ARTICLES

A State Supreme Court in Transition

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I. INTRODUCTION

While many scholars have studied the makeup and personalities of the United States Supreme Court at points throughout history, there have been no such comprehensive studies of the Washington Supreme Court. The only major publication about the court's activity is the annual compilation of caseload statistics from the Office of Administrator for the Courts.[1] Apart from an occasional article in *The Washington State Bar News* discussing major decisions during a term, this field of legal scholarship is virtually barren.[2]

This article presents a statistical snapshot of voting patterns within the court at the turn of the century and then explores how the changing makeup of the court may affect substantive areas of the law. The Washington Supreme Court is in a state of transition; following the November 2000 elections, only Justice Smith has served more than

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1. WASHINGTON STATE OFFICE OF ADMINISTRATOR FOR THE COURTS, CASELOADS OF THE COURTS OF WASHINGTON (2000) (published annually), *available at* http://www.courts.wa.gov/caseload/supreme/home00.cfm (last visited April 13, 2002) [hereinafter CASELOADS].

2. There is one study of Washington Supreme Court voting over the ten-year period of 1986-96. It is, however, limited to state constitutional criminal cases. *See* Laura L. Silva, *State Constitutional Criminal Adjudication in Washington Since* State v. Gunwall: *"Articulable, Reasonable and Reasoned" Approach?*, 60 ALB. L. REV. 1871 (1997).

ten years on the high court. Four of the nine justices are serving their first terms. By looking at the opinions and voting records of both the remaining and departing members of the court, we can make some generalizations about the disposition of individual justices and even blocs of justices. Analysis of the same data in a particular area of law may also enable one to predict about future developments as well.

The Article begins with a brief discussion on its methodology. Part III of the Article presents the statistics themselves with a brief commentary. Part IV provides an analysis of the court, focusing on voting patterns and particular types of issues that might be affected by a changing court. This is done by examining seven criminal law cases from the court during the term studied and one case from the succeeding court.

II. METHODOLOGY

Because justices of the Washington Supreme Court are elected, how a newly elected member participates is a natural point to begin compiling statistics. Justice Ireland joined the court in November 1998. The first opinion she participated in was *State v. Bencivenga*,[3] decided on April 15, 1999, setting the starting point of the study. The statistics end with the change of the court following the November 2000 elections. Although a few opinions are still being published in which departing Justices Guy and Talmadge participated, we set a general cutoff point at the end of *Washington Reports, Second Series*, volume 143. Early in the study, the membership of the court altered again when Chief Justice Durham resigned, and Governor Locke appointed Justice Bridge to fill the vacancy. Because of this, the sampling for those two justices is smaller than for the others.

During the study period, the court issued 234 written opinions. Each opinion was analyzed to determine several facts. The first was which lower appellate court's opinion was under review in order to determine possible variances among the justices, based on geographical divisions. The second datum recorded was who wrote the majority, concurring, and dissenting opinions. The third was how each justice voted. From that information, we created a matrix of alignment. A small amount of judgment was used in evaluating certain concurring opinions to determine whether they expressed full agreement or partial agreement with the majority view. If, for example, the concurring opinion stated agreement with the majority and the justice wrote it solely to reply to a dissenting justice, that concurring opinion and the

3. 137 Wash. 2d 703, 974 P.2d 832 (1999). Because of its arguable significance, *State v. Demery*, 144 Wash. 2d 753, 30 P.3d 1278 (2001), was also included.

justices signing onto it were treated as signing onto the majority opinion. By contrast, if the concurring opinion agreed with the result of the majority opinion but disagreed with its rationale, the opinion and those signing onto it were treated as having truly concurred. For purposes of alignment, opinions that concurred in part and dissented in part were generally treated as disagreeing with both the majority and dissenting opinions.

In analyzing treatment of lower court decisions by geographical area, only court of appeals decisions were included. That is, this study looked at whether the supreme court was more likely to affirm or reverse any particular division of the court of appeals. Cases emanating from a geographical area on direct review from the trial court were treated separately.

One type of case merits special mention: the Personal Restraint Petition (PRP). According to the Washington Supreme Court's published caseloads for 2000, PRPs make up almost half of the court's new cases.[4] Most are not decided with published opinions, but some are. During this study, almost sixty published opinions responded to PRPs. For purposes of this study, they were treated as other decisions (classified by appellate division or direct review and evaluated with respect to treatment).

III. THE STATISTICS

A. Supreme Court's Relationship to Court of Appeals

1. Does the Court Have a Geographical Bias in Its Disposition of Appeals?

Since the November 2000 elections left no member of the court from Eastern Washington, one question is whether the court's disposition of appeals shows any geographical biases. During the time of this article's study, the court's makeup was skewed to the west as well; only Justice Guy was from Division III. Five justices were from Division I (all from King County), and one additional justice, Madsen, had worked and lived in King County until she joined the supreme court and presumably moved to Division II to be closer to her place of employment. Two members of the court, Johnson and Alexander, are from Division II.

4. CASELOADS, *supra* note 1, at 2, *available at* http://www.courts.wa.gov/caseload/supreme/ann/2000/atbls00.pdf (last visited March 29, 2002).

Nevertheless, the study results show no significant bias toward any division, least of all toward Division I.[5] One hundred sixty-six opinions came to the supreme court through the court of appeals. An additional fifty-three opinions were for cases on direct review. Of the cases from the court of appeals, seventy-two came from Division I (43%), sixty-two came from Division II (37%), and thirty-two came from Division III (19%).[6] The decisions were classified into the following three categories: (1) decisions affirming the lower court; (2) decisions reversing the lower court; and (3) decisions affirming the lower court in part and reversing it in part.

The numbers for all divisions show that the supreme court affirmed the court of appeals seventy-seven times (46%), reversed it seventy times (42%), and reversed it in part and affirmed it in part nineteen times (11%). Thus, by our methodology, the supreme court reversed the court of appeals to at least some degree over 53% of the time. As low as these numbers seem, the court of appeals fared much better on review than the lower courts subject to direct review. There were fifty-three cases in the study that went through direct review. Of those, nineteen (36%) were affirmed, nineteen were reversed (36%), and fifteen (28%) were affirmed in part and reversed in part. That adds up to 64% of the cases on direct review being reversed to some extent.

Within the geographical divisions, Divisions II and III actually had the highest approval rating. Of these two, Division II had the highest percentage of affirmed decisions. Of the sixty-two cases reviewed, thirty (48%) were affirmed; twenty-eight (45%) were reversed; and four (6%) were affirmed in part and reversed in part. Although Division II had a higher percentage of affirmed decisions, the latter two numbers result in a higher percentage of reversed decisions in Division II than Division III. Of the thirty-two Division III cases reviewed, fifteen (47%) were affirmed, the same number and percentage were reversed (47%), and two (6%) were affirmed in part and reversed in part. That results in 53% of the division's reviewed cases being reversed in some part.

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5. *See infra* App. B (Table 1).

6. CASELOADS, *supra* note 1, does not compile data on appeals to the Supreme Court by appellate division. It does, however, contain the number of opinions issued by each division during a calendar year. In 2000, Division I issued 917 opinions, *id.* at 9; Division II issued 551 opinions, *id.* at 10; and Division III issued 406 opinions, *id.* at 11. These numbers figure out to 43%, 29%, and 22% respectively. On the one hand, one might argue that the lower proportional review of Division I evidences a geographical bias. This is because failure to review an intermediate court decision effectively of affirms it. On the other hand, the percentages of the Supreme Court's actual reversal support an argument that this particular data may be more the result of coincidence than geographical bias.

