NO. 82332-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF
DAROLD R. J. STENSON,

Petitioner

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

> Imagine that speeders who drive yellow cars are ticketed but speeders who drive other colored cars are not. Whether or not the traffic law explicitly singles out speeders in yellow cars, a system that reaches that result in practice would be unfair. In a death penalty system in which approximately 2% of known murderers are sentenced to death, fairness mandates that those few who are sentenced to death should be comparable to others who are sentenced to death – and worse than those who are not. A system in which the sentence of death depends more on the color of the victim or the county that the crime is committed in than on the severity of the offense is also arbitrary.

http://www.deathpenaltyinfo.org/arbitrariness

Amici American Civil Liberties Union and American Civil Liberties Union of Washington (hereinafter "the ACLU") ask this Court to enter an order prohibiting the State of Washington from taking Darold Stenson's life. His execution would be unfair and unconstitutional for the reasons set forth in Mr. Stenson's PRP brief and in this brief. The ACLU does not ask the Court to address the constitutionality of Washington's death penalty statute or the adequacy of the Court's statutory proportionality review, issues that the Court addressed in other cases. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007) (direct appeal, statutory proportionality review, other constitutional challenges); *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006) (direct appeal, statutory

proportionality review, 8th Amendment but not Washington Constitution challenge to arbitrariness of Cross's death sentence). The issue of whether the death penalty can be lawfully imposed in other cases is not before the Court. Instead, the question is whether it would be unconstitutionally arbitrary for the State to take Mr. Stenson's life, in light of information now available that has not previously been presented to or addressed by this Court.

II. IDENTITY AND INTEREST OF *AMICI* CURIAE

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU Capital Punishment Project engages in public advocacy and litigation, including direct representation of capital defendants across the country. Its attorneys have considerable expertise in death penalty litigation.

The American Civil Liberties Union of Washington is a statewide, nonprofit, nonpartisan organization with more than 20,000 members, dedicated to the principles of liberty and equality embodied in the U.S. Constitution and Washington Constitution. It has participated in death penalty litigation in Washington for many years, including twice having its amicus briefs accepted by this Court in prior proceedings involving Darold Stenson. *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); *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2007).

Amici ACLU respectfully submit this brief to assist the Court in resolving serious questions regarding the constitutionality of carrying out Darold Stenson's execution in light of substantial evidence that it is arbitrary and the product of bias. Given the ACLU's longstanding interest in the protections contained in the state and federal constitutions, including due process, the Eighth Amendment's prohibition against cruel and unusual punishment, and the Washington Constitution's prohibition on cruel punishment, the proper resolution of these questions is a matter of substantial importance to the ACLU and its members.

III. STATEMENT OF THE CASE

The facts set forth in Petitioner Stenson's PRP and accompanying brief compel the conclusion that it would be arbitrary and capricious to permit Mr. Stenson's imminent execution (scheduled for December 3, 2008) to go forward. The PRP demonstrates, by analysis of the trial judge reports filed to date, including over 100 reports filed since Mr. Stenson's direct appeal was decided, that the taking of his life cannot be explained by the number of victims, his criminal history, his relationship with the victims, the vulnerability or status of the victims, the statutory aggravating factors found, the amount of planning involved, the defendant's motive, or

the amount of suffering of the victims. Given that executing Mr. Stenson while imprisoning hundreds of others for similar and indeed more heinous crimes cannot be justified, it would be unconscionable for the State of Washington to select Mr. Stenson to be the second person since 1981, when the current capital punishment statute became effective, to be involuntarily executed.

This *amici* brief discusses various aspects of the data in the trial judge reports and other authoritative sources which confirm that Mr. Stenson's execution would be unconstitutionally arbitrary. Specifically, the significant disparities in race of the victim, whether or not the defendant was represented by appointed trial counsel, and the differing rates of seeking the death penalty across counties, reveal that Mr. Stenson's execution would be the product of arbitrariness, caprice, and systemic bias.

IV. ISSUE ADDRESSED BY *AMICI*

When an execution is arbitrary, not justified by valid factors about the offense or the offender, and likely the result of several forms of systemic bias as revealed by new evidence, should it be enjoined as unconstitutional under the Washington Constitution?

V. ARGUMENT

A. EVOLVING STANDARDS OF DECENCY UNDER THE UNITED STATES AND WASHINGTON CONSTITUTIONS PROHIBIT THE ARBITRARY TAKING OF MR. STENSON'S LIFE.

As this Court has long recognized, executions by the State must meet two goals: they must avoid "'random arbitrariness" in capital sentencing and must avoid the "imposition of the death sentence in a racially discriminatory manner." *State v. Elledge,* 144 Wn.2d 62, 80, 26 P.3d 271, 281 (2001). *See also, State v. Cross, supra*, 156 Wn.2d at 630 ("The goal is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish wanton or random, and is not based on race or other suspect classifications.") Both goals are expressions of the fundamental concepts of justice and basic fairness. *See, e.g,* Timothy Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 784 (2004) ("As Margaret Radin has argued, the commitment to such review is a logical extension of our collective endorsement of a Kantian concept of justice and more particularly, our dedication to fairness.").

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny recognized that the arbitrary infliction of the death

penalty constitutes cruel and unusual punishment. As Justice Stewart stated in his concurring opinion in *Furman*:

> For, of all the people convicted of rapes and murders, . . . many just as reprehensible as these, the petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . .. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Furman, 408 U.S. 309-10 (Stewart, J., concurring). See *also, State v. Cross*, *supra*, 156 Wn.2d at 622-623 ("Under *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny, the death penalty is constitutional only if it is properly constrained to avoid freakish and wanton application."). When the death penalty is rarely[1] applied or when "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," 408 U.S. at 312 (White, J., concurring), then "death sentences are cruel and unusual in the same way that being struck by lighting is cruel and usual." 408 U.S. at 310 (Stewart, J., concurring).

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[1] "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

The prohibition against cruel and unusual punishment in death penalty sentencing further encompasses a prohibition against discrimination. *See id.* at 249 ("'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."); *id.* at 255 (Douglas, J. concurring) ("Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position"). This Court has long recognized the need to "alleviat[e] the types of major systemic problems identified in *Furman:* random arbitrariness and imposition of the death sentence based on race." *State v. Lord,* 117 Wn.2d 829, 910, 822 P.2d 177 (1991) (citing *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976); *Furman,* 408 U.S. at 257 (Douglas, J., concurring)).

Any analysis of a challenge to a death sentence under Article 1, §14 of Washington's Constitution must begin with this Court's "repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713, 733 (2000). Furthermore, this Court has recognized that the cruel punishment clause further

requires "fundamental fairness" because "the death penalty is the ultimate punishment." *State v. Bartholomew,* 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) ("Bartholomew II").

It is equally settled that any claim of a constitutional violation under the Eighth Amendment or Article 1, §14 of the Washington Constitution must be evaluated according to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (*quoting 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.Ed.2d 335 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1865... but rather by those that currently prevail."); *Kennedy v. Louisiana,* ___ U.S. ___, 128 S.Ct. 2641, 2649, 171 L.Ed.2d 525 (2008) ("'The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'") (quoting *Furman v. Georgia,* 408 U.S. at 382 (Burger, C. J., dissenting); *McCleskey v. Kemp,* 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) ("the constitutional prohibition against cruel and unusual punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'")

(quoting *Weems v. United States,* 217 U.S. 349, 378, 30 S.Ct. 544, 54 L.Ed. 793 (1910)); *State v. Frampton*, 95 Wn.2d 469, 492, 627 P.2d 922, 934 (1981) (holding hanging unconstitutional under the federal and Washington constitutions because "execution by hanging can hardly be compatible with 'the evolving standards of decency that mark the progress of a maturing society'") (citation omitted).[2]

B. MR. STENSON'S DEATH SENTENCE IS ARBITRARY AND, BASED ON NEW EVIDENCE, LIKELY THE PRODUCT OF SEVERAL FORMS OF IMPERMISSIBLE SYSTEMIC BIAS.

Mr. Stenson's PRP provides ample data on which this Court can conclude that taking his life would be arbitrary. In this brief, the ACLU asks the Court to stop his execution because the following facts are better predicters of his death sentence than the facts of his crime: (1) the victims in Mr. Stenson's case were white; (2) he had appointed counsel; and (3) he was prosecuted in Clallam County. Accordingly, his death sentence is likely the product of unjustified systemic biases.

Additionally, Mr. Stenson's death sentence is arbitrary given that all of the significantly more aggravated cases in Washington resulted in

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[2] The Court of Appeals in this state also did not hesitate to apply the "evolving standards" rule under Wash. Const. Art. 1, § 14, when striking down as unacceptable by modern standards a lifetime banishment from the state, even if such conditions had been allowed in earlier centuries. *State v. Gitchel*, 5 Wn. App. 93, 486 P.2d 328 (1971).

lesser sentences. Accordingly, this Court should enjoin Mr. Stenson's execution under the state and federal constitutional prohibitions against cruel punishment.[3]

New evidence from the trial judge reports[4] and a Washington State Bar Report documents the presence of significant disparities in capital sentencing in this state. The trial judge reports[5] of aggravated first-degree murder cases in Washington between 1981 and 2003 strongly suggest that disturbing disparities in sentencing exist based on the race of the victim. *See* Affidavit of Professor David Baldus at ¶¶s 4-7, attached hereto in Ap-

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[3] The ACLU asks this Court to grant relief both under the United States Constitution and, as a separate and independent ground, the Washington Constitution. *See*, *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

[4] Professor David Baldus of the University of Iowa School of Law performed a statistical analysis of the trial reports from a database compiled by Professor Timothy Kaufman-Osborn. *See* Baldus Aff. at ¶ 4. The database includes reports between 1981 and 2003, evidence that was not available when this Court conducted its limited proportionality review of Mr. Stenson's death sentence in 1997. *Id.*

[5] Trial judges are required to submit reports in all aggravated first degree murder cases by statute. *See* RCW 10.95.120 ("In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington...."). The statute specifies that the reports shall include information in response to 58 questions, divided into categories about the defendant, the trial, the sentencing proceeding, the victim, representation of the defendant, the case chronology and general considerations. *Id.* This includes information, discussed *infra*, such as the number of victims, the race of the victims, appointed versus retained counsel, whether the prosecution sought death, and the sentence.

pendix. This evidence further suggests that defendants who are able to pay for retained counsel fare far better than their indigent counterparts with appointed counsel, strongly suggesting discrimination based on economic status. *Id.* at ¶ 7.

Additionally, a Washington State Bar report documents sharp disparities across counties in the rates at which the death penalty is sought and imposed. *See* Washington State Bar, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE (December 2006) (herein "State Bar Report"), at 12.

As is set forth below, Mr. Stenson is on death row for the deaths of two white victims, was represented at trial by appointed counsel, and was prosecuted in a county which has sought death in 60% of all potential capital cases (approximately twice as high as the statewide average). Each of these factors appears to have had greater significance in explaining Mr. Stenson's death sentence than the actual facts of the crime or Mr. Stenson's character and background.

1. Race of the Victim Disparities Plague Washington Sentencing

Mr. Stenson, a white defendant, was convicted of the murder of two white victims. *See* Trial Judge Report No. 144, *State v. Darold Stenson,* 93-1-00039-1 (Filed 9/16/1994). The evidence from the trial judge

reports suggests that the race of the victims in his case may well have contributed to the imposition of a death sentence. *See* Baldus Aff. at ¶¶s 5-7.

Based on the data from the trial judge reports, analyzed by Professor David Baldus of the University of Iowa School of Law, a widely acknowledged statistical expert with special expertise in review of death penalty cases, Washington prosecutors have sought death sentences almost three times as often if one or more of the victims was white. Baldus Aff. at ¶ 6 (2.8 disparity ratio); *see also,* Baldus Aff., Resume, pp. 9-10 (special master to New Jersey Supreme Court and consultant to Delaware Supreme Court and South Dakota Supreme Court on the proportionality review of death sentences). The prosecution sought death sentences in 31% of the cases with a white victim (approximately 1 in every 3 cases), but sought death sentences in only 13% of cases without a white victim (approximately 1 in every 8 cases). Baldus Aff. at ¶ 6. This information about the disparity in the rates at which the prosecution seeks a death sentence based on the race of the victim is set forth below in Table 1. According to Professor Baldus, this race-of-the-victim disparity is statistically significant, and unlikely to be due to chance. *Id.*

Table 1. Race-of-Victim Disparity in the Rates that the Prosecutors Sought the Death Penalty in First-Degree Aggravated Murder Cases – Washington State (1981-2003)[6]

		A	B
		First-Degree Aggravated Murder Cases (N)	Rates at Which the Prosecution Sought the Death Penalty
1.	All Cases	251	31% (79/251)
2.	Cases with ≥ 1 White Victims	199	36 % (72/199)
3.	Cases with no White Victims	52	13% (7/52)
4.	Difference in Seek Rates (Row 2-Row 3)		23-pts. (36% - 13%)
5.	Ratio of Seek Rates (Row 2/Row 3)		2.8 (36%/13%)

The trial judge reports also point to a troubling correlation between race of the victim and the imposition of a death sentence. In Washington, the death penalty has been imposed in 15% of cases with one or more white victim, but in only 8% of cases without a white victim. Baldus Aff. at ¶ 7. In other words, the death penalty was imposed 1.9 times more often in cases with at least one white victim than it was in all other cases. *Id.* This information is set forth below in Table 2. Because the overall

[6] Baldus Aff. at p. 3.

number of death sentences is small, the analysis lacks sufficient power to document a statistically significant result. *Id.* Nonetheless, this evidence of a white-victim disparity in death penalty sentencing "raises concern about the fairness with which the death penalty has been imposed in Washington." *Id.*

Table 2. Race-of-Victim Disparity in the Rates that Death Sentences Were Imposed In First- Degree Aggravated Murder Cases in Washington State (1981-2003)[7]

		A	B
		First-Degree Aggravated Murder Cases (N)	Rates at Which Death Sentences Were Imposed
1.	All Cases	251	13% (33/251)
2.	Cases with ≥ 1 White Victims	199	15% (29/199)
3.	Cases with no White Victims	52	8% (4/52)
4.	Difference in Death Sentencing Rates (Row 2 – Row 3)		7-pts. (15% - 8%)
5.	Ratio of Death Sentencing Rates (Row 2/Row 3)		1.9 (15%/8%)

[7] Baldus Aff. at 4.

These findings of race-of-the-victim disparities in the prosecution and imposition of the death penalty in Washington are consistent with the large number of sophisticated statistical studies across the country documenting race-of-the-victim discrimination. *See e.g.,* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia et al*, 83 Cornell L. Rev. 1638, 1661 (1998) (reviewing all available national studies since 1973 and concluding that evidence of race of the victim disparities was present in 90% of the states with available data); *Artemus Rick Walker v. Georgia*, 77 U.S.L.W. 3238, 2008 U.S. LEXIS 7763 (October 20, 2008) *Slip Op.* at 3 (Stevens, J., statement respecting the denial of certiorari) (describing recent troubling evidence as showing that "the race-of-victim effect persists") (citing Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1424–1426 (2004)); *Ring v. Arizona,* 536 U.S. 584, 613, 614-18, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Breyer, J., concurring) (describing studies showing that "the race of the victim and socio-economic factors seem to matter"); Michael J. Songer, Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 151 (2006) (documenting race of the victim dis-

crimination in South Carolina); Stephanie Hindons et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549, 549 (concluding that "the probability of death being sought is 4.2 times higher for those who kill whites than for those who kill blacks"); Isaac Unah and John Charles Boger, *Race and the Death Penalty in North Carolina: An Empirical Analysis, 1993-1997* (April 16, 2001), available at http://www.deathpenaltyinfo.org/race-and-death-penalty-north-carolina (concluding that "the race of the homicide victim played a real, substantial, and statistically significant role in determining who received death sentences in North Carolina during the 1993-1997 period").

These recent studies mirror the conclusion reached by the General Accounting Office in 1990 when it published a review of all state empirical studies. U.S. General Accounting Office, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARATENESS (1990). The GAO report determined that the finding that the race of the victim "influence[d] the likelihood of being charged with capital murder or receiving a death sentence ... was remarkably consistent across data sets, states, data collection methods, and analytic techniques." *Id.* at 6. The report concluded that the race of the victim was particularly associated with bias at the prosecutorial stage, including charging and plea-bargaining decisions. *See id.*; David Baldus et al., *Arbitrariness and Discrimination in the Ad-*

ministration of the Death Penalty: A legal and empirical analysis of the Nebraska Experience (1973-1999), 81 NEB. L. REV. 486, 500 (2002) ("Where race effects are present, these studies generally report that the principal source of these race effects is the prosecutorial decision to seek or waive the death penalty in death-eligible cases."). Like these national studies, the evidence from Washington documents that prosecutors have been less likely to take death off the table in cases with a white victim.

Hastings College Law professor Rory K. Little, a former United States Attorney and former Associate Deputy Attorney General, described the origin and consequence of race of the victim discrimination in the context of the federal death penalty:

> [I]t is in the exercising of leniency that prosecutors produce racially disparate capital punishment statistics. ... [B]y aggressively pursuing capital charges when the victim is white, white prosecutors act not out of bad motive but rather from benign, understandable human feelings of empathy. But meanwhile, minority defendants and victims do not benefit as often from such discretionary acts flowing from empathy.

Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 FORDHAM URB. L. J. 347, 487 (1999). Yale Law Professor Stephen Carter described the negative societal impact that such discrimination has as sending a message that society devalues the lives of minority victims. *See* Stephen Carter, *When Victims*

Happen to be Black, 97 Yale L.J. 420, 444 (1988) (when the criminal justice actors punish defendants more harshly in cases with white victims than cases with black victims, it is "making statements about the value of black lives").

The evidence from the trial judge reports demonstrates that the race of the victims in Mr. Stenson's case constitutes a form of unjustified systemic bias both in the decision of the prosecution to seek death and in the imposition of a death sentence.

2. Economic Disparities Plague Washington Capital Sentencing

Additional evidence from the trial judge reports points to the discriminatory role that economic status of the defendant plays in the imposition of the death penalty in Washington. Of the 254 aggravated murder cases in Washington through 2003, all but 15 defendants had at least one appointed counsel. Baldus Aff. at ¶ 8; Table 3 (*infra*). *None* of the 15 defendants with retained counsel received a death sentence. *Id.* All of the death sentences in Washington were imposed on defendants who, like Mr. Stenson, had appointed counsel. *Id.* This disparity "raises serious concerns about the risk of discrimination in the system based on the socioeconomic status of the defendant," *id.*, and demonstrates that economic dis-

parities likely contributed to the imposition of Mr. Stenson's death sentence.

Table 3. Status of Defense Counsel Disparity in the Rates that Death Sentences Were Imposed In First-Degree Aggravated Murder Cases - Washington State (1981-2003)

		A	B
		First-Degree Aggravated Murder Cases (N)	Rates at Which Death Sentences Were Imposed
1.	All Cases	254	13% (33/254)
2.	Cases with ≥ 1 Appointed Counsel	239	14% (33/239)
3.	Cases with Retained Counsel	15	0% (0/15)
4.	Difference in Death Sentencing Rates (Row 2-Row 3)		14-pts. (14% - 0%)
5.	Ratio of Death Sentencing Rates (Row 2/Row 3)		Indefinite large - (14%/0%)

This stark disparity in counsel is consistent with a 2001 examination of counsel for death-row inmates by the SEATTLE POST-INTELLIGENCER. This analysis concluded that "[o]ne-fifth of the 84 people who have faced execution in the past 20 years were represented by lawyers who had been, or

were later, disbarred, suspended or arrested." Lise Olsen, *Uncertain Justice*, SEATTLE POST-INTELLIGENCER, Aug. 6, 2001.

The quality of counsel disparities in Washington between those who can afford to retain their own legal defense and those who must rely upon the state plague other states as well. *See* Douglas Vick, *Poorhouse Justice: Underfunded Indigent Defense Services And Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 410, n. 390 (Fall 1995) (describing Texas Judicial Council study in the mid-1980s which "indicated that 65% of charged defendants represented by retained counsel were convicted of capital murder while 93% of charged defendants who could not afford their own attorney were convicted of a capital offense"); David C. Baldus, et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 3, 158 (1990) ("After adjustment for all other legitimate case characteristics and the defendant's race, [Georgia] defendants with court-appointed attorneys faced odds of receiving a death sentence that were 2.6 times higher than defendants with retained counsel."); William J. Bowers, *Legal Homicide: Death as Punishment in America, 1864-1982*, 355-56 (1984) (describing Florida study which found that representation by a public defender or court-appointed lawyer was the strongest predictor of a death sentence).

Harvard Law Professor Stephen Bright has explained the import of this widely observed difference in quality of representation: "[i]t is not the facts of the crime, but the quality of legal representation, that distinguishes this case, where the death penalty was imposed, from many similar cases, where it was not." Stephen Bright, *Counsel For The Poor: The Death Sentence Not For The Worst Crime But For The Worst Lawyer*, 103 YALE L.J. 1835, 1836 (May 1994). Justice Douglas recognized economic disparities – particularly as reflected the difference in quality of counsel for the rich and the poor – as a basis for invalidating the death penalty in *Furman*:

> It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favor the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favorable aspect, while the poor defendant often has a lawyer assigned by the court.

Furman, 408 U.S. at 251 (Douglas, J., concurring).

Had Mr. Stenson been able to retain private counsel, the statistical evidence suggests that he might well not have received the death penalty. The role that economic status plays, like the race of the victims, is far too great for this Court to say with confidence that Mr. Stenson's death sentence was "fairly" imposed. These factors strongly suggest that executing Mr. Stenson would be both arbitrary and profoundly unfair.

3. Geographic Disparities Plague Washington Capital Sentencing.

The Washington State Bar recently issued a report on the state's capital punishment system that analyzed the evidence of geographic disparities:

> [The] data shows that most of the death penalty cases occur in a small number of counties. There are 14 counties in which there has not been an aggravated murder case during the last 25 years. There are 8 counties where there have been aggravated murders [sic] cases, but the prosecutor has not sought the death penalty. Thus, death penalty cases have been brought in 17 of the 39 counties during the last 25 years and the death sentence has been imposed in 10 of those counties.

State Bar Report, *supra* at 12. These findings echo the 2001 conclusion of the POST-INTELLIGENCER that "[l]ocation determines the odds that a criminal will face execution." Lise Olsen, *One Killer, Two Standards,* SEATTLE POST-INTELLIGENCER, Aug. 7, 2001.

Mr. Stenson was convicted in Clallam County. *See* Trial Judge Report No. 144. According to the State Bar Report, there were five death-eligible aggravated murder cases in Clallam County at the time of the report. State Bar Report, at 12. Of those five cases, the prosecution filed a death notice in three, or 60%. This rate is approximately twice as high as the statewide average, 31%. *Id.* at 11-12. Clallam County imposed a

death sentence in 40% of the death-eligible cases, more than three times higher than the statewide average of 11.8%. *Id.*

Like race-of-the victim and economic disparities, geographic disparities are far from unique to Washington. *See* Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999 ("A murder sentence in this country -- prison time or the death penalty -- often depends not just on the nature of the crime itself but on where it was committed. The odds that a convicted killer will be sentenced to death vary dramatically from state to state and even from county to county within many states...."); Joint Legislative Audit And Review Commission Of The Virginia General Assembly, *Review of Virginia's System of Capital Punishment,* available at http://jlarc.state.va.us/reports/rpt274.pdf (Virginia legislative study finding that it is "clear that the most important factor influencing the decision of prosecutors to seek the death penalty in capital murder cases is the jurisdiction in which the murder occurred rather than the circumstances of the crime").

The statistics from the State Bar Report report demonstrate that Mr. Stenson's death sentence is likely to be attributed, at least in part, to geographic disparities which do not justify his execution. Had Mr. Stenson lived in one of the neighboring counties, he probably would not be on

death row today. This evidence, again, strongly suggests that his execution would be both arbitrary and deeply unfair.

4. Given the Disparities in Washington's Capital Sentencing Discussed Above, this Court Should Enjoin the State from Executing Mr. Stenson.

Because Mr. Stenson's execution would almost certainly be the result of systemic biases relating to the race of the victim, economic status, and geographic disparities, rather than any valid distinguishing fact, it should not be permitted under the Washington Constitution *See e.g., Bartholomew II,* 101 Wn. 2d at 640; *State v. Lord*, 117 Wn.2d 829, 910, 822 P.2d 177 (1991) ("Our concern is with alleviating the types of major systemic problems identified in *Furman:* random arbitrariness and imposition of the death sentence based on race."); *see also, State v. Marshall*, 130 N.J. 109, 209, 613 A.2d 1059 (1992) (describing the need to "seek corrective measures" if evidence demonstrates that race of the victim "played a significant part in capital sentencing decisions" because such discrimination would "threaten the foundation of our system of law").

Other state courts and justices have ruled that unjustified disparities in application of the death penalty must be remedied under their state constitutions. *See State v. Loftin,* 157 N.J. 253, 298, 724 A.2d 129, 151 (1999) (holding that under the New Jersey constitution "one purpose of proportionality review is 'the prevention of 'any impermissible discrimina-

tion in imposing the death penalty'"); *Claims of Racial Disparity v. Commissioner of Correction,* 2008 WL 713763, *6 (Conn. Super. 2008) (holding that petitioner "may seek to demonstrate that the imposition of the death penalty in Connecticut violates the Constitution of the state of Connecticut, even though such a statistical attack might be unavailing on the federal arena"); *see also*, Ky. Rev. Stat. Ann. § 532.300-532.309 (providing for racial discrimination challenge based on statistical evidence by statute); *Foster v. State*, 614 So.2d 455, 465 (Fla. 1992) (Barkett, C.J., dissenting) ("Discrimination, whether conscious or unconscious, cannot be permitted in Florida courts. As important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the State is not imposing the ultimate penalty of death in a racially discriminatory manner.")

Consistent with these authorities, this Court would honor its own traditional recognition that death penalty sentences must be fair and free from discrimination by enjoining Mr. Stenson's execution because it is the

product of invalid systemic biases and arbitrariness. *See Elledge,* 144 Wn.2d at 80; *Lord*, 117 Wn.2d at 910.[8]

5. Mr. Stenson's Execution is Arbitrary Because His Crime Does Not Qualify As "the Worst of the Worst" When Compared to Other Washington Cases.

To meet the requirements of our state constitution, this Court must thoroughly examine whether Mr. Stenson's death sentence has, "like lightning," stricken him, "but not others, in a way that defies rational explanation." *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289, 326 (1993) (Utter, J., dissenting); *see also Furman*, 408 U.S. at 309 (Stewart, J., concurring). Given "[t]he severity of the death penalty, its irrevocability, and our statutory mandate," this Court must "assess carefully whether the death penalty has been imposed arbitrarily." *Id.* Pursuant to its constitutional obligation to root out arbitrary and capricious death sentences, this Court must "identify what counts as 'the worst of the worst' in the state and overturn[] outlying death verdicts." James Liebman et al., *A Broken System,*

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[8] The United States Supreme Court's ruling in *McCleskey v. Kemp*, *supra*, does not control this Court's interpretation of the Washington Constitution. *McCleskey* was a 5-4 ruling in which the majority required "exceptionally clear proof" of racial discrimination before it would find an Eighth Amendment violation based on statistical evidence. In addition to the states cited above which have refused to follow it based on their state constitutions, the *McCleskey* majority opinion has been harshly criticized. *See, e.g.*, Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 480 (1995) (describing *McCleskey* as a "badge of shame upon American's system of justice").

Part II: Why There Is So Much Error In Capital Cases And What Can Be Done About It 478 (Feb. 2002)[9]

This Court conducted a limited, statutorily required proportionality review of Mr. Stenson's case in 1997, when only 174 trial judge reports were available. Today – as Mr. Stenson faces his execution – there are 295 such reports available. Petitioner's Br. at 3. Under the Eighth Amendment and Article 1, §14 of the Washington Constitution, this Court should review this now-available evidence and ask whether Mr. Stenson's sentence is arbitrary in light of other aggravated murder cases in Washington.

The answer, clearly, is yes. The most powerful evidence of this fact is that all of the mass murderer defendants with crimes far more aggravated than Mr. Stenson's have received life sentences. As set forth in Petitioner's brief, Gary Ridgway (the brutal mass murderer of 48 women), Kwan Fai Mak, Benjamin Kin Ng, and Wai Chiu Ng (who robbed, hog-

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[9] The study is available at http://justice.policy.net/cjedfund/dpstudy. Particularly in Washington, in which only four executions have occurred in the post-*Furman* era, this Court should be attuned to an additional concern: "when the death penalty is applied with such infrequency and inconsistency, its supposed justifications [namely, deterrence, retribution, cost efficiency, incapacitation, and denunciation] themselves evaporate." *See* Amsterdam et al., *Amici Curiae Brief of New York Law School Professors in People v. Harris*, 27 NYU Rev. Law & Soc. Change 399, 466 (2001-02). Washington's rare executions "become visible hypocrisies, and the few condemned prisoners who are put to death now die in the name of theories that their executioners cannot rationally maintain." *Id.*

tied, and killed 13 victims), and Robert Yates (who killed 13 people), all received life sentences for those offenses. *See* Petitioner's Br. at 2-11; *State v. Yates*, *supra*, 161 Wn.2d at 732. Indeed, *none* of the defendants who were convicted of murdering four or five victims are under sentence of death. *Id.* In contrast, Mr. Stenson – who was convicted of the murders of two individuals - now faces execution.

In *Cross*, a majority of this Court acknowledged the profound equality questions raised by Gary Ridgway's life sentence. *Cross*, 156 Wn. 2d at 622 ("[t]he fact that he will live out his life in prison instead of facing the death penalty has caused many in our community to seriously question whether the death penalty, in fairness, can be proportional when applied to any other defendant."). And although the majority concluded that the Ridgway case did not, standing alone, render Cross's death sentence disproportionate and arbitrary, it explicitly stated that this conclusion was reached "[u]der the United States Constitution (the only constitution plead here)." *Id.* at 100-01.

In this case, unlike in *Cross*, Mr. Stenson brings his arbitrariness challenge under the Washington constitution.[10] *Id.* As the *Cross* dissent explained:

> Properly recognizing and analyzing what has happened in the administration of capital cases in this state inevitably leads to the conclusion that the sentence of death in this case, and generally, is disproportionate to the sentences imposed in similar cases. Contrary to what we had expected to find when we established an analytical framework to conduct our statutory review, that the worst of the worst offenders would be subject to the death penalty, what has happened is that the worst offenders escape death. ... The Ridgway case does not stand alone ... but instead is symptomatic of a system where all mass murders have, to date, escaped the death penalty.

Id. at 641 (C. Johnson, J., dissenting). Given the analysis of the data in the trial judge reports set forth in previous sections of this brief, and in Mr. Stenson's PRP brief, Justice Johnson's insights are even more demonstrably correct now than they were at the time *Cross* was decided.

Under the broad scope of Washington's cruel punishment clause, including its recognition of the importance of fundamental fairness, as well as the Eighth Amendment's prohibition against the arbitrary infliction of the death penalty, Mr. Stenson's death sentence for two not-

[10] Neither the PRP nor this *amicus* brief ask this Court to engage in statutory proportionality review, as was involved in *Cross*, *Yates*, and prior proceedings in Mr. Stenson's case.

extraordinary murders cannot be affirmed in the face of the uncontroverted evidence that all mass murderers have received life sentences.

The arbitrariness of Mr. Stenson's death sentence is compounded by the fact that his sentence is likely the product of systemic bias and discrimination. When Professor Baldus conducted his thorough review of Georgia's death penalty, he found that the cases where discrimination was the greatest risk were "mid-range" cases, like Mr. Stenson's:

> When the case becomes tremendously aggravated so that everybody would agree that if we're going to have a death sentence, these are the cases that should get it, the race effects go away. It's only in the mid-range of cases where the decision makers have a real choice as to what to do. If there's room for the exercise of discretion, then the racial factors begin to play a role.

See, McCleskey, 481 U.S. at 287 n. 5 (quoting testimony of Professor Baldus). What is striking about Washington's capital regime is its contrast with Professor Baldus' conclusion that "when the case becomes tremendously aggravated ... everybody would agree that if we're going to have a death sentence, these are the cases that should get it." Under the arbitrary system in Washington this premise proves false. In Washington, the tremendously aggravated cases have resulted in life, not death. Because Mr. Stenson's death sentence is the product of arbitrariness and discrimination, this Court should enjoin his execution.

Numerous respected jurists around the country have expressed their concern that executions which are the product of arbitrariness, bias and discrimination are unconstitutional and should not be permitted to occur. As Justice Blackmun noted in the same year that Mr. Stenson was sentenced to death, "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake." *Callins v. Collins*, 510 U.S. 1141, 1144, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting); *see also, Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520, 1551, 171 L.Ed.2d 525 (2008) (Stevens, J., concurring) (concluding that the death penalty today violates the Eighth Amendment, in part because of the persistent "risk of discriminatory application of the death penalty"); *Ring v. Arizona,* 536 U.S. at 613, 614-18 (Breyer, J., concurring) (highlighting arguments that the death penalty is, "as currently administered, cruel and unusual," including evidence that "the race of the victim and socio-economic factors seem to matter" and "the inadequacy of representation in capital cases"). Mr. Stenson's case is proof that for some defendants, in the words of Sixth Circuit Judge Martin, the arbitrariness of the death penalty "has only gotten worse." *Moore v. Parker*, 425 F.3d 250, 269 (6th Cir. 2005) (Martin, J., dissenting).

Similarly, in 1980 the Massachusetts Supreme Judicial Court, applying the evolving standards of decency test, ruled four defendants' death

sentences unconstitutional due to arbitrariness.[11] *District Attorney v. Watson*, 381 Mass. 648, 411 N.E.2d 1274 (1980). The Court made several insightful comments regarding arbitrariness and bias that apply to Mr. Stenson's case. The Court stressed that the system had not ensured that only the "worst" offenders were executed. 411 N.E.2d at 1283-84. The opinion described race of the victim discrimination and quoted a commentator's conclusion "that the death penalty is reserved for those who kill whites, because the criminal justice system in these states simply does not put the same value on the life of a black person as it does on the life of a white." 411 N.E.2d at 1285-86. The court rejected the suggestion that racial discrimination is confined to the South or to any other geographical area." *District Attorney v. Watson*, 411 N.E.2d at 1283-86.

The Chief Justice of the Wyoming Supreme Court, in dissent, also explained in 1981 why he would have ruled that the death penalty was unconstitutionally arbitrary and therefore violated the state constitution. In *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), Chief Justice Rose stated:

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[11] Following *Watson*, the Massachusetts Constitution was amended to provide that no section of the Massachusetts Constitution "be construed as prohibiting the imposition of the punishment of death." Mass. Const. Pt. 1, art. 26 (amended 1982). In *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (Mass. 1984), the Massachusetts Supreme Court held that the current death penalty statute was unconstitutional, notwithstanding the constitutional amendment. *Id.* at 159, 116 ("We do not consider that our invalidation of this statute is equivalent to prohibiting the imposition of the punishment of death.")

> In the debates upon the Murder Bill of 1965 (which abolished the death penalty in England), Lord Chancellor Gardiner declared: "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect." (268 Hansard, Parliamentary Debates (5th Series) (Lords, 43rd Parl., 1st Sess., 1964-1965) 703 (1965).
>
> For my part, the death penalty itself is constitutionally cruel and/or unusual and thus violates the self-respect of humanity in this so-called enlightened age. Because it offends contemporary standards of human decency, this barbaric sanction is disappearing from the lists of acceptable criminal punishments among the various civilized cultures of the world. I find great discomfiture in the thought that the social order of which I am a member can find no better way to address its atrocities than to compound them by committing more of the same. I question the level of moral sophistication of a society that is forced to the admission that its only response to murder is murder. It frightens me to hear it argued that, since the vilest and most depraved criminal has killed four people, the most civilized and humane response that the state of Wyoming can think of, in discharging its punishment obligations to society, is to kill the killer while pretending that the act of state murder is not offensive to her people's sense of decency.[12] 632 P.2d at 199.

This Court should enjoin Mr. Stenson's execution under the state constitutional prohibition against cruel punishment. Executing him would be arbitrary and almost certainly the product of systemic biases – includ-

[12] Wyoming's Constitution, like Washington's, differs from the Eighth Amendment; Wyo. Const. Art. 1, §14 prohibits cruel *or* unusual punishment.

ing race of the victim disparities, economic disparities, and geographic disparities in Washington's death penalty. Compounding the arbitrariness of this, every mass murderer in Washington has escaped execution. Executing Mr. Stenson would be just as freakish and random as being struck by lightning.

6. Other State Constitutional Provisions Support Stopping the Taking of Mr. Stenson's Life: Due Process and the Requirement of "Frequent Recurrence to Fundamental Principles."

The due process clauses of the state and federal constitution protect against the State's deprivation of "*life*, liberty, or property, without due process of law." [emphasis added.] Although this Court is not often called upon to discuss the word "life" in this constitutional provision, that is precisely what is at stake in this case. Courts may find a substantive due process violation under the Fourteenth Amendment and Washington Constitution, Art. 1, § 3, not only when the government's conduct unreasonably hinders a fundamental right, but also when the government's action is "arbitrary," "irrational," "arbitrary and irrational" or "fundamentally unfair or unjust." *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). Even when only the property provision of the due process clause is at stake, "[a]rbitrary, irrational action on the part of regulators is sufficient to sustain a substantive due process claim

under § 1983." *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 23, 829 P.2d 765 (1992). *See also*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (stating with respect to limits on punitive damages: "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

Washington courts have consistently defined arbitrary and capricious action as: "[W]illful and unreasoning action, without consideration and in disregard of facts and circumstances. *DuPont-Fort Lewis Sch. Dist. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971). *See also McDonald v. Hogness*, 92 Wn.2d 431, 598 P.2d 707 (1979)." *State v. Rowe*, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980) (prosecution policy of classifying felonies as "high impact" or "expedited" for purposes of choosing which will have habitual criminal charge not arbitrary and capricious; it "is not only reasonable and logical, it permits an objective approach consistent with pragmatic and due process values.") When the taking of Mr. Stenson's life cannot be explained based on the eight different factors listed in his PRP, and is likely the product of the systemic biases discussed in this brief, his execution satisfies the definition of arbitrary and capricious and must be enjoined under the due process clause.

Washington's due process should be interpreted according to Art. 1, § 32, which requires "a frequent recurrence to fundamental principles." *See Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960, 969 (2008) (Sanders, J., dissenting, citing Art. 1, § 32 in support of interpreting a substantive provision of the Washington Constitution), The fundamental principle of guarding against arbitrariness, particularly when considering the State's taking of a person's life, compels stopping Mr. Stenson's execution.

C. MR STENSON'S CLAIM MUST BE ANALYZED WITH RECOGNITION THAT DEATH IS DIFFERENT; A STAY PENDING CONSIDERATION OF HIS CLAIMS SHOULD BE GRANTED.

As noted above, Mr. Stenson's execution is currently scheduled for December 3, 2008. At the time of the Court's en banc conference on November 6, it will have had little time to consider *amici* briefs. The State's response to the PRP is not due until 120 days after the PRP was filed. In order to fully consider the facts and arguments pertaining to whether it is constitutional for the State to take Mr. Stenson's life, a stay pending full consideration of the briefs is essential.

This Court has previously acknowledged "the indisputable fact that 'death is different,' and that this difference must impact the court's decisionmaking, requiring the utmost solicitousness for the defendant's posi-

tion." *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164, 174 (1980).[13] To decide Mr. Stenson's claims in haste risks failing to "adequately respect that difference." *Id.* Mr. Stenson's punishment of death, "unique in its severity and irrevocability," *Gregg,* 428 U.S. at 187, demands a "searching" review by this Court, to guarantee that Mr. Stenson has not been sentenced to die at the hands of the State in an arbitrary and capricious manner. *Callins v. Collins*, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari) ("[B]ecause human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.")

This Court has eloquently acknowledged the gravity and finality of a decision in death penalty cases, in which a man's life is at stake. As in all death cases before this Court, "[t]his case requires that we decide whether the State may deliberately and lawfully take this man's life. Such decisions rank high among the most difficult and important that any judge, or any juror, will ever make." *Cross*, 156 Wn.2d at 639-40. In reflecting on the constitutionality of Mr. Stenson's punishment, this Court should

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[13] *See also Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (plurality opinion; opinion of Scalia, J., joined by Rehnquist, J.) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides.").

take the time to exercise care in its deliberations in light of the seriousness and irrevocability of its decision.[14]

The Massachusetts Court in *Watson*, *supra*, 411 N.E.2d at 1285, also eloquently articulated why the utmost care must be taken in addressing issues such as those raised in Mr. Stenson's PRP and this brief: "[T]he criminal justice system allows chance and caprice to continue to influence sentencing and we are here dealing with the decisions as to who shall live and who shall die. With regard to the death penalty, such chance and caprice are unconstitutional ...."

As noted above, there is troubling evidence that Mr. Stenson's sentence is both arbitrary when compared to other death sentences and the result of substantial bias. In analyzing the evidence, this Court must guarantee that "'capital punishment is not imposed without ... serious and calm reflection....'" *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86, 92 (1992), *quoting Thompson v. Oklahoma,* 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). Mr. Stenson's claims call for serious and calm reflection and

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[14] On a practical level, Mr. Stenson remains securely housed on the death row unit of the Washington State Penitentiary, where he has been incarcerated for the past fourteen years. Security need not be a concern to the Court in hastening his execution. More importantly, however, as Judge Norris of the Ninth Circuit once cautioned: "*A human life is at stake.* I fail to understand the rush to judgment." *Brewer v. Lewis*, 989 F.2d 1021 (9th Cir. 1993) (Norris, J., dissenting) (emphasis added).

demand that this Court not permit his execution before they have been satisfactorily addressed.

Another factor for the Court to consider in ruling on a temporary stay for the arguments in the PRP and this brief to be considered is the overwhelming weight of international opinion. *Roper*, at 577-578. Today the majority of the countries of the world either have no death penalty (93 countries), have the death penalty only for extraordinary crimes such as crimes committed under military law (9 countries), or do not use the death penalty in practice (35 countries). *See Amnesty International,* ABOLITIONIST AND RETENTIONIST COUNTRIES, *available at* http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries. Only 60 countries, including the United States, retain and utilize the death penalty. *Id.* The trend toward abolition began only in the last 50 years and has continued at an accelerating pace. *See id*; William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417, 421 (2004). In the last 10 years alone, 27 countries abolished the death penalty,[15] and 5 more ab-

[15] Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Bhutan, Canada, Cook Islands, Cyprus, Cote D'Ivoire, East Timor, Estonia, Greece, Liberia, Lithuania, Malta, Mexico, Philippines, Rwanda, Samoa, Senegal, Turkey, Turkmenistan, United Kingdom, Ukraine, Uzbekistan, and Yugoslavia (now two countries, Serbia and Montenegro).

olished the death penalty for ordinary crimes.[16] *See* Amnesty International, ABOLITIONIST AND RETENTIONIST COUNTRIES. *Amici* are not submitting this information for the purpose of asking the Court to rule the death penalty is unconstitutional in all cases; however, this information does support the grant of a temporary stay to fully consider Mr. Stenson's arguments.

Just a few miles north, the High Court of Canada in *United States v. Burns*, 2001 SCC7, 26129, refused extradition of two Washington defendants charged with aggravated first degree murder until assurances were given that the death penalty, which is prohibited in Canada, would not be sought, concluding:

> In Canada, the death penalty has been rejected as an acceptable element of criminal justice. Capital punishment engages the underlying values of the prohibition against cruel and unusual punishment. It is final and irreversible. Its imposition has been described as arbitrary and its deterrent value has been doubted. ...[17]

In this country, there exists a continuing movement toward moratorium or abolishment of the death penalty. *See e.g.* EXECUTIVE ORDER OF ILLINOIS FORMER GOVERNOR GEORGE RYAN CREATING THE COMMISSION ON CAPITAL PUNISHMENT, (November 4, 2000), *available at* http://www.idoc.state.il.us/ccp/ccp/executive_order.html (Illinois former

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[16] Albania, Chile, Latvia, Kazakhstan, and Kyrgyzstan.
[17] http://scc.lexum.umontreal.ca/en/2001/2001scc7/2001scc7.html

governor appointing a special commission to study the death penalty after ordering a moratorium because of "persistent problems in the administration of the death penalty");[18] Jeremy Peters, *Death Penalty Repealed in New Jersey,* N.Y. TIMES Dec. 17, 2007 (New Jersey abolished the death penalty by law on December 17, 2007); and New York *People v. LaValle*, 3 N.Y.3d 88, 817 N.E.2d 341 (2004) (declaring New York death penalty unconstitutional). Washington may impose the death penalty only "fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The arbitrary and discriminatory application of the death penalty in Mr. Stenson's case is reason alone to pause the machinery of death for as long as necessary, until all of Mr. Stenson's claims before this Court have been meaningfully and thoughtfully resolved. This Court's careful consideration has never been more critical than now, when a human life rests in the balance.

VI. CONCLUSION

For the reasons set out above, the ACLU asks this Court to stay the execution of Darold Stenson until it has had the opportunity to consider

[18] If, as an alternative, the Court is not ready to conclude Mr. Stenson's execution should be enjoined, but it believes that further study and/or statistical analysis of the administration of Washington's death penalty should occur, the Court could appoint a special master to assist the Court in that study and analysis, as the New Jersey Court did in *State v. Loftin, supra.*

the data contained in Mr. Stenson's PRP and this *amici* brief. The ACLU also asks the Court to enjoin the State of Washington from executing Mr. Stenson because to do so would be unconstitutional under the state constitution and *Furman v. Georgia*.

Respectfully submitted this 4th day of November, 2008.

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