

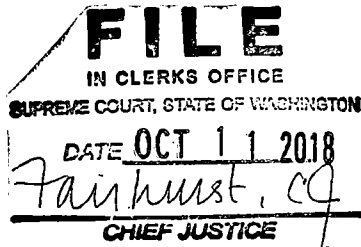
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This opinion was filed for record
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SUSAN L. CARLSON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|-----------------------|---|--------------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 88086-7 |
| Respondent, |) | |
| |) | |
| v. |) | EN BANC |
| |) | |
| ALLEN EUGENE GREGORY, |) | FILED <u>OCT 11 2018</u> |
| |) | |
| Appellant. |) | |
| _____ |) | |

FAIRHURST, C.J.—Washington’s death penalty laws have been declared unconstitutional not once, not twice, but three times. *State v. Baker*, 81 Wn.2d 281, 501 P.2d 284 (1972); *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981).¹ And today, we do so again. None

¹ Arguably, it has occurred four times because a federal district court judge found that our statutory proportionality review of death sentences violated due process. *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1288-91 (W.D. Wash. 1994), *aff’d sub nom. on other grounds, Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995). But we considered and rejected the claim. *In Re Pers. Restraint of Benn*, 134 Wn.2d 868, 925-26, 952 P.2d 116.

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of these prior decisions held that the death penalty is per se unconstitutional, nor do we. The death penalty is invalid because it is imposed in an arbitrary and racially biased manner. While this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered. As noted by appellant, the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant. The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution.

I. FACTS AND PROCEDURAL HISTORY

A. Factual background

In 1996, Allen Eugene Gregory raped, robbed, and murdered G.H. in her home.² In 1998, Gregory was investigated for a separate rape crime based on

² In Gregory's first appeal, we summarized the crime scene as follows:

The evidence suggested that G.H. had been attacked in her kitchen. She was probably stabbed once in the neck and then dragged into her bedroom. G.H.'s work clothes had been cut off of her, and her hands were tied behind her back with apron strings. She was then stabbed three times in the back. In addition, she had three deep slicing wounds to the front of her throat. . . . The medical examiner concluded that G.H. suffered blunt force trauma to the head and she had several bruises, but the cause of death was multiple sharp force injuries to her back and neck. Semen was found in G.H.'s anal and vaginal swabs, on her thigh, and on the bedspread. The evidence suggested that she was still alive when she was raped. Missing from her home were a pair of diamond earrings, jewelry, and her cash tips from that evening.

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allegations by R.S. In connection with that investigation, the Tacoma Police Department obtained a search warrant for Gregory's vehicle. In the vehicle, police located a knife that was later determined to be consistent with the murder weapon used to kill G.H. Police also obtained Gregory's blood sample during the rape investigation and used that sample to connect him to the deoxyribonucleic acid (DNA) found at G.H.'s crime scene. *State v. Gregory*, 158 Wn.2d 759, 812, 147 P.3d 1201 (2006) (*Gregory I*), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). After matching Gregory's DNA to that found at G.H.'s murder scene, the State charged Gregory with aggravated first degree murder. *Id.* Gregory was also charged and convicted of three counts of first degree rape stemming from R.S.'s allegations.

B. Procedural history

In 2001, a jury convicted Gregory of aggravated first degree murder. *Id.* at 777, 812. The same jury presided over the penalty phase of his trial. *Id.* at 812. The jury concluded there were not sufficient mitigating circumstances to merit leniency and sentenced Gregory to death. *Id.* When Gregory appealed his murder conviction and death sentence, we consolidated our direct review of those issues with Gregory's appeal of his separate rape convictions. *Id.* at 777. We reversed the rape convictions,

State v. Gregory, 158 Wn.2d 759, 811-12, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

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affirmed the aggravated first degree murder conviction, and reversed the death sentence. *Id.* at 777-78. We based our reversal of Gregory's death sentence on two grounds: (1) "the prosecutor engaged in misconduct during closing arguments in the penalty phase of the murder trial" and (2) "the rape convictions," which we reversed, "were relied upon in the penalty phase of the murder case." *Id.* at 777. We remanded the case for resentencing. On remand, the trial court impaneled a new jury to preside over a second special sentencing proceeding. Again the jury determined there were not sufficient mitigating circumstances to merit leniency and sentenced Gregory to death. Gregory appealed his sentence, raising numerous issues. In addition to any appeal, our court is statutorily required to review all death sentences. RCW 10.95.130(1). Pursuant to statute, we consolidate the direct appeal and death sentence review. *Id.*

Following remand, the State also prepared for a new rape trial. The State conducted interviews with R.S., but the interviews revealed that she had lied at the first trial. The State moved to dismiss the rape charges because R.S.'s inconsistent statements "ma[d]e it impossible for the State to proceed forward on [count I and count II]" and, given her statements, "the State d[id] not believe there [was] any reasonable probability of proving the defendant is guilty of [count III]." Clerk's Papers at 519. The trial court dismissed the rape charges with prejudice.

II. ISSUES³

A. Whether Washington's death penalty is imposed in an arbitrary and racially biased manner.

B. Whether statutory proportionality review of death sentences alleviates the alleged constitutional defects of the death penalty.

C. Whether the court should reconsider arguments pertaining to the guilt phase of Gregory's trial.

III. ANALYSIS

A. Historical background of the death penalty in Washington

A brief history of the various death penalty schemes in Washington serves to illustrate the complex constitutional requirements for capital punishment. *See also State v. Bartholomew*, 98 Wn.2d 173, 180-92, 654 P.2d 1170 (1982) (*Bartholomew I*), *vacated*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983) (similar historical discussion). In 1972, the United States Supreme Court nullified capital punishment laws in 39 states, including Washington, and the District of Columbia. *Furman v. Georgia*, 408 U.S. 238, 305, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Baker*, 81 Wn.2d at 282; *State v. Lord*, 117 Wn.2d 829, 908, 822 P.2d 177 (1991) ("*Furman* prohibits sentencing procedures which create a substantial risk that death

³ Since we hold that the death penalty is unconstitutional, we decline to address Gregory's other challenges to the penalty imposed or alleged errors that occurred during the penalty phase of the trial.

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will be imposed in an arbitrary and capricious manner. In other words, where the death penalty is imposed wantonly and freakishly, it is unconstitutional.” (citation omitted)). Three years later, by way of a ballot initiative, Washington enacted a new capital punishment law that required mandatory imposition of the death penalty for specified offenses. Initiative 316, LAWS OF 1975 2d Ex. Sess., ch. 9, *repealed by* LAWS OF 1981, ch. 138, § 24. But this, too, proved problematic. In 1976, the United States Supreme Court held that mandatory imposition of death sentences for specified homicides is unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976). Consequently, we declared our capital punishment law unconstitutional. *Green*, 91 Wn.2d at 447. In contrast, Georgia’s capital punishment law was upheld. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion). To be constitutionally valid, “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Id.* at 189.

Our legislature enacted a new capital punishment law, allowing for the imposition of the death penalty where the jury, in a subsequent sentencing proceeding, found an aggravating circumstance, no mitigating factors sufficient to

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merit leniency, guilt with clear certainty, and a probability of future criminal acts. LAWS OF 1977, 1st Ex. Sess., ch. 206 (codified in chapter 9A.32 RCW and former chapter 10.94 RCW, *repealed by* LAWS OF 1981, ch. 138, § 24). The statute was found unconstitutional because it allowed imposition of the death penalty for those who pleaded not guilty but did not impose the death penalty when there was a guilty plea. *Frampton*, 95 Wn.2d at 480. The legislature again refined our capital punishment law in an attempt to conform to various legal directives. Ch. 10.95 RCW. Our current statute is nearly identical to the Georgia statute. *State v. Harris*, 106 Wn.2d 784, 798, 725 P.2d 975 (1986) (“The language in our statute is identical to that used in the Georgia statute.”); *cf. Bartholomew I*, 98 Wn.2d at 188 (“The statutory aggravating circumstances are similar but not identical to those of the approved Georgia statute.”).

Chapter 10.95 RCW provides for a bifurcated proceeding—first the defendant is found guilty of aggravated first degree murder, and then a special sentencing proceeding is held before either a judge or a jury to determine whether there are sufficient mitigating circumstances to merit leniency. RCW 10.95.050, .060. If there are, the defendant shall be sentenced to life without parole. RCW 10.95.080. If the defendant is sentenced to death, the sentence is automatically reviewed by this court, in addition to any appeal the defendant seeks. RCW 10.95.100. Our statutorily mandated death sentence review proceeding requires this court to determine (a)

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whether there was sufficient evidence to justify the judge's or jury's finding in the special sentencing proceeding, (b) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, (c) whether the death sentence was brought about through passion or prejudice, and (d) whether the defendant had an intellectual disability. RCW 10.95.130(2).

Proportionality review “serves as an additional safeguard against arbitrary or capricious sentencing.” *State v. Pirtle*, 127 Wn.2d 628, 685, 904 P.2d 245 (1995); *Harris*, 106 Wn.2d at 797. The goal is “to ensure that the death penalty’s imposition is not ‘freakish, wanton, or random[] and is not based on race or other suspect classifications.’” *State v. Davis*, 175 Wn.2d 287, 348, 290 P.3d 43 (2012) (alteration in original) (quoting *State v. Cross* 156 Wn.2d 580, 630, 132 P.3d 80 (2006)). The United States Supreme Court held that statutory proportionality review is not required by the federal constitution, *Pulley v. Harris*, 465 U.S. 37, 43-44, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), but the impetus for it nonetheless derives from constitutional principles. *Lord*, 117 Wn.2d at 908 (proportionality review “was undertaken in Washington in response to the United States Supreme Court decision in *Furman*”).

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- B. Gregory’s constitutional challenge to the death penalty is intertwined with our statutorily mandated proportionality review

Gregory challenged the constitutionality of the death penalty, supported with numerous reasons. He also presented a statutory argument, that his death sentence is excessive and disproportionate to the penalty imposed in similar cases. RCW 10.95.130(2)(b). Gregory claimed that his death sentence “is random and arbitrary, and, to the extent it is not, it is impermissibly based on his race and the county of conviction.” Opening Br. of Appellant at 96 (underlining omitted). These assertions are precisely what proportionality review is designed to avoid. *See State v. Brown*, 132 Wn.2d 529, 554-55, 940 P.2d 546 (1997) (“In conducting proportionality review the court is principally concerned with avoiding two systemic problems . . . : random arbitrariness and imposition of the death sentence in a racially discriminatory manner.”).

In *Davis*, our court grappled with proportionality review of the defendant’s death sentence. “How to properly perform proportionality review, and upon what data, is a reoccurring, vexing problem in capital case jurisprudence across the nation.” *Cross*, 156 Wn.2d at 636. The majority and dissenting opinions took different approaches disputing which factors were relevant and to what degree statistical evidence could be relied on. The majority saw “no evidence that racial discrimination pervades the imposition of capital punishment in Washington.” *Davis*, 175 Wn.2d at 372. But the dissent believed that “[o]ne could better predict

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whether the death penalty will be imposed on Washington's most brutal murderers by flipping a coin than by evaluating the crime and the defendant. Our system of imposing the death penalty defies rationality, and our proportionality review has become an 'empty ritual.'" *Id.* (Fairhurst, J., dissenting) (quoting *State v. Benn*, 120 Wn.2d 631, 709, 845 P.2d 289 (1993) (Utter, J., dissenting)). "We can, and must, evaluate the system as a whole." *Id.* at 388. Justice Wiggins specifically called on competent experts to present evidence on the "statistical significance of the racial patterns that emerge from the aggravated-murder trial reports." *Id.* at 401 (Wiggins, J., concurring in dissent).

In light of *Davis*, Gregory commissioned a study on the effect of race and county on the imposition of the death penalty. Opening Br. of Appellant, App. A (KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2012 (Jan. 27, 2014) [<https://perma.cc/XPS2-7YTR>]).⁴ Subsequently, additional trial reports were filed. Beckett performed a new regression analysis and updated her report. KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014 (Oct. 13, 2014) (Updated Beckett Report) [<https://perma.cc/3THJ-989W>]. The Updated Beckett Report supported three main conclusions: (1) there is significant

⁴ For readability, we refer to Katherine Beckett and Heather Evans collectively as "Beckett."

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county-by-county variation in decisions to seek or impose the death penalty, and a portion of that variation is a function of the size of the black population but does *not* stem from differences in population density, political orientation, or fiscal capacity of the county, (2) case characteristics as documented in the trial reports explain a small portion of variance in decisions to seek or impose the death penalty, and (3) black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants. *Id.* at 31-33. Gregory filed a motion to admit the Updated Beckett Report, which we granted.

The State raised many concerns about the reliance on Beckett's statistical analysis, arguing that this was an inappropriate forum for litigating facts and adducing evidence. The State was also concerned because Beckett had not been subject to cross-examination about her involvement with Gregory's counsel, her statistical methodology, and her overall reliability. The State requested an opportunity to challenge the Updated Beckett Report. We granted the request and ordered that a hearing be held before then Supreme Court Commissioner Narda Pierce. No actual hearing was held since the parties agreed on the procedures and Commissioner Pierce was able to solicit additional information through interrogatories. The State filed the report of its expert, and Gregory filed Beckett's response. NICHOLAS SCURICH, EVALUATION OF "THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014" (July 7, 2016); KATHERINE BECKETT &

