No. 80209-2

WIGGINS, J. (concurring in dissent)—I concur with Justice Fairhurst's amply supported analysis of the random and arbitrary nature of the imposition of the death penalty in Washington. I write separately to add my deep concern that the death penalty might be much more predictable than we have recognized. I refer, of course, to the race of the defendant. A review of the reports of prosecutions for aggravated first degree murder quickly discloses that African-American defendants are more likely to receive the death penalty than Caucasian defendants.[1] The only unresolved question in my mind is whether this pattern is sufficiently well established that the pattern is statistically significant.[2] Accordingly, I would either reverse the death penalty for the reasons so well stated in Justice Fairhurst's dissent or remand to superior court to take evidence on the statistical significance of the disproportionate number of African-Americans sentenced to death.

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[1] The majority complains that neither party asked the court to review this issue. The legislature, not the parties, has directed us to review every death sentence to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(2)(b). As discussed below, we have repeatedly said that this proportionality review is to ensure that the death penalty is not imposed arbitrarily or based on race. We would fail in this solemn responsibility if we shirked from our duty.

[2] The majority incorrectly attributes to this dissent the belief that "the sentences that have been imposed in the last thirty years cannot be explained by aggravating and mitigating circumstances or other proper considerations, but can be explained by 'the race of the defendant.'" Majority at 73 (quoting concurrence in dissent at 1). As stated above, the disparity is apparent but the open question is whether the disparity is statistically significant in view of the sample size.

I begin with the observation that Cecil Emile Davis committed a horribly cruel, painful, and heinous crime when he murdered Yoshiko Couch. In the abstract, Davis may well deserve execution. But we cannot look at Davis alone. The legislature has wisely charged us with the task of examining "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(2)(b). We cannot ignore whether the defendant's race becomes a significant factor in imposing the death penalty.

Before examining the reports, I emphasize that this opinion does not accuse anyone in the criminal justice system of racism, whether they are police, prosecutors, defense counsel, witnesses, jurors, or judges. The African-American experience in this country has been complex and frequently tragic. Attitudes about race can be so deeply buried in our individual and collective unconscious that it is difficult to evaluate their effect on our judgments or the judgments of others. The point is not that African-Americans have been deliberately treated differently with respect to the death penalty; the point is that they have in fact been treated differently.

Our analysis of the death penalty cases begins with the 73[3] aggravated first

[3] Under RCW 10.95.120, whenever a defendant is convicted of aggravated first degree murder, the trial judge must submit a report to the supreme court clerk containing information about the defendant, the victim, and other details about the case. All Reports of the Trial Judge (TR) are on file with the Washington State Supreme Court Clerk's Office. The cases analyzed in this opinion are: TR 2, TR 3, TR 7, TR 9, TR 15, TR 20, TR 23, TR 25, TR 26, TR 29, TR 31, TR 34, TR 34A, TR 36, TR 39, TR 42, TR 43, TR 44, TR 45, TR 47, TR 48, TR 50, TR 51, TR 52, TR 53, TR 56, TR 58, TR 60, TR 62, TR 63, TR 64, TR 65, TR 66, TR 73, TR 75, TR 76, TR 77, TR 86, TR 88, TR 92, TR 93, TR 95, TR 119, TR 125, TR 132, TR 135, TR 140, TR 144, TR 154, TR 157,

degree murder cases in which the prosecution sought the death penalty against African-Americans or Caucasians.[4] Thirteen of the 73 cases were against African-American defendants, including defendant Davis.[5,] Of these 13, 8 received death sentences.[6] Thus, of the 13 cases in which the prosecution sought the death penalty against African-American defendants, 62 percent resulted in the death penalty.

Excluding these 13 cases involving African-American defendants from the trial reports where the prosecution sought the death penalty, 60[7] cases involving Caucasians remain. Of these, the jury returned the death penalty in 24 cases.[8] Thus,

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TR 164, TR 165, TR 167, TR 174, TR 175, TR 176, TR 177, TR 180, TR 181, TR 182, TR 183, TR 184, TR 185, TR 186, TR 190, TR 194, TR 216, TR 220, TR 227, TR 251, TR 258, TR 281, and TR 303. Cecil Davis (TR 180, 281), Mitchell Rupe (TR 7, 31), and Paul St. Pierre (TR 34, 34A) faced multiple special sentencing proceedings and thus have multiple trial reports. We have included these additional trial reports in our analysis. Additionally, we have excluded TR 16A because it is the only trial report for a murder and conviction predating the enactment of RCW 10.95.120.

