No. 80209-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CECIL DAVIS,

Appellant.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CHURCHES, AND LUTHERAN PUBLIC POLICY OF WASHINGTON STATE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Since 1981, nearly 300 defendants in Washington have been convicted of the most brutal form of homicide possible: aggravated murder. Only two have been involuntarily executed for their crimes. Over 100 people brutally murdered multiple victims each, yet were spared the death penalty. Appellant Cecil Davis was sentenced to death for the aggravated murder of one victim, and has significant mental impairments. For the reasons set forth in this brief, allowing the state to execute Mr. Davis would violate article I, section 14 of the Washington Constitution.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the principles of liberty and equality embodied in the U.S. Constitution and the Washington Constitution. It has participated in death penalty litigation in Washington for many years, including having amicus briefs accepted by this Court in several capital appeals. See State v. Cross, 156 Wn.2d 580, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006); In re the Personal Restraint of Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004); In re the Personal Restraint of Stenson, 150 Wn.2d 207, 76 P.3d 241 (2003).

The Washington Association of Churches (WAC) is an ecumenical organization that equips people of faith to build ecumenical and interfaith

relationships, engage in advocacy and enable ministries of compassion throughout the State of Washington. Membership is open to all Christian denominations, churches, ministries and seminaries. Core values of the association include justice and reconciliation. The WAC has historically opposed the death penalty and advocated for legislation that would abolish its use. The death penalty is inconsistent with WAC members' efforts to promote respect for human life, to stem the tide of violence in our society and to embody the message of God's redemptive love. Abolishing the death penalty remains on the 2011 legislative agenda.

Lutheran Public Policy of Washington State (LPPO) is a statewide religious advocacy organization that engages congregations and people of faith, government, and community organizations to create a more just and sustainable world. LPPO has over 1,000 congregational advocates located in 194 congregations all over the state. These advocates are involved in numerous social issues such as reforming our criminal justice system, reducing recidivism, and advocating for better programming in prisons so that those coming out will make a better adjustment to society.

ISSUE ADDRESSED BY *AMICI*

Whether the execution of Cecil Davis constitutes cruel punishment in violation of article I, section 14, where (a) Mr. Davis was convicted of the aggravated murder of one person, (b) only one of the other 180 people convicted of the aggravated murder of one victim since 1981 has been involuntarily executed, and over a hundred multiple-victim murderers have escaped death, (c) evolving standards of decency have led to significant declines in executions nationally and internationally, and (d) evolving standards of decency have led courts to conclude that executing persons with significant mental impairments is unconstitutionally cruel punishment.

STATEMENT OF THE CASE

In 1998 Cecil Davis was convicted of the aggravated murder of Yoshiko Couch and sentenced to death. In 2004, this Court granted Mr. Davis's personal restraint petition and remanded for a new penalty trial. The evidence at the new penalty trial included evidence from five experts regarding Mr. Davis's multiple mental impairments. Op. Br. at 14-18, 52-53; Resp. Br. at 12-18. The experts agreed that Mr. Davis's score on IQ tests ranged from 68 to 82 (with the State's expert stating that his overall IQ was 74, in the 4th percentile for the population), that he had a cognitive disorder (which meant many of his mental abilities were impaired), that he

had "moderately severe" slowing of the electrical activity in his brain, plus a form of brain injury labeled post-concussive disorder (from a vehicle accident) and major mental illness, and that his functioning was "borderline" with his score on a test for functioning being at best 50 out of 100 and his reading and math skills at a fourth grade level. Id. The experts and members of Mr. Davis's family testified that he had struggled in school from an early age, was placed in special education classes and dropped out in tenth grade, had been beaten repeatedly by his stepfather, and was taunted for being "slow." Id. Following the 2007 penalty trial, Mr. Davis was again sentenced to death.

ARGUMENT

Executing Cecil Davis for the murder of one person – when over a hundred multiple-victim murderers have escaped death, and when the evidence demonstrated Mr. Davis had significant mental impairments – would violate the state constitutional prohibition on cruel punishment.

a. Article I, section 14 is more protective than the Eighth Amendment.

Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Const. art. I, § 14. The framers considered and rejected the language of the Eighth Amendment to the United States Constitution, which only prohibits punishment that is both "cruel" and "unusual." U.S. Const. amend. VIII; State v. Fain, 94 Wn.2d 387, 393,

617 P.2d 720 (1980) (citing The Journal of the Washington State Constitutional Convention: 1889 501-02 (B. Rosenow ed. 1962)).

Because of the differences in text and history, this Court has long held that article I, section 14 provides greater protection than its federal counterpart. State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996); Fain, 94 Wn.2d at 393.[1] Accordingly, a Gunwall[2] analysis is not necessary. State v. Roberts, 142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000). Rather, this Court will "apply established principles of state constitutional jurisprudence." Id.

In order to pass state constitutional muster, a sentence must be both inherently and comparatively proportional. See Fain, 94 Wn.2d at 397. This Court evaluates four factors in determining whether a sentence violates article I, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute, and whether that purpose can be equally well served by a less severe punishment, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same

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

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

jurisdiction. Id. at 397 and 401 n.7; see Harris v. Kastama, 98 Wn.2d 765, 770, 657 P.2d 1388 (1983) ("The calculation of the constitutional proportionality of penalties must be based upon a consideration of all the factors enumerated in Fain").

A sentence may be considered proportional under the Eighth Amendment yet violate article I, section 14. See Fain, 94 Wn.2d at 391, 402 (acknowledging that defendant's sentence would not violate the federal constitution but reversing it as cruel punishment under the state constitution). Further, a sentencing statute may be facially constitutional but violate the cruel punishment clause as applied to a particular defendant's conduct. Thorne, 129 Wn.2d at 773 n.11.

b. An analysis of the Fain factors demonstrates that Mr. Davis's execution would violate article I, section 14.

A review of the Fain factors shows that the imposition of a death sentence upon Mr. Davis constitutes cruel punishment in violation of the state constitution. Accordingly, his sentence should be vacated and his case remanded for entry of a sentence of life without the possibility of parole.

i. The nature of the offense. The first factor that must be evaluated is the nature of the offense. Fain, 94 Wn.2d at 397. The death penalty is appropriate only for "the most serious crimes." Atkins v. Virginia, 536

U.S. 304, 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). It "must be reserved for those crimes that are 'so grievous an affront to humanity that the only adequate response may be the penalty of death.'" Kennedy v. Louisiana, 554 U.S. 407, 171 L.Ed.2d 525, 128 S.Ct. 2641, 2659 (2008) (quoting Gregg v. Georgia, 428 U.S. 153, 184, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976)).

Here, the nature of the offense is very serious – but far less serious than the mass murders whose perpetrators have escaped death. Cecil Davis was convicted of the aggravated murder of a single victim. Although the jury found that he killed the victim in the course of robbery, rape, or burglary, the fact that there was but one victim renders Mr. Davis's death sentence grossly disproportionate to the offense. In the last 45 years, only one person in our state has been involuntarily executed for killing just one person.[3] Only a minority of other states have executed single-victim murderers in the last 10 years, and less than a third of the world's countries continue to impose capital punishment at all.[4] Mr. Davis's mental impairments (discussed below) also must be considered a

[3] Cal Coburn Brown was put to death in September, 2010. In a 2009 PRP, undersigned counsel made substantially the same arguments for Mr. Brown that are made herein, but this Court did not reach the merits because the petition was time-barred. See In re the Personal Restraint of Brown, No. 82711-7. Mr. Davis's appeal presents the first opportunity for this Court to address the merits of the article I, section 14 proportionality issue for a defendant given the death penalty for a single murder and who has significant mental impairments.

[4] http://www.deathpenaltyinfo.org/executions. Last viewed 11/24/10.

mitigating factor regarding the nature of the offense. Mr. Davis's execution would be a wanton and freakish exception to the evolving trend, serving no legitimate purpose.

ii. The legislative purpose. The second consideration in state constitutional proportionality analysis is the legislative purpose behind the sentencing statute, and whether that purpose can be equally well served by a less severe punishment. Fain, 94 Wn.2d at 401 n.7. This standard should be employed with caution to respect the separation of powers. Id. But the factor may not be overlooked entirely, because it is ultimately the Court's duty to determine the constitutionality of a sentence. Id. at 402; see Washington State Labor Council v. Reed, 149 Wn.2d 48, 62, 65 P.3d 1203 (2003) ("The ultimate power to interpret, construe, and enforce the constitution of this state belongs to the judiciary").

The purposes of capital punishment are retribution and deterrence. Gregg, 428 U.S. at 183. Unless the imposition of the death penalty on a particular type of defendant 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." Atkins, 536 U.S. at 319 (citing Enmund v. Florida, 458 U.S. 782, 798, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982)).

Killing Cecil Davis would not further these legislative goals. First, the retributive goal is not served by killing one out of every 100 aggravated murderers.[5] Indeed, such a random and freakish application of the death penalty only divides victims' families into arbitrary categories of worthy and unworthy.[6] Furthermore, executing a single-victim defendant while sentencing notorious mass murderers to life in prison makes a mockery of the notion that capital punishment is reserved for "the worst of the worst." See State v. Cross, 156 Wn.2d 580, 652, 132 P.3d 80 (2006) (C. Johnson, J., dissenting) ("Where the death penalty is not imposed on Gary Ridgeway, Ben Ng, and Kwan Fai Mak, who represent the worst mass murderers in Washington's history, on what basis do we determine on whom it is imposed?"); Atkins, 536 U.S. at 319 (retributive goal not served by executing those with "lesser culpability"). And retribution "most often can contradict the law's own ends," particularly in capital cases. Kennedy, 128 S.Ct. at 2650. "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Id.

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[5] Information from reported cases and trial judge reports submitted pursuant to RCW 10.95.120 shows that besides Brown, just one other defendant, Charles Campbell, has been involuntarily executed in this state in the last 45 years. No one else has been involuntarily executed even though almost 300 people have been convicted of aggravated murder since 1981.

[6] Kristin Froehlich, Honest debate needed on the death penalty, The Middletown Press, April 30, 2010.

As for deterrence, hard data demonstrate that this goal is not only equally served by life sentences, but better served by incarceration than execution. An 18-year study of the issue concluded that for every year between 1990 and 2007, the murder rate in death-penalty states was higher than that in states without the death penalty.[7] Even more significantly, the difference in the murder rate between the two groups is now 10 times greater than it was in 1990. Id. States that impose capital punishment suffer from a murder rate that is over 40% higher than states without a death penalty. Id. And although the annual number of death sentences has declined by 60% nationally since the 1990's, the murder rate has remained close to constant.[8] A national poll released in 2009 revealed that the nation's police chiefs do not believe the death penalty acts as a deterrent to murder.[9] Additionally, the purported legislative justifications for the death penalty are particularly weak when the defendant suffers from the kind of mental impairments Mr. Davis has. As is discussed below, executing a person with reduced judgment, understanding, and self-control (compared to others convicted of murder) does not serve the

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[7] http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates, last viewed 11/24/10.

[8] The Death Penalty in 2008: Year End Report (Death Penalty Information Center), Dec. 2008 (hereinafter "2008 Report") at 1, 3. Available at http://www.deathpenaltyinfo.org/2008YearEnd.pdf.

[9] The Death Penalty in 2009: Year End Report (Death Penalty Information Center), Dec. 2009 (hereinafter "2009 Report") at 3. Available at http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf.

legislative purposes of deterrence or retribution. See, Double Tragedies: Victims Speak Out Against the Death Penalty for People with Severe Mental Illness (published by MVFHR and NAMI (2009) at p. 1 (describing how both murder victims' family members and the family members of defendants with mental impairments oppose the execution of persons with severe mental impairments since it results in a "double tragedy" rather than promoting justice).[11]

Finally, the huge cost of the death penalty must be considered together with its failure to serve a legitimate legislative purpose in this case. A Washington State Bar Association subcommittee has thoroughly documented the extremely high cost of the death penalty in Washington.[12] How can that cost be justified in a case where no valid legislative purpose is served?[13] In sum, the purposes behind the death penalty would be equally – if not better – served by sentencing Cecil Davis to life in prison without the possibility of parole. The second Fain factor thus counsels against Mr. Davis's execution.

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[11] http://www.nami.org/Content/ContentGroups/Policy/Issues_Spotlights/Death_Penalty/DoubleTragedies.pdf

[12] http://www.wsba.org/lawyers/groups/finalreport.pdf at p. 14-25.

[13] Supporting this point, Washington's Attorney General Rob McKenna commented on September 7, 2010, to KIRO-FM radio, that he could "live without" the death penalty in our state because it is expensive and not helpful to protecting public safety. http://www.mynorthwest.com/?sid=362930&nid=11

iii. The punishment Mr. Davis would have received in other jurisdictions for the same offense. As with the first two factors, the third Fain factor – other jurisdictions – cuts in favor of overturning Mr. Davis's death sentence. In evaluating this factor, this Court looks not to the static state of affairs, but to trends which signal "evolving standards of decency." Fain, 94 Wn.2d at 397. The method of analysis tracks that of the Eighth Amendment, but our state constitution requires a more cutting-edge response to the latest trends, in order to enforce the stronger protection against cruel punishment required in Washington. See id. at 399-400 (reviewing same national trends as United States Supreme Court reviewed in Rummel v. Estelle[14], but reaching different result which was more protective of defendant's rights).

In most jurisdictions, Cecil Davis would not be executed. Although a majority of states in this country retain capital punishment statutes, a minority have executed single-victim defendants in the last 10 years.[15] See Kennedy, 128 S.Ct. at 2657 (statistics about number of executions evaluated rather than looking only at legislation); Roper v. Simmons, 543 U.S. 551, 561, 564, 161 L. Ed. 2d 1, 125 S. Ct. 1183 (2005) (considering it significant that "even in the 20 states without a formal

[14] 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980).
[15] http://www.deathpenaltyinfo.org/executions. Last viewed 11/24/10.

prohibition on executing juveniles, the practice is infrequent); Atkins, 536 U.S. at 316 (similarly finding it significant that "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon"). The annual number of new death sentences nationally has fallen roughly 60% since the 1990s, when Mr. Davis was convicted.[16] New York and New Jersey abolished the death penalty in 2008,[17] and New Mexico followed in 2009.[18] See Simmons, 543 U.S. at 574 (constitutional proportionality analysis must include states that have abandoned the death penalty altogether, not just those that have abandoned it for the defendant's class of offenders).

Other trends also show that Mr. Davis's execution does not pass state constitutional muster. In 1999, shortly after Mr. Davis was convicted, 98 executions occurred nationwide.[19] But by 2009, that number had dropped by nearly 50%, to 52. Id. Only 11 states administered death sentences that year. Id. The South was responsible for 87% of the executions, with almost half occurring in Texas alone. Id. at 2, 6.

Consistent with the decrease in both death sentences and executions, public support for the death penalty has declined sharply. See

[16] 2008 Report at 1.
[17] 2008 Report at 4.
[18] 2009 Report at 1.
[19] 2009 Report at 1.

Atkins, 536 U.S. at 316 n.21 (polling data considered in cruel punishment analysis). In 1994, a Gallup Poll found that 80% of the American public approved of the death penalty.[20] But a 2010 poll of 1,500 Americans conducted by Lake Research Partners reveals that 61% of Americans now oppose capital punishment and prefer a term of incarceration for murder.[21]

Opposition to the death penalty among esteemed jurists and criminal justice professionals has also grown. See Roper v. Simmons, 543 at 561 (considering views of "respected professional organizations"); Atkins, 536 U.S. at 316 n.21 (citing opinions of professionals "with germane expertise"). In a national poll released in 2009, the nation's police chiefs ranked the death penalty last in their priorities for effective crime reduction, concluding it does not prevent murder and is an inefficient use of taxpayer dollars.[22] Shortly before he retired, Justice Stevens concluded that "the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose." Baze v. Rees, 553 U.S. 35, 170 L.Ed.2d 420, 128 S.Ct. 1520, 1551 (2008) (Stevens, J., concurring). Oregon Supreme Court Justice Walters urged her colleagues to "consider our state's experience in imposing the death penalty and to examine its

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[20] 2008 Report at 2.
[21] http://www.deathpenaltyinfo.org/pollresults. Last viewed 11/24/10.
[22] 2009 Report at 3.

constitutionality anew," in light of the fact that in 2008, "jurists who had voted many times to affirm sentences of death have reassessed the constitutionality of the death penalty in light of their experiences with its administration and objective evidence of the evolving standards of decency." State v. Davis, 345 Or. 551, 593-94, 201 P.3d 185 (Or. 2008) (Walters, J., concurring).

Further demonstrating the "evolving trend" against executing persons like Mr. Davis, on October 23, 2009, the members of the American Law Institute voted "overwhelmingly" to withdraw Section 210.6 of the Model Penal Code, on which Washington's capital punishment statute is based.[23] Section 210.6 was drafted in 1962, but after "decades of experience with death-penalty systems modeled on it," the Institute concluded, "on the whole the section has not withstood the tests of time and experience."[24] Indeed, "no state has successfully confined the death penalty to a narrow band of the most aggravated cases." Id. at 30. The Institute removed its provision for capital punishment because "real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process." Id. at 4.

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[23] http://www.ali.org/_news/10232009.htm. Last viewed 11/26/10.

[24] American Law Institute, Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (2009) at 4 (hereinafter "ALI Report").

Finally, an international consensus has developed against the death penalty. See Simmons, 543 U.S. at 575-76 (looking to views of other nations); Atkins, 536 U.S. at 316 n.21 (considering practices within "the world community"). 139 countries do not impose capital punishment, while only 58 retain the death penalty.[25] Since 1976, 94 nations have abolished the death penalty, such that 71% of the world's governments no longer execute their citizens. Id. This overwhelming international trend indicates that executing Cecil Davis would not comport with the evolving standards of decency that mark the progress of a maturing society.

Ultimately, regardless of the total number of states, countries, judges, doctors, or citizens who have abandoned their support for the death penalty since Cecil Davis was convicted, it is "the consistency of the direction of change" that mandates reversal. Atkins, 536 U.S. at 315; accord Simmons, 543 U.S. at 565-66 (holding juvenile death penalty unconstitutional despite small number of states recently abolishing it). As demonstrated above, the overwhelming trend both nationally and internationally is away from capital punishment, particularly for single-victim defendants. These trends require a reevaluation of the constitutionality of Mr. Davis's execution, and reversal of his sentence.

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[25] http://deathpenaltyinfo.org/abolistionist-and-retentionist-countries, last viewed 11/24/10.

See Atkins, 536 U.S. at 314 (reevaluating and overruling prior case affirming death sentence for mentally retarded, even though prior case was only 13 years old, because "much has changed since then"); Simmons, 543 U.S. at 574 (reevaluating and overruling prior case affirming death sentence for juveniles, even though prior case was only 16 years old, for same reason).

In sum, the third Fain factor, like the first two, strongly indicates that Mr. Davis's execution would violate the cruel punishment clause.

iv. The punishment meted out for similar offenses in Washington. An evaluation of the final Fain factor, punishment for similar offenses in Washington, unquestionably shows that Mr. Davis's execution would be unconstitutionally cruel.[26]

Only one single-victim defendant, Cal Brown, has been involuntarily executed in Washington since 1963.[27] See Kennedy, 128 S.Ct. at 2657 (reversing death sentence for child rape in part because "no individual has been executed for the rape of an adult or child since 1964"). Besides Brown, just one other defendant has been involuntarily executed

[26] Six of the seven cases that this Court deemed similar to Mr. Davis's in his prior appeal have now resulted in outcomes other than the death penalty. And in the prior appeal, the Court addressed only statutory proportionality and not the constitutional proportionality argument made here.

[27] Executions in the U.S. 1608-2002: The ESPY File, Executions by State, available at http://www.deathpenaltyinfo.org/documents/ESPYstate.pdf; http://www.deathpenaltyinfo.org/executions.

in this state in the last 45 years, and that defendant tortured and murdered three victims, including a child. State v. Campbell, 102 Wn.2d 1, 6, 691 P.2d 929 (1984). No one else has been involuntarily executed even though almost **300** people have been convicted of aggravated murder since 1981, and **101 had multiple victims**.[28]

Although the murder of Yoshiko Couch was brutal, the Trial Judge Reports contain numerous cases in which multiple victims were killed in equally brutal fashion, yet a death sentence was not imposed. For example, George Russell sexually assaulted and bludgeoned three women to death, but was sentenced to life in prison. (Trial Report No. 120). Martin Sanders raped and killed two 14-year-old victims. (Trial Report No. 81). Steven Carey burned his wife and child to death. (Trial Report No. 10). Cherno Camara killed his two children with a hatchet. (Trial Report No. 130). Jack Spillman killed, eviscerated, and sexually mutilated two women. (Trial Report No. 167). Scott Pierce stabbed and choked two young victims in a racially motivated attack. (Trial Report No. 168). Gerald Davis raped and murdered two elderly women. (Trial Report No. 186). None of these men was sentenced to death.

[28] Information from reported cases and trial judge reports submitted pursuant to RCW 10.95.120.

David Anderson killed four victims by strangling, beating, and stabbing them repeatedly. (Trial Report No. 205). Alex Baranyi similarly murdered four people by strangling them, stabbing them, and beating them with a bat. (Trial Report No. 267). David Rice bludgeoned a husband, wife, and their two preteen children to death with a steam iron. (Trial Report No. 43). Lawrence Sullens killed three people, then beat and shot the 11-year-old daughter of two of the victims. The daughter survived despite being left to die in the house the defendant subsequently burned down. (Trial Report No. 69). All of these men escaped death.

Billy Neal killed three victims by stabbing them a total of 140 times. (Trial Report No. 219). Stanley Runion held three victims, including a 16-year-old, hostage for an hour before murdering them. (Trial Report No. 99). Sean Stevenson shot his parents and sister to death after raping his sister. (Trial Report No. 50). Kenneth Ford strangled, beat, and stabbed one victim in the throat repeatedly, then killed one victim with a knife and shot two others to death. (Trial Report No. 234). Michael Thornton shot two victims in the head. When one didn't die immediately, he stabbed him in the neck and hit him over the head with rocks. (Trial Report No. 238). Robert Parker stripped two victims, gagged them with their own undergarments, sexually assaulted them, and

stabbed them multiple times in the abdomen. (Trial Report No. 185). None of these brutal multiple-victim murderers is on death row.

The above list is merely illustrative. The Trial Judge Reports are rife with further examples of horrific multiple-victim murders whose perpetrators escaped death. See, e.g., Nos. 59, 69, 86, 95, 101, 128, 157, 161, 172, 174, 182, 203, 228, 238, 256, 275. This Court has commented in other cases that evidence of the defendant's mental impairments may explain the failure to carry out the death penalty for these murders, but there is significant evidence of those impairments in Mr. Davis's case as well. State v. Pirtle, 127 Wn. 2d 628, 688, 904 P.2d 245 (1995) (noting that the trial judge reports indicate evidence of mental illness may lead prosecutors and juries not to seek or impose the death penalty). Thus, the fourth Fain factor, like the first three, shows that executing Cecil Davis for the aggravated murder of one victim would violate article I, section 14 of the Washington Constitution.

In sum, an analysis of the factors set forth in State v. Fain demonstrates that it would violate the state constitution to permit Cecil Davis's execution to proceed.

c. The evidence of Mr. Davis's significant mental impairments of various kinds additionally demonstrates that his execution would be unconstitutionally disproportionate and cruel.

Case law prohibiting the execution of the mentally retarded[29] and juveniles logically compels the conclusion that the execution of those with multiple severe mental impairments like Mr. Davis's is also disproportionate and unconstitutional. The Supreme Court explained in Atkins that mental impairments diminish the "personal culpability" required for a death sentence. Atkins, 536 U.S. at 318. The Court similarly reasoned that the immaturity of juvenile offenders renders them "insufficiently culpable" to be subject to capital punishment. Simmons, 543 U.S. at 573. The same principles apply to those whose low IQ, other cognitive disorders, brain injuries or mental illness (or all combined) render their mental status equivalent to the mentally retarded or juveniles. See Timothy Hall, Mental Status and Criminal Culpability after Atkins v. Virginia, 29 Dayton L. Rev. 355, 361-62 (2004); and see, Greenspan and Switzky, Execution Exemption Should be Based on Actual Vulnerability, Not Disability Label, 13 Ethics & Behavior at p. 19-26 (2003) (explaining

[29] The Washington Legislature revised RCW 10.95.030(2) and other statutes in 2010 to use more respectful language in describing cognitive disabilities, but the term "mentally retarded" is used in the leading court decisions on this issue and that is why it is used here.

that persons with IQs in the range of Mr. Davis's "function[] socially in a manner more in line with that of a significantly younger person.").

Mr. Davis's numerous mental impairments are the same kind of conditions that led the Atkins and Simmons Courts to find execution unconstitutional. The Atkins Court, 536 U.S. at 318 said:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.... There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan .... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

The Atkins Court further declared that "[b]ecause of their disabilities in the areas of reasoning, judgment, and control of their impulses, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Id. at 306. In referring to the "mentally retarded," Atkins noted "An IQ between 70 and 75 or lower, ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. at 309, n. 5.

Two years later, the Supreme Court reaffirmed that execution of the mentally retarded is unconstitutional without the need for proof that the crime was attributable to the defendant's low IQ. Tennard v. Dretke, 542 U.S. 274, 287-88, 159 L.Ed.2d 384, 124 S.Ct. 2562 (2004) (defendant's IQ of 67 was impaired intellectual functioning that was inherently relevant mitigating evidence). Leaving no doubt that IQ scores in the same range as Mr. Davis's were constitutionally relevant to mitigation of a death sentence, the Tennard Court stated:

> Evidence of significantly impaired intellectual functioning is obviously evidence that "might serve 'as a basis for a sentence less than death,'"[citation omitted]; see also, e.g., Wiggins v. Smith, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (observing, with respect to individual with IQ of 79, that "Wiggins['] ... diminished mental capacitie[s] further augment his mitigation case"); Burger v. Kemp, 483 U.S. 776, 779, 789, n. 7, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (noting that petitioner "had an IQ of 82 and functioned at the level of a 12-year-old child ....)"

And in another 2004 case, the Supreme Court said that the defendant's IQ scores and history of participation in special education classes might well have been considered as a reason to impose a sentence more lenient than death. Smith v. Texas, 543 U.S. 37, 44, 160 L.Ed.2d 303, 125 S.Ct. 400 (2004).

The Supreme Court's reasoning in the above cases applies equally to the mental impairment evidence and apparently impulsive crime in Mr. Davis's case, even if the statutory definition of "mentally retarded" was

not met.[30] It is well-established that a defendant's mental impairments of the types Mr. Davis has are relevant mitigating factors in a capital case. Correll v. Ryan, 539 F.3d 938, 943-44, 950, 952 (9th Cir. 2008) (counsel ineffective in capital case for failure to adequately investigate defendant's mental impairments including mental illness and brain injury, noting that "potential brain injury, a history of drug addiction, and abuse suffered as a child ... is precisely th[e] type of evidence that the Supreme Court has deemed 'powerful,' citing Wiggins v. Smith, 539 U.S. at 534); Commonwealth v. Gorby 589 Pa. 364, 371-72, 909 A.2d 775 (2006) (experts agreed defendant's cognitive disorder and depression, despite normal intelligence, substantially impaired his reasoning ability, judgment and behavioral control, and counsel was ineffective for failing to present that evidence as mitigation); Crook v. State, 813 So.2d 68, 75 (Fla. 2002) ("Clearly, the existence of brain damage is a significant mitigating factor that trial courts should consider in deciding whether a death sentence is appropriate in a particular case."); Jones v. State, 705 So.2d 1364, 1366 (Fla.1998) (court reversed the defendant's death sentence and remanded for the imposition of a life sentence, stating "our review of the record

[30] RCW 10.95.030(2)(c) defines mentally retarded as having "Significantly subaverage general intellectual functioning" (meaning intelligence quotient seventy or below), concurrent deficits in adaptive behavior, and manifestation of the impaired intellectual and behavioral functioning prior to age 18.

reveals copious unrebutted mitigation," including evidence that the defendant was "borderline" mentally retarded based upon the defendant's IQ of 76, and the fact that the defendant was placed in special education classes, had first-grade reading ability, and had learning disabilities.); Offord v. State, 959 So.2d 187, 193 (Fla. 2007) (in death penalty case, bipolar disorder recognized as serious mental illness and forming basis for vacating death sentence as disproportionate); New Jersey v. Nelson, 173 N.J. 417, 803 A.2d 1, 41 (2002) (Zazzali, J., concurring) (finding under state constitution that death is a disproportionate sentence for mentally ill defendant).

This Court has also acknowledged that mental impairments including mental illness are mitigating factors in a death penalty case that raise significant questions about the appropriateness of execution. In re the Personal Restraint of Brett, 142 Wn.2d 868, 882, 16 P.3d 601 (2001) (defense counsel's failure to investigate and develop mitigating evidence of defendant's mental illness ineffective); Pirtle, 127 Wn.2d at 687 (mental illness is a mitigating factor). The same reasoning as this Court, the United States Supreme Court and other courts have accepted regarding the mitigating effect of mental impairment evidence should lead this Court to conclude that executing Mr. Davis would violate article I, section 14 of the Washington Constitution.

As the Atkins Court recognized, an execution is not constitutional simply because the penalty phase jury may have considered evidence of the defendant's mental impairments. The Court explained that juries are unlikely to weigh properly the mitigating aspects of mental retardation. First, the Court noted that mentally retarded persons have a "lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." Id. at 320-21. Second, the Court noted that, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." Id. at 321 (citing Penry v. Lynaugh, 492 U.S. 302, 323-325, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989)). Similarly, the Court recognized that it had a constitutional duty to stop the execution of juveniles even if a brutal murder was involved and the jury was able to consider youth as a mitigating factor. In words that could easily apply to the crime Mr. Davis was sentenced to death for and the evidence of his multiple mental impairments, the Simmons Court stated:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's

> objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

543 U.S. at 572-73.

As noted above in section b.iii, international trends regarding the death penalty are relevant to a constitutional proportionality analysis. A defendant's mental impairments are recognized internationally as a valid reason for not executing that person. The United Nations Commission on Human Rights has consistently adopted resolutions calling on all states that maintain the death penalty "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person." See, for example, The Question of the Death Penalty, U.N. Commission on Human Rights Res. 2005/59, ¶ 7(c), U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005); and see, the annual resolutions supporting the same point passed every April between 1999 and 2004. The Commission has interpreted the phrase "mental disorder" to encompass both mental illness and mental retardation.

The second proportionality factor – legislative purpose – also weighs against execution of Mr. Davis because of his mental impairments. Defendants who at the time of their offenses suffer from severe mental illness are not likely to be deterred from committing their offenses by the

threat of capital punishment. As Justice Powell noted, "the death penalty has little deterrent force against defendants who have reduced capacity for considered choice." Skipper v. South Carolina, 476 U.S. 1, 13, 90 L.Ed.2d 1, 106 S. Ct. 1669 (1986) (Powell, J., concurring). In Atkins, the Court said that for mentally retarded offenders, the "cold calculus" of cost and benefit is "at the opposite end of the spectrum from behavior." 536 U.S. at 319. As the Court recognized about the mentally retarded in Atkins, exempting those with other equally significant mental impairments from capital punishment will not lessen the deterrent effect upon offenders who do not have those impairments. Id. at 320. Since the death penalty serves no legitimate penological purpose when applied to defendants with significant mental impairments, executing Mr. Davis would be the purposeless infliction of needless pain and suffering, in violation of the state's cruel punishment provision.

The execution of persons with significant mental impairments debases us all. In their dissent in the lower court opinion in Atkins, Justices Hassell and Koontz movingly wrote:

> It is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.

Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312, 395, 397 (2000) (Hassell, J., & Koontz, J., dissenting).

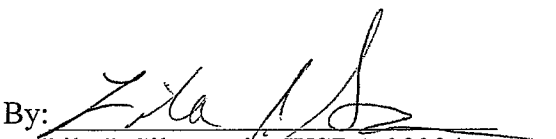
It is this Court's duty both in conducting statutory proportionality review and in evaluating the constitutionality of executing Mr. Davis to look beyond the prosecution's claim that Mr. Davis knew what he was doing at the time of the crime. An informed proportionality analysis must consider the well-documented evidence in the record of Mr. Davis's multiple mental impairments. His impairments are functionally equivalent to the mental impairments that led the Atkins and Simmons Courts to conclude executions of those individuals would be cruel and unusual punishment. In short, it is now clear (as it was not at the time of Mr. Davis's prior proceedings before this Court), that the execution of a defendant who suffers from severe mental impairments is contrary to the evolving standards of decency that mark the progress of a maturing society. Accordingly, this Court should hold that Mr. Davis's execution would violate Article I, section 14 of the Washington Constitution.

CONCLUSION

The fact that mass murderers in Washington have escaped the death penalty, and the significant evidence of Mr. Davis's mental impairments, necessarily cast doubt on the constitutionality of his

execution. Therefore, amici respectfully request that this Court vacate Cecil Davis's death sentence and remand for imposition of a sentence of life in prison without the possibility of parole.

Respectfully submitted this 10th day of January, 2011.

By: 

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CECIL DAVIS, Appellant.	)))))))))	NO. 80209-2

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **BRIEF OF AMICI CURIAE** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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