

Washington state Supreme Court strikes down death penalty as “arbitrary and racially biased”

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The Washington state Supreme Court on Thursday unanimously struck down the death penalty in that state as invalid, unconstitutional and “racially biased.” The ruling invalidating the state’s 37-year-old death penalty law makes Washington the latest in a string of states in recent years to abandon capital punishment.

Governor Jay Inslee had already imposed a moratorium on the state’s death penalty in 2014. The court’s order has now declared that the death sentences of the eight inmates on death row should be converted to life in prison. Because the ruling was based on the unconstitutionality of the death penalty law according to the state constitution, and not the US Constitution, it cannot be appealed to the US Supreme Court.

“The death penalty is invalid because it is imposed in an arbitrary and racially biased manner,” the Washington justices wrote in their opinion. “While this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered.”

The Supreme Court ruled in an appeal by convicted murderer Allen Eugene Gregory, a black death row inmate. The court did not revisit arguments over Gregory’s guilt, noting his murder conviction had already been appealed and confirmed by a second jury.

Gregory’s appellate attorneys, Neil Fox and Lila Silverstein, presented arguments in light of a 2012 case, *State v. Davis*, in which the high court had considered the death penalty’s “proportionality review” to ensure fairness in death sentences, calling on experts to present evidence on the “statistical significance of the racial patterns” in capital murder trial reports.

Fox and Silverstein commissioned an analysis by University of Washington (UW) sociologists Dr. Katherine Beckett and then-PhD candidate Health Evans, which evaluated all of Washington’s aggravated-murder trial reports from 1981 to 2014 and found widespread bias based on race and location of crime. The American Civil Liberties Union filed a friend-of-the-court brief supporting Gregory’s appeal, and dozens of former state judges urged the court to overturn the death penalty.

Chief Justice Mary Fairhurst wrote the opinion, in which four justices concurred, (one in result only). The other four justices signed a concurrence agreeing with the majority’s conclusions invalidating the death penalty but adding that other state constitutional factors “compel this result.”

Writing for the court’s majority, Chief Justice Fairhurst said the court concluded that Washington’s death penalty violates the state constitution’s prohibition on “cruel punishment” and “lacks fundamental fairness.” The opinion referred to the UW analysis, which found significant “county-by-county variations” in death sentences, and that black defendants are about four times more likely to get the death penalty than white defendants.

The state court’s decision was along the lines of US Supreme Court Justice Stephen Breyer’s dissenting opinion in *Glossip v. Gross*, in which he argued that the death penalty in the United States may be unconstitutional, as it violates the Eighth Amendment to the Constitution’s prohibition on “cruel and unusual punishment.”

Breyer said the death penalty was cruel because of its “serious unreliability” as shown by “convincing

evidence ... that innocent people have been executed” and “striking evidence that “it has been wrongly imposed” on more than 100 innocent men and women. He also said that wrongful convictions were more likely in capital than in non-capital cases, due to public pressure to obtain conviction, anomalies in the jury selection process, flawed forensic testimony, judicial misconduct and other factors.

The death penalty was also cruel, Breyer said, because it failed to distinguish between particularly heinous and less brutal crimes, while being influenced by factors related to race, gender, geography and disparities in resources of capital charged inmates. He also cited “unconscionably long delays that undermine the death penalty’s penological purpose.”

The Washington decision brings to 20 the number of states that have barred capital punishment. Of 50 US states, 29 have either abolished the death penalty or have not carried out an execution in 10 years, according to the Death Penalty Information Center (DPIC). An additional nine states have not carried out the death penalty in the past five years. The District of Columbia, the US military and the federal government have also not had an execution in at least 10 years.

Since the US Supreme Court reinstated the death penalty in 1976, three states—Texas, Virginia and Florida—have accounted for more than half of the 1,483 executions. Texas has carried out 555 executions, far more than any other state. Texas has carried out 10 executions so far this year and has five scheduled through the end of this year.

But while Texas continues its death penalty pursuit, executions in the US are waning. So far this year, 18 executions have been carried out nationwide, compared to 23 in 2017, 20 in 2016 and 28 in 2015, according to DPIC. Today, 54 percent of Americans support the death penalty, much lower than in the 1990s. As recently as 2007, about twice as many people favored the death penalty as opposed it.

The US has also come under criticism from the European Union and International Criminal Court for its continued use of the death penalty, a practice condemned and outlawed by the vast majority of industrialized nations. European as well as some US suppliers of execution drugs have also made their drugs unavailable for use by states continuing to subscribe to the barbaric practice, forcing states to turn to

unregulated compounding pharmacies and other disreputable—and secret—sources for drugs for lethal injections.

While the US Supreme Court has outlawed the death penalty in cases where a crime has been committed by a juvenile or the mentally impaired, it has consistently upheld the constitutionality of capital punishment as a whole.

With the recent confirmation of Brett Kavanaugh as an associate justice, shifting the nation’s high court further to the right, it is likely that the Supreme Court will continue to uphold the constitutionality of the death penalty for the foreseeable future.

Kavanaugh has frequently praised deceased Justice Antonin Scalia as “his hero” and a “role model.” Scalia, a fervent death penalty supporter, said of capital punishment that “death is no big deal,” and that no one ever said an execution had to be painless. Kavanaugh’s addition to the court is poised to cement the high court in the pro-death capital punishment camp, in opposition to growing sentiment in the US and internationally opposing the death penalty.



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