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Brief of Amicus Curiae Fred T. Korematsu Center for Law and Equality in Support of Appellant

Fred T. Korematsu Center for Law and Equality

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 88086-7

STATE OF WASHINGTON,

Respondent,

v.

ALLEN EUGENE GREGORY,

Appellant.

BRIEF OF *AMICUS CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF APPELLANT

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring that effective remedies exist to address implicit and explicit bias in the courtroom and in the criminal justice system at large. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Both the Eighth Amendment of the United States Constitution and the more protective Article I, section 14, of Washington's constitution prohibit arbitrary imposition of the death penalty. Yet, a report by Professor Katherine Beckett ("Beckett Report"), which compiles and analyzes the vast majority of trial court reports filed since implementation of the current death penalty statute in 1981, both provides this Court a

basis on which to revisit the constitutionality of Washington's death penalty statute, and demonstrates that the statute has permitted the very arbitrariness it should prevent.

The Beckett Report demonstrates that extra-legal factors such as racial bias continue to influence the administration of the death penalty, resulting in its disproportionate imposition on Black defendants. Aversive racism may negatively affect Black defendants, making them less likely to receive discretionary leniency, or mercy. However, an equally compelling and important explanation for this racial disproportionality is that in-group favoritism may positively affect White defendants, making them *more* likely to receive discretionary leniency.[1]

Thus, consistent with the mandate of *Furman v. Georgia* to ensure the death penalty is not imposed on the "constitutionally impermissible basis of race," 408 U.S. 238, 313, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (White, J., concurring), an inquiry into possible mechanisms of arbitrariness must take into account the role of discretionary leniency—i.e., a jury's decision to impose a life sentence in a capital case—as well as a jury's decision to impose death.

[1] Because there is greater familiarity with aversive bias, this brief focuses on in-group favoritism as an important, and often overlooked, mechanism that produces racial disproportionality.

The arbitrariness and racial bias that infect capital sentencing not only render Washington's death penalty statute unconstitutional under both the Eighth Amendment and under Washington's more protective Article I, section 14, but also demonstrate that Mr. Gregory's sentence must be reversed under the mandatory review procedures of RCW 10.95.130. The statute requires this Court to reverse a death sentence that is disproportionate or based on passion or prejudice. This Court should apply its understanding of how bias actually operates to these statutory inquiries, and should reverse in light of the great improbability that a capital jury can render a verdict free from implicit bias.

ARGUMENT

I. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RECONSIDER WHETHER THE DEATH PENALTY STATUTE ADEQUATELY GUARDS AGAINST ITS OWN ARBITRARY APPLICATION, AS REQUIRED BY THE EIGHTH AMENDMENT AND *FURMAN*.

In 2006, this Court in *State v. Cross*, 156 Wn.2d 580, 623, 132 P.3d 80 (2006), reaffirmed that Washington's death penalty statute is constitutional. However, as Mr. Gregory explains in his reply brief, *stare decisis* does not require adherence to *Cross* because, today, the evidentiary record for assessing the constitutionality of the death penalty is very

different from what existed when *Cross* was decided. ARB[2] at 56-57 (discussing the 120 additional trial reports filed since Cross's, 67 of which were filed after *Cross*, and the resulting Beckett Report). This alone is sufficient to revisit *Cross*.

In addition, *Cross*'s reliance upon *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976),[3] should be reconsidered for three additional reasons. First, *Cross* relied heavily on the Washington death penalty statute's similarity to the statute upheld in *Gregg*. Yet, as the *Gregg* Court recognized, the constitutionality of any death penalty statute must be judged first under *Furman*. 428 U.S. at 188-89 (citing *Furman*, 408 U.S. at 313 (White, J., concurring) and 408 U.S. at 309-10 (Stewart, J., concurring)). Accordingly, whether a particular death penalty statute passes muster should depend not on its resemblance to the statutes upheld in *Gregg*, but rather on an assessment—based on the available data—of whether the statute prevents arbitrary application of the death penalty. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). And, as Mr. Gregory

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[2] We adopt Mr. Gregory's naming conventions for citations to briefs: AOB for Mr. Gregory's opening brief; BOR for the State's brief; and ARB for Mr. Gregory's reply.

[3] *Cross* relies on a line of cases that traces back to *Gregg*. *See Cross*, 156 Wn.2d at 623 (citing *Gregg*, 428 U.S. at 189); *In re Cross*, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (quoting *State v. Dodd*, 120 Wn.2d 1, 13 n. 2, 838 P.2d 86 (1992) (citing *Gregg*, 428 U.S. at 188-89)).

asserts, "The data are now available, and they demonstrate that the required narrowing has not been achieved." ARB at 64.

Second, *Gregg* cannot be the last word on the constitutionality of Washington's death penalty statute because that case was necessarily speculative. *See Gregg*, 428 U.S. at 198 (because Troy Leon Gregg was the first individual convicted and sentenced under Georgia's new procedures, the Court could only surmise that "*[o]n their face* these procedures *seem* to satisfy the concerns of *Furman*.") (emphasis added)).[4] As Justice Breyer recently explained in his dissent in *Glossip v. Gross*, "[i]n 1976 [when the Court decided *Gregg*], the Court thought that the constitutional infirmities in the death penalty could be healed.…Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed." 576 U.S. __, 135 S. Ct. 2726, 2755, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting); *see also id.* at 2759-60 ("When the death penalty was reinstated in 1976, this Court acknowledged that the death penalty is (and would be) unconstitutional if 'inflicted in an arbitrary and capricious manner.'") (citing *Gregg*, 428 U.S. at 188 (joint opinion of

[4] *See also* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1235 (2013) (explaining the Court upheld the statutory schemes at issue in *Gregg* "on the basis of its assumptions about how the schemes would operate because there was not yet any empirical evidence to challenge those assumptions.").

Stewart, Powell, and Stevens, JJ.)); *Godfrey v. Georgia*, 446 U.S. 420, 427-29, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (plurality opinion) (vacating a death sentence that had been imposed based on a statutory aggravating circumstance which, standing alone without further definition, allowed for standardless sentencing discretion) (citing *Furman*, 408 U.S. at 313 (White, J., concurring) and *Gregg*, 428 U.S. at 188-89) (opinion of Stewart, Powell, and Stevens, JJ.)).

Finally, the Court in *Gregg* did not have the benefit of the developed body of social science research on implicit bias that is now available for this Court to consider. Unaided by this more nuanced understanding of juror decision making, *Gregg* considered discretionary leniency only as isolated acts of mercy, rather than understanding discretionary leniency as a mechanism of system-wide arbitrariness. *See Gregg*, 428 U.S. at 199, 203, 206-07.[5]

Because this Court has new data demonstrating the arbitrary application of Washington's death penalty, and because recent social science literature compels a new understanding of discretionary leniency,

[5] Relying on *Gregg*, the Court in *McCleskey v. Kemp* recognized that a capital punishment system is unconstitutional if it "operates in an arbitrary and capricious manner," but concluded that discretionary leniency did not contribute to arbitrary outcomes in that case. 481 U.S. 279, 306-08, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (citing *Gregg*, 428 U.S. at 199).

stare decisis does not require adherence to *Cross* and this Court must consider anew the constitutionality of Washington's death penalty statute.

II. ARTICLE I, SECTION 14 AND RCW 10.95.130(2)(B) DEMAND INVESTIGATION INTO ALL MECHANISMS OF ARBITRARINESS, BECAUSE ARBITRARINESS IS CRUEL.

a. In Assessing Arbitrariness, Washington Law Demands Consideration of Cases in Which Capital Juries Exercised Mercy.

The question of mercy, or discretionary leniency, is highly relevant under Washington jurisprudence. *See* Const. art. I, § 14; *State v. Fain*, 94 Wn.2d 387, 392-93, 397, 617 P.2d 720 (1980). Article I, Section 14 of the Washington Constitution states: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Const. art. I, § 14. Washington's prohibition against cruel punishment is more protective than the Eighth Amendment.[6] *See, e.g.*, *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); *Fain*, 94 Wn.2d at 392-93. Although Mr. Gregory is

[6] In the limited context of whether a capital defendant can waive review, this Court determined that Article I, section 14 does not provide more protection than the Eighth Amendment. *Dodd*, 120 Wn.2d at 20-22 (holding that a capital defendant may waive general review, but may not waive mandatory review required by Chapter 10.95 RCW); *see also State v. Yates*, 161 Wn.2d 714, 792, 168 P.3d 359 (2007) (citing *Dodd*, 120 Wn.2d at 22) (relying on *Dodd*'s statement that *Gunwall* factors do not demand that Article I, section 14 be interpreted more broadly than the Eighth Amendment in dismissing Yates' much broader argument that Chapter 10.95 RCW is arbitrary and thus violates Article I, section 14, when *Dodd* examined only whether Article I, section 14 provided greater protection regarding waiver of appeal).

entitled to relief under both the Eighth Amendment and under Washington's constitutional prohibition of cruel punishment, this Court may grant relief based on the more protective Article I, section 14 even if it does not decide that *Furman* and its progeny require invalidation of the capital punishment scheme. *Michigan v. Long*, 463 U.S. 1032, 1041-42, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *see also* ARB at 69.

One of the hallmarks of a just punishment is its proportionality to the crime; conversely, punishment that is disproportionate is, under Article I, Section 14, cruel. *See generally Fain*, 94 Wn.2d at 396-401. But the proportionality inquiry is not limited to whether a particular punishment is proportionate to the crime; proportionality is a broad and evolving concept that must be able to examine proportionality as a systemic issue. As the Court in *Fain* explained, proportionality "is an illusive concept which has developed gradually in response to society's changes…its scope is not static; rather, it 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" 94 Wn.2d at 396-97 (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). Therefore, the proportionality of one death sentence must be judged not only in relationship to other death sentences, but also in relationship to life sentences for aggravated murder as well—i.e., cases where jurors have exercised discretionary leniency.

Further, the plain language of the proportionality review statute, which requires the Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," requires inclusion of all similar aggravated murder convictions. RCW 10.95.130(2)(b). "Similar cases" is defined as "cases…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." RCW 10.95.130(2)(b) (emphasis added). RCW 10.95.120 requires trial judges to submit reports in all aggravated murder convictions. RCW 10.95.120; *State v. Davis*, 175 Wn.2d 287, ¶118, 290 P.3d 43 (2012). As this Court in *Davis* explained: "[T]he statute instructs us to compare Davis's death sentence to the penalty imposed in all cases of aggravated first degree murder, regardless of whether the prosecutor pursued the death penalty or whether the fact finder returned a sentence of death or life imprisonment." 175 Wn.2d ¶118; *see also State v. Davis*, 141 Wn.2d 798, 880, 10 P.3d 977 (2000).

b. Washington's Constitutional and Statutory Mandate to Assess the Proportionality of a Death Sentence Allows for the Consideration of Statistical Evidence, and that Evidence Suggests the Death Penalty Is Disproportionately Imposed on the Impermissible Basis of Race.

Statistical evidence of racial disproportionality is an appropriate metric for both the constitutional and statutory measure of arbitrariness in Washington State and can therefore form the basis for relief under either Article I, section 14, or under statutory proportionality review pursuant to RCW 10.95.130(2)(b). *See Davis*, 175 Wn.2d ¶156.[7] And, because Washington law requires consideration of all aggravated murder convictions, any statistical or other analysis of system-wide arbitrariness must take into account those cases where the jury (or prosecutor) exercised mercy.

The Beckett Report—the most comprehensive statistical analysis of racial disproportionality in Washington's death penalty—concludes that a capital defendant's race is likely the most influential factor in determining whether he is sentenced to death or to life without parole. *See generally* Katherine Beckett & Heather Evans, *The Role of Race in*

[7] Unlike in *Davis*, Mr. Gregory has asserted that this evidence of racial disproportionality renders his sentence random and arbitrary, in violation of both RCW 10.95.130 (AOB at 97-99, ARB at 46-48) and Article I, section 14 (AOB at 104-15, ARB at 69-73).

Washington State Capital Sentencing, 1981-2014, 31-33 (2014).[8] Professor Beckett explains that "the case characteristics for which data are available and which are presumed to be the primary drivers of decision-making in capital cases actually explain a small proportion of the variance in case outcomes in aggravated murder cases." *Id.* at 32. Instead, extra-legal factors—most notably, the race of the defendant—have a striking impact on sentencing decisions. *Id*. at 32-33; *see also id.* at 10-12 (summarizing research demonstrating implicit bias generally and more specifically against Black criminal defendants in capital trials). Specifically, Professor Beckett found that after controlling for all other variables in her model, a Black defendant is "four and one half times more likely than similarly situated non-black defendants to be sentenced to death." *Id.* at 30. The Beckett Report therefore provides the basis for a searching inquiry into the possible mechanisms of racial disproportionality.

[8] Importantly, the Beckett Report is based on data since implementation of the death penalty in 1981. Specifically, she included all trial court reports involving death eligible defendants convicted of aggravated murder between December 1981 and May 2014, which totaled 297. *Id.* at 4-5. Thirty cases involved juvenile defendants, and three involved defendants who were ineligible due to extradition agreements. *Id.* at 4.

III. THE MECHANISM OF IN-GROUP FAVORITISM, IN ADDITION TO AVERSIVE BIAS, HELPS ACCOUNT FOR THE ARBITRARY AND RACIALLY DISPROPORTIONATE IMPOSITION OF THE DEATH PENALTY.

The Beckett Report suggests that in exercising "the discretion so regularly conferred upon them,"[9] juries are no more capable of making unbiased decisions in capital trials than in other contexts.[10] And while racial disproportionality can be attributed in part to aversive racism, or racial derogation, "preferential treatment of white Americans helps drive the stark disparities that define America's criminal justice system." Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871, 873 (2015) [hereinafter Smith, *Implicit White Favoritism*]. "To gain a fuller understanding of what drives unjustified disparities….[we must examine] the bias of implicit favoritism."[11] *Id.* at 874 (explaining that even if aversive bias disappeared, "racial disparities

[9] *Furman*, 408 U.S. at 314 (White, J., concurring).

[10] Consistent with Washington's more robust constitutional protections, Washington antidiscrimination jurisprudence is evolving to provide remedies for a constitutionally cognizable risk of racial bias, even absent evidence of actual prejudice. *See, e.g.*, *State v. Saintcalle*, 178 Wn.2d 34, ¶2, 309 P.3d 326 (2013) (concluding that Washington's *Batson* procedures are not robust enough to effectively combat implicit racial bias); *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011) (reversing murder conviction because the prosecutor improperly injected racial prejudice into the trial, and recognizing the constitutionally cognizable risk that Mr. Monday's right to a fair trial under Article I, section 22, was violated).

[11] In-group favoritism is distinct from aversive racism, whose focal points are the negative beliefs about another group. Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common In-group Identity Model*, 61 J. Soc. Issues 615, 618 (2005).

would persist because removing derogation is not the same as being race-neutral.")

Consistent with research suggesting that preferential treatment of white defendants is partially responsible for driving racial disparities in the criminal justice system, Amicus encourages this Court to consider how in-group favoritism may account for some of the racial disproportionality that plagues Washington's death penalty scheme. The mechanisms of in-group favoritism are complex, but their effect is simple: social science teaches us that an individual who identifies with a group makes decisions and judgments to favor that in-group. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 Soc. Just. Res. 143, 146 (2004).

Indeed, it is well documented that people implicitly and automatically "favor their own group at the expense of other groups in terms of their evaluations, judgments, and behavior in intergroup relations." Dasgupta, *supra*, at 146 (listing studies); Smith, *Implicit White Favoritism*, *supra*, at 874-75 (discussing implicit favoritism, defined as "the automatic association of positive stereotypes and attitudes with members of a favored group, leading to preferential treatment for persons of that group" (citing Dasgupta, *supra*, at 146-47)). Therefore, racial discrimination, and consequently racial disproportionality, is likely to be

"as much an exercise of in-group favoritism as it is an exercise of out-group derision." Catherine Smith, *The Group Dangers of Race-Based Conspiracies*, 59 Rutgers L. Rev. 55, 58, 68-72 (2006).