[4] Consistent with the majority opinion, our analysis is limited to only African-American and Caucasian defendants.

[5] African-American defendants included: TR 29, TR 77, TR 88, TR 119, TR 135, TR 157, TR 177, TR 180, TR 185, TR 186, TR 194, TR 216, and TR 281.

[6] TR 29, TR 119, TR 135, TR 177, TR 180, TR 194, TR 216, TR 281.

[7] TR 2, TR 3, TR 7, TR 9, TR 15, TR 20, TR 23, TR 25, TR 26, TR 31, TR 34, TR 34A, TR 36, TR 39, TR 42, TR 43, TR 44, TR 45, TR 47, TR 48, TR 50, TR 51, TR 52, TR 53, TR 56, TR 58, TR 60, TR 62, TR 63, TR 64, TR 65, TR 66, TR 73, TR 75, TR 76, TR 86, TR 92, TR 93, TR 95, TR 125, TR 132, TR 140, TR 144, TR 154, TR 164, TR 165, TR 167, TR 174, TR 175, TR 176, TR 181, TR 182, TR 183, TR 184, TR 190, TR 220, TR 227, TR 251, TR 258, TR 303.

[8] TR 3, TR 7, TR 9, TR 15, TR 31, TR 39, TR 43, TR 47, TR 73, TR 75, TR 76, TR 125, TR 132, TR 140, TR 144, TR 154, TR 165, TR 175, TR 176, TR 181, TR 183, TR 220, TR 251, TR 303.

Caucasians received the death penalty in 40 percent of the cases in which it was sought.

This means that of all African-American and Caucasian defendants for whom the prosecution sought the death penalty, African-Americans were much more likely than Caucasians to be sentenced to death (62 percent versus 40 percent). Based on this record, if the death penalty were color blind, one would expect to find that as a group, African-American defendants' crimes and past histories made them considerably more deserving of the death sentence than Caucasian defendants. But the trial reports contradict this expectation. When we consider key statistics for all African-Americans and Caucasians sentenced to death, it appears that African-American murder defendants as a group were no worse than Caucasian murder defendants.

For instance, African-American defendants sentenced to death averaged fewer aggravating circumstances (2.0) than Caucasians (2.6).[9] Moreover, if we consider cases involving multiple murder victims, only one of the eight African-Americans sentenced to death killed more than one victim, while 14 of the 24

[9] African-American defendants sentenced to death had the following numbers of aggravating circumstances: TR 194, 3; TR 180, 3; TR 281, 3; TR 177, 2; TR 216, 2; TR 29, 1; TR 119, 1; and TR 135, 1. Caucasian defendants sentenced to death had the following numbers of aggravating circumstances: TR 9, 4; TR 73, 4; TR 76, 4; TR 125, 4; TR 140, 4; TR 7, 3; TR 31, 3; TR 39, 3; TR 43, 3; TR 47, 3; TR 132, 3; TR 154, 3; TR 175, 3; TR 176, 3; TR 251, 3; TR 15, 2; TR 144, 2; and TR 165, 2; the remaining six had one aggravating circumstance. Although African-American defendants sentenced to death had fewer aggravating circumstances than Caucasian defendants, African-American defendants averaged fewer mitigating circumstances (0.63) than Caucasian defendants (1.6).

Caucasians sentenced to death killed more than one victim.[1] Lastly, African-American defendants sentenced to death averaged fewer prior convictions (4.1) than Caucasians (4.6).[11]

The trial reports are evidence that once the prosecution seeks the death penalty against African-American defendants, those defendants are much more likely to be sentenced to death than their Caucasian counterparts. The majority attempts to disprove any disproportionality in sentencing by analyzing the pool of defendants *eligible* for the death penalty and concluding "the likelihood of a white defendant receiving the death penalty in Washington is practically the same as the likelihood of a black defendant receiving it." Majority at 73-74. This is a false comparison. The relevant issue is how often juries return a verdict of death when the prosecution seeks the death penalty. Including defendants against whom the prosecution has not chosen to seek the death penalty tells us nothing about unequal imposition of the death penalty when the jury is asked to decide death.

The majority again looks to the wrong statistical set when it divides the

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[1] The sole African-American to kill multiple victims, TR 177, killed two victims. The 14 Caucasian defendants who killed multiple victims are: TR 43, 4; TR 303, 4; TR 9, 3; TR 76, 3; TR 220, 3; TR 7, 2; TR 31, 2; TR 39, 2; TR 132, 2; TR 154, 2; TR 251, 2; TR 15, 2; TR 144, 2; and TR 75, 2.

[11] African-American defendants sentenced to death had the following numbers of prior convictions: TR 281, 10; TR 180, 8; TR 194, 4; TR 119, 4; TR 177, 3; TR 29, 2; TR 135, 2; and TR 216, unknown. The Caucasian defendants had the following prior convictions: TR 125, 15; TR 251, 15; TR 132, 13; TR 73, 9; TR 181, 8; TR 175, 6; TR 176, 6; TR 9, 4; TR 140, 4; TR 154, 4; TR 39, 4; TR 43, 3; TR 144, 3; TR 165, 3; TR 3, 3; TR 75, 3; TR 183, 3; TR 76, 2; TR 47, 2; and TR 15, unknown. One Caucasian defendant had no prior convictions: TR 303.

aggravated first degree murder cases into two time periods: 1981 to 1991 compared to 1991 to 2011. Majority at 79-81. No reason is suggested for this division, which appears to be arbitrary. Moreover, the number of African-American defendants is sufficiently small that a small adjustment in the time periods can give rise to wide variations.

Additionally, the majority claims the fact that the State has sought the death penalty in a higher percentage of cases against Caucasian defendants than African-American defendants "refute[s] the notion that attitudes about race have led prosecutors to discriminate against black defendants in capital cases." *Id.* at 77. But the majority examines only cases in which defendants are *convicted* of aggravated first degree murder, without examining whether prosecutors charge the two populations at the same rate. A deeper inquiry into charging rates may explain why African-Americans, despite comprising less than 4 percent of Washington's population,[12] account for 25 percent of the cases in which defendants are sentenced to death.

Needless to say, these selective statistics do not tell the entire story, but they are objective quantitative measurements and not one of them explains why African-Americans seem so disproportionately sentenced to death.These statistics cannot tell us that petitioner Cecil Davis would not have received the death sentence if he had not been African-American. But the numbers warn of a significant danger that the

[12] *State & County Quick Facts*, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/53000.html (last visited Sept. 14, 2012).

death penalty might not be imposed in a fair, equal, or just manner. I would remand this case to the trial court for a hearing to evaluate whether racial disparities exist in the imposition of the death penalty and whether they are statistically significant.

I turn now to a review of the history of Washington's death penalty to evaluate the significance of this lopsided record.

In Washington, the legislature has mandated that we engage in a comparative proportionality analysis in every capital case. RCW 10.95.130. Our legislature adopted this statutory requirement in response to United States Supreme Court cases from the 1970s that addressed racial discrimination in capital punishment and the problem of imposing the death penalty in an arbitrary and capricious manner. *See* Laws of 1981, ch. 138, § 13; Laws of 1977, Ex. Sess., ch. 206, §§ 1-2, 7, 10. A brief review of these cases and our legislature's response to them is helpful in framing the discussion of race and capital punishment in Washington.

In 1972, the United States Supreme Court considered the alarming issue of inconsistencies and racial disparities in the imposition of the death penalty. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). *Furman*, a per curiam decision with five concurring and four dissenting opinions, brought to light several problems with the manner in which some states—there, specifically Georgia and Texas—imposed the death penalty. The concurring justices were primarily concerned that certain states' legislative grants of unfettered discretion to juries and judges in death sentencing were leading to arbitrary or racially discriminatory results.

See, *e.g.*, *id.* at 256-57 (Douglas, J., concurring) ("[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *id.* at 293 (Brennan, J., concurring) ("[The infliction of the death penalty] smacks of little more than a lottery system."). Because of these concerns, the Court reversed and remanded the death sentences of three African-American men. *Id.* at 239-40 (per curiam).