Although Division I actually had the lowest percentage of cases reversed in their entirety, it also had the lowest percentage of affirmed decisions. Of the seventy-two decisions reviewed by the supreme court, thirty-two (44%) were affirmed, twenty-seven (37%) were reversed, and thirteen cases (18%) were affirmed in part and reversed in part. The forty cases reversed in some respect total the highest percentage of reversal (62%) of the appellate divisions.

The variation between the percentages of affirmation by the supreme court are minimal. However, it does appear that, at least for the term of the study, there was no geographical bias in favor of the region from which most of the court's members came. It also appears that the supreme court is more likely to affirm a decision by its appellate colleagues than one on direct review.

2. How Frequently Does the Supreme Court Reverse Lower Court Rulings?

Initially, the high reversal rate indicated by these numbers and percentages is somewhat striking. One hopes that the law itself had a certain amount of clarity to it. One further hopes that appellate judges (at whatever level) would interpret the law similarly, bound by the same precedents. That the supreme court affirms in full less than 50% of court of appeals decisions is surprising at first glance. However, it is probable that those lower court cases likely to be affirmed are denied a discretionary review by the supreme court. If the law is settled and was applied correctly by the appellate court, there is no need to hear the case, much less write an opinion that reads essentially the same as the lower court's. If the court of appeals decision was published, the precedent is already set. That being so, the supreme court need not bind itself as well. The supreme court should only exercise its discretionary review when the law is unclear or contradictory. In such cases, disagreements among appellate jurists is likely.

B. Which Justices Are Most Often in the Majority?

Table 2[7] contains statistics on the number of times each justice voted with the majority. For this study, voting with the majority could be done in either of the following: (1) writing or signing onto the majority opinion; or (2) writing or signing onto a concurring opinion. One justice stands out as being on the majority side more than any other. Justice Smith was on the majority 216 times out of the 228 opinions he participated in, almost 95% of the time. Second was Jus-

7. *See infra* App. B.

tice Bridge at almost 90%, followed by Justice Guy at 88%, and Justices Ireland and Durham at 87%. Of course, none of this indicates who are the leaders or the followers among this group. However, certain justices are clearly not followers. Justice Sanders agreed with the majority only 71% of the time, and Justice Johnson agreed with only just over 80% of the majority opinions.

1. How Often Do the Justices Write Opinions?

During the study period, the court published 234 opinions. Of these, seventy-eight (exactly one-third) were unanimous and four were issued per curiam.

a. Majority Opinions

Table 2 shows the number of majority opinions written by each justice. With one exception, each member wrote about the same number of majority opinions. Those sitting on the court for the duration of the study wrote between twenty-two and twenty-nine majority opinions. The one exception was Justice Madsen, who wrote thirty-six majority opinions. When one considers the number of times Justice Madsen signed onto majority opinions, it accentuates this difference. Of those one hundred seventy opinions, Justice Madsen wrote thirty-six, or 21% of the majority opinions with which she agreed. In contrast, Justices Alexander, Talmadge, and Johnson wrote just over 16%.

Unfortunately, these are merely numbers and do not explain the reasons for the disparity. Several possible explanations that may account for this disparity, either singularly or combined, are listed below:

1. One justice may volunteer to write the opinion more than the others.

2. A justice may be considered to have expertise in an area like criminal law where there might be more (and shorter) opinions to write. This explanation seems plausible, given that Justice Madsen served as both a prosecutor and a defender. Furthermore, her experience as a Seattle Municipal Court judge likely exposed her to a heavier and more varied caseload than the other justices.

3. Other justices may have administrative assignments that place demands on their time. This is likely true of Chief Justice

Guy, who had one of the lowest opinion writing percentages at 11%.

4. A justice may be more particular about what an opinion contains or excludes, so other justices may let her write the opinion rather than modify theirs. This could also be Justice Madsen's case in that she concurred without opinion six times during the study period (apparently dissatisfied enough with the majority opinion not to sign it, but not enough to write separately).

5. A justice may have antagonized one or more justices, and the writing assignment is punitive.

6. The higher percentage may simply be random.

There are other possibilities in addition to these speculations. However, until the justices speak on the issue, one cannot be certain. Perhaps, the justices would not all agree on the explanation anyway.

b. Concurring Opinions

Concurring opinions, writes one federal court of appeals judge, are written for more subtle reasons than dissents: "Though certainly not as threatening as dissents, concurrences raise more collegial eyebrows, for in writing separately on a matter where the judge thinks the majority got the result right, she may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way."[8]

As in most courts, concurring opinions are infrequent in Washington Supreme Court decisions. Of the 234 decisions during the time of the study, only forty-seven had concurring opinions, and on more than one occasion, two different concurring opinions were written in the same case.

What is most striking about these statistics is the lack of balance in the use of concurrences. In the 228 decisions in which he participated, Justice Smith neither wrote nor signed onto a concurring opinion.[9] Similarly, Justice Guy participated minimally in concurring

8. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1413 (1995).

9. Perhaps the explanation offered by Learned Hand in Gerald Gunther's biography applies to Justice Smith as well. Hand accepted his colleague's opinions "as they came unless there was some clear statement of law such as I could not join in. [I] seldom find another opinion

opinions, writing only one and signing onto three others in 227 decisions. In contrast, Justice Talmadge wrote nineteen concurrences, followed by Justices Alexander and Madsen with ten and eight concurring opinions respectively. The other justices rarely wrote concurring opinions and occasionally signed onto a colleague's concurrence. The newest justices, Ireland and Bridge, appeared reticent to use concurrences (Ireland wrote one and signed onto none; Bridge wrote none and signed onto three). The latter phenomenon seems logical in that the new members would try to establish a collegial relationship with the other members before fully exercising their speech (at least in written form). Thus, it appears that the most and least experienced members of the high court were least likely to concur, perhaps for different reasons.

Four of the justices also concurred without opinion at times (Madsen ten times, Sanders twice, Johnson once, and Talmadge once, who actually concurred with the dissent without opinion). This odd notation indicates significant enough disagreement with the majority opinion that the justice will not sign onto it. Yet, the disagreement is insufficient to merit comment. Again, this form was not used by either the most or least experienced members of the court.

c. Dissenting Opinions

The need for a dissenting opinion is much more straightforward than that of a concurring opinion. When a justice disagrees with the result, the justice dissents and must, therefore, give some rationale. If a justice is the lone dissenting voice, he or she must author the dissenting opinion.

As we expect from his statistics on voting with the majority, Justice Sanders, who voted with the majority least often, wrote the most dissenting opinions. Of the sixty-six times he dissented, Justice Sanders wrote an opinion forty-two times. Yet, Justice Johnson, who dissented second most often (forty-four times), authored only twelve opinions. In contrast, Justice Talmadge wrote thirty-two dissenting opinions while dissenting thirty-nine times. One might surmise that, when Talmadge disagreed, he wanted to state precisely why. His relatively high number of concurring opinions supports this speculation.

Other justices seem to take the opposite approach. For example, Justice Bridge dissented eleven times, but never authored a dissenting

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which [*sic*] says the thing as I should have." GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 298 (1994).

opinion.[10] Similarly, Justice Smith voted with the dissent twelve times and authored only one dissenting opinion, which was only a single paragraph.[11] One explanation for some justices' disinterest in writing dissents is that they may believe that, since the dissenting opinion does not establish precedent, its rationale is not as important as the fact that the justice does not side with the majority.

Opinions concurring in part and dissenting in part were infrequent. While only Justices Smith and Bridge never signed onto such opinions, only five justices wrote them. Justice Madsen wrote six concur/dissents, Justice Alexander five, Justices Sanders and Talmadge each wrote three, and Justice Johnson wrote one. For purposes of this study, we treated these opinions as disagreeing with both the majority and dissenting opinions.

2. Are There Voting Blocs Within the Court? Are There "Swing" Justices?

Tables 3A through 3J[12] contain statistics on the voting alignment of the justices. Because of the personnel change from Justice Durham to Justice Bridge during the term, the sampling for those two is smaller and may be less reliable. Alignments ranged from nearly 95% agreement to a low of just below 55% (agreement in this context is agreement in result rather than with the opinion).

The highest percentage of alignment (94.5%) was between Justices Durham and Ireland. It is followed by that between Justices Guy and Bridge (90.5%), and Durham and Talmadge (90%). These pairings were followed by Justices Talmadge and Bridge (89%), and Justices Talmadge and Ireland (88%).

The five lowest percentages of alignment all involve Justice Sanders. His percentage of agreement with Justice Durham was 54.5% and was 55% with Justice Talmadge. Those were followed by his percentage of agreement with Justice Guy (61%) and Justices Ireland and

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10. As mentioned in the text, a possible explanation for Justice Bridge's limited number of dissenting opinions is her recent appointment to the bench. There is evidence that, during a justice's early days on the court, he or she tends to agree with others, even if in dissent. The reason is probably the desire to be collegial and foster positive relations with the other justices. For example, this study began with Justice Ireland's first term on the court. Although during the course of the study term she wrote nine dissenting opinions, she wrote nearly all of them after her first year on the court (Vol. 137 = 0; Vol. 138 = 0; Vol. 139 = 2; Vol. 140 = 0; Vol. 141 = 6; Vol. 142 = 1).

11. Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 995 P.2d 35 (2000). Essentially, Smith's opinion says that the other dissenting opinion (twenty-eight pages in *Washington Reports*) by Justice Sanders is too expansive for Justice Smith to sign onto. *Id.* at 200, 995 P.2d at 95.

12. *See infra* Appendix B.

Bridge (63.5% and 64.5% respectively). Following the Sanders percentages, the lowest levels of agreement were between Justices Durham and Johnson (66%), followed by Justices Durham and Madsen (66.5%), Justices Alexander and Talmadge (67%), and Justices Johnson and Bridge (67.5%).

There are some intriguing observations we can make from these numbers. First, although Justice Smith was in the majority more than any other justice, his percentage of alignment with any particular justice was not especially high. His percentages ranged from 84% (with five different justices) to 72.5% (with Justice Sanders). Second, in evaluating Justice Sanders' high percentages, he aligns with Justices Johnson and Alexander (both at 80%). Justices Johnson and Alexander agree with each other at a relatively high 85.5% rate.

This evidence may indicate that there is a cohesive group of justices that includes or included Justices Durham, Guy, Talmadge, Ireland, and Bridge. That group of five, however, is essentially a group of four, given that Justice Bridge replaced Justice Durham. The lowest level of agreement within this group is 86% (Guy and Talmadge). There is another group of justices that is less cohesive, including Justices Johnson, Alexander, and at its fringe, Sanders. These three all have a relatively high alignment with each other and a relatively low alignment with the above group.

Finally, Justices Smith and Madsen appear to be swing votes. Neither justice has a particularly high alignment with either group of justices. That Justice Smith is a swing vote is supported by the fact that he is in the majority most often. His vote, when added to the first group, makes that the majority position. The theory of Justice Madsen as a swing vote may explain the high percentage of majority opinions she authored. Being the vote that the plurality needs to make it a majority, she may be able to bargain certain items into the opinion. At that point, the plurality may agree but have her write the opinion to her satisfaction. The swing vote theory may also explain why Justice Madsen concurs at the level that she does and does so at times without opinion.

If the above is true, there may be changing times ahead for the court. Two of the plurality group have retired and were replaced during the most recent election. If either of the new justices does not join that group, the balance may shift. That has yet to be seen.

Of course, none of the above suggests that any justice votes strictly according to some all-encompassing philosophical agreement with certain others on the court. It does suggest, however, that there may be patterns; and that these patterns may be more prevalent in

particular types of cases. We will explore that possibility more fully in the next section.

IV. ANALYSIS

A. A Case Study of Seven Criminal Law Cases

An examination of twenty-two closely divided criminal law decisions confirms the general patterns noted above.[13] The examination also suggests that when two justices from the plurality group retire, and Justices Chambers and Owens replace them, this replacement may impact the law in this area. In these twenty-two cases, Justices Bridge (16-0) and Ireland (21-0) voted in favor of the government in every case in which they sat; and Chief Justice Guy (20-1) and Justice Talmadge (18-1) voted in favor of the government almost 95% of the time in the cases in which they sat. Only slightly less cohesive, a four-justice bloc almost always voted in favor of the defendant: Justice Sanders (22-0); Justice Johnson (21-1); Justice Madsen (17-5); and Chief Justice Alexander (17-5). The swing justice was Smith, who sided with the government twelve times and with the defendant ten times. Not surprisingly, the government prevailed on appeal in sixteen of these cases.

A careful reading of the cases confirms the hypothesis that the two blocs bring fundamentally different perspectives to the decision of these cases. Those perspectives were described more than a quarter century ago by Herbert Packer in his classic study of the criminal process: one believes that justice depends on enforcing law and order; the other, that it depends on observing due process.[14] An effective and

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13. Sixteen of the twenty-two were five to four, four were six to three, and two were five to three. The five to four cases are *State v. Demery*, 144 Wash. 2d 753, 30 P.3d 1278 (2001); *State v. Keller*, 143 Wash. 2d 267, 19 P.3d 1030 (2001); *In re Quackenbush*, 142 Wash. 2d 928, 16 P.3d 638 (2001); *State v. Cronin*, 142 Wash. 2d 568, 14 P.3d 752 (2000); *State v. Williams*, 142 Wash. 2d 17, 11 P.3d 714 (2000); *State v. Greiff*, 141 Wash. 2d 910, 10 P.3d 390 (2000); *State v. Bradley*, 141 Wash. 2d 731, 10 P.3d 358 (2000); *State v. Perez-Cervantes*, 141 Wash. 2d 468, 6 P.3d 1160 (2000); *State v. Anderson*, 141 Wash. 2d 357, 5 P.3d 1247 (2000); *State v. McCarty*, 140 Wash. 2d 420, 998 P.2d 296 (2000); *State v. Taylor*, 140 Wash. 2d 229, 996 P.2d 571 (2000); *State v. Cruz*, 139 Wash. 2d 186, 985 P.2d 384 (1999) (Kennedy, Justice Pro Tem joining in dissent); *State v. Brown*, 139 Wash. 2d 20, 983 P.2d 608 (1999); *State v. Bustamante-Davila*, 138 Wash. 2d 964, 983 P.2d 590 (1999); *State v. West*, 139 Wash. 2d 37, 983 P.2d 37 (1999); and *State v. Robinson*, 138 Wash. 2d 753, 982 P.2d 590 (1999). The six to three cases are *In re Becker*, 143 Wash. 2d 491, 20 P.3d 409 (2001) (Gross, Justice Pro Tem joining in majority); *State v. Atsbeha*, 142 Wash. 2d 904, 16 P.3d 626 (2001); *In re Meyer*, 142 Wash. 2d 608, 16 P.3d 563 (2001); and *State v. Roberts*, 142 Wash. 2d 471, 14 P.3d 713 (2001). The five to three cases are *In re Dyer*, 143 Wash. 2d 384, 20 P.3d 907 (2001); and *State v. Parker*, 139 Wash. 2d 486, 987 P.2d 73 (1999) (Dolliver, Justice Pro Tem joining in dissent).

14. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–73 (1968).

fair criminal justice system rests on a wise balancing of both these competing values, and it is thus not surprising that, in close cases, the court splits along these lines.

Seven cases clearly illustrate this tension. First, *State v. Anderson*[15] involves a recurrent problem in the criminal law: how should a court construe a criminal statute? More particularly, the issue was whether "knowing possession" is an element of unlawful possession of a firearm. The defendant, who had been stopped for a traffic violation, was arrested and searched when officers learned there was an outstanding warrant for his arrest.[16] In conducting a search incident to arrest, they found a handgun under the driver's seat and, since Anderson had a prior felony conviction, charged him with unlawful possession of a firearm.[17] At trial, Anderson claimed both the car and the gun belonged to his cousin, and that he did not know the gun was under the seat.[18]

The majority, per Justice Alexander, held that knowing possession was an element of the offense.[19] While conceding that the legislature may create strict liability crimes, the majority acknowledged that criminal offenses with no mental element are generally disfavored, especially where substantial punishment is imposed.[20]

Justice Ireland, writing for the minority, emphasized that the legislature had concluded that "'[s]tate efforts at reducing violence must include changes in criminal penalties, reducing the unlawful use of and access to firearms.'"[21] Thus, the legislature could reasonably conclude that strict liability was necessary and the statutory language was consistent with that intent. Finally, the dissent insisted that the majority's concern that innocent persons might be unfairly ensnared was "ameliorated by the availability of unwitting possession as an affirmative defense."[22] Concluding, Justice Ireland accused the majority of "rewrit[ing] a statute it deems unduly harsh."[23]

While *Anderson* represented a victory for the due process bloc, the crime control bloc prevailed in the remaining six cases, beginning with *State v. Bustamante-Davilla*.[24] Like *Anderson*, *Bustamante-Davilla* involved a recurrent problem that frequently divides the crime

15. *Anderson*, 141 Wash. 2d 357, 5 P.3d 1247.
16. *Id.* at 359, 5 P.3d at 1249.
17. *Id.*
18. *Id.*
19. *Id.* at 364, 5 P.3d at 1251.
20. *Id.* at 363, 5 P.3d at 1251.
21. *Id.* at 370, 5 P.3d at 1254 (citing 1994 Wash. Laws 7-101).
22. *Id.* at 371, 5 P.3d at 1255.
23. *Id.* at 373, 5 P.3d at 1255–56.
24. 138 Wash. 2d 964, 983 P.2d 590 (1999).

control and due process blocs: when may the police appropriately search a suspect and/or his home?[25] The police had gone to the defendant's home to arrest him under a removal order issued by an immigration judge.[26] When they arrived, they asked if they could enter the defendant's mobile home. He responded, "Yeah, come in."[27] When they did, they saw a rifle.[28] Knowing the defendant was a convicted felon and, therefore, prohibited from having a gun,[29] the officers arrested him and charged him with unlawful possession of a firearm.[30]

Complicating facts aside, the issue boiled down to this: was the ensuing search and seizure illegal because the officers did not advise the defendant that he could refuse entry? In the face of *State v. Ferrier*,[31] which construed the state constitution to require officers without a search warrant to follow a "knock and talk" process that ensures that the defendant gave informed consent,[32] the majority, per Justice Smith, found the search and seizure lawful. Relying on one factor—the education and intelligence of the defendant—of a three factor, totality of the circumstances test, the majority concluded that he gave an informed consent.[33] Those who place a premium on crime control are naturally loathe to let an obviously guilty person escape because the constable was not as punctilious as he might have been.[34]

The four dissenters, through Justice Alexander, were dismayed that the majority ignored the "letter and spirit"[35] of *Ferrier* and the defendant's compelling privacy interest in his home. Since, in their view, the officers had no right to enter the defendant's home, the trial court should have suppressed the weapon, though in plain view, and dismissed the charge: "The fact that the rifle was seized pursuant to the plain view exception to the warrant requirement avails the officers only if they had a right to be where they were when the contraband was viewed."[36] It is hardly surprising that the due process bloc would place a high premium on privacy and insist that the police respect it.[37]

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25. PACKER, *supra* note 14, at 199–200.

26. *Bustamante-Davilla*, 138 Wash. 2d at 967, 983 P.2d at 591.

27. *Id.* at 969, 983 P.2d at 592.

28. *Id.* at 969, 983 P.2d at 593.

29. *Id.* at 970, 983 P.2d at 593.

30. *Id.* at 969–70, 983 P.2d at 592–93.

31. 136 Wash. 2d 103, 960 P.2d 927 (1998).

32. *Id.* at 106, 960 P.2d at 928.

33. *Bustamante-Davilla*, 138 Wash. 2d at 981–82, 983 P.2d at 599.

34. PACKER, *supra* note 14, at 178. Under the crime control model, "[t]he one kind of sanction that should be completely inadmissible is . . . suppression of evidence." *Id.*

35. *Bustamante-Davilla*, 138 Wash. 2d at 984–85, 983 P.2d at 600.

36. *Id.* at 987, 983 P.2d at 601.

37. PACKER, *supra* note 14, at 180. Under the due process model, "any evidence that is obtained directly or indirectly [by the police] should be suppressed." *Id.*; *see also id.* at 196–97.

Protecting the community from sex offenders and career criminals is another area in which crime control and due process values clash. Two such cases sharply divided the court; and, in each, the crime control bloc prevailed. In *In re Meyer*,[38] Meyer, Erickson, and Sundstrom, three sex offenders, claimed that registration and community notification procedures violated their rights to due process. Basically, the petitioners argued that the protection of their liberty interests entitled them to a hearing before their risk level was determined and information about them distributed to the community.[39] Justice Talmadge, writing for a six person majority, disagreed, emphasizing by analogy to prisoner rights cases that the petitioners' liberty interests were circumscribed.[40] Moreover, he argued that "these statutes were not punitive and did not create an affirmative disability or restraint on sex offenders."[41] Talmadge was equally dismissive of the petitioners' assertion of privacy rights. Their interest in "avoiding stigma or protecting reputation . . . does not give rise to a liberty interest."[42] Further, the justices noted that the information is a matter of public record.[43] Moreover, they noted, as those concerned with crime control would, that the public has a substantial interest in knowing when "potentially dangerous individuals" are living in the neighborhood.[44]

Speaking once again through Justice Alexander, the three person minority insisted that fundamental fairness required a hearing, particularly in view of the largely untrammeled discretion of state officials to determine risk classifications and make disclosure decisions:

> When a government agency focuses its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic or belonging to a certain undesirable group, and that agency must by law gather and synthesize evidence outside the public record in making that determination, the interest of the person to be labeled goes beyond mere reputation. The interests cannot be captured in a single word or phrase. It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the secret machinations of a Star Chamber. Finally, and perhaps most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal

38. 142 Wash. 2d 608, 16 P.3d 563 (2001).
39. *Id.* at 611–12, 16 P.3d at 564–65.
40. *Id.* at 617, 16 P.3d at 567.
41. *Id.* at 619, 16 P.3d at 568.
42. *Id.* at 620, 16 P.3d at 569.
43. *Id.* at 621, 16 P.3d at 569.
44. *Id.* *See generally* PACKER, *supra* note 14, at 23–24, 253–56.

> and, perhaps, even physical harassment likely to follow from designation. In our view, that interest, when combined with the obvious reputational interest that is at stake, qualified as a "liberty" interest within the meaning of the Due Process Clause.[45]

The dissenting opinion thus reinforces the importance that the due process bloc attributes to ensuring fairness in the criminal justice system.[46]

Another criminal case, *State v. Keller*,[47] involved a defendant who was sentenced to life imprisonment under the Persistent Offender Accountability Act[48] (POAA, habitual offender statute, or "three strikes and you're out law" by other names) after having been convicted of vehicular assault and felony hit and run. In *Keller*, the majority, again speaking through Justice Smith, held that two prior felony convictions could be counted as two prior convictions under POAA although they previously counted as a single offense in calculating the defendant's offender score for purposes of sentencing.[49] Consequently, the defendant was now subject to life imprisonment under the three strikes law.

For the majority, the issue was simply one of statutory interpretation. Having been allowed to serve his sentences for the two prior convictions concurrently, the defendant argued they should be counted as only one offense because a prior statute had said that "for the purpose of computing the offender score, count all adult convictions served concurrently as one offense."[50] Thus, the court was faced with the challenge of interpreting the current statute in light of a prior statute. Invoking numerous variations on the plain and ordinary meaning rule, the court concluded that the phrase "cannot reasonably be interpreted to mean anything but what it says."[51]

Chief Justice Alexander, conceding that the defendant's crimes were substantial,[52] reached a different conclusion. First, he found the statute less clear than did the majority. He argued that the majority's focus on the legislature's intent is misplaced since the three strikes law

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45. *Id.* at 629–30, 16 P.3d at 573–74 (citing Noble v. Bd. of Parole & Post-Prison Supervision, 964 P.2d 990, 995–96 (Or. 1998)).

46. Professor Packer stresses that a commitment to equality, which embodies notions of fairness, is "[a]nother strand in the complex of attitudes underlying the Due Process Model . . . ." PACKER, supra note 14, at 168.

47. 143 Wash. 2d 267, 19 P.3d 1030 (2001)

48. Former WASH. REV. CODE § 9.94A.030(25), .360 (1995).

49. *Keller*, 143 Wash. 2d at 283, 19 P.3d at 1038.

50. *Id.* at 272, 19 P.3d at 1033 (citing former § 9.94A.360(6)(c)).

51. *Id.* at 277, 19 P.3d at 1035.

52. *Id.* at 283, 19 P.3d at 1039.

was a voter initiative and that it is very difficult to discern "any particular intent on the voters' part with respect to a 'three strikes' law."[53]

Second, the Chief Justice invoked the rule of lenity, which holds that criminal statutes setting out multiple or inconsistent punishments should be construed in favor of the more lenient punishment, a point he emphasizes once again at the end of the opinion:

> Particularly in light of the fact that a life sentence without the possibility of parole is at stake here, we should be free of doubt about the meaning of the statutes in question before we reject that argument. Because I am left with substantial doubt, I would resolve the ambiguity in favor of *Keller* per the rule of lenity.[54]

Prisoners' claims are another category of cases that often divide the crime control and due process blocs. In *In re Dyer*,[55] the prisoner petitioned the court to order prison officials to permit him to participate in the "extended family visit program." The program allows prisoners to enjoy conjugal visits in "a private visiting unit."[56] Under current regulations, the prison superintendent has discretion to deny inmates the opportunity of participating in the program if they "have a documented history of domestic violence."[57] Dyer did; and, when that was discovered, his participation was terminated.[58]

Justice Ireland, writing for a four person majority, concluded that neither the Constitution nor state law, *i.e.*, the applicable administrative regulations, created a protected liberty interest. Relying on the age old right/privilege distinction, Ireland found that participation in the extended family visit program fell into the latter category. In support of her conclusion, she cited RCW 72.09.470:

> To the greatest extent practical, all inmates shall contribute to the cost of privileges. The department shall establish standards by which inmates shall contribute a portion of the department's capital costs of providing privileges, including television cable access, extended family visitation, weight lifting, and other recreational sports equipment and supplies.[59]

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53. *Id.* at 287, 19 P.3d at 1040.
54. *Id* at 287–88, 19 P.3d at 1041.
55. 143 Wash. 2d 384, 20 P.3d 907 (2001).
56. *Id.* at 388, 20 P.3d at 909.
57. *Id.* at 398, 20 P.3d at 915 (citing Division of Prison Directive 590.100(V)(A)(10)).
58. *Id.* at 390, 20 P.3d at 910.
59. *Id.* at 393 n.10, 20 P.3d at 912 n.10 (citing WASH. REV. CODE § 72.09.470 (2001)) (citations omitted) (alteration in original).

She and the other members of the majority were also influenced by the perceived need to let prison officials manage the prisons: "It is not in the best interest of the courts to involve themselves in the 'day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. [C]ourts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.'"[60] Finding that the superintendent had not abused his discretion in view of Dyer's abuse of prior wives, the majority affirmed the lower court's denial of Dyer's petition.[61] Deference to administrative judgment is a characteristic of those who favor crime control.

The only member of the due process bloc who never cast a crime control vote in any of the twenty-three cases, Justice Sanders opened his dissent with the proclamation: "There is no iron curtain drawn between the Constitution and the prisons of this country."[62] Mincing no words, he blasted the five person majority:

> Notwithstanding the obvious nobility of a prison policy which assists inmates to maintain their marriages and family ties under such trying circumstances, the facts of this case illustrate the human tragedy and suffering imposed not only upon the inmate but his wife and small children when prison officials cease to practice the purpose which they have embraced in theory. Similarly, such travesty is not remitted by courts which fail to stand behind the legal rights of prisoners touting noninvolvement in the "'day-to-day management of prisons'" as superior to the discharge of their duty to protect the legal rights of every citizen, including those behind bars.[63]

Characterizing the record of Dyer's violence as "sparse and self-contradictory,"[64] Justice Sanders insisted that Dyer was entitled to some "opportunity to participate in a hearing . . . where contested facts could be determined, if only summarily and superficially."[65] Sanders reinforced the emotional appeal of his argument by quoting letters from Dyer's minor children pleading for the opportunity to see their father like "other families [do]."[66]

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60. *Id.* at 393, 20 P.3d at 912 (citing Sandin v. Conner, 515 U.S. 472, 482 (1995)).

61. *Id.* at 398–99, 20 P.3d at 914. *See generally* PACKER, *supra* note 14, at 158–63.

62. *Id.* at 399, 20 P.3d at 914 (citing Wolf v. McDonnell, 418 U.S. 539 (1974)).

63. *Id.* at 400–01, 20 P.3d at 915 (citing 143 Wash. 2d at 393, 20 P.3d at 912 (citing *Sandin*, 515 U.S. at 482)).

64. *Id.* at 401, 20 P.3d at 916.

65. *Id.*

66. *Id.* at 404, 20 P.3d at 917.

Responding to the majority's dismissal of any liberty interest, Justice Sanders found that Dyer's earlier participation in the program had become an ordinary incident of prison life,[67] and that the hardship of its administrative curtailment violated a liberty interest.[68] He also found the denial arbitrary and capricious.[69] Justices Alexander and Johnson joined in his concluding blast: "By allowing the arbitrary revocation of a regulatory entitlement from this prisoner and his family, the majority has walked away from its responsibility to protect the legal rights of these citizens and whitewashed a travesty of justice."[70] Suspicious of bureaucrats, devotees of due process are likely to find arbitrary behavior whenever they think that the official has acted unreasonably.[71]

State v. Cienfuegos[72] is especially interesting because one of the two new Justices, Justice Chambers, wrote for the crime control majority. The case involved a habitual drug addict who was charged with, and convicted of, first degree escape after he bolted from the custody of officers while returning to jail from the courthouse.[73] Shackled, he nevertheless managed to temporarily elude capture, but was soon found lying under a bush, his head sticking out.[74] Despite evidence at his subsequent trial, including expert testimony, that the defendant was in an irrational state of mind because he was going through withdrawal, defense counsel did not request an instruction on diminished capacity.[75]

Thus, one issue before the court was whether the failure to request a diminished capacity instruction amounted to ineffective assistance of counsel, a common claim in criminal appeals. Here, it was coupled with another: Cienfuegos also claimed that the jury panel did not fairly represent the ethnic makeup of the county, denying him a fair trial.[76]

The majority conceded that the defendant would have been entitled to a diminished capacity instruction had he asked for one.[77] Nevertheless, it found the error harmless:

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67. *Id.* at 406, 20 P.3d at 918.

68. Due process devotees view the taking of a person's liberty as "the heaviest deprivation that government can inflict on an individual." PACKER, *supra* note 14, at 165.

69. *Dyer*, 143 Wash. 2d at 408, 20 P.3d at 919.

70. *Id.* at 412, 20 P.3d at 921.

71. PACKER, *supra* note 14, at 163–65.

72. 144 Wash. 2d 222, 25 P.3d 1011 (2001).

73. *Id.* at 224–25, 25 P.3d at 1013.

74. *Id.* at 225, 25 P.3d at 1013.

75. *Id.* at 226, 25 P.3d at 1014.

76. *Id.*

77. *Id.* at 228, 25 P.3d at 1015.

> In closing both the prosecutor and defense counsel argued extensively about Cienfuegos's ability to have knowledge or form the requisite intent. From this instruction, the jury could have taken into account Cienfuegos's impairment. The diminished capacity instruction would have highlighted that fact and should have been given, but even without it defense counsel was able to argue his theory of the case. Cienfuegos has not met the *Strickland* requirement that his counsel's errors were so serious as to deprive him of a fair trial. Cienfuegos has failed to show that confidence in counsel to request the diminished capacity instruction. The jury's verdict has been undermined by the failure of his. Therefore, Cienfuegos has not shown that he received ineffective assistance of counsel in this case.[78]

The harmless error doctrine is frequently invoked by the devotees of crime control. They often point out that the defendant is only guaranteed a fair trial, not a perfect one.

On the second issue, the representativeness of the jury pool, the majority discounted the defendant's claim that he was denied information about the makeup of jury lists and simply asserted that "nowhere in our jurisprudence is it suggested a bare allegation that the jury list is not representative is sufficient to bring this issue into play."[79] In so doing, the majority was invoking a burden of proof doctrine and saying the defendant had not shown enough to establish a factual predicate for his claim. Interestingly, among the justices joining the five person majority was the other new justice, Justice Owens.

Once again, Chief Justice Alexander spoke for the "due process four." He insisted that the failure to request the instruction was essentially automatic error, citing *State v. Thomas*[80] for the proposition that failure of defense counsel to request a diminished capacity instruction, where the facts support the instruction, deprives the defendant of a fair trial and requires the case be retried.[81] He also reminded his colleagues in the majority that, in *State v. Griffin*,[82] they had said that "'[g]eneralized instructions on criminal intent are not sufficient to apprise a jury of mental disorders which may diminish a defendant's capacity to commit a crime.'"[83] Basically, the due process four could not understand how any defendant could be said to have had a fair

78. *Id* at 230, 25 P.3d at 1016.

79. *Id.* at 232, 25 P.3d at 1017.

80. 109 Wash. 2d 222, 743 P.2d 816 (1987).

81. *Cienfuegos*, 144 Wash. 2d at 233, 20 P.3d at 1017.

82. 100 Wash. 2d. 417, 670 P.2d 265 (1983).

83. *Cienfuegos*, 144 Wash. 2d at 235, 20 P.3d at 1018 (citing *Griffin*, 100 Wash. 2d at 420, 670 P.2d at 266)

trial when he was denied the opportunity to raise a defense to which he was entitled.

The final case, *State v. Demery*,[84] gave Justice Owens her first opportunity to write for the crime control bloc. The issue before the court was whether statements made by police officers during a taped interview accusing the suspect, who later became the defendant, of lying constituted impermissible opinion testimony.[85] The issue arose because the trial judge admitted over the defense counsel's objection a taped, post-arrest interview of the defendant, including the following colloquy:

> [Detective:] How have you been treated since you've been here?
>
> [Defendant:] I've been treated all right. . . . [Y]ou guys are lookin' at me . . . . like I'm lying.
>
> [Detective:] 'Cause you are.
>
> [Defendant:] Oh.[86]

The majority affirmed the defendant's conviction even though it conceded that "witnesses are not permitted to testify regarding the veracity of another witness because such testimony invades the province of the jury . . . ."[87] Moreover, the majority acknowledged that "[s]uch testimony from a law enforcement officer may be especially prejudiced."[88] In this case, however, the majority emphasized three counterbalancing considerations. One, the officers' statements did not carry "a special aura of reliability" because they were simply part of a "commonly used police interview technique."[89] Two, the comments were offered solely to provide the jury with a context within which to understand and evaluate the defendant's responses.[90] Third, somewhat surprisingly, the majority rejected the argument that the judge should have given a curative instruction admonishing the jurors not to take into account the police comments in determining his veracity.[91] Thus, the majority concluded that the police statements were not "impermissible opinion testimony."[92]

Predictably, Justice Sanders was outraged, stating: "The majority concludes a recorded expression of an officer's opinion that a suspect

84. 144 Wash. 2d 753, 30 P.3d 1278 (2001).
85. *Id.* at 754, 30 P.3d at 1280.
86. *Id.* at 756 n.2, 30 P.3d at 1280 n.2.
87. *Id.* at 764, 30 P.3d at 1285.
88. *Id.* at 765, 30 P.3d at 1285.
89. *Id.*
90. *Id.* at 764, 30 P.3d at 1284.
91. *Id.* at 762, 30 P.3d at 1283.
92. *Id.* at 765, 30 P.3d at 1285.

is lying is admissible at trial even though the same officer would not be permitted to offer such an opinion in live testimony. I see no distinction between the two."[93] Citing chapter and verse in support of his conclusion, Justice Sanders argued (1) that Washington's evidentiary rules plainly forbade the introduction of such evidence and (2) that Washington case law clearly supported the conclusion that the trial judge should have excluded it. Finally, Sanders characterized the majority's conclusion that a curative instruction was not needed "'because the jury clearly understood from the officers' testimony that the statements were offered solely to provide context . . . .'"[94] as incredible. According to Sanders, such a conclusion requires the abilities of a mind-reader. He conceded he lacked those abilities and expressed profound doubts that the majority enjoyed them. Thus, Sanders concluded: "There is no meaningful difference between permitting the jury to hear an officer directly call a defendant a liar in open court and permitting the jury to hear an officer call a defendant a liar on a tape recording."[95]

The usual due process justices, Chief Justice Alexander and Justices Johnson, Madsen, and Sanders disagreed *on the merits*.[96] So, too, interestingly, did Justice Chambers. His was nevertheless the minority opinion because the Chief Justice found the trial judge's error harmless.[97]

B. Evaluation and Conclusion

Each of these seven cases involved issues of major importance to the fair and effective administration of criminal justice in the courts of this state. On such questions, which are generally similar in importance to the issues raised in the other sixteen cases examined, the Washington Supreme Court appears to be narrowly divided. These cases dramatize three facts. First, all the justices favor a fair and effective criminal justice system. The crime control bloc may emphasize effectiveness more because they understand that the purpose of the criminal justice system is to ensure a safe and secure public order. The due process bloc may emphasize fairness more because they believe that the preservation of individual liberty requires the state to prove the defendant's guilt only by procedures that respect his liberty interests.

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93. *Id.* at 767, 30 P.3d at 1286.
94. *Id.* at 771, 30 P.3d at 1288.
95. *Id.* at 773, 30 P.3d at 1288–89.
96. *Id.* at 767, 30 P.3d at 1286.
97. *Id.* at 765–67, 30 P.3d at 1285–86 (Alexander, J., concurring).

Second, the blocs thus bring two different philosophical perspectives to their resolution of particular claims. The crime control bloc is more willing to defer to the expertise of those who operate the criminal justice system. The due process bloc, having less confidence in that expertise, often favors more fact finding hearings in order to make sure the "expert" judgment is in fact correct. The due process bloc is also more likely to focus on the rights of the defendant and define them more broadly while the crime control bloc is inclined to give greater weight to the safety interests of the community.

Last, the balance of power between the two blocs may shift in coming years. Justices Chambers and Owens may simply slip into the robes left by Chief Justice Guy and Justice Talmadge. As a result, the crime control bloc will continue to prevail more often than not, relying most often on Justice Smith or occasionally on Justice Madsen or Chief Justice Alexander for that necessary fifth vote. But one case does not a judicial career make, and it is probably too soon to conclude that the new justices, like the ones they replaced, value crime control more than due process.[98] If even one of them jumps the crime control ship, the sails of the due process ship will swell as the rough currents of the criminal law shift in favor of the due process crew. *Cienfuegos* and *Demery* offer a tantalizing but inclusive insight into that possibility.

98. The career of Justice Sanders certainly illustrates the truth of this assertion. In an earlier study of the Washington Supreme Court's use of the *Gunwall* doctrine in criminal cases, Silva counted Sanders a 100% pro-government conservative because the then newest justice joined a unanimous court in sustaining the government's case. *See* Silva, *supra* note 2, at 1909. The author's larger conclusions, however, generally support ours. She found Guy (91%), Durham (92%), Talmadge (67%), and Smith (64%) to be strongly to moderately conservative. Justices Alexander (80%) and Johnson (70%), on the other hand, tended to vote liberally. Justice Madsen was the swing vote, joining the conservative half the time and the liberals the other half. *See id.* These relatively slight percentage differences are best explained by Ms. Silva's looking at all criminal cases involving *Gunwall*, including ones where the court was unanimous or nearly so, whereas we focused on criminal cases where the court was closely divided. In the latter cases, where the controlling and precedent law are presumably less clear, the justices' ideological preferences more strongly influence their final judgment. *See* Silva, *supra* note 2.

APPENDIX A:
BRIEF BIOGRAPHIES OF THE JUSTICES

During the span of this study, there were ten members of the supreme court. The following basic biographies are intended to give readers who are not familiar with the justices some background on them. The biographies are limited to the following: years on the bench; prior jobs; whether the justice was appointed, elected, or both; geographical representation; and any obvious party affiliation.

Barbara Durham: Elected to supreme court in 1984. Court of appeals judge (Division I), 1980–84. King County Superior Court Judge, 1977–80. Mercer Island District Court Judge, 1973–77. Prior to that, Deputy Prosecutor.[99]

Richard P. Guy: Appointed to supreme court in 1989 (Governor Gardner, Democrat).[100] Elected 1990 and 1994. Private practice with business law firm, 1981–89. Spokane County Superior Court Judge, 1977–81. Prior to that, Chief Criminal Deputy Prosecuting Attorney for Spokane County and State Attorney General's Office. Retired from supreme court 2000.[101]

Charles Z. Smith: Appointed to supreme court in 1988 (Governor Gardner, Democrat).[102] Elected 1988, 1990, and 1996. Prior to that, private practice and Associate Dean and Professor at University of Washington School of Law. King County Superior Court Judge, 1966–73. Seattle Municipal Court Judge, 1965–66. Special Assistant to United States Attorney General, 1960–64. Prosecuting Attorney for King County, 1956–60.[103]

Charles W. Johnson: Elected to supreme court in 1991 and 1996. Prior to that, private practice (general practice). Sat as pro tem judge in Pierce County.[104]

Gerry L. Alexander: Elected to supreme court in 1994 and 2000.[105] Court of appeals judge (Division II), 1985–94. Superior

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99. OFFICE OF THE GOVERNOR AND THE OFFICE OF THE SECRETARY OF STATE, WASHINGTON STATE YEARBOOK 12 (Richard Yates & Charity Yates eds., 1999).

100. *State Supreme Court Justices' Biographies: A Look at Court Members and their Initiative Decisions*, SEATTLE TIMES, Mar. 17, 2000, at A18 [hereinafter *Biographies*].

101. OFFICE OF THE GOVERNOR AND THE OFFICE OF THE SECRETARY OF STATE, WASHINGTON STATE YEARBOOK 11 (Richard Yates & Charity Yates eds., 2000) [hereinafter YEARBOOK 2000].

102. *Biographies*, *supra* note 100.

103. YEARBOOK 2000, *supra* note 101.

104. *Id.* at 12.

Court Judge for Thurston and Mason Counties, 1973–84. Prior to that, private practice.[106]

Richard B. Sanders: Elected to supreme court in 1995 and 1998. Prior to that, private practice (including litigation). Home in King County.[107]

Barbara A. Madsen: Elected 1992 and 1998. Seattle Municipal Court Judge, 1988–92. Prior to that, Seattle Municipal Court Commissioner. Prior to that, Seattle City Attorney's Office. Prior to that criminal defense attorney. Home in Pierce County.[108]

Phillip A. Talmadge: Elected to supreme court in 1994. Washington State Senate, 1979–95. Contemporaneous private practice (concentration on appeals). Retired from supreme court in 2000.[109] Home in King County.[110]

Faith Ireland: Elected to supreme court in 1998. King County Superior Court Judge, 1984–98. Prior to that, private practice (general practice). Home in King County.[111]

Bobbe J. Bridge: Appointed to supreme court in 1999 (Governor Locke, Democrat). Elected in 2000. King County Superior Court Judge, 1990–2000. Prior to that, partner in law firm practice (civil practice). Home in King County.[112]

Tom Chambers: Elected to supreme court in 2000. Prior to that, attorney in private practice (litigation). Home in King County.[113]

Susan Owens: Elected to supreme court in 2000. Prior to that, District Court Judge in Western Clallam County (nineteen years). Also, Chief Judge of Quileute Tribe (five years)and Chief Judge of Lower Elwha S'Klallam Tribe (six years). Home in Clallam County (Olympic Peninsula).[114]

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105. *State Supreme Court: Owens over Sullivan in Close Race for Supreme Court Justice*, SEATTLE TIMES, Nov. 8, 2000, at B10.

106. YEARBOOK 2000, *supra* note 101, at 12.

107. *Id.*

108. *Id.*

109. *Seven Vie for Supreme Court in Election Free-for-All*, SEATTLE TIMES, Sept. 10, 2000, at B1.

110. YEARBOOK 2000, *supra* note 101, at 12.

111. *Id.*

112. *Id.* at 13.

113. OFFICE OF THE GOVERNOR AND THE OFFICE OF THE SECRETARY OF STATE, WASHINGTON STATE YEARBOOK 14–15 (Scott D. Dwyer & Mary B. Dwyer eds., 2001)

114. *Id.* at 15.

APPENDIX B:

TABLE 1: COURT OF APPEALS AFFIRM/REVERSE PERCENTAGES (BY DIVISION)

	Division I			Division II			Division III			Direct Review		
Vol.	Affirmed	Reversed	Aff'd / Rev'd	Affirmed	Reversed	Aff'd / Rev'd	Affirmed	Reversed	Aff'd / Rev'd	Affirmed	Reversed	Aff'd / Rev'd
137	3	4	0	3	0	1	2	1	0	0	1	1
138	7	6	4	6	7	1	3	4	0	4	3	1
139	4	2	2	3	6	1	0	2	2	4	5	2
140	4	3	2	6	4	0	3	2	0	4	2	1
141	6	4	1	3	9	0	4	2	0	1	1	3
142	4	4	2	6	2	1	2	1	0	2	4	5
143	4	4	2	3	0	0	1	3	0	4	3	2
Total	32	27	13	30	28	4	15	15	2	19	19	15
%	44%	37%	18%	48%	45%	6%	47%	47%	6%	36%	36%	28%

TABLE 2: NUMBER OF TIMES JUSTICE IN MAJORITY

	Durham	Guy	Smith	Johnson	Alexander	Sanders	Madsen	Talmadge	Ireland	Bridge
Maj. Written	6	22	26	28	29	23	36	26	24	9
Maj. Signed	38	174	190	147	147	125	134	134	153	82
Total Maj. Op.	44	196	216	175	176	148	170	160	177	91
Con. Written	1	1	0	3	10	4	8	19	1	0
Con. Signed	2	3	0	6	4	7	5	4	0	3
Con. w/o Op.	0	0	0	1	0	2	10	0	0	0
Total Con.	3	4	0	10	14	13	23	23	1	3
Total Maj. Decision	47	200	216	185	190	161	193	183	178	93*
Con./Dis. Written	0	0	0	1	5	3	6	3	0	0
Con./Dis. Signed	1	4	0	3	3	4	1	0	1	0
Total Con./Dis	1	4	0	4	8	7	7	3	1	0
Dis. Written	1	4	1	11	13	39	11	29	10	0
Dis. Signed	5	19	11	29	16	20	19	6	14	11
Total Dis.	7	27	12	44	37	66	30	39**	25	11
Total Participation	54	227	228	230	227	227	230	222	203	104
Percent. Maj. Dec.	87%	88%	95%	80%	84%	71%	84%	82%	87%	89%

* The total majority opinions (ninety-one) and the total concurring opinions (three) do not add up to the total majority decisions (ninety-three). This is because Justice Bridge signed onto both the majority and concurring opinions in *Kucera v. State Dep't of Transp.*, 140 Wash. 2d 200, 995 P.2d 63 (2000). She was counted once in each category for purposes of this study. However, she is only counted as siding with the majority decision once for the case.

** Includes one case where Justice Talmadge concurred in the result of dissent without opinion.

TABLE 3A: JUSTICE DURHAM ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Guy	44	2	7	46	87%
Smith	43	3	9	46	83.5%
Johnson	31	4	18	35	66%
Alexander	35	1	16	36	69%
Sanders	26	3	24	29	54.5%
Madsen	30	6	18	36	66.5%
Talmadge	42	4	5	46	90%
Ireland	34	1	2	35	94.5%
Bridge	N/A	N/A	N/A	N/A	N/A

TABLE 3B: JUSTICE GUY ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	44	2	7	46	87%
Smith	184	4	37	188	83.5%
Johnson	147	12	69	159	70%
Alexander	159	7	20	166	73.5%
Sanders	123	14	88	137	61%
Madsen	163	23	42	186	81.5%
Talmadge	170	19	31	189	86%
Ireland	169	3	27	172	86.5%
Bridge	93	1	10	94	90.5%

TABLE 3C: JUSTICE SMITH ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	43	3	9	46	83.5%
Guy	184	4	37	188	83.5%
Johnson	179	10	38	189	83.5%
Alexander	173	10	45	183	80.5%
Sanders	151	12	62	163	72.5%
Madsen	164	21	44	185	81%
Talmadge	155	22	43	177	80.5%
Ireland	168	1	32	169	84%
Bridge	85	2	17	87	83.5%

TABLE 3D: JUSTICE JOHNSON ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	31	4	18	35	66%
Guy	147	12	69	159	69.5%
Smith	179	10	38	189	83.5%
Alexander	185	11	33	196	85.5%
Sanders	168	14	45	182	80%
Madsen	160	21	49	181	78.5%
Talmadge	132	24	67	156	70%
Ireland	138	9	54	147	73%
Bridge	63	7	34	70	67.5%

TABLE 3E: JUSTICE ALEXANDER ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	35	1	16	36	69%
Guy	159	7	60	166	73.5%
Smith	173	10	42	183	81.5%
Johnson	185	11	33	196	85.5%
Sanders	166	15	45	181	80%
Madsen	159	24	46	183	80%
Talmadge	126	21	73	147	67%
Ireland	137	9	55	146	72.5%
Bridge	69	6	29	75	72%

TABLE 3F: JUSTICE SANDERS ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	26	3	24	29	54.5%
Guy	123	14	88	137	61%
Smith	151	12	62	163	72.5%
Johnson	168	14	45	182	80%
Alexander	166	15	45	181	80%
Madsen	144	24	60	168	73.5%
Talmadge	97	24	100	121	55%
Ireland	117	11	73	128	63.5%
Bridge	59	8	37	67	64.5%

TABLE 3G: JUSTICE MADSEN ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	30	6	18	36	66.5%
Guy	163	23	42	186	81.5%
Smith	164	21	44	185	81%
Johnson	160	21	49	181	78.5%
Alexander	159	24	46	183	80%
Sanders	144	24	60	168	73.5%
Talmadge	129	35	59	164	73.5%
Ireland	134	21	48	155	76.5%
Bridge	74	11	19	85	81.5%

TABLE 3H: JUSTICE TALMADGE ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	42	4	5	46	90%
Guy	170	19	31	189	86%
Smith	155	22	43	177	80.5%
Johnson	132	24	67	156	70%
Alexander	126	21	73	147	67%
Sanders	97	24	100	121	55%
Madsen	129	35	59	164	73.5%
Ireland	157	15	23	172	88%
Bridge	79	8	11	87	89%

TABLE 3I: JUSTICE IRELAND ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	34	1	2	35	94.5%
Guy	169	3	27	172	86.5%
Smith	168	1	32	169	84%
Johnson	138	9	54	147	74%
Alexander	137	9	55	146	72.5%
Sanders	117	11	73	128	63.5%
Madsen	134	21	48	155	76.5%
Talmadge	157	15	23	172	88%
Bridge	92	1	7	93	93%

TABLE 3J: JUSTICE BRIDGE ALIGNMENT STATISTICS

	Same Opinion	Same Result/ Different Opinion	Different Result	Total Agreement Result	Percentage Agreement Result
Durham	N/A	N/A	N/A	N/A	N/A
Guy	93	1	10	94	90.5%
Smith	85	2	17	87	83.5%
Johnson	63	7	34	70	67.5%
Alexander	69	6	29	75	72%
Sanders	59	8	37	67	64.5%
Madsen	74	11	19	85	81.5%
Talmadge	79	8	11	87	89%
Ireland	92	1	7	93	93%