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HEATHER EVANS, RESPONSE TO EVALUATION OF “THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014” BY NICHOLAS SCURICH (Aug. 25, 2016). Commissioner Pierce reviewed these filings and then posed follow-up questions in interrogatory form. After receiving answers, Commissioner Pierce filed her report. FINDINGS AND REPORT RELATING TO PARTIES’ EXPERT REPORTS (Nov. 21, 2017) (Commissioner’s Report). The Commissioner’s Report did not make legal conclusions or recommend how this court should weigh the evidence before us. Rather, the Commissioner’s Report provided us with an overview of the disagreements between the experts and the overall strength and weakness of Beckett’s analysis, which may impact the weight that we accord to her conclusions. The parties (and amici) filed supplemental briefing that shed further light on the issues raised in the Commissioner’s Report and the overall assessment of Beckett’s analysis. In turn, the Updated Beckett Report and the subsequent rigorous evidentiary process provided this court with far more system-wide information concerning the death penalty, enabling Gregory to use that information to substantiate his constitutional challenge as well. In his supplemental brief, Gregory incorporates the analysis and conclusions from the Updated Beckett Report to support his constitutional claim, arguing that the death penalty is imposed in an arbitrary and racially biased manner.

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Given the intertwined nature of Gregory's claims, we have discretion to resolve them on statutory grounds, by solely determining if *his* death sentence fails the statutorily mandated death sentence review and must be converted to life without parole, or on constitutional grounds, by assessing our state's death penalty scheme *as a whole*. "Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds." *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). Because Gregory challenges the process by which the death penalty is imposed, the issue cannot be adequately resolved on statutory grounds. Proportionality review is a statutory task that this court must perform on the specific death sentence before us, but it is not a substitute for the protections afforded to all persons under our constitution.

C. Washington's death penalty scheme is unconstitutional, as administered

1. *Standard of review*

We review constitutional claims *de novo*. However, conducting a constitutional analysis in death penalty cases is slightly different from our traditional constitutional review. "The death penalty differs qualitatively from all other punishments, and therefore requires a correspondingly high level of reliability." *Pirtle*, 127 Wn.2d at 663; *see also Lord*, 117 Wn.2d at 888 (The death penalty is "subjected to a correspondingly higher degree of scrutiny than sentencing in noncapital cases.").

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Gregory brought challenges under both the state and federal constitutions. We have “a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law.” *Collier v. City of Tacoma*, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993) (quoting *O’Day v. King County*, 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988)); accord *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.”). If we neglect this duty, we “deprive[] the people of their ‘double security.’” *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 238, 635 P.2d 108 (1981) (quoting THE FEDERALIST NO. 51, at 339 (A. Hamilton or J. Madison) (Modern Library ed. 1937)). “It is by now well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution.” *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980) (plurality opinion).

Article I, section 14 of our state constitution provides, “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” Our interpretation of article I, section 14 “is not constrained by the Supreme Court’s interpretation of the [Eighth Amendment].” *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (*Bartholomew II*); U.S. CONST. amend. VIII. This court has “repeated[ly] recogni[z]ed that the Washington State Constitution’s cruel

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punishment clause often provides greater protection than the Eighth Amendment.”

State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Ramos*, 187 Wn.2d 420, 453-54, 387 P.3d 650 (quoting same passage), *cert. denied*, 138 S. Ct. 467 (2017).

Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation. The historical evidence reveals that the framers of [the Washington Constitution, article I, section 14] were of the view that the word “cruel” sufficiently expressed their intent, and refused to adopt an amendment inserting the word “unusual.”

State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). A formal *Gunwall*⁵ analysis is not necessary when we apply established principles of state constitutional jurisprudence. *Roberts*, 142 Wn.2d at 506 n.11.⁶

For example, in *Bartholomew II*, we adhered to our decision invalidating portions of our capital punishment law on independent state constitutional grounds rather than conforming our analysis to a recent United States Supreme Court case affirming the death penalty against an Eighth Amendment challenge. 101 Wn.2d at 634 (referring to *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235

⁵ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

⁶ We recognize that article I, section 14 is not per se broader than the Eighth Amendment. Under certain contexts, the court may have good reason to interpret the state and federal constitutions synonymously rather than independently. For example, in *State v. Dodd*, we found that article I, section 14 was not more protective than the Eighth Amendment when a capital defendant wanted to waive general appellate review in hopes of a speedier execution. 120 Wn.2d 1, 21, 838 P.2d 86 (1992). We later explained that the “ruling in *Dodd* is limited to the facts of that case.” *State v. Thorne*, 129 Wn.2d 736, 772 n.10, 921 P.2d 514 (1996).

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(1983)). Our decision rested “on an interpretation of both the state and federal constitutions,” but the independent state constitutional grounds were “adequate, in and of themselves, to compel the result.” *Id.* at 644 (relying on *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), so that any federal constitutional decision by the Supreme Court “will have no bearing on our decision”). However, in *State v. Yates*, we did not address the defendant’s state constitutional argument because he could not “establish that chapter 10.95 RCW violates the Eighth Amendment, [so] his claim that the statute violates article I, section 14 of the Washington State Constitution is unavailing.” 161 Wn.2d 714, 792, 168 P.3d 359 (2007). In contrast, the evidence here shows that Gregory *could* establish that Washington’s death penalty violates both the federal and state constitutions. At the very least, article I, section 14 cannot provide for less protection than the Eighth Amendment, and in this case, we interpret it independently from the federal counterpart. Let there be no doubt—we adhere to our duty to resolve constitutional questions under our own constitution, and accordingly, we resolve this case on adequate and independent state constitutional principles. *See Long*, 463 U.S. at 1041-42.

2. *Our prior decisions upholding Washington’s death penalty do not preclude Gregory’s claim*

We have previously upheld the constitutionality of the death penalty under somewhat similar claims. In *Cross*, we rejected the defendant’s argument that “the

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death penalty in Washington is effectively standardless and that our proportionality review does not properly police the use of the penalty.” 156 Wn.2d at 621; *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (rejecting his constitutional claims again). We reaffirmed the holding in *Yates* under the federal and state constitutions. 161 Wn.2d at 792. Every decision of this court creates precedent that “[w]e do not lightly set aside.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

However, “stability should not be confused with perpetuity,” and major changes have taken place since our *Cross* opinion that support our decision to revisit the constitutionality of the death penalty. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). First, we have numerous additional trial reports for defendants convicted of aggravated murder that were not previously available to us or the defendants who made constitutional claims. Reply Br. of Appellant at 56 (judges have filed 120 additional trial reports since *Cross* was filed; 67 of those were filed after the *Cross* opinion was published and dozens were filed after Gregory’s motion to complete process of compiling aggravated murder reports was filed). Second, Gregory commissioned a statistical study based on the information in the trial reports to demonstrate that the death penalty is imposed in an arbitrary and racially biased manner. Additionally, we allowed the State to challenge the Updated Beckett Report, subjected it to a thorough evaluation process

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facilitated by our court commissioner, and accepted supplemental briefing from the parties and amici concerning the analysis and conclusions presented.

In *Davis*, this court saw “no evidence that racial discrimination pervades the imposition of capital punishment in Washington.” 175 Wn.2d at 372. That is precisely what has now come to light and warrants our consideration. *See Roper v. Simmons*, 543 U.S. 551, 564-69, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (reconsidering precedent upholding the death penalty for juvenile offenders, supported by scientific and sociological studies about the differences between juveniles and adults, and objective indicia of society’s view of juveniles); *Atkins v. Virginia*, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (reconsidering precedent upholding the death penalty for intellectually disabled defendants, because “[m]uch has changed since then,” including objective indicia that society’s views on the execution of such defendants had changed and newly available clinical information about people with intellectual disabilities); *State v. O’Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) (in light of “advances in the scientific literature” concerning cognitive and emotional development, while not overruling *State v. Ha’mim*, 132 Wn.2d 834, 940 P.2d 633 (1997), we concluded that youth is far more likely to diminish a defendant’s culpability for sentencing purposes than we had implied in prior cases). In this case, we need not decide whether the prior cases were incorrect and harmful at the time they were decided.

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Rather, the scope of article I, section 14, no less than that of the Eighth Amendment, “is not static.” *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion). Where new, objective information is presented for our consideration, we must account for it. Therefore, Gregory’s constitutional claim must be examined in light of the newly available evidence presently before us.

3. *Washington’s death penalty is imposed in an arbitrary and racially biased manner*

It is now apparent that Washington’s death penalty is administered in an arbitrary and racially biased manner. Given the evidence before us, we strike down Washington’s death penalty as unconstitutional under article I, section 14. “Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article I, section 14 of the state constitution.” *Bartholomew II*, 101 Wn.2d at 640; *see also State v. Manussier*, 129 Wn.2d 652, 676, 921 P.2d 473 (1996) (“the state constitution, like the Eighth Amendment, proscribes disproportionate sentencing in addition to certain modes of punishment”).

To reach our conclusion, we afford great weight to Beckett’s analysis and conclusions. We refer to Beckett’s analysis and conclusions rather than a specific report or model variation filed with this court because there have been numerous updates, corrections, and iterations of her analysis that were conducted since the Updated Beckett Report was first admitted. The State is correct that we cannot explicitly rely on the Updated Beckett Report because of these subsequent changes

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in Beckett's data file and analysis. As a result of the State's challenge and Commissioner Pierce's fact-finding process, Beckett's analysis became only more refined, more accurate, and ultimately, more reliable.

After running various models, as requested by Commissioner Pierce, Beckett summarized her findings regarding race:

[F]rom December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account.

Resp. to Comm'r's Suppl. Interrogs. at 16 (Sept. 29, 2017). Though the Updated Beckett Report presented three main conclusions concerning the impact of race, county, and case characteristics on the death penalty, *supra* at Section III.B, Gregory's constitutional argument does not refer to the county variance, so we do not consider that conclusion in our analysis. Suppl. Br. of Appellant at 25 ("This new evidence [referring to the Updated Beckett Report] shows the death penalty is imposed in an arbitrary and racially biased manner."). With regard to the methodological issues raised by the State, we find that these concerns have no material negative impact on the weight accorded to Beckett's analysis and conclusions.⁷

⁷ The State argued that Beckett's analysis was based on too small of a data set because she used maximum likelihood estimate procedures, which generally require at least 100 cases to draw from. To the contrary, we agree with Gregory and amici that the concern is inapplicable because

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The most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty. We make this determination by way of legal analysis, not pure science. *Davis*, 175 Wn.2d at 372, 401 (“We acknowledge that ‘we are not statisticians.’” (quoting Wiggins, J., concurring in dissent)). At the very most, there is an 11 percent chance that the observed association between race and the death penalty in Beckett’s regression analysis is attributed to random chance rather than true association. Commissioner’s Report at 56-68 (the p-values range from 0.048-0.111, which measures the probability that the observed association is the result of random chance rather than a true association).⁸

Beckett conducted an observational study in which her data set includes *all* trial reports filed for defendants who underwent a special sentencing procedure from 1981-2014. The data set reflects the population, not a sample.

Additionally, concerns regarding Beckett’s coding protocol and data entry have largely been alleviated by the rigorous review process throughout this litigation. Since the coding and data entry are based on the trial judge’s qualitative trial report, there will always be some degree of variance or subjectivity when those reports are translated into numerical values. Gregory highlights the more crucial point—the initial regression analysis in the Updated Beckett Report, the regression analysis conducted in response to Commissioner Pierce’s interrogatories, and the final regression analysis conducted pursuant to the updated coding protocol all lead to the *same conclusion*. The subsequent analysis, with corrections, provides even stronger support for the statistical significance of race on the imposition of the death penalty. The State argues that the existence of errors “should give this Court pause.” Suppl. Br. of Resp’t at 4. Surely we have taken a pause by allowing the State to challenge the Updated Beckett Report and directing Commissioner Pierce to undergo a fact-finding process. We are unpersuaded that the existence of some errors should lead to the conclusion that the rest of the data set is rife with additional errors, especially when professors and social scientist researchers across the field characterize it as a “rigorous and thorough study.” Br. of Soc. Scientists & Researchers, at 1.

⁸ The most common p-value used for statistical significance is 0.05, but this is not a bright line rule. Commissioner’s Report at 57-58. The American Statistical Association (ASA) explains that the “mechanical ‘bright-line’ rules (such as ‘ $p < 0.05$ ’) for justifying scientific claims or conclusions can lead to erroneous beliefs and poor decision making.” *Id.* at 58 (quoting SCURICH, *supra*, at 22) “‘A conclusion does not immediately become ‘true’ on one side of the divide and ‘false’ on the other.’” *Id.* (quoting Ronald L. Wasserstein & Nicole A. Lazar, *The ASA’s Statement*

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Just as we declined to require “precise uniformity” under our proportionality review, we decline to require indisputably true social science to prove that our death penalty is impermissibly imposed based on race. *Lord*, 117 Wn.2d at 910.

This is consistent with constitutional legal analysis. For example, in *Furman*, Justice Stewart explained that the death sentences before the court were “cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.” 408 U.S. at 309-10 (Stewart, J., concurring).⁹ Justice Stewart did not need to compare the probability of being struck by lightning to the probability of being sentenced to death, nor did he need to rely on an expert’s regression analysis to ensure that the petitioners were in fact randomly selected without any relation to other dependent variables. Similarly, Justice White explained what he believed to be “a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.” *Id.* at 311 (White, J., concurring). He did not need to rely on an expert’s calculation as to what point the rate at which the death penalty is imposed becomes low enough that

on *p-Values: Context, Process, and Purpose*, 70 AM. STATISTICIAN 129, 131 (2016)), <http://dx.doi.org/10.1080/00031305.2016.1154108>.

⁹ “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.” *Gregg*, 428 U.S. at 169 n.15.

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potential murderers are no longer deterred from committing their intended crimes. Similarly, under the Sixth Amendment to the United States Constitution, ineffective assistance of counsel claimants must show deficient performance and prejudice, where prejudice entails a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* We do not expect the defendant to present statistical evidence of the outcome of hypothetical trials with a more effective attorney and compare it to the original trial, controlling for all other variables. Lastly, in *State v. Santiago*, when deciding that the death penalty was unconstitutional, the Connecticut Supreme Court took judicial notice of scientific and sociological studies that were ““not necessarily indisputably true”” but were ““more likely [true] than not true.”” 318 Conn. 1, 127-29, 122 A.3d 1 (2015) (emphasis omitted) (quoting 2 MCCORMICK ON EVIDENCE § 331, at 612-13 (Kenneth S. Broun ed., 7th ed. 2013)).

Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance. We need not go on a fishing expedition to find evidence external to Beckett’s study as a means of validating the results. Our case law and history of racial discrimination

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provide ample support. *See, e.g., City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124 (2017) (peremptory challenge used to strike the only African-American on a jury panel); *State v. Walker*, 182 Wn.2d 463, 488, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring) (describing prosecutor's use of inflammatory, racially charged images "highlighting the defendant's race—his blackness—in a case where that had absolutely no relevance"); *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 632, 316 P.3d 1020 (2014) (prosecutor heckled black defense attorney in a death-penalty trial, asking, "'Where did you learn your ethics? In Harlem?'""); *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013) (plurality opinion) ("'[T]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable.'" (second alteration in original) (quoting TASK FORCE ON RACE & CRIMINAL JUSTICE SYS., PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 1 (2011), https://law.seattleu.edu/Documents/Korematsu/Defender%20Initiative/2014DefenderConference/2pm%20panel/preliminary_report_race_criminal_justice_030111.pdf) [https://perma.cc/6BV4-RBB8])); *State v. Monday*, 171 Wn.2d 667, 676-79, 257 P.3d 551 (2011) (reversing a case in which the prosecutor argued to the jury that "black folk don't testify against black folk" and referred to the police as "po-leese" in the examination of black witness); *State v. Rhone*, 168 Wn.2d 645, 648, 229 P.3d 752 (2010) (plurality opinion) (peremptory challenge used to strike the

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“only African-American venire member in a trial of an African-American defendant”); *State v. Dhaliwal*, 150 Wn.2d 559, 582, 79 P.3d 432 (2003) (Chambers, J., concurring) (the prosecution’s theory of the case relied on “impermissible stereotypes of the Sikh religious community”); *Turner v. Stime*, 153 Wn. App. 581, 594, 222 P.3d 1243 (2009) (requiring new trial based on jurors’ racist remarks regarding Japanese-American attorney); OFFICE OF ATTY. GEN. OF WASH. STATE, CONSOLIDATING TRAFFIC-BASED FINANCIAL OBLIGATIONS IN WASHINGTON STATE 9 (Dec. 1, 2017), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=SB%206360%20Report_12-01-7_0c338f90-d3b6-46e2-a87d-387eba9a0b46.pdf [<https://perma.cc/TB4K-KAEF>]; *see also* Amici Curiae Br. of 56 Former & Retired Wash. State Judges et al. at 8-13.

The arbitrary and race based imposition of the death penalty cannot withstand the “evolving standards of decency that mark the progress of a maturing society.” *Fain*, 94 Wn.2d at 397 (quoting *Trop*, 356 U.S. at 101). When considering a challenge under article I, section 14, we look to contemporary standards and experience in other states. *State v. Campbell*, 103 Wn.2d 1, 32, 691 P.2d 929 (1984). We recognize local, national, and international trends that disfavor capital punishment more broadly.¹⁰ When the death penalty is imposed in an arbitrary and

¹⁰ Governor Jay Inslee issued a moratorium on capital punishment in 2014. He explained that “[t]he use of the death penalty in this state is unequally applied There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an

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racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks "fundamental fairness" and thus violates article I, section 14. *Bartholomew II*, 101 Wn.2d at 640.

4. *The death penalty, as administered, fails to serve legitimate penological goals*

Given our conclusion that the death penalty is imposed in an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve penological goals. The principal purposes of capital punishment are "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183; *State v. Kwan Fai Mak*, 105 Wn.2d 692, 755 n.124, 718 P.2d 407 (1986) (quoting the same passage). Unless the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458

imperfect system. . . . When the majority of death penalty sentences lead to reversal, the entire system itself must be called into question." Governor Jay Inslee Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014), https://www.governor.wa.gov/sites/default/files/documents/20140211_death_penalty_moratorium.pdf [<https://perma.cc/U6VX-9FVH>]. While a majority of states have capital punishment laws, the annual number of new death sentences has steadily decreased over the last 20 years, from 315 in 1996 to 39 in 2017. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2017: YEAR END REPORT 1 (Jan. 3, 2018), <https://deathpenaltyinfo.org/documents/2017YrEnd.pdf> [<https://perma.cc/YGV4-XLHV>]. Nine states have abolished the death penalty since *Gregg*, and three other governors issued moratoria. Suppl. Br. of Appellant at 31 (citing *States with and without the Death Penalty as of November 9, 2016*, DEATH PENALTY INFO. CTR., <https://www.deathpenaltyinfo.org/states-and-without-death-penalty>) [<https://perma.cc/8DT6-H7DG>]). Internationally, dozens of countries have abolished capital punishment, including all European Union nations. *Id.* (citing *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries>) [<https://perma.cc/V3BE-9JQS>]).

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U.S. 782, 798, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)). “If the policy of this state is retribution for capital crimes, then it must be evenhanded.” *Campbell*, 103 Wn.2d at 48 (Utter, J., concurring in part, dissenting in part).

In *Davis*, this court was unable to address the defendant’s state constitutional claim that the death penalty failed to serve the legislative goal of deterrence because of a “severe lack of information on the death penalty’s implementation.” 175 Wn.2d at 345. Now the information is plainly before us. Beckett’s analysis and conclusions demonstrate that there is “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313 (White, J., concurring). To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional.

Our capital punishment law was intended to fix the problems identified in *Furman*, but after decades of experience, we now see the same fatal flaws emerge, despite the legislative attempt to avoid such deficiencies. Yet, the death penalty is not per se unconstitutional. *Campbell*, 103 Wn.2d at 31 (“the death penalty is not per se unconstitutional, since both the federal and state constitutions recognized capital punishment at the time of their adoption”). We leave open the possibility that the legislature may enact a “carefully drafted statute,” *Gregg*, 428 U.S. at 195, to impose capital punishment in this state, but it cannot create a system that offends

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constitutional rights. “[T]he death penalty is constitutional only if it is properly constrained to avoid freakish and wanton application.” *Cross*, 156 Wn.2d at 622-23. The United States Supreme Court was “unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.” *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), *overruled on other grounds* *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct 616, 193 L. Ed. 2d 504 (2016). We agree. “[T]o hold that the death penalty is per se unconstitutional would be to substitute our moral judgment for that of the people of Washington.” *State v. Rupe*, 101 Wn.2d 664, 698, 683 P.2d 571 (1984) (plurality opinion).

5. *Proportionality review fails to alleviate the constitutional defects in our capital punishment law, but it cannot be severed*

Imposing the death penalty in an arbitrary and racially biased manner cannot be alleviated through this court’s statutory proportionality review. RCW 10.95.130(2)(b). Proportionality review serves as a safeguard against arbitrary sentencing, but it is conducted on an individual basis for each death sentence. “At its heart, proportionality review will always be a subjective judgment as to whether *a particular death sentence* fairly represents the values inherent in Washington’s sentencing scheme for aggravated murder.” *Pirtle*, 127 Wn.2d at 687 (emphasis added). It does not address our capital punishment law as a whole. Notwithstanding the broad goals of proportionality review, case-by-case review of death sentences cannot fix the constitutional deficiencies before us.

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Despite this shortcoming, proportionality review cannot be severed. Our capital punishment law contains a severability clause, LAWS OF 1981, ch. 138, § 22, but such clauses are “‘not an inexorable command’.” *Hall v. Niemer*, 97 Wn.2d 574, 584, 649 P.2d 98 (1982) (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S. Ct. 323, 68 L. Ed. 686 (1924)); *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002) (severability clauses are “not necessarily dispositive”). The test for severability is

“whether the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.”

Hall, 97 Wn.2d at 582 (alteration in original) (quoting *State ex rel. King County v. State Tax Comm’n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933)). The disputed provision “must be grammatically, functionally, and volitionally severable.” *McGowan*, 148 Wn.2d at 295.

At the time of enactment, the legislature likely assumed that a constitutional death penalty statute required proportionality review (a component of death sentence review) because the Georgia death penalty statute upheld in *Gregg* contained a mandatory proportionality review. 428 U.S. at 206. The United States Supreme Court later held that proportionality review is not required under the federal constitution, *Pulley*, 465 U.S. at 43-44, but the provisions remain intimately