Following *Furman*, the states engaged in a flurry of legislation to ensure that their death penalty statutes and sentencing schemes were constitutional. *See* Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the American Agenda 38-45 (1986) (discussing state legislative responses to *Furman*); *see also Gregg v. Georgia*, 428 U.S. 153, 179 n.23, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion) (noting the increase in state legislative activities prompted by *Furman*). Georgia, whose laws were at the center of the controversy in *Furman*, reworked its statutes to provide safeguards ensuring that the death penalty was not applied in an arbitrary or discriminatory fashion. *See* 1973 Ga. Laws 159, § 4.

These new statutes quickly made their way back to the United States Supreme Court: in 1976, the Court upheld the new statutes because, "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given

category of crime will be set aside." *Gregg*, 428 U.S. at 224 (White, J., concurring in judgment). The Court noted that Georgia's new approach allowed the Georgia Supreme Court to compare "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.* at 198. Confident that the new laws "afford[ed] additional assurance that the concerns that prompted [the] decision in *Furman* [were] not present to any significant degree," *id.* at 207, the Court indicated that Georgia's statutory creation of comparative proportionality review appropriately addressed *Furman's* aims of eliminating freakish, arbitrary, and racially discriminatory sentences in the imposition of the death penalty.

On the same day that the Supreme Court heard *Gregg*, it also considered another common state legislative response to *Furman*. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). North Carolina and several other states, including Washington, had enacted statutes making the death penalty mandatory where certain aggravating circumstances were present.[13] *Id.* at 286. These laws attempted to meet *Furman's* strictures by removing the limitless discretion of judges and juries that the Court found repugnant in *Furman*. *Id.* The Supreme Court struck down North Carolina's mandatory capital sentencing scheme in its

[13] Washington voters overwhelmingly passed an initiative that required capital punishment upon conviction of aggravated murder in the first degree. *See* former RCW 9A.32.045-.046 (Laws of 1975-76, 2d Ex. Sess., ch. 9, §§ 1-2 (Initiative Measure 316, §§ 1-2); Laws of 1977, Ex. Sess., ch. 206, §§ 4-5), *repealed by* Laws of 1981, ch. 138, § 24, effective May 14, 1981.

entirety, noting that it was the "standardless sentencing power in the jury" that was constitutionally infirm in *Furman*, not the general discretion of juries in deciding whether a defendant should receive a death sentence. *Id.* at 302. Because North Carolina had "fail[ed] to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences," the Court made clear that mandatory death sentencing was unconstitutional. *Id.*

In the wake of the *Gregg* and *Woodson* decisions, many state legislatures, including Washington's, returned to the drawing board to ensure that their death penalty statutes would meet constitutional muster. *See* Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 Wash. L. Rev. 775, 790 (2004) (citing Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 Alb. L. Rev. 1161, 1168 n.29 (2001)).

The Washington Legislature sought the advice of the Attorney General, who provided a detailed opinion recommending that Washington model its death penalty laws after the Georgia statutes upheld in *Gregg*. 1976 Op. Att'y Gen. No. 15, at 11-13, 1976 WL 168499, at *6-7. The legislature responded by enacting legislation nearly identical to Georgia's statute, including the requirement of comparative proportionality review by the Washington State Supreme Court. *Compare* RCW 10.95.130, *and* former RCW 10.94.030 (Laws of 1977, Ex. Sess., ch. 206, § 7), *repealed by* Laws of 1981, ch. 138, § 24, effective May 14, 1981,[14] *with* Ga. Code

Ann. § 17-10-35 (enacted by 1973 Ga. Laws 159, § 4); *see also State v. Harris*, 106 Wn.2d 784, 798, 725 P.2d 975 (1986) ("The language in our statute is identical to that used in the Georgia statute and most of the other statutes which expressly provide for proportionality review.").

