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No. 53849-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

IN RE PERSONAL RESTRAINT PETITION OF:

ALLEN EUGENE GREGORY,

REPLY BRIEF OF PETITIONER

Judgment in Pierce County Superior Court
No. 98-1-04967-9
The Hon. Rosanne Buckner (Ret.), Presiding

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A. ARGUMENT IN REPLY

1. *The State's Time-Bar Argument is Frivolous*

The State argues that Mr. Gregory is time-barred because he did not file a PRP while his direct appeal and statutory direct review were pending in the Supreme Court. *State's Response to Personal Restraint Petition* (“*Resp.*”) at 6-8. Under the State’s view, even though the death sentence against Mr. Gregory was not yet final, and the judgment entered in June 2012 was being reviewed by the Supreme Court, Mr. Gregory should have filed a Personal Restraint Petition attacking the underlying conviction by June 2013, thereby bifurcating his case.

This is an absurd argument and one not supported by any case cited by the State. Mr. Gregory clearly raised guilt phase issues in both the trial court and the Supreