

No. 80209-2

FAIRHURST, J. (dissenting)— Washington statutes require us to reverse any death sentence that is “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” RCW 10.95.130(2)(b), .140(1)(b). While the majority purports to undertake the required analysis, it overlooks dozens of life sentences imposed for aggravated murders similarly brutal to the one Cecil Emile Davis committed. Our proportionality review will not tolerate the randomness that these sentences reveal in Washington’s system of imposing the ultimate punishment. Davis’s death sentence should be remanded for imposition of a sentence of life imprisonment without possibility of parole. I dissent.

This court is required to evaluate every death sentence to determine whether it is “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” RCW 10.95.130(2)(b). “[S]imilar

cases” is a term defined by statute as:

cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120.

Id. Under RCW 10.95.120, trial judges must submit reports in all cases where the defendant is convicted of aggravated first degree murder, including where the defendant pleads guilty. Therefore, the plain language of our proportionality statute requires us to consider all aggravated first degree murder convictions, regardless of whether the prosecutor pursued the death penalty or whether the fact finder returned a sentence of death or life imprisonment. If we determine the defendant’s sentence is excessive or disproportionate to the cases in this group, we must reverse the death sentence for the imposition of a life imprisonment sentence. RCW 10.95.140(1)(b).

We must avoid the temptation to confuse the question actually posed by RCW 10.95.130(2)(b) with the question of whether Davis’s death sentence is proportionate to his crime. The statute does not ask us to evaluate Davis and his crime in a vacuum. Such an interpretation not only ignores the statute’s plain language, it reduces proportionality to a tautology: aggravated murders are by definition the worst possible crimes, so they will always be proportionate to the

worst possible punishment. Instead, the statute asks us to compare the defendant's sentence to the sentence imposed in all other aggravated murder cases, including life sentences and the results of plea bargains.

Having identified the correct pool of comparable cases—all aggravated murder convictions, regardless of whether the death penalty was pursued or imposed—we still must determine what it means for a sentence to be disproportionate. While we have approached this inquiry in a variety of ways, we have consistently stressed that

“this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed *generally* and not wantonly and freakishly imposed.”

State v. Harris, 106 Wn.2d 784, 798, 725 P.2d 975 (1986) (alteration in original) (internal quotation marks omitted) (quoting *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829, 864 (1975)); *see also, e.g., State v. Brown*, 132 Wn.2d 529, 555, 940 P.2d 546 (1997) (referencing the same standard); *State v. Benn*, 120 Wn.2d 631, 679, 845 P.2d 289 (1993) (same).

In my view, when we follow the statutory mandate to consider similar cases, it becomes apparent that the death penalty is not imposed generally in similar cases

in Washington State. Considering the crime and the defendant, it is impossible to predict whether a defendant convicted of a brutal aggravated murder will be sentenced to life in prison or death. The majority fails to reach this conclusion because, despite the statute's plainly worded mandate, it does not meaningfully analyze cases where the death penalty was not sought or imposed. The only life sentence that the majority explicitly discusses is that of Gary Ridgway, who strangled 48 women and often returned to rape their corpses. Majority at 59-60. The majority characterizes Ridgway's sentence as an anomaly that could not alone render the death penalty disproportionate. *Id.* When we use the correct statutory pool, the same four factors analyzed by the majority illustrate that Ridgway's life sentence can no longer be characterized as unique.¹ Rather, Ridgway is a notable entry in a long list of murderers who escaped death for crimes comparable to those that support death sentences.

The majority first considers the nature of the crime, which involved substantial conscious suffering due to the violent rape. Majority at 57-58. Since our death penalty statute was enacted in 1981, at least 45 murderers have been

¹The majority states that my consideration of these factors "postpones . . . consideration of mitigating factors" and offers critical evidence "belatedly." Majority at 65-66. But I address the four factors in the same order as the majority. It should not be overly burdensome for the majority to read my analysis in the same order in which it presents its own or, indeed, to confront the substance of my argument without suggesting deceit in the manner in which I present it.

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sentenced to life in prison for aggravated murders involving rape, sexual assault, or

sexual mutilation. Report of Trial Judge² (TR) 1 (Mario Ortiz raped 77-year-old victim, stabbed her, shattered her face by a massive blow, and dragged her down the stairs by the head); TR 2 (Arnold Brown digitally raped and strangled to death his seven-year-old niece); TR 6 (Kenneth Hovland raped and sodomized 16-year-old victim with a blunt object, stabbed her eight times, and suffocated her by forcing her face into the mud); TR 8 (Charles Bingham raped and strangled intellectually disabled victim); TR 18 (Brian Kester raped victim at gunpoint, then fatally shot her in the face and breast); TR 27, at 8 (John Anderson raped victim, perforating her vagina, broke all her facial bones, knocked out her teeth, “pulpified” her eye, punctured her neck, and strangled her); TR 36 (Bradley Bushey beat, raped, and strangled victim); TR 45 (James Dykgraaf tied up victim, sexually assaulted her for an hour, strangled her for several minutes, then shot her with a sawed-off shotgun); TR 49 (Michael Idhe anally, orally, and vaginally raped 67-year-old victim, then strangled her); TR 50 (Sean Stevenson shot his sister, raped her, and then fatally shot her; Stevenson also fatally shot his parents); TR 55 (Russell Stenger kidnapped a woman jogging, raped her repeatedly at gunpoint, drove her to another location

²Reports of the trial judge filed pursuant to RCW 10.95.120 are on file with the Washington State Supreme Court Clerk’s Office.

and raped her again, tied her to a tree and shot her); TR 56 (Daniel Yates bound, raped, then shot victim); TR 58 (Gene Kane sexually assaulted victim, then stabbed her to death); TR 67 (Susan Cummings raped and killed victim); TR 79 (Sherwood Knight broke into victim's apartment, raped her, and strangled her); TR 81 (Martin Sanders raped two 14-year-old girls, beat one in the head with a tire jack, then strangled them); TR 83 (Ronald Thomas hog-tied victim to bed, raped, and strangled her); TR 94 (Daniel Edwards raped and shot victim); TR 100 (Michael Hightower raped and shot victim); TR 102, 103 (Emmett Nash and Jose Nash kidnapped, raped, and strangled victim); TR 109 (Gregory Scott raped, suffocated, and strangled victim); TR 120 and *State v. Russell*, 125 Wn.2d 24, 30-36, 882 P.2d 747 (1994) (George Russell raped and sexually assaulted three women; strangled, bludgeoned, or stabbed them to death; and left their bodies posed in gruesome, sexual positions); TR 124 (Christopher Bradley raped victim and stabbed her to death with pocket knife); TR 136 (Michael Green kidnapped, stabbed, and bludgeoned to death 12-year-old victim; victim was also raped); TR 137 (Charles Bolton raped 75-year-old woman, possibly using scissors, then threw her into river to drown or freeze); TR 142 (Keith Dyer raped and stabbed 13-year-old to death); TR 150 (Michael Lauderdale bound victim, anally raped him, and bludgeoned him

with a baseball bat); TR 166 (William Robinson Jr. held victim hostage for hours, anally raping, stabbing, and ultimately suffocating her); TR 167 (Jack Spillman III repeatedly, fatally stabbed one woman and bludgeoned another, then sexually mutilated and eviscerated them); TR 172 (James Thomas strangled mother and 13-year-old daughter after raping the daughter); TR 184 (Guy Rasmussen kidnapped 9-year-old; body found beaten and raped, with cigarette burns on thighs and panties stuffed in throat); TR 185 (Robert Parker gagged two women with their undergarments, raped them, stabbed them in the abdomen, and strangled them); TR 186 (Gerald Davis tied up 77-year-old woman, raped her, smashed her eye socket, slashed her with a knife, then strangled her; also suffocated 91-year-old woman with a gag after hitting her over the head); TR 191 (Dennis Smith raped and killed victim); TR 193 (David Lewis digitally raped and fatally stabbed 12-year-old victim); TR 207 (Donnie Ivy stabbed and strangled 63-year-old victim; victim's body found with vaginal hemorrhaging); TR 215 (Ulus Rogers raped the victim, possibly postmortem, and fatally stabbed her); TR 227 (Brodie Waldradt bound and gagged his ex-fianceé, who was pregnant with full-term child, raped her, and bludgeoned her to death); TR 236 (Duwayne Bender raped and stabbed 65-year-old victim); TR 239 (Lloyd Monroe beat, raped, and strangled victim); TR 245 (James

Kinney raped and bludgeoned victim); TR 252 (Roy Webbe raped the victim, stabbed her, and severed her spinal cord, possibly in an attempted decapitation); TR 260 (Scott Fischer raped, beat, and strangled victim); TR 265 (Gary Ridgway strangled 48 women, often returning to rape their corpses).³

In contrast, since our death penalty statute was enacted, only 13 death sentences other than Davis's have been imposed for murders involving rape or sexual assault.⁴ Thus, defendants sentenced to life in prison for murders involving

³Because RCW 10.95.130(2)(b) defines "similar cases" as including cases where trial reports were filed pursuant to RCW 10.95.120, the facts of the aggravated murder convictions listed in this opinion are based primarily on the information contained in those reports. Consistent with the court's conclusion in *State v. Cross*, 156 Wn.2d 580, 636-37, 132 P.3d 80 (2006), I include even those sentences that were later vacated. Throughout the opinion, there are two categories of defendants who I do not include as receiving life sentences despite trial reports indicating the contrary. First, where a defendant received a life sentence after an original death sentence was vacated, I include the defendant only for purposes of the original death sentence. For example, while Richard Clark's second trial report (TR 277) might seem to fit in the foregoing list of aggravated murders involving sexual assault, it is not listed because he received a life sentence only after his original death sentence was vacated. Second, in 1993, this court held that Washington State does not authorize the death penalty for crimes committed by juveniles. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993). I therefore exclude from the lists of defendants receiving life sentences those defendants who, at the time they were sentenced, were ineligible for the death penalty under *Furman*. I do include juveniles who were eligible for the death penalty at the time they were sentenced because *Furman* had not yet been decided. *E.g.*, TR 50 (Sean Stevenson).

I believe the foregoing practices of including and excluding certain trial reports are favorable to the majority, as they generally minimize the number of life sentences listed and generously include other death penalty cases as comparable to Davis's case. In using this methodology, I hope to demonstrate that the random imposition of death sentences in Washington is not merely a manipulation of the relevant numbers but a reality that emerges even when viewing our cases in the manner most apt to demonstrate that Davis's sentence is proportional.

⁴TR 9 (Charles Campbell); TR 39 (Clark Hazen); TR 47 (Brian Lord); TR 73 (Michael Furman); TR 76 (Westley Dodd); TR 119 (Jonathan Gentry); TR 140 (Cal Brown); TR 160 (Jeremy Sagastegui); TR 165 (Clark Elmore); TR 175 (Richard Clark); TR 177 (Dwayne

rape or sexual assault far outnumber those who receive the death penalty for such crimes. In fact, defendants sentenced to life in prison for murders involving rape or sexual assault even outnumber the 31 defendants who have received death sentences since our current statute was enacted.⁵

The majority next considers both the number and nature of the aggravating factors in Davis's case: robbery, burglary, and rape. Majority at 60-61. With regard to nature, the violent rape stands out as the distinguishingly heinous feature of Davis's crime. Rape is not always charged or found applicable in aggravating murder cases involving sex crimes, so the pool of defendants for whom rape was found to be an aggravator is smaller than the group of 45 defendants, listed above, whose crimes involved sexual assault. The ratio of life sentences to death sentences for murders with an aggravating factor of rape, however, is similar. Rape was found to be an aggravating factor in 34 cases resulting in life sentences,⁶ but it was an

Woods); TR 216 (Allen Gregory); TR 251 (Robert Yates Jr.).

⁵TR 3 (Dwayne Bartholomew); TR 7, 31 (Mitchell Rupe); TR 9 (Charles Campbell); TR 13 (Kwan Mak); TR 15 (Patrick Jeffries); TR 29 (Benjamin Harris); TR 39 (Clark Hazen); TR 43 (David Rice); TR 47 (Brian Lord); TR 73 (Michael Furman); TR 75 (Gary Benn); TR 76 (Westley Dodd); TR 119 (Jonathan Gentry); TR 125 (James Brett); TR 132 (Blake Pirtle); TR 135 (Sammie Luvenc); TR 140 (Cal Brown); TR 144 (Darold Stenson); TR 154 (Charles Finch); TR 160 (Jeremy Sagastegui); TR 165 (Clark Elmore); TR 175 (Richard Clark); TR 176 (Michael Roberts); TR 177 (Dwayne Woods); TR 181 (Henry Marshall III); TR 183 (James Elledge); TR 194 (Covell Thomas); TR 216 (Allen Gregory); TR 220 (Dayva Cross); TR 251 (Robert Yates Jr.); TR 303 (Conner Schierman).

⁶TR 1 (Mario Ortiz); TR 2 (Arnold Brown); TR 6 (Kenneth Hovland); TR 8 (Charles Bingham); TR 18 (Brian Kester); TR 27 (John Anderson); TR 36 (Bradley Bushey); TR 45

aggravating factor in only 7 death penalty cases.⁷ Accordingly, rape-murderers with life sentences outnumber those with death sentences more than four-to-one.

With regard to number of aggravators, 38 defendants with three or more aggravating factors were sentenced to life in prison,⁸ whereas 15 defendants with three or more aggravators, excluding Davis, were sentenced to death.⁹ Accordingly, defendants whose crimes are comparable to or worse than Davis's crime based on

(James Dykgraaf); TR 49 (Michael Idhe); TR 50 (Sean Stevenson); TR 55 (Russell Stenger); TR 56 (Daniel Yates); TR 67 (Susan Cummings); TR 79 (Sherwood Knight); TR 81 (Martin Sanders); TR 83 (Ronald Thomas); TR 94 (Daniel Edwards); TR 100 (Michael Hightower); TR 102 (Emmett Nash); TR 103 (Jose Nash); TR 109 (Gregory Scott); TR 124 (Christopher Bradley); TR 142 (Keith Dyer); TR 150 (Michael Lauderdale); TR 166 (William Robinson Jr.); TR 185 (Robert Parker); TR 191 (Dennis Smith); TR 215 (Ulus Rogers); TR 227 (Brodie Waldradt); TR 236 (Duwayne Bender); TR 239 (Lloyd Monroe); TR 245 (James Kinney); TR 252 (Roy Webbe); TR 260 (Scott Fischer).

⁷Rape was found to be an aggravating circumstance in the following cases: TR 39 (Clark Hazen); TR 47 (Brian Lord); TR 73 (Michael Furman); TR 140 (Cal Brown); TR 165 (Clark Elmore); TR 175 (Richard Clark); and TR 216 (Allen Gregory). Rape was not found to be an aggravating circumstance in the case of TR 76 (Westley Dodd); TR 119 (Jonathan Gentry); TR 160 (Jeremy Sagastegui); TR 177 (Dwayne Woods); or TR 251 (Robert Yates Jr.).

⁸TR 18 (Brian Kester); TR 35 (John Lennon); TR 45 (James Dykgraaf); TR 53 (James Thompson); TR 55 (Russell Stenger); TR 56 (Daniel Yates); TR 61 (Russell McNeil); TR 63 (Leslie McVay); TR 64 (Jonathan Woods); TR 65 (Jeffrey Lane); TR 67 (Susan Cummings); TR 70 (Herbert Rice); TR 81 (Martin Sanders); TR 82 (Melvin Stohs); TR 97 (James Fountain); TR 107 (David Simmons); TR 108 (Henry Dailey); TR 113 (Julian Loera); TR 115 (Daniel Tash); TR 128 (Tommy Metcalf); TR 141 (Bryan Powers); TR 164 (Steven Morgan); TR 185 (Robert Parker); TR 191 (Dennis Smith); TR 206 (Vy Thang); TR 209 (Terence Weaver); TR 215 (Ulus Rogers); TR 224 (Nicolas Vasquez); TR 227 (Brodie Waldradt); TR 231 (James Ferrell); TR 232 (Kenneth Leuluaialii); TR 236 (Duwayne Bender); TR 239 (Lloyd Monroe); TR 245 (James Kinney); TR 267 (Alex Baranyi); TR 280 (Ulysses Handy III); TR 296 (Darrell Jackson); TR 297 (Tyreek Smith).

⁹TR 7, 31 (Mitchell Rupe); TR 9 (Charles Campbell); TR 39 (Clark Hazen); TR 43 (David Rice); TR 47 (Brian Lord); TR 73 (Michael Furman); TR 76 (Westley Dodd); TR 125 (James Brett); TR 132 (Blake Pirtle); TR 140 (Cal Brown); TR 154 (Charles Finch); TR 175 (Richard Clark); TR 176 (Michael Roberts); TR 194 (Covell Thomas); TR 251 (Robert Yates Jr.).

the number of aggravating factors have been sentenced to life in prison more than twice as often as they have been sentenced to death.

The third factor the majority considers is Davis's prior convictions. As the majority points out, Davis had a lengthy criminal history. Majority at 61-62. Accordingly, we might appropriately exclude from the pool of comparable cases those defendants with no criminal history. Of the 45 defendants listed above who received life sentences for sex-related murders, 32 had some criminal history.¹ This is still substantially greater than the 13 death sentences imposed for murders involving rape or sexual assault.¹¹ Moreover, the criminal histories of the 32 remaining defendants are significant. For example, 8 were previously convicted of rape.¹²

¹TR 2 (Arnold Brown); TR 6 (Kenneth Hovland); TR 27 (John Anderson); TR 36 (Bradley Bushey); TR 45 (James Dykgraaf); TR 49 (Michael Idhe); TR 55 (Russell Stenger); TR 56 (Daniel Yates); TR 58 (Gene Kane); TR 79 (Sherwood Knight); TR 81 (Martin Sanders); TR 83 (Ronald Thomas); TR 94 (Daniel Edwards); TR 100 (Michael Hightower); TR 102 (Emmett Nash); TR 103 (Jose Nash); TR 120 (George Russell); TR 136 (Michael Green); TR 137 (Charles Bolton); TR 142 (Keith Dyer); TR 167 (Jack Spillman III); TR 184 (Guy Rasmussen); TR 185 (Robert Parker); TR 186 (Gerald Davis); TR 191 (Dennis Smith); TR 193 (David Lewis); TR 215 (Ulus Rogers); TR 227 (Brodie Waldradt); TR 239 (Lloyd Monroe); TR 252 (Roy Webbe); TR 260 (Scott Fischer); TR 265 (Gary Ridgway). The trial reports indicated that 10 defendants had no criminal history. TR 1 (Mario Ortiz); TR 18 (Brian Kester); TR 50 (Sean Stevenson); TR 67 (Susan Cummings); TR 109 (Gregory Scott); TR 150 (Michael Lauderdale); TR 172 (James Thomas); TR 207 (Donnie Ivy); TR 236 (Duwayne Bender); TR 245 (James Kinney). The reports are unclear on whether three defendants had prior convictions. TR 8 (Charles Bingham); TR 124 (Christopher Bradley); TR 166 (William Robinson Jr.).

¹¹*Supra* note 4.

¹²TR 36 (Bradley Bushey); TR 49 (Michael Idhe); TR 81 (Martin Sanders); TR 100 (Michael Hightower); TR 102 (Emmett Nash); TR 136 (Michael Green); TR 184 (Guy

The majority states that Davis is in a special category because few other aggravated murder defendants had prior murder or manslaughter convictions. Majority at 62. But nearly one-half of all defendants with prior murder or manslaughter convictions were sentenced to life in prison.¹³ Furthermore, it seems to me that the significance of a prior murder or manslaughter conviction rests largely on the fact that the defendant has taken more than one life. Accordingly, we should also consider defendants who committed the aggravated murder of two or more victims. Of 92 death-eligible defendants who committed aggravated murder involving two or more victims, 75 received life sentences¹⁴ and only 17 were

Rasmussen); TR 252 (Roy Webbe).

¹³Twelve defendants had prior murder or manslaughter convictions. Five, all with prior murder convictions, were sentenced to life imprisonment. TR 23 (Robert Hughes); TR 38 (Charles Harris); TR 44 (Dennis Williams); TR 48 (Christopher St. Pierre); TR 191 (Dennis Smith). Seven were sentenced to death. TR 29 (Benjamin Harris); TR 47 (Brian Lord); TR 119 (Jonathan Gentry); TR 154 (Charles Finch); TR 176 (Michael Roberts); TR 183 (James Elledge); TR 251 (Robert Yates Jr.).

¹⁴TR 4 (Jimmy Ramil); TR 5 (Pompeyo Guloy); TR 10 (Steven Carey); TR 12 (Gregory Brown); TR 14 (Benjamin Ng); TR 16 (William Kincaid); TR 20 (William Martin); TR 22 (Fortunato Dictado); TR 37 (Robert Strandy); TR 42 (Kenneth Petersen); TR 50 (Sean Stevenson); TR 53 (James Thompson); TR 59 (Thomas Baja); TR 61 (Russell McNeil); TR 68 (Darrin Hutchinson); TR 69 (Lawrence Sullens); TR 70 (Herbert Rice); TR 81 (Martin Sanders); TR 84 (Shawn Dee Reite); TR 86 (Rick Peerson); TR 95 (Kenneth Schrader); TR 96 (Gregory Fish); TR 97 (James Fountain); TR 99 (Stanley Runion); TR 101 (Miniviluz Macas); TR 107 (David Simmons); TR 108 (Henry Dailey Jr.); TR 128 (Tommy Metcalf); TR 130 (Cherno Camara); TR 146 (Martin Bulichi); TR 148 (Troy Oakes); TR 152 (Steven McCord); TR 157 (Vincent Sherrill); TR 161 (Nga Ngoeung); TR 162 (Anthony Sammons); TR 167 (Jack Spillman, III); TR 168 (Scott Pierce); TR 172 (James Thomas); TR 174 (Timothy Blackwell); TR 182 (Joey Ellis); TR 185 (Robert Parker); TR 186 (Gerald Davis); TR 187 (Derrick Jones); TR 190 (Sean Jones); TR 198 (Joseph Schuler II); TR 199 (Eric Krueger); TR 203 (Marvin Francisco); TR 210 (Cheyenne Brown); TR 211 (Dennis Anfinson); TR 213 (Richard Morgan); TR 218 (Billy Neal Jr.); TR 219 (Billy Neal Sr.); TR 232 (Kenneth Leuluaialii); TR 234 (Kenneth Ford); TR

sentenced to death.¹⁵

The final factor, Davis’s personal history, revealed a difficult childhood, low intelligence, and personality disorders. It is virtually impossible to compare mitigating factors among all “similar cases,” as that term is defined by statute, because a defendant does not present mitigating factors unless a special sentencing proceeding¹⁶ occurs. Therefore, cases where the death penalty was not sought are effectively excluded from our comparison of this factor. The phrasing of the report of the trial judge form adds further difficulty because it allows the trial judge’s opinion to affect the number of mitigating circumstances included in the report. The form asks: “Was there, *in the court’s opinion, credible evidence* of any mitigating circumstances as provided in Laws of 1981, ch. 138, § 7?” (Emphasis added.) Davis’s second trial report illustrates the problem this phrasing can cause. The

238 (Michael Thornton); TR 240 (Kimonti Carter); TR 247 (Jimmee Chea); TR 256 (Kevin Cruz); TR 264 (Robert Anderson); TR 265 (Gary Ridgway); TR 272 (Herbert Riggins); TR 273 (Nellish Phadnis); TR 275 (Richard Prather); TR 276 (Mitchell Amell); TR 278 (Melvin Johnson); TR 279 (Brandon Martin); TR 280 (Ulysses Handy III); TR 282 (John Morimoto); TR 287 (Brian Matsen); TR 291 (Bryan Kim); TR 296 (Darrell Jackson); TR 297 (Tyreek Smith); TR 299 (Sarooun Phai); TR 300 (Areewa Saray); TR 302 (Charles Nettlebeck).

¹⁵TR 7 (Mitchell Rupe); TR 9 (Charles Campbell); TR 13 (Kwan Mak); TR 15 (Patrick Jeffries); TR 39 (Clark Hazen); TR 43 (David Rice); TR 75 (Gary Benn); TR 76 (Westley Dodd); TR 132 (Blake Pirtle); TR 144 (Darold Stenson); TR 154 (Charles Finch); TR 160 (Jeremy Sagastegui); TR 177 (Dwayne Woods); TR 220 (Dayva Cross); TR 251 (Robert Yates, Jr.); TR 132 (Blake Pirtle); TR 303 (Conner Schierman).

¹⁶A special sentencing proceeding is the statutory name for a proceeding in which the death penalty is sought. RCW 10.95.050. If the prosecutor does not pursue death, no special sentencing proceeding occurs.

judge indicated that no mitigating evidence whatsoever was presented. TR 281, at 7-8. In fact, four experts testified to Davis's low intelligence and personality disorders, and the jury was instructed on two statutory mitigating factors. Clerk's Papers at 1165 (Instruction 6); Report of Proceedings (May 15, 2007) at 3490.¹⁷ Therefore, Davis's trial report seems to reflect the trial judge's assessment of the credibility of the mitigating evidence rather than what the jury actually heard.

If we do compare mitigating circumstances, notwithstanding the methodological problems mentioned, the trial reports reveal that while 36 defendants who presented evidence of two or fewer mitigating factors were sentenced to life in prison,¹⁸ 26 such defendants, other than Davis, were sentenced to death.¹⁹ Of those sentenced to death, three requested or did not oppose the death

¹⁷The jury was instructed to consider the statutory mitigating factors of “[w]hether the murder was committed while the defendant was under the influence of extreme mental disturbance” and “[w]hether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental defect or disease.”

¹⁸TR 2 (Arnold Brown); TR 23 (Robert Hughes); TR 25 (James Daugherty); TR 34 (Paul St. Pierre); TR 36 (Bradley Bushey); TR 42 (Kenneth Petersen); TR 44 (Dennis Williams); TR 45 (James Dykgraaf); TR 48 (Christopher St. Pierre); TR 51 (David Jirovec); TR 53 (James Thompson); TR 56 (Daniel Yates); TR 58 (Gene Kane); TR 62 (Thomas Kron); TR 63 (Leslie McVay); TR 66 (James Elgren); TR 70 (Herbert Rice); TR 86 (Rick Peerson); TR 88 (Ray Lewis); TR 92 (Marc Darrah); TR 93 (Timothy Caffrey); TR 95 (Kenneth Schrader); TR 100 (Michael Hightower); TR 157 (Vincent Sherrill); TR 158 (Roderick Selwyn); TR 164 (Steven Morgan); TR 167 (Jack Spillman III); TR 174 (Timothy Blackwell); TR 182 (Joey Ellis); TR 184 (Guy Rasmussen); TR 185 (Robert Parker); TR 186 (Gerald Davis); TR 197 (Joseph Revay); TR 224 (Nicolas Vasquez); TR 227 (Brodie Waldradt); TR 256 (Kevin Cruz).

¹⁹TR 3 (Dwayne Bartholomew); TR 9 (Charles Campbell); TR 13 (Kwan Mak); TR 15 (Patrick Jeffries); TR 29 (Benjamin Harris); TR 39 (Clark Hazen); TR 43 (David Rice); TR 47

penalty.² Therefore, to the limited extent we can meaningfully compare mitigating factors, we can again conclude that even where aggravated murder defendants present little mitigating evidence, they are more likely to be sentenced to life than to death.

To summarize, over three times as many defendants received life sentences for aggravated murders involving sexual assault as were sentenced to death. The disparity in favor of life sentences increases to more than four-to-one when we consider cases where rape was found to be an aggravating factor. If we eliminate defendants with no criminal history, persons convicted of aggravated murder involving sexual assault were still almost two and one-half times more likely to be sentenced to life in prison than sentenced to death.

Certainly, our proportionality review is not merely a statistical task. *See* majority at 59. Anecdotally, we could also conclude that aggravated murderers whose crimes and histories are comparable to Davis's have received life sentences. For example, Gerald Davis tied up, raped, beat, and stabbed a 77-year-old woman

(Brian Lord); TR 73 (Michael Furman) TR 75 (Gary Benn); TR 76 (Westley Dodd); TR 119 (Jonathan Gentry); TR 125 (James Brett); TR 132 (Blake Pirtle); TR 140 (Cal Brown); TR 144 (Darold Stenson); TR 154 (Charles Finch); TR 160 (Jeremy Sagastegui); TR 165 (Clark Elmore); TR 175 (Richard Clark); TR 177 (Dwayne Woods); TR 181 (Henry Marshall III); TR 183 (James Elledge); TR 194 (Covell Thomas); TR 216 (Allen Gregory); TR 251 (Robert Yates Jr.).

²TR 76 (Westley Dodd); TR 160 (Jeremy Sagastegui); TR 177 (Dwayne Woods).

and tied up, bludgeoned, and suffocated a 91-year-old. TR 186. He committed this crime just four days after Cecil Davis raped and murdered Yoshiko Couch. *Id.* Gerald Davis was 36 years old, a year younger than Cecil Davis, at the time of Couch's murder. *Id.* Like Cecil Davis, Gerald Davis had a low intelligence quotient of 77, and at trial, he presented mitigating evidence of an abusive, troubled childhood. *Id.* He was sentenced to life in prison. *Id.* Certainly, small differences can be found between Cecil Davis's and Gerald Davis's cases. But without invading the jury's role, it is hard to fathom why Cecil Davis was sentenced to death while Gerald Davis was sentenced to life imprisonment.

Or take Martin Sanders, who raped and strangled two 14-year-old girls, one of whom he also severely beat with a tire jack. TR 81. He was age 30 or 31 when he committed the crime and had a criminal history of kidnapping, assault, and sexual intercourse without consent. *Id.* There was evidence that Sanders had poor scholastic performance and a difficult upbringing, but he was found competent to stand trial. *Id.* On a plea bargain, he was sentenced to life in prison. *Id.*

Faced with these statistical and anecdotal comparisons, I cannot vote to affirm Davis's death sentence with assurance that the death penalty has been imposed generally in other similar cases throughout the state. *See Harris*, 106

Wn.2d at 798. Rather, Davis's case illustrates the randomness that plagues our system. While perfect consistency in deciding who is sentenced to death may not be attainable, our statutes do not permit the crime and the defendant to become meaningless as predictors of the sentence imposed. Yet this has, in fact, occurred: the nature of Davis's crime, his prior convictions, the aggravating factors found applicable, and his personal history do not reveal why he was sentenced to die.

The majority suggests that our death penalty system is proportional because death and life sentences can be explained by factors beyond the crime and the defendant, such as the strength of the State's case, the wishes of the victim's family, or facts known to the defendant about other, unsolved cases. In concluding that these factors make the death penalty proportional, the majority again ignores the language of RCW 10.95.130(2)(b), mistaking the question of whether a sentence is appropriate in an individual case for whether the sentence is generally imposed in similar cases. But the statute requires us to analyze the death penalty, a punishment unique in its severity and irrevocability, on a system-wide level.

When one takes the broad, statutorily directed perspective, factors that appear rational at an individual level become irrational. For example, the majority states that Martin Sanders's life sentence is due, in part, to the recommendation of one of

the victim's parents and the fact that Sanders agreed to talk with authorities about an unsolved murder. Majority at 67-68 (citing TR 81). These are rational considerations when viewing Sanders's case alone. But when viewed as part of a system of deciding who dies and who lives, the same factors create irrational, perverse results. A murderer is more likely to escape death if he has concealed the details of an unsolved crime or fortuitously picked a victim whose family opposes the death penalty.

Other, impermissible factors may play an even greater role in whether the death penalty is imposed. While it is not yet clear that a causal relationship exists, I am troubled that since this court upheld Davis's first death sentence as proportional in 2000, the only counties where death sentences have been imposed are King and Pierce.²¹ This fact raises the possibility that the county in which a crime is committed, rather than the crime or the defendant, may determine who receives the death penalty. While neither our trial reports nor the record in Davis's case confirms that the death penalty's imposition is based on geographical fortuity, we should carefully watch this trend in future cases.

It is not an answer to pretend that the unique factors of each case tie our

²¹TR 194 (Covell Thomas, Pierce County); TR 216 (Allen Gregory, Pierce County); TR 220 (Dayva Cross, King County); TR 251 (Robert Yates Jr., Pierce County); TR 303 (Conner Schierman, King County).

hands, making us impotent to perform our statutory duty because no truly “similar” cases exist. Certainly, crimes ““cannot be matched up like so many points on a graph.”” Majority at 64 (quoting *Benn*, 120 Wn.2d at 680 (quoting *Lord*, 117 Wn.2d at 910)). The fact that each aggravated murder case is not identical need not reduce our statutory inquiry to a meaningless exercise. We can, and must, evaluate the system as a whole.

When I look at the true statutory pool, I cannot escape the truth about Washington’s death penalty. One could better predict whether the death penalty will be imposed on Washington’s most brutal murderers by flipping a coin than by evaluating the crime and the defendant. Our system of imposing the death penalty defies rationality, and our proportionality review has become an “empty ritual.” *Benn*, 120 Wn.2d at 709 (Utter, J., dissenting). I cannot agree that Davis’s sentence is not excessive or disproportionate to the sentences imposed in similar cases. I therefore dissent.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Debra L. Stephens
