CRIMINAL JUSTICE

Sentenced to Death

A Report on Washington Supreme Court Rulings In Capital Cases

August 2000
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... nor cruel and unusual punishments inflicted.
United State Constitution, Amendment VIII
(1791)

No person shall be deprived of life
Washington Constitution, Article I, section 3
(1889)

It is clear that the Washington Supreme Court did not fulfill the essential function of ensuring evenhanded, rational, and consistent imposition of death sentences under Washington law.
United States District Court Judge Robert Bryan
Harris v. Blodgett
(1994)

Introduction

In June of 2000, Columbia University issued a comprehensive study[1] of 23 years of capital punishment throughout the United States. This study, based on capital cases between 1973 and 1995, found that more than two-thirds (68%)[2] of America?s death sentences are overturned on appeal by state and federal courts, and concluded that this country has a "broken system" that can only be described as one "fraught with error."

When reading newspaper accounts of egregious miscarriages of justice in death penalty cases elsewhere, Washington citizens may assume that our own state's system of prosecuting capital crimes works well. This assumption is false.

Drawing from the Columbia study, the ACLU analyzed all reported capital cases in Washington under current statutes[3] and the publicly available data regarding Washington?s death penalty to evaluate just

how well our state does at guaranteeing constitutional fairness in trials to persons accused of capital crimes.

Based on this analysis, the ACLU concludes that Washington?s capital punishment system?particularly the Washington Supreme Court?s mandatory review of death sentences?also is fraught with error.

Washington Supreme Court review of capital cases

When Washington seeks to impose the ultimate penalty of death, both the state and federal constitutions require that persons accused of a capital crime be afforded a trial that is fundamentally fair. This means that the accused is entitled to effective legal representation, to an impartial judge and jury, and to prosecutors and police who strictly abide by the law and ethical guidelines.

Although the principle of fairness is beyond debate, whether it is being carried out in practice has become a matter of substantial debate. We find that the Washington death penalty system, including the Washington Supreme Court?s reviews of convictions and sentences, earns a failing grade for fairness.

The ACLU conducted an analysis of court rulings in the 25 Washington cases in which the death sentence has been imposed since 1981, when the current death penalty statute took effect. That analysis of almost two decades of death sentences and executions makes it clear that the system by which we impose and review death sentences in Washington is fundamentally flawed.

The Washington Supreme Court, which is required by law to assure that death penalty cases have been handled fairly, has failed its duty.

Typically, federal courts review state supreme court rulings in death penalty cases. In Washington, federal courts have overturned seven of eight cases after defendants lost their appeals before the Washington Supreme Court. These decisions make it clear that capital defendants do not receive effective legal representation, that they are subjected to judicially unsound rulings, and that they can face conduct by prosecuting attorneys and law enforcement officials that does not comply with the law. Defendants have been sentenced to death based on false testimony of police informers, on evidence wrongfully withheld by police or prosecutors, on prejudicial rulings by trial judges, and because of negligent representation by their defense attorneys.

Yet, these constitutional errors have historically not been acknowledged by our state supreme court. The Washington Supreme

Court has routinely affirmed constitutionally deficient aggravated first-degree murder convictions and death sentences. Indeed, in one case the Washington Supreme Court chastised defense counsel for raising arguments subsequently deemed meritorious by the federal court. The state court called the arguments "frivolous and repetitive" and suggested that it had been unethical for counsel even to raise the arguments.

The seriousness of errors in Washington capital cases is highly troubling and makes clear that the execution of an innocent person could eventually occur here.

Analysis of capital cases completed in state court and reviewed by federal court

Eight cases have progressed to federal court review after defendants lost their appeals and petitions before the Washington Supreme Court:

- All but one have been overturned by either the federal District Court or the federal Ninth Circuit Court of Appeals because of fundamental constitutional errors at trial.[4]
- The reversal rate of convictions and death sentences in Washington cases greatly exceeds the national average. Nationwide the federal courts overturn 40%[5] of state court death sentences, as compared to 7 of 8 in Washington.[6]
- In five of the seven cases, the federal courts threw out both the aggravated first-degree murder conviction and the death sentence.[7]
- These fundamental constitutional violations in trial or sentencing proceedings were errors the Washington Supreme Court had rejected as insignificant.

These reversals were not made for technicalities; in some cases there was more than one reason for the reversal:

- Four convictions and/or death sentences were overturned by federal courts in part because attorneys made such serious errors that the defendants were denied effective assistance of counsel.[8]
- Three convictions and/or death sentences were overturned by

federal courts because of prosecutorial or police misconduct, including the withholding of relevant evidence from the defense.[9]

- Two convictions and/or death sentences were overturned by federal courts because of state trial court errors in excluding important evidence for the defense.[10]
- One case involved juror misconduct.

Yet the Washington Supreme Court typically ignores these errors. Only four death sentences,[11] out of the 20 reviewed on direct appeal to date, have been overturned by the Washington Supreme Court. Nationwide, state appellate courts overturned 47% of capital cases due to serious error.[12] Five capital cases remain before the court on direct appeal.[13]

History of Washington s death penalty

The death penalty was first enacted in Washington by the Territorial Legislature in 1854 and provided for an automatic penalty of death for anyone convicted of first-degree murder.[14]

In 1909, the state legislature abolished the automatic death penalty and made first-degree murder punishable by either life imprisonment or the death penalty, at the trial court?s discretion.[15]

The death penalty was completely abolished in 1913,[16] reinstated in 1919, giving juries the right to decide between life and death,[17] and abolished again in 1975.[18]

Later that year, Initiative 316, which imposed an automatic mandatory death penalty for aggravated murder in the first degree, was passed.[19] The 1977 legislature amended the statute to remove the provision making death the mandatory sentence and to add procedures for imposing a death sentence.[20]

In 1981, this statute was declared unconstitutional because it allowed defendants who pled guilty to escape the death penalty altogether while it exposed people who did not plead guilty to the possibility of execution.[21] This scheme unfairly chilled the right to plead not guilty and to receive a jury trial. The 1981 legislature enacted a new capital punishment statute to remedy the constitutional defects of the 1977 statute.[22]

Imposition and review of a death sentence

Under current law, aggravated first-degree murder convictions carry either a sentence of life without the possibility of parole, or death if the jury finds that there are "not sufficient mitigating circumstances to merit leniency."[23]

Given the ultimate nature of a death sentence, once it is imposed, the Washington Supreme Court is required to review the conviction and sentence, to guarantee that the trial was fair, and to determine if the sentence was excessive or disproportionate compared to sentences imposed in similar cases.[24]

If the state supreme court affirms the conviction and sentence, the defendant may seek discretionary review by the United States Supreme Court.[25]

If the U.S. Supreme Court refuses to grant this initial review, a person is entitled under Washington?s constitution to file a "personal restraint petition" (PRP). In a PRP, a defendant may raise issues that were not covered in the trial court or appellate proceedings, including allegations of ineffective assistance of counsel.

Once the state court proceedings have been completed, a person sentenced to death has the right to file a petition for habeas corpus in the U.S. District Court. If the petition is denied, there is a right to seek review by the U.S. Court of Appeals and subsequently by the U.S. Supreme Court.

Cases where both convictions and death sentences were overturned by federal courts

In the following five Washington cases, federal courts overturned both the convictions for aggravated first-degree murder and the death sentences that resulted from those convictions.

Gary Benn

Benn was convicted of two counts of aggravated first-degree murder and sentenced to death in 1990.[26] The conviction was based on the testimony of a jailhouse informer with a well-known history of committing perjury. Although Benn?s lawyer properly challenged the fairness of the prosecution?s reliance of this witness, Benn?s claims for post-conviction relief were denied by the Washington Supreme Court.[27]

On June 30, 2000, a federal district court overturned Benn?s convictions and death sentence and granted the petition for a writ of habeas corpus. The federal judge wrote:

> No judge wishes to hold that another has erred. No judge is eager to rule that a convicted felon is entitled to a new trial. After thorough review of this matter, however, I am compelled to conclude that the petitioner?s conviction is fatally flawed.

The fatal flaw involved the prosecution?s reliance on a jailhouse informant to establish the alleged motive for the crime. According to the informant, Benn had confessed to him in jail that he had killed his half-brother and a friend because they had threatened to turn him in to the police for filing a false insurance claim unless he gave them half of the insurance proceeds. This witness, however, was identified to defense counsel only one day before trial, in violation of criminal rules of procedure and trial court rulings. The prosecutor falsely told defense counsel that he had been precluded from identifying the witness sooner because the witness was in the federal witness protection program.

Although this witness had been a police informant for 15 years, the trial judge required the prosecutor to produce information regarding the witness? contacts with police just within the prior 12 months. Prosecutors never provided this information to defense counsel. The information, had it been provided, would have demonstrated that this key prosecution witness had a long history of defrauding the very police he was supposed to be assisting. The informant was known to be using and selling drugs throughout the entire period he worked for the police. He had been given money by the Tacoma Police Department to make a heroin purchase, but had used some of the heroin himself and had cut the rest to make up the lost weight.

The informant also had a history of perjuring himself and even told an acquaintance that he intended to lie when testifying in Benn?s case because that was what the prosecutors wanted. Although the witness had warrants outstanding for his arrest at the time of Benn?s trial, the prosecutors obtained his attendance at trial using an out-of-state subpoena which effectively shielded him from prosecution while in this state to testify.

The federal judge concluded:

> In short, there was evidence not disclosed to [the] defense which, if believed by the jury, would have painted a primary prosecution witness as completely unreliable, a liar for hire, ready to perjure himself for whatever advantage he could squeeze out of the system, for every possible advantage.

Brian Lord

Lord was convicted of aggravated first-degree murder in 1987 after his trial counsel failed to call three crucial alibi witnesses. Despite this fact, the statutorily mandated direct appeal of his conviction and sentence was affirmed by the Washington Supreme Court.[28] The court subsequently similarly denied Lord?s PRP.

Lord?s conviction and sentence, however, were overturned by the Ninth Circuit Court of Appeals when it found that Lord?s trial counsel had failed to call three witnesses who saw the victim the day *after* she allegedly had been murdered by Lord.[29] This testimony was deemed so fundamental to the defense that the federal appellate court found that Lord had not received effective assistance of counsel during his trial:

> . . . Lord?s claim of ineffective assistance turns on counsel?s failure to call to the stand three witnesses who, if believed, would have cleared Lord of the murder.
>
> . . .
> Mindful of the deference we owe to counsel?s trial strategy, we nevertheless conclude that counsel?s cursory investigation of the three possible alibi witnesses, and the subsequent failure to put them on the stand, constitute deficient performance that was prejudicial to Lord?s defense.[30]

Lord had previously raised this very same constitutional issue before the Washington Supreme Court when he asked that court to reverse his conviction and sentence. The court, however, disposed of his claim in a single paragraph:

> . . . Lord alleges prejudice from his trial counsel?s failure to call witnesses who

> claimed to have seen the victim the day after she was killed. However, the State produced evidence that the victim?s sister, whose appearance was very similar to Tracy?s, had been out searching for her sister and could have been mistaken for her. . . . Lord has not established that there is a reasonable probability that the testimony of these witnesses would have affected the outcome of the trial.[31]

Lord again pressed this constitutional error in his state PRP. The state supreme court simply refused to consider any issue previously raised and rejected on direct appeal, including the error in failing to call key alibi witnesses.[32] In fact, the Supreme Court chastised Lord?s appointed counsel for raising this issue again:

> The "process of ?winnowing out weaker arguments . . . and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective advocacy. Here, appointed counsel has thrown the chaff in with the wheat, ignoring their duty under RPC 3.1 to present only meritorious claims and contentions and leaving it for this court to cull the small number of colorable claims from the frivolous and the repetitive.[33]

Ninth Circuit Court of Appeals Judge Alex Kozinski, appointed by President Reagan and well-known as a conservative in death penalty cases, disagreed with the state supreme court?s constitutional analysis and clearly viewed Lord?s challenge as meritorious:

> If [the three alibi witnesses] had testified, the State might still have won a conviction by exploiting the inconsistencies in their accounts or convincing the jury that it was Tracy?s sister they saw that day. That, however, would be a very different case. As it is, we find ourselves "in grave doubt as to the harmlessness of an error that affects substantial rights," and must conclude that counsel?s omission of this evidence

> prejudiced Lord.[34]

Ironically, had it not been for the persistence of Lord?s appointed appellate counsel in raising claims that the state supreme court dismissed as "chaff," Lord would be on death row today because of errors made by his trial counsel.

Benjamin Harris

Benjamin Harris was convicted of aggravated first-degree murder and sentenced to death in 1985. The conviction and sentence were affirmed by the Washington State Supreme Court in 1986.[35] Harris? state PRP was denied in 1988.[36] Harris was subsequently found competent to be put to death.[37]

Like Lord, Harris had both his conviction and sentence thrown out by a federal court. U.S. District Court Judge Robert Bryan held that Harris had received ineffective assistance of counsel during his trial.[38] In addition, the court held that the Washington Supreme Court?s review of the proportionality of Harris? death sentence violated his right to due process.[39]

Judge Bryan?s lengthy decision demonstrates the constitutional defects in Harris? criminal trial. He wrote:

> This is not a search for legal technicalities. It is not a search for justification to take, or save, a life. It is not about the legal, moral, or social implications of the death penalty. . . . This is a review of a state proceeding to determine if federal constitutional requirements were met."[40]

The federal court?s review found at least 11 violations of Harris? Sixth Amendment right to effective assistance of counsel, including trial counsel?s failure to spend any time on pre-trial investigations; his failure to adequately counsel Harris on the implications of important decisions; his failure to investigate Harris? mental and emotional state, including his competency to stand trial; his failure to challenge the admissibility of statements Harris had made to police; his failure to adequately protect Harris? Fifth Amendment right against self-incrimination by allowing Harris to talk with prosecutors before trial and by deciding to have Harris take the stand at the last minute; his failure to develop any defense whatsoever; and his failure to present

readily available mitigating evidence during the sentencing phase of the trial.[41]

The federal court also found that Harris? trial counsel had inexplicably made outrageous statements and arguments in his closing argument, referring to Harris as a "liar 85 percent of the time," a womanizer, an alcoholic, and a thief.[42]

Despite the egregious nature of these errors, the Washington Supreme Court, when presented with the same arguments, summarily rejected them, finding no constitutional errors in either the trial or the sentencing proceeding.[43]

Perhaps even more significant, however, was Judge Bryan?s holding that the Washington Supreme Court?s review of Harris? death sentence was, by itself, constitutionally deficient:

> It is clear that the Washington Supreme Court did not fulfill the essential function of ensuring evenhanded, rational, and consistent imposition of death sentences under Washington law.[44]

The federal court noted that the state supreme court?s test for determining whether a death sentence was proportional was unconstitutionally inconsistent. Further, that the state court?s application of that test in the Harris case was "of questionable accuracy."[45]

The state Attorney General filed an appeal from the federal district court?s decision overturning Harris? conviction (but chose not to challenge the decision setting aside the death sentence). The federal appeals court affirmed the district court?s decision to overturn Harris? conviction based on clear instances of significant ineffective assistance of trial counsel.

David Rice

David Rice was convicted of aggravated first-degree murder and sentenced to death in 1986. His conviction and sentence were affirmed by the Washington Supreme Court.[46] Rice?s first PRP was denied without an evidentiary hearing and without a published opinion. His second PRP was denied in 1992.[47]

After the evidentiary hearing, the district court in *Rice v. Wood*,

C89-568T (W. D. Wash., Nov. 10, 1997), reversed both Rice?s conviction and his death sentence, holding that Rice had been denied effective assistance of counsel because (1) trial counsel had allowed Rice to give the police a taped confession within an hour of being retained by Rice and without any investigation into Rice?s mental condition; (2) trial counsel allowed the confession to occur outside of his presence; (3) trial counsel allowed Rice to meet with detectives and prosecuting attorneys outside of his presence on a regular basis; (4) trial counsel failed to uncover evidence from psychiatrists and nurses who were of the opinion that Rice was mentally ill and that he had committed the murders while under the influence of extreme mental disturbance; (5) despite evidence that Rice was mentally ill, trial counsel allowed him to be interviewed by the press prior to trial; (6) trial counsel failed to present favorable mitigation testimony that was readily available. The district court also found that the trial court had given an erroneous jury instruction on the issue of whether all 12 jurors had to conclude that the case merited leniency before it could impose the alternative sentence of life without parole.

Patrick James Jeffries

Jeffries was convicted of aggravated first-degree murder and sentenced to death in 1983.[48] The various state PRPs filed by Jeffries were all summarily rejected by the Washington Supreme Court.[49]

Initially, the federal district court denied Jeffries? petition for habeas corpus, a decision originally affirmed by a panel of three judges at the federal Court of Appeals.[50] On reconsideration, however, the federal Ninth Circuit Court of Appeals held that the conviction and death sentence had to be overturned due to juror misconduct. One juror had talked to other jurors about Jeffries? prior conviction for armed robbery, even though this fact was information that they were precluded, by law, from knowing about during the guilt phase of the trial.

After several additional decisions by the district court and the court of appeals, the reversal of the conviction and sentence was finally affirmed.[51]

In so ruling, the Ninth Circuit stated that the Washington Supreme Court had erroneously dismissed Jeffries? claim of juror misconduct. The state supreme court made this error, according to the Ninth Circuit, because it had misread the factual record as to when Jeffries had first raised the issue of juror misconduct and then had applied the wrong

constitutional standard to the claim:

> In this case, there is no debate about whether one of the Washington Supreme Court?s critical factual findings was correct. It unfortunately was not. The Washington Supreme Court denied relief on the juror misconduct issue because it found that the misconduct was not reported until over two and a half years after it occurred. Clear and convincing evidence to the contrary of this finding exists?Indeed, neither party disputes that the Washington Supreme Court erred on this pivotal point.
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> * * *
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> [T]he Washington Supreme Court?s decision was based on an unreasonable determination of facts in light of the evidence presented in the state court proceedings and was contrary to clearly established law.[52]

Cases where death sentences were overturned by federal courts

In the following two Washington cases, federal courts have upheld the convictions for aggravated first-degree murder but have overturned the death sentences and remanded the cases to the state court system for new sentencing hearings.

Kwan Fai Mak

Mak was convicted of aggravated first-degree murder and sentenced to death in 1983. The Washington Supreme Court rejected 52 different alleged errors to confirm the conviction and sentence.[53]

The federal district court, however, disagreed with the Washington Supreme Court and held that Mak had not received effective assistance of counsel during the penalty phase of his capital trial.[54] The federal court held that appointed trial counsel were given only three months to prepare for a massive trial, despite repeated requests for a continuance. The attorneys, well-intentioned public defenders, had no death penalty trial experience; only one had tried a murder case prior to Mak?s trial. Because of the sheer time constraints, trial counsel had focused their trial preparation on the guilt phase of the trial and had no time to

prepare mitigating evidence despite substantial evidence being readily available. As the court concluded, "[a] person cannot constitutionally be put to death under such circumstances."[55]

The Ninth Circuit Court of Appeals affirmed the federal district court?s decision. The appeals court found that there was constitutional error in the state court?s failure to allow Mak to present evidence in the penalty phase to show that two other men, and not Mak, had masterminded the killings, and in the giving of a jury instruction that did not correctly set forth the requirement of juror unanimity for a death sentence.[56]

Mitchell Rupe
Mitchell Rupe was convicted of aggravated first-degree murder and sentenced to death in 1982. This death sentence was overturned by the Washington Supreme Court in 1984 because of evidentiary errors made by the trial court, and the case was remanded to the trial court for a new sentencing hearing.[57]

After a second death sentence was imposed, the sentence was affirmed on appeal.[58] Rupe?s state PRP was denied by the Washington Supreme Court in 1990.[59]

Rupe?s death sentence was reversed by the federal district court[60] when that court held that hanging Rupe would constitute cruel and unusual punishment because decapitation could occur during the hanging process. This issue became moot when Washington passed a new law allowing execution by lethal injection.

Rupe?s death sentence had also been reversed by the federal court on an alternative ground?the trial court had refused to allow Rupe to present evidence that a key prosecution witness had taken a polygraph test and had been found to be untruthful. The investigator involved in the case had then lied about the results of the polygraph test and had tried to cover up the falsehood. The federal court held that the trial court?s refusal to allow this evidence during the penalty phase of the trial constituted a violation of the Eighth and Fourteenth Amendments to the Constitution.[61]

Call for a Moratorium on the Death Penalty

Over the course of the last three years, the fundamental fairness (or lack of fundamental fairness) of the death penalty system throughout the United States has been the subject of much discussion and debate.

In February 1997, the American Bar Association?s House of Delegates adopted a policy calling upon jurisdictions that authorize the death penalty to halt all executions unless, and until, fundamental changes occurred in the system of capital punishment. The ABA based this policy on findings that the application of capital punishment by various states and by the federal government failed to ensure fundamental fairness and impartiality. The ABA also determined that, because of systematic failures, there is presently an intolerable risk that innocent persons are executed.

This debate intensified when Republican Governor George Ryan of Illinois declared a moratorium on executions in his state after 13 men on death row were exonerated by new evidence. Governor Ryan cited what he called "a shameful record of convicting innocent people and putting them on death row."