The legislative history regarding the enactment of comparative proportionality review in Washington also demonstrates that the legislature was responding to *Gregg*, *Woodson*, and *Furman* and believed the new statutory scheme would ensure that the death penalty in Washington would not be applied arbitrarily or discriminatorily. *See, e.g.,* Memorandum from David D. Cheal, Counsel, House Judiciary Comm., to Representative Pearsall, Constitutional Requirements of Death Penalty Legislation 1 (May 12, 1977) ("[Comparative proportionality review] is a further protection against arbitrariness and wide discrepancies in the application of the death penalty.") (on file with House File on Substitute H.B. 615, 45th Leg., 1st Ex. Sess. (1977)); Transcript of Proceedings of H.R., Substitute H.B. 615, 45th Leg., 1st Ex. Sess. (Apr. 29, 1977) (arguments during floor debate regarding the disproportionate imposition of the death penalty on racial minorities) (on file with House File on Substitute H.B. 615, *supra*).

To summarize, the timing, language, and history of our death penalty statutes

[14] The Washington Legislature first required comparative proportionality review in 1977. In 1981, the legislature repealed the 1977 statute, although it maintained the same statutory language, and added a definition of "similar cases" as well as the trial court questionnaire form currently in use by the trial courts to report on all aggravated murder cases. Kaufman-Osborn, *supra*, at 812-13 (discussing differences between the 1977 and 1981 statutes).

indicate that the legislature was primarily concerned with maintaining the constitutional availability of capital punishment in Washington by enacting laws that, according to the United States Supreme Court, remedied the problems identified in *Furman*.

Although the United States Supreme Court has indicated that comparative proportionality review is not constitutionally required, *Pulley v. Harris*, 465 U.S. 37, 43-44, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), RCW 10.95.130 still mandates it.[15] Accordingly, our comparative proportionality review should include fulfilling our statutory duty to ensure that racial discrimination does not pervade the imposition of capital punishment in Washington. In my view, the question is how to prevent our review from becoming an "'empty ritual.'" Dissent at 14 (quoting *State v. Benn*, 120 Wn.2d 631, 709, 845 P.2d 289 (1993) (Utter, J., dissenting)).

I find it problematic and unworkable that we have endorsed the view of the United States Supreme Court in rejecting statistics on the impact of race on the imposition of the death penalty. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 753-54, 101 P.3d 1 (2004) (citing *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)). *McCleskey* involved a black defendant convicted of murder for shooting a white police officer during a robbery of a furniture store in Georgia. 481 U.S. at 283. At trial and throughout his appeals and habeas petitions,

[15] After *Pulley*, several states repealed their comparative proportionality review requirements, and other state supreme courts that had mandated such review abandoned it. *See* Kaufman-Osborn, *supra*, at 791-92 (citing Latzer, *supra*, at 1168 n.31 (listing the states that repealed statutes or abandoned precedent requiring comparative proportionality review)).

McCleskey presented a statistical study that "purport[ed] to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."[16] *Id.* at 286. Despite the Courts' acknowledgement that there was "some risk of racial prejudice influencing a jury's decision in a criminal case" and that statistics "may show only a likelihood that [race] entered into some decisions," *id.* at 308, the Court simply concluded that such "disparities in sentencing are an inevitable part of our criminal justice system." *Id.* at 312. *McCleskey* leaves us with the question of what exactly would suffice to show racial discrimination in capital sentencing.

In Mr. Davis's previous personal restraint petition, this court relied on *McCleskey* to reject Mr. Davis's submission of similar Washington statistics that suggested that the death penalty is "'imposed more frequently when the defendant is nonwhite and the victim is white, and never, or almost never, when the racial equation is reversed.'" *Davis*, 152 Wn.2d at 753 (quoting brief). But we did not examine the overall statistics on the frequency with which African-American defendants are sentenced to death compared to non-African-American defendants. Thus, our prior decision in *Davis* does not and cannot control our decision here.

Furthermore, the racial statistics in both *McCleskey* and *Davis* were put forth in the context of constitutional challenges under the cruel and unusual punishment

[16] The study found that the death penalty was imposed in 22 percent of cases involving black defendants and white victims, but was imposed in only 3 percent of the cases involving white defendants and black victims and in only 1 percent of the cases involving black defendants and black victims. 481 U.S. at 286.

clause of the Eighth Amendment to the United States Constitution. Those cases, even if decided correctly, are distinguishable from the statistics discussed in this opinion because these statistics focus on the duty imposed by our legislature to conduct comparative proportionality review to ensure that death sentences in Washington are not handed down arbitrarily or discriminatorily. I do not believe that we can address discrimination based on race or other factors in our death penalty cases if we do not consider the statistical trends that present themselves upon examination of trial reports in aggravated murder cases. If we refuse to engage in some form of statistical analysis, we render a nullity the entire statutory scheme we are charged with enforcing.

I am not alone in my confusion. Numerous commentators have expressed dismay over the failure of comparative proportionality review to address the issue of racial discrimination in capital punishment. Most of their criticisms attack *McCleskey* for presenting the judiciary with a convenient way to sidestep the issue of racial disparities in the imposition of capital punishment. *See*, *e.g.*, David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 Columbia Hum. Rts. L. Rev. 143, 144 (2007) ("*McCleskey* has nearly eliminated the incentive of federal and state courts and legislatures to address meaningfully the issue of racial discrimination in the administration of the death penalty and has provided them with a political and legal framework for denying and

avoiding the issue."); Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 Berkeley J. Crim. L. 29, 46 (2007) (*McCleskey* "effectively barred a petitioner's ability to prove systemic racism in capital punishment"); Bruce Gilbert, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 Seattle U. L. Rev. 593, 620-21 (1995) (noting that "[c]omparative proportionality review in Washington realistically addresses only the 'outlier' case" and thus fails to "address discriminatory application of the death penalty"); Rebecca A. Rafferty, Note, *In the Shadow of* McCleskey v. Kemp*: The Discriminatory Impact of the Death Sentencing Process*, 21 New Eng. J. on Crim. & Civ. Confinement 271, 294 (1995) ("The result of *McCleskey* was to place a virtually insurmountable burden on death row defendants who are victims of racial discrimination.").

In addition to these criticisms, our own cases have repeatedly recognized that the purpose of conducting comparative proportionality review is "to avoid random arbitrariness *and imposition of the death sentence based on race*." *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 270, 172 P.3d 335 (2007) (emphasis added); *see also State v. Cross*, 156 Wn.2d 580, 639, 132 P.3d 80 (2006); *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 148, 102 P.3d 151 (2004); *Davis*, 152 Wn.2d at 750-51; *State v. Elledge*, 144 Wn.2d 62, 80, 26 P.3d 271 (2001); *State v. Woods*, 143 Wn.2d 561, 615, 23 P.3d 1046 (2001); *State v. Davis*, 141 Wn.2d 798, 880, 10 P.3d 977 (2000); *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999); *State v.*

Brown, 132 Wn.2d 529, 554-55, 940 P.2d 546 (1997); *State v. Stenson*, 132 Wn.2d 668, 759, 940 P.2d 1239 (1997); *State v. Brett*, 126 Wn.2d 136, 209, 892 P.2d 29 (1995); *State v. Gentry*, 125 Wn.2d 570, 655, 888 P.2d 1105 (1995); *Benn*, 120 Wn.2d at 680; *State v. Lord*, 117 Wn.2d 829, 910, 822 P.2d 177 (1991); *State v. Rupe*, 108 Wn.2d 734, 767, 743 P.2d 210 (1987).

In the past, we have stated that our statutorily mandated task when we conduct comparative proportionality review is not to "'ascertain, in essence, mathematical proportionality.'" *Cross*, 156 Wn.2d at 639 (quoting *Brett*, 126 Wn.2d at 212-13). But I fail to see how we can assure capital defendants or the legislature that race does not affect whether a capital defendant receives the death penalty in Washington when we brush aside the very statistical data that would assist us in making this determination.

In light of this history of our death penalty statutory scheme, the conclusion is inescapable that we must examine the impact of the defendant's race upon the administration of the death penalty in Washington. But we are not statisticians. We cannot evaluate the significance or importance of these numbers without the assistance of competent experts. Pursuant to RAP 9.11, I would direct the superior court to conduct an evidentiary hearing into the statistical significance of the racial patterns that emerge from the aggravated-murder trial reports. I would direct the superior court to hear such relevant evidence as the parties offer and to make findings on the significance of the racial patterns. We would then be in a position to

perform the proportionality analysis mandated by the legislature.

Alternatively, I join in Justice Fairhurst's dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR: