NO. 83828-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

DAROLD R.J. STENSON,

Petitioner-Plaintiff,

v.

ELDON VAIL, Secretary of Washington Department of Corrections (in his official capacity), *et al.*,

Respondents-Defendants.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
705 2nd Avenue, Suite 300
Seattle, Washington 98104
(206) 624-2184

Beth M. Andrus, WSBA # 18381
SKELLENGER BENDER, P.S.
1301 Fifth Avenue, Suite 3401
Seattle, Washington 98101
(206) 623-6501

Attorneys for *Amicus* ACLU of Washington

TABLE OF CONTENTS

Washington State Cases

Federal Cases

Other Jurisdictions

Constitutional Provisions

Statutes and Legislative Documents

Other Authories

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The ACLU of Washington is a nonprofit, nonpartisan 25,000 member organization dedicated to the principles of liberty embodied in the U.S. Constitution and Washington constitution. The ACLU opposes the death penalty, regardless of the chosen method of execution. It has participated in death penalty litigation in Washington for many years, including having *amicus* briefs accepted by this Court in several capital cases.[1]

II. ISSUE ADDRESSED BY AMICUS

Would executing the Petitioners by lethal injection violate the Cruel Punishment Clause of Washington's Constitution?

III. STATEMENT OF THE CASE

Petitioners presented compelling evidence at trial of defects in the ever-changing lethal injection protocol the Department of Corrections (DOC) planned to use to carry out the executions of Messrs. Stenson, Gentry and Brown. Op. Br. of Appellant at 5-27. DOC's medical director resigned[2] because of ethical concerns regarding participating in an execution, and the entire execution team resigned because the trial court granted discovery of the team's medical training (Petitioner Br. at p. 9-10). The medical competency of the team thus remains unknown. The trial court

---

[1] *See In re PRP of Stenson*, 150 Wn.2d 207, 76 P.3d 241 (2003); *In re PRP of Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004); and *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006).

[2] seattletimes.nwsource.com/html/localnews/2008558781_execution25m.html

rejected Petitioners' state constitutional challenge, ruling that "for purposes of this case," the state constitution's cruel punishment clauses was no different than the Eighth Amendment." CP 3207, 3214-15.

IV. SUMMARY OF ARGUMENT

Washington's Cruel Punishment Clause (Wash. Const. Art. I, § 14) affords greater protection than the Eighth Amendment. Defects in Washington's method of execution and capital punishment system demonstrate that it is time for Washington to stop "tinkering with the machinery of death" and rule the executions of Petitioners to be unconstitutional.

V. THE HISTORY OF EXECUTIONS IN WASHINGTON DEMONSTRATES THAT ALL METHODS ARE FLAWED

Washington's territorial legislature first enacted a statute mandating the penalty of death for anyone convicted of first degree murder in 1854.[3] Washington executed 23 individuals in the late 1800s.[4] Before the turn of the century, hanging was the nearly "universal form of execution." *State v. Frampton*, 95 Wn.2d 469, 492, 627 P.2d 922 (1981). The 1854 Territorial Law provided: "The punishment of death prescribed by law must be inflicted by hanging by the neck."[5] The Criminal Practice Act of 1873 contained an identical provision,[6] as did the 1881 Code of Washington.[7]

---

[3] Act of April 28, 1854, 1854 Wash. Laws 75, 78.
[4] http://deathpenaltyinfo.org/deathpenaltystats.xls ("DPIC Spreadsheet").
[5] 1854 Wash. Laws p. 125 §123 ("Hanging Statutes").
[6] 1873 Wash. Laws p. 244, §289.

Historians report that lethal injection was considered a potential execution method in the United States as early as 1888. A New York commission searching for an acceptably humane method of execution rejected lethal injection, in part because of the concern that the public would link the practice of medicine with death.[8] At the time Washington enacted its constitution in 1889, 48 states used hanging as the method of execution. *Campbell v. Wood*, 18 F.3d at 662, 697-98 (9th Cir. 1994) (Reinhardt, J., dissenting). These hangings usually occurred in public.[9]

In 1909, the Washington legislature eliminated automatic death sentences and made first degree murder punishable by either life imprisonment or death, at the trial judge's discretion.[10] According to DOC, 15 men were executed between 1904 and 1911.[11] These executions were not without controversy and in 1913, the Washington legislature abolished the death penalty.[12] According to news accounts, a wave of legislative reform occurred in Washington after women were given the right to vote in 1911.

---

[7] 1881 Code of Wash. at p. 207, § 1131.
[8] Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 64 (2007) ("Lethal Injection Quandary").
[9] Casey L. Ewart, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 Wm. & Mary Bill of Rts. J. 1159, 1161 (February 2006). For a gripping story of the public 1900 hanging of a possibly innocent man in Spokane, Washington, *see* Dick Krutch, *A Hanging in Spokane: The 1897 Case of* State *of Washington vs. George Webster*, Washington State Bar Magazine (Dec. 2009), available at www.wsba.org.
[10] Act of March 22, 1909, ch. 249, §140, 1909 Wash. Laws 890, 930.
[11] *See* Dept of Corrections List of Executed Men, at http://www.doc.wa.gov/-offenderinfo/capitalpunishment/executedlist.asp (referred to hereafter as "DOC Executed List").
[12] *See* Act of March 22, 1913, ch. 167, §1, 1913 Wash. Laws 581.

One of the reform measures was the abolition of the death penalty, perceived by many legislators as barbaric.[13] Arguments advanced included the fact that executions had not lessened crime, was unjust and was inhumane.[14] This change led to a ten year respite in executions.

The state legislature reinstated the death penalty in 1919.[15] From 1919 to 1963, Washington hanged 58 men[16] While Washington retained hanging, other states and countries rejected it as too barbaric. In the 1950s, Great Britain concluded lethal injection was no better than hanging.[17] At the same time, numerous challenges to the constitutionality of capital punishment were making their way through federal courts. Washington's death penalty statute was ruled unconstitutional by *Smith v. Washington*, 408 U.S. 934, 92 S. Ct. 2852, 33 L.Ed.2d 747 (1972), when the U.S. Supreme Court vacated a Washington death sentence under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

---

[13] *See* HistoryLink Essay, *Washington abolishes the death penalty on March 22, 1913*, www.historylink.org, citing "Goss Wins Fight Against Hanging," Seattle Post-Intelligencer, February 21, 1913.
[14] Norman S. Hayner & John R. Cranor, *The Death Penalty in Washington State*, 284 Annals of the American Academy of Political and Social Science 101 (November 1952), quoting the *Olympic Daily Recorder*, February 21, 1913.
[15] *See* Act of March 4, 1919, ch. 112, §1, 1919 Wash. Laws 273, 274, attached as Appendix 9.[16] *See* DOC Executed List; DPIC Spreadsheet.
[16] *See* DOC Executed List; DPIC Spreadsheet.
[17] Lethal Injection Quandary, at 64-65.

In 1975, the Washington legislature abolished the death penalty in reaction to these legal challenges.[18] But in the November 1975 state general election, Washington voters approved Initiative Measure No. 316, which reinstated the penalty and eliminated discretion in the imposition of the death penalty. The law mandated execution for first-degree murder.[19]

When the Supreme Court invalidated mandatory death penalty provisions in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976), our death penalty statute became unenforceable.[20] The same year, Georgia's revised death penalty statute was affirmed in *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), with the Court finding that safeguards built into that statute were adequate to prevent the death penalty from being imposed arbitrarily. After *Gregg*, the Washington legislature passed a new death penalty statute modeled after the Georgia legislation[21] Hanging remained the sole method of execution.

Lethal injection was first adopted by a state in May 1977, when Oklahoma passed a lethal injection statute.[22] When two Oklahoma state legisla-

---

[18] Washington Criminal Code Act of 1975, ch. 260, 1975 Wash. Laws, 1st Sess. 817, 862 (repealing murder statutes).
[19] 1975-76 Wash. Laws, 2d Sess. 17, codified at RCW 9A.32.045-.047 (repealed 1981).
[20] AGO 1976 No. 15.
[21] 1977 Wash. Laws, ch. 206 §7 (1977).
[22] *See* An Act Relating to Criminal Procedure; Amending 22 Okla. Statutes 1971, § 1014, and Specifying the Manner of Inflicting Punishment of Death, S.B. 10, 36th Leg., 1st

tors consulted the state chief medical examiner for a method of killing by injection, he suggested the three-drug cocktail now widely used across the United States.[23] Texas passed a lethal injection statute the next day.[24]

In 1980, this Court invalidated several provisions of Washington's 1977 statute in *State v. Martin*, 94 Wn.2d 1, 614 P.2d (1980). The *Martin* decision, along with a challenge to hanging that had been briefed and argued in *Frampton*, 95 Wn. 2d 469, 627 P.2d 922 (1981), led prosecutors to draft and submit a proposed death penalty bill to try to fix the constitutional errors identified in *Martin* and, in anticipation of an adverse ruling in *Frampton*, to eliminate hanging as the method of execution.

In December 1980, prosecutors proposed revisions, one of which provided for the use of lethal injection:

> (a) The sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary.
>
> (b) In the event that the execution of the sentence of death as provided by Section 14(a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be

---

Sess. (Okla. 1977), *Lethal Injection Quandary*, *supra*, at 66; Jerry Merrill, *The Past, the Present and the Future of Lethal Injection: Baze v. Rees' Effect on the Death Penalty*, 77 U.M.K.C. L. Rev. 161, 165-166 (Fall 2008) ("Merrill").

[23] Lethal Injection Quandary, *supra*, at 68-69.

[24] Amnesty Int'l, *Lethal Injection: The Medical Technology of Execution* 6 (Jan. 1998 & Sept 1999 update), Merrill, *supra*, at 166.

> inflicted by hanging by the neck which shall be supervised by the superintendent of the penitentiary.[25]

The similarity between the language of a 1978 Texas case (*Ex Parte Granviel*, 561 S.W.2d 503 (Tex. 1978) and the Washington prosecutors' explanation of the proposed bill suggests that using sodium thiopental was derived from testimony in the *Granviel* case.

A review of the legislative history of the subsequently introduced bill in Washington, HB 76, reveals no indication that anyone consulted a medical expert in identifying sodium thiopental as an appropriate execution drug.[26] Section 20 of HB 76 contained identical language as initially proposed by the prosecutors. *Id.* Substitute HB 76, introduced in the House in early March 1981, proposed giving the superintendent of the penitentiary the authority to "establish procedures whereby the sentence of death is carried out by two or more persons under circumstances making it impossible to determine actual personal responsibility for the execution of the sentence." *Id.* While the bill was being debated, this Court issued its decision in *State v. Frampton*, on April 16, 1981. In a 6-to-3 vote, the Supreme Court held that hanging was not an unconstitutional method of execution. *See* Dissent of Rosellini, J., 95 Wn.2d at 512 with concurrence of Dore, J.,

---

[25] *See* December 30, 1980 Letter from King County Prosecuting Attorney Ronald A. Franz to Rep. Earl F. Tilly.

[26] *See* HB 76 Bill Documents, available from the Washington State Archives.

and Concurrence/Dissent of Stafford, J., 95 Wn.2d at 513-514 with concurrence of Brachtenbach, C.J., Hicks, J., and Dimmick, J. Five days after the *Frampton* decision, the state senate amended SHB 76 to retain hanging as the primary execution method, with lethal injection an option to be selected by a defendant.

Today, thirty-six states, including Washington, and the U.S. military and U.S. government have switched to lethal injection.[27] Most states, like Washington, "have foregone medical and scientific studies to analyze or improve the protocol, but instead have simply, 'mirror[ed] the legal and scientific choices that Oklahoma officials made [over] thirty years ago.'"[28] In 1986, the Washington legislature, at the request of DOC, removed the reference to sodium thiopental as the lethal injection drug.[29] According to the legislative reports from the time, DOC requested the modification because "[a]ctual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions." The information may have been provided by Texas.[30] Texas had executed 10 men by lethal injection by this time. One of the first "botched lethal injection ex-

---

[27] *See* http://www.deathpenaltyinfo.org/methods-execution .
[28] Merrill, *supra*, at 166, quoting *Lethal Injection Quandary*.
[29] *See* Engrossed Substitute Senate Bill 4683, amending RCW 10.95.180(1); *see also State v. Campbell*, 112 Wn.2d 186, 192, 770 P.2d 620 (1989), quoting RCW 10.95.180 (1986).
[30] *See* Human Rights Watch, *So Long as They Die: Lethal Injections in the United States*, Vol. 18, No. 1(G), at 13 (April 2006).

ecutions" took place in Texas in 1984, when James Autry was executed and it took Autry ten minutes to die, during which time he was able to move and complain of pain.[31]

It has long been assumed that Texas and Oklahoma included pancuronium bromide in their protocols because the drug will paralyze the prisoner preventing him from moving during the execution, reducing witnesses' discomfort in watching the death.[32] The testimony at trial in this case supports this assumption. Tr. 273, l. 13-14; Tr. 443, l. 24 – 444, l. 21; Tr. 574, l. 2-10; Tr. 578, l. 8-14.

In September 1994, a federal court held that hanging death row inmate Mitchell Rupe would constitute cruel and unusual because of the risk that Mr. Rupe would be decapitated during his execution. *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), *aff'd in part and vac'd in part*, 93 F.3d 1434 (9th Cir. 1996). This case led the legislature to make lethal injection the default execution method in this state, with hanging an

[31] *Use of Pavulon*, 14 Wm. & Mary Bill Rts. J. at 1167-1168. *See also Lethal Injection Quandary*, 76 Fordham L. Rev. at 179.

[32] In *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L.Ed.2d 420 (2008), Kentucky argued that "maintaining an appearance of dignity" was the sole reason for its use of a paralytic agent as the second drug in its sequence. Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 Am. Crim. L. Rev. 1101, 1136 (Summer 2008) ("*Impermissible Research*"). *See also* Alper, 35 Fordham Urb. L. J. at 819 n.17 (pancuronium bromide has no therapeutic benefit but makes the execution appear "peaceful" to witnesses).

option only available if chosen by the defendant.[33] The purpose of the change was to eliminate the argument that hanging is unconstitutional.[34] The bill passed and RCW 10.95.180 (1) remains the same today.

While non-medically trained people envision lethal injection as the process of painlessly allowing a person to drift to sleep peacefully and to cease breathing shortly after losing consciousness, the reality of this execution process is now known to be much different than once imagined. The stories of "botched" executions using lethal injection abound.[35] The problem with adopting technologically complicated death machinery, such as electric chairs or gas chambers, or complicated medical-type execution procedures, such as lethal injections, is that people trained to be competent in medical procedures are not running the machines or performing the procedures. The State's expert in this case, Dr. Mark Dershwitz, notes that "[i]t is virtually unanimously accepted by physicians, particularly anesthesiologists, that the administration of lethal doses of pancuronium and/or potassium chloride to a conscious person would result in extreme suffer-

---

[33] *See* SB 5500 (1996) available at http://search.leg.wa.gov.
[34] *See* Senate Bill Report, SB 5500 ("Washington is out there alone in defending hanging as the primary form of execution."). *See also* House Bill report, SB 5500 (noting the *Rupe* holding that execution by hanging had been found to be unconstitutionally cruel).
[35] *Impermissible Research*, 45 Am. Crim. L. Rev. at 1107. Michael Radelet, Examples of Post-Furman Botched Executions (September 16, 2009), http://www.death-penaltyinfo.org/some-examples-post-furman-botched-executions, and Human Rights Watch, World Report 2009 at Chapter VI, "Botched Executions

ing."[36] Dr. Dershwitz acknowledges that the protocol must be implemented with **correct** doses of the **correct** medications, which must be administered in the **correct** order into a properly functioning intravenous delivery system, with sufficient time for the first drug to produce unconsciousness. *Id.*

The statute requires the drugs to be administered intravenously, thus proper insertion of the IV catheter is critical. RCW 10.95.180 (1). This has repeatedly caused problems in practice. There is no dispute that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride in the amounts contemplated by the lethal injection protocol. *See Morales v. Tilton*, 465 F. Supp.2d 972, 978 (N.D. Cal. 2006). Assessing the depth of unconsciousness from an anesthesia "is a complex examination requiring both significant training and experience." Dershwitz at 949; *see* RP 347-348. There is nothing in DOC's protocol that requires the prison superintendent to have any experience in assessing the depth of an inmate's consciousness. RP 681.

VI. WASHINGTON'S DEATH PENALTY SYSTEM, INCLUDING FLAWS IN THE METHOD OF EXECUTION, VIOLATES THE CRUEL PUNISHMENT CLAUSE

1. The State Constitution is More Protective than the Eighth Amendment

[36] Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental As Used in Lethal Injection*, Fordham Urb. L. J. 931 (2008) ("Dershwitz").

Wash. const. art. I, § 14 provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." [37] The text of this provision differs from the text of the Eighth Amendment and, as a result, in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), and *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996), this Court held the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment. *Accord State v. Rivers*, 129 Wn.2d 697, 713, 921 P.2d 495 (1996); *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); *State v. Morin*, 100 Wn. App. 25, 29, 99 P.2d 113 (2000); and *State v. Ames*, 89 Wn. App. 702, 710, n. 8, 950 P.2d 514 (1998). This is "an established principle of state constitutional jurisprudence," and no analysis under *State v. Gunwall*, 106 Wn. 2d 54, 720 P.2d 808 (1986) is necessary. *Roberts*, 142 Wn.2d at 506, n.11.

Washington's constitution was adopted in 1889 by a constitutional convention of delegates who borrowed heavily from the constitutions of other states, rather than from the U.S. Constitution.[38] This history makes it

[37] The constitutions of fifteen of the thirty-six states that inflict capital punishment have prohibitions against "cruel and unusual punishments." An additional fourteen proscribe cruel "or" unusual punishments, and five bar "cruel" punishments. Two states have no analogous textual provisions. James R. Acker and Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 Vand. L. Rev. 1299, 1321 (1989).

[38] Robert Utter & Hugh Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE AT P. 9 (2002) ("Utter & Spitzer").

highly unlikely that the drafters of art. I, §14 intended the clause to have the same meaning as the Eighth Amendment.[39] The trial court's conclusion that the state Cruel Punishment Clause is no different than the Eighth Amendment is erroneous.

2. Washington's Capital Punishment System, including the Method of Execution, Flunks the "Evolving Standards of Decency" Test.

Justice Sanders has recognized that, at the time of the ratification of the Washington constitution, "cruelty" was generally understood to mean more than torture or barbaric punishments. It included the concept of the "unnecessary" infliction of pain. *State v Rivers, supra*, 129 Wn.2d at 723-24 (Sanders, J., dissenting).[40] This is a test broader than that adopted in *Baze*.

The record in this case demonstrates that fallible humans will be responsible for carrying out the lethal injections in Washington, and that therefore there is a risk of human error in this part of the process, creating an unacceptable risk of the infliction of unnecessary pain. Problems with the administration of lethal injections have arisen, not only because of concerns that the inmate has not been adequately anesthetized, but also

---

[39] Utter & Spitzer at p. 3-4.

[40] This standard appears well accepted, both by DOC and by the courts. *See* RP 73 ("Humane" means "not subject to unnecessary risk of pain or harm); *Morales v. Tilton*, *supra*, 465 F. Supp.2d at 973 (California has duty to adopt lethal injection procedures that do not create an unnecessary risk of the infliction of pain).

because of the inadequacy of the training of the individuals performing the injections. Since 1985, at least 32 lethal injections nationwide have been prolonged because executioners have been unable to find suitable veins in which to inject the drugs. There are well-known and well-publicized reports of inmates who experienced excruciating pain because the drugs were not injected into the IV in the correct order.[41]

But evaluating whether a punishment is unconstitutionally cruel involves more than determining whether the framers of our state constitution would have considered it cruel in 1889. The original meaning of the Cruel Punishment Clause must be supplemented by contemporary values, "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958); *see also Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L.E.d2d 335 (2002); *Kennedy v. Louisiana*, 129 S. Ct. 1, 171 L.Ed.2d 932, 77 U.S.L.W. 3194 (2008). The Court should evaluate a punishment "in the light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962).