For example, psychological research demonstrates that people experience more empathy for in-group than out-group members. Smith, *Implicit White Favoritism*, *supra*, at 899. In a criminal trial, jurors are tasked with understanding the intentions, actions, and behaviors of defendants; thus, if a juror's "empathic abilit[y] [is] fraught with implicit favoritism for in-group members, one might expect that disparities could result." *Id.*; *see also* Mina Cikara et al., *Us and Them: Intergroup Failures of Empathy*, 20 Current Directions Psychol. Sci. 149, 150 (2011) (studies have demonstrated that, as a result of implicit favoritism toward one's own "group," people are more likely to empathize with their in-group than those in the out-group).

In one mock juror study, researchers found that the "weight given the mitigating evidence by our jurors significantly differed as a function of the racial dimension of the case," and tied their findings to the ability of jurors to empathize with the defendant. Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav. 481, 494 (2009). Jurors tended to give less weight to mitigation evidence for Black defendants

(consistent with the implicit aversive bias explanation), *id.*, with white male jurors having the highest tendency to misuse mitigating evidence, *id.* at 488-89 (Table 3), 494. The researchers explained their understanding of their findings in terms of both aversive bias and in-group dynamics:

> We view the racial differences in the use and misuse of mitigating evidence…as stemming largely from our participants' inability or unwillingness to empathize with the plight of Black defendants….
>
> This suggests that juries composed largely of White members may legitimize and widen the empathic divide in the course of their deliberations over punishment. Thus, the presence of other more similar-appearing jurors may underscore the defendant's *lack* of similarity, activating racial solidarity rather than cross-racial compassion.

Id. at 494 (emphasis in original). The same researchers later explained this phenomenon as the "tendency for White jurors—especially White male jurors—to interpret many common penalty phase facts and circumstances as potentially mitigating for a White defendant but to see those same things as irrelevant or even aggravating for a defendant who is Black." Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 574 (2011).

Jurors' inability to cross what Lynch and Haney call the "empathic divide" "further institutionalizes what social psychologists have termed the 'fundamental attribution error'—systematically discounting the

important social, historical, and situational determinants of behavior (in this case, criminal behavior) and correspondingly exaggerating the causal role of dispositional or individual characteristics." *Id.* at 590. Attribution error[12] explains how our prejudices shape our understanding of others' behavior. Smith, *Implicit White Favoritism*, *supra*, at 902. Social scientists have found that people tend to attribute positive behaviors of in-group members as dispositional and negative behavior as situational. *Id.* at 903. Attribution error therefore bears directly upon how jurors' understanding of mitigation evidence is influenced by race, contributing to racially disproportionate punishment.[13]

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[12] The terms altered attribution and Ultimate Attribution Error are also used in social science literature to refer to the same phenomenon.

[13] In the juvenile offender context where there is severe racial disproportionality, attribution error would "suggest that white jurors are more likely to deem [a] white juvenile's actions as 'unfortunate' and attributable to the 'transient' nature of youth; whereas the same white jurors could find that a…black male [juvenile] defendant who committed the same violent crime did so because it reflects his 'irreparably corrupt' disposition." Smith, *Implicit White Favoritism*, *supra*, at 912. In Washington State, this is precisely what has been observed. *See* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 647 (2012), 47 Gonz. L. Rev. 251 (2012), 87 Wash. L. Rev. 1 (2012) (discussing study of probation officers in Washington state which showed that "[b]lack youths' crimes are commonly attributed to internal traits (attitudes and personalities) while white youths' crimes are attributed to their social environment (peers and family)," which contributes to "more severe sanctions and sentencing recommendations for black youth" (citation omitted)).

IV. PASSION OR PREJUDICE REVIEW UNDER RCW 10.95.130(2)(C) CREATES A STATUTORY REMEDY FOR DEATH SENTENCES INFECTED BY IMPLICIT BIAS.

RCW 10.95.130(2)(c) mandates that this Court review every death sentence to ensure it was not "brought about through passion or prejudice." As this Court recognized in *State v. Saintcalle*, racism lives "beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to with racial animus." 178 Wn.2d 34, ¶24, 309 P.3d 326 (2013). Implicit bias literature teaches us that bias still operates even absent explicit appeals to the passion or prejudice of the jury.

Death sentences may be influenced not only by in-group favoritism, as discussed above, but also by implicit aversive bias. Some of the most telling evidence of implicit aversive bias emerges from experiments with the perception of black faces. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 876 (2004). Studies show a strong tendency to link the social category of black with concepts of crime. *Id.* (citing studies). Eberhardt designed studies to further examine the bidirectional nature of the link—i.e., "the association of Blacks with crime renders objects relevant in the context of Black faces and Black faces relevant in the

context of crime." *Id.* at 877. Eberhardt's first study demonstrated that when subjects were primed with 30-microsecond images of black faces, and then shown a degraded and fuzzy image of a gun, *id.* at 878-81, the "Black faces triggered a form of racialized seeing that facilitated the processing of crime-relevant objects," *id.* at 881. Conversely, "exposure to White faces inhibited the detection of crime-relevant object." *Id.* Eberhardt's second study confirmed the hypothesis of the bidirectional link between race and crime, revealing that "race-neutral concepts such as crime can become racialized. Not only are Blacks thought of as criminal, but also crime is thought of as Black." *Id.* at 883.

Further, the more stereotypically "black" a person appears physically (e.g., broad nose, thick lips, dark skin), the more criminal that person is judged to be. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 383-85 (2006). In fact, Eberhardt and her colleagues found that perceived stereotypicality of black defendants predicts whether they receive a death sentence in cases where race is highly salient—a black defendant charged with killing a white victim. *Id.* at 383. In such cases, black defendants who fell in the top half as opposed to the bottom half of the stereotypicality distribution had double the chance of receiving a death sentence. *Id.* at 385. Studies also

link the increased likelihood of capital punishment where the victim is white to an implicit bias that associates white lives with concepts of value and black lives with concepts of worthlessness. *See* Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 521, 564 (2014).

This implicit bias research demonstrates that discrimination does not need to be "injected by the prosecution"[14] in order to exist and to automatically and unconsciously corrupt the process of considering the death penalty. Implicit bias deeply disrupts traditional assumptions about the jury decision-making process, and the very concept of requiring purposeful discrimination. Because people may lack full cognitive access to what motivates their behavior, this Court must move beyond requiring conscious intentionality before attributing bias as a motivating factor of jurors.

Equipped with the Beckett Report, as well as its own sophisticated understanding of implicit bias, this Court is well positioned to review death sentences for passion or prejudice in a manner that recognizes how bias actually operates. This Court should reverse Mr. Gregory's death

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[14] *See Monday*, 171 Wn.2d at 678.

sentence, in recognition of the great improbability that a capital jury can render a verdict free from implicit bias.

CONCLUSION

Washington's capital punishment scheme allows jurors broad discretion, and the exercise of that discretion results in the arbitrary and racially biased imposition of the death penalty. Aversive racism makes Black defendants less likely to receive discretionary leniency, while in-group favoritism makes White defendants more likely to receive mercy. The scheme accordingly violates the Eighth Amendment under *Furman*, and also runs afoul of the heightened protection of our state constitution's cruel punishment provision. Finally, Mr. Gregory's sentence is invalid under RCW 10.95.130(2), which requires death sentences to be proportionate and free of passion or prejudice. For all these reasons, Amicus urges this Court to reverse.

RESPECTFULLY SUBMITTED this 15th day of December, 2015.

s/ Jessica Levin

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*The Korematsu Center thanks the following students at Seattle University School of Law for their work on the brief: Yessenia Medrano-Vossler, Travis Moeller, Anne Paxton, Ramya Ramanathan, and Meghan Young.