Following Illinois? moratorium was the news of the success of the Benjamin N. Cardozo School of Law?s Innocence Project, led by Barry Scheck and Peter Neufeld. In their book, "Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted," Scheck and Neufeld, along with journalist Jim Dwyer, explained how they had succeeded in overturning murder convictions and death sentences based on fraudulent forensic evidence, mistaken eyewitness identifications, prosecutorial or police misconduct, lying jailhouse informers, and incompetent attorneys representing the accused.

In 1999, the Nebraska state legislature approved a two-year moratorium on executions while the state undertakes a full review of its death penalty processes. Earlier this year, the New Hampshire Legislature voted to abolish the death penalty, the first state to do so since the United States Supreme Court allowed executions to resume 24 years ago.

And now, in 2000, a Columbia University Law School study reports on the analysis of 23 years of capital convictions and sentences from all states, finding that "the overall rate of prejudicial error in the American capital punishment system was 68%. In other words, courts found serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period."[62]

Time and again it has been demonstrated that the imposition of the death penalty in the United States is filled with unfairness due to social,

economic and racial factors. In Washington our state?s highest court fails its statutory duty to give meaningful legal review in cases where the government seeks to execute citizens. Seven of the eight death penalty cases reviewed and affirmed by the Washington Supreme Court that have received federal judicial review have been reversed by United States District Court or Court of Appeals judges.

We urge Washington s leaders and policy n in the growing national call for jurisdictions that authorize the death penalty to halt all executions in light of the fundamental unfairness of the system.

End Notes

[1] *A Broken System: Error Rates in Capital Cases, 1973-1995,"* by Professors James S. Liebman and Jeffrey Fagan of the Columbia University School of Law, and Valerie West, Doctoral Candidate, Department of Sociology, New York University. The Columbia study is available on the Internet at www.TheJusticeProject.org.

[2] *A Broken System* ..., Executive Summary.

[3] Twenty-five men have been sentenced to death by Washington state juries since 1981. Of those 25 men, 20 have completed their statutorily mandated, first stage, direct appeal to the Washington Supreme Court; five men await their mandatory statutory review by the court. The Washington Supreme Court has reversed death sentences in only four of these 20 cases as a result of a direct appeal. The Washington Supreme Court has only once reversed a death sentence as the result of a state constitutionally mandated, second stage, Personal Restraint Petition (PRP) (James Brett).

[4] The one exception was a death sentence that was upheld by an *en banc* panel of the US Court of Appeals for the Ninth Circuit by a 6 to 5 vote. *See Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (en banc). The seven overturned cases are *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 122 L.Ed.2d 742, 113 S.Ct. 1363 (1993); *Harris by and through Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994), *aff , 64* F.3d 1432 (9th Cir. 1995); *Rupe v.*

Wood, 93 F.3d 1434 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142, 136 L.Ed.2d 894, 117 S.Ct. 1017 (1997); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997); *Rice v. Wood*, C89-568T (W.D. Wash. 1997); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999); *Benn v. Wood*, C98-5131 FDB (W.D. Wash. 2000).

[5]*A Broken System* Executive Summary.

[6]Of the seven reversed cases, three have been finally concluded: one man was freed, two were given life in prison; the other four are still in the courts.

[7]Brian Lord, David Rice, Benjamin Harris, Gary Benn, and Mitchell Rupe.

[8]Brian Lord, David Rice, Benjamin Harris, and Kwan Fai Mak.

[9]Bejamin Harris, Gary Benn, Mitchell Rupe.

[10]Mitchell Rupe, Kwan Fai Mak

[11]Charles Finch, Michael Furman, Sammie Luvene, Michael Roberts.

[12]*A Broken System* Executive Summary.

[13]Richard Clark, Cecil Davis, James Elledge, Henry Marshall, and Dwayne Woods.

[14]Act of April 28, 1854, 1854 Wash. Laws 75, 78 (repealed 1975); Hellwig, *Death Penalty in Washington: An Historical Perspective*, 57 Wash. L. Rev. 525-549 (1982).

[15]Act of March 22, 1909, ch. 249, ? 140, 1909 Wash. Laws 890, 930 (repealed 1975).

[16]Act of March 22, 1913, ch. 167, ? 1, 1913 Wash. Laws 581.

[17]Act of March 4, 1919, ch. 112, ? 1, 1919 Wash. Laws 273, 274 (repealed 1975).

[18]Washington Criminal Code of 1975, ch. 260, 1975 Wash. Laws, 1st Ex. Sess. 817, 872.

[19]Initiative Measure No. 316, 1975-76 Wash. Laws, 2d Ex. Sess. 17, codified at RCW 9a.32.045-47 (1977, repealed 1981).

[20]Act of June 10, 1977, ch. 206, 1977 Wash. Laws, 1st Ex. Sess. 774, 776-778. This change was in reaction to the United States Supreme Court decision in *Woodson v. North Carolina*, 428 U.S. 279, 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1975), invalidating mandatory death penalty provisions.

[21]*State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981).

[22]Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535, codified at RCW Ch. 10.95 (1981); *see also* Department of Corrections, Death Penalty Information (6/8/00), http://www.wa.gov/doc/Content/faq/deathpnlty.htm.

[23]RCW 10.95.030.

[24]RCW 10.95.130(2)(b).

[25]Status Report at 4.

[26]*State v. Benn*, 120 Wn.2d 631, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 126 L.Ed.2d 331, 114 S. Ct. 382 (1993).

[27]*In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998).

[28]*State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 121 L.Ed.2d 112, 113 S. Ct. 164 (1992). Lord?s personal restraint petition was similarly denied by the court. *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), *cert. denied*, 513 U.S. 849, 130 L.Ed.2d 86, 115 S. Ct. 146 (1994).

[29]*Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999)

[30]184 F.3d at 1085, 1093.

[31]117 Wn.2d at 884-885 (footnotes omitted).

[32]123 Wn.2d at 302.

[33]123 W.2d at 302-303 (Durham, J.).

[34]184 F.3d at 1096.

[35]*State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 94 L.Ed.2d 781, 107 S. Ct. 1592 (1987).

[36]*In re Harris*, 111 Wn.2d 691, 763 P.2d 823 (1988), *cert. denied*, 490 U.S. 1075, 104 L.Ed.2d 651, 109 S. Ct. 2088 (1989).

[37]*In re Harris*, 114 Wn.2d 419, 789 P.2d 60 (1990).

[38]*Harris by and through Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W. D. Wash. 1994).

[39]Judge Bryan?s decision was affirmed by the Ninth Circuit Court of Appeals at 64 F.3d 1432 (9th Cir. 1995).

[40]853 F. Supp. at 1247.

[41]*Id.* at 1258-1270.

[42]*Id.* at 1267.

[43]106 Wn.2d at 800; 111 Wn.2d at 698.

[44]*Id.* at 1291.

[45]*Id.* at 1290.

[46]*State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 105 L.Ed.2d 707, 109 S. Ct. 3200 (1989).

[47]*In re Rice*, 118 Wn.2d 876, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 121 L.Ed.2d 344, 113 S. Ct. 421 (1992).

[48]*State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

[49]*In re Jeffries*, 722 P.2d 99 (1986) (PRP denied); *In re Jeffries*, 110 Wn.2d 326, 752 P.2d 1338 (1988) (second PRP denied); *In re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990) (third PRP denied).

[50]*Jeffries v. Blodgett*, 771 F. Supp. 1520 (W. D. Wash. 1991), *aff ,d.* 974 F.2d 1179 (9th Cir. 1992).

[51]*Jeffries v. Blodgett*, 114 F.3d 1484 (9th Cir. 1997) (en banc) (affirmed decision that jury?s knowledge of past armed robbery conviction constituted error; conviction for aggravated first-degree murder and death sentence reversed; conviction for first-degree murder left in place).

[52]114 F.3d at 1500-1501 (citations omitted).

[53]*State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L.Ed.2d 599, 107 S.Ct. 599 (1986).

[54]*Mak v. Blodgett*, 754 F. Supp. 1490 (W. D. Wash. 1991).

[55]*Id.* at 1501.

[56]*Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 122 L.Ed.2d 742, 113 S. Ct. 1363 (1993).

[57]*State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

[58]*State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed.2d 934, 108 S. Ct. 2834 (1988).

[59]*In re Rupe*, 115 Wn.2d 379, 798 P.2d 780 (1990).

[60]*Rupe v. Wood*, 863 F. Supp. 1307 (W. D. Wash. 1994).

[61]*Rupe v. Wood*, 863 F. Supp.1315 (W. D. Wash. 1994), *aff'd*, 93 F.3d 1434 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142, 136 L.Ed.2d 894, 117 S. Ct. 1017 (1997).

[62]*A Broken System* Executive Summary.

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