Execution methods found constitutional at one point have later been struck down under evolving standards of decency. As society has recognized that the technological advancements of electricity and gas could not

[41] Seema Shah, *supra*, at 1106.

deliver swift or painless death, these methods of execution have been rejected – either by legislatures or courts. *See Fierro v. Gomez*, 77 F.3d 301, 307 (9th Cir. 1996), *vac'd* (for consideration under a new lethal injection statute), 519 U.S. 918, 117 S. Ct. 285, 136 L.Ed.2d 204 (1996) (California's gas chamber is unconstitutionally cruel because persistence of consciousness of one minute or more during the execution process outside bounds of Eighth Amendment); *Rupe v. Wood*, 863 F. Supp. at 1313 (Washington's hanging protocol violated Eighth Amendment).

Many judges facing lethal injection cases have reached the conclusion that it is impossible to constitutionally carry out the death penalty. *See Callins v. Collins*, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting) (faced with Callins' execution by lethal injection and the numerous systemic defects in carrying out the death penalty (including racial and economic disparities and lack of consistency and proportionality), Justice Blackmun concluded that "the death penalty experiment has failed. … The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."); *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 1543-47, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring) (appalled by aspects of a lethal injection

execution, despite its portrayal as innocuous; death penalty no longer served the societal purposes of incapacitation, deterrence or retribution); *State v. Webb*, 252 Conn. 128, 149-50, 750 A.2d 448 (2000) (Katz, J., dissenting) (whether carried out by impalement or electrocution, crucifixion or the gas chamber, firing squad or hanging, lethal injection or some other method yet to be designed, the very quintessence of capital punishment is cruelty).[42]

3. The Same Systemic Defects Cited by Judges in Lethal Injection Cases are Present in Washington.

The record in this case, and the examples of botched lethal injection executions discussed above, provide clear evidence that fallible humans will be responsible for carrying out the lethal injections of the Petitioners, and that therefore there is a risk of human error in this part of the process. But the risk of a botched execution is not the only human error that will taint these executions if they are allowed to proceed. The following other systemic defects have also been recognized as applicable to Washington's capital punishment system.

a. Impossibility of Proportionality and Increased Arbitrariness

[42] *See also*, *State v. Cobb*, 251 Conn. 285, 522-30, 743 A.2d 1 (1999), (Berdon, J., dissenting) ("Because the law evolves continuously as a result of changes in the personnel of the court or as a result of justices who revise their positions, … the imposition of the death penalty has no place in a civilized democratic society. It embodies an arbitrariness that cannot be tolerated when the state determines who should live and who should die.")

Four justices of this Court, in dissent, concluded that since the "worst of the worst" murderers in Washington had escaped the death penalty, "[t]hese cases exemplify the arbitrariness with which the penalty of death is exacted. They are symptoms of a system where statutory comparability defies rational explanation." *State v. Cross*, 156 Wn.2d 580, 641-42, 648-52, 132 P.3d 80 (2006) (C. Johnson, J., dissenting). "Reviewing the history of this court's proportionality review reveals how the administration of capital cases defies any rational analysis." *Cross*, 156 Wn.2d at 641.

Justices Marshall and Brennan, concurring in *Godfrey v. Georgia*, 446 U.S. 420, 439-40, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980), also recognized that the capital punishment was fraught with arbitrariness, rendering it unconstitutional. The arbitrariness of the death penalty has only increased since Justices Marshall and Brennan's observations in 1980. In 2007, dissenting Judge Martin in *Benge v. Johnson*, 474 F.3d 236, 254-55 (6th Cir. 2007) agreed with the *Cross* dissent that implementation of the death penalty had become unconstitutionally arbitrary. Three judges of the Third Circuit, in dissent in *Flamer v. State of Delaware*, 68 F.3d 736, 772 (3rd Cir. 1995), also agreed that the capital punishment system had become so complex and irrational as to render it unconstitutional. Dissenting New Jersey Supreme Court Justice Long also concluded that the lack of a fair proportionality review in implementation of the death penalty rendered the

death penalty unconstitutional under New Jersey's more protective state constitution. *State v. Timmendequas*, 168 N.J. 20, 773 A.2d 18, 50-51, 78-79 (2001).

b. The Cruel Punishment Clause Bars Carrying out Executions that are Necessarily Tainted by Racial Bias and Other Unjustified Disparities.

Justice Blackmun in *Callins*, *supra*, Justice Stevens in *Baze*, *supra*, Justices Marshall and Brennan, concurring in *Godfrey v. Georgia*, *supra*, 446 U.S. at 439, and Judge Martin dissenting in *Benge*, 474 F.3d at 257-58, have all expressed their conclusion that the death penalty is unconstitutional because it has been impossible to remove the taint of racial bias. There is growing evidence that death sentences in this state are in fact imposed in a racially discriminatory manner. *See*, Analysis of race of the victim in Washington cases where prosecutors have sought the death penalty, conducted by Professor David Baldus of the University of Iowa School of Law and previously submitted in the ACLU amicus brief in this Court in Mr. Stenson's PRP case, Case No. 82332-4. This statistical evidence was recently corroborated by the Ninth Circuit in *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010) in which the Court discussed undisputed evidence of racial bias in Washington's criminal justice system. The racial bias in this state's death penalty system demonstrates a systemic defect that cannot be ignored.

c. The Cruel Punishment Clause prohibits any sentence lacking a corresponding public benefit that could not be achieved by a less severe sanction.

A final basis for concluding that the systemic defects in Washington's capital punishment system are too numerous to render it constitutional is that while the costs of the death penalty system, including lethal injection are great, the exact same benefit to the public can be achieved through the lesser penalty of life without parole. Several judges who have concluded the death penalty should be ruled unconstitutional have made this point. *See State v. Brown*, 138 N.J. 481, 593, 651 A.2d 19 (1994) *overruled in part on other grounds by State v. Cooper*, 151 N.J . 326, 700 A.2d 306 (1997) (Handler, J., concurring and dissenting); and *Cobb*, *supra*, 251 Conn. at 539-40 (Berdon, J., dissenting and, quoting from Justice Brennan, explaining that the lack of valid purposes served by capital punishment rendered it unconstitutionally cruel).

Wash. const. art. I, § 14 does more than limit the method of punishment; there must be some public good advanced by the punishment inflicted that could not be achieved by a less severe sanction. *See*, *Rivers*, 129 Wn.2d at 728 (Sanders, J., dissenting). Yet neither of the goals alleged to justify the death penalty-- deterrence of murder by prospective offenders and retribution (*Roper v. Simmons*, 543 U.S. 551, 571, 125 S.Ct. 1183, 161 L.Ed..2d 1 (2005)) -- are served in Washington.

A recent study found "no empirical support for the argument that the existence or application of the death penalty deters prospective offenders from committing homicide."[43] [44] As to retribution and the claim that society must send a message that a life will be forfeited if you take a life, there is no method to objectively test the validity of this argument. The argument would also support **any** harsh penalty, including punishments outlawed as excessively inhumane, such as beheading, drawing and quartering, or disemboweling.

Respectfully submitted this _____ day of March, 2010.

ACLU OF WASHINGTON FOUNDATION

Beth M. Andrus, WSBA #18381 SKELLENGER BENDER P.S.	Sarah A. Dunne, WSBA #34896 Nancy L. Talner, WSBA #11196

Attorneys for *Amicus Curiae*
American Civil Liberties Union of
Washington

[43] *See* Tomislav V. Kovandzic, Lynne M. Vieraitis & Denise Paquette Boots, "Does the death penalty save lives? New evidence from state panel data, 1977 to 2006," 8 CRIMINOLOGY & PUBLIC POLICY 803 (2009).

[44] The absence of any deterrent effect is well known by law enforcement in this State. T. McConn, "*Death penalty divides local law enforcers*," Walla Walla Union-Bulletin, November 11, 2009. For a collection of studies relating to deterrence and the death penalty, *see* *http://www.deathpenaltyinfo.org/discussion-recent-deterrence-studies*. There is simply no evidence that execution by lethal injection will deter murder or other violent crime. Thus, the punishment does not serve this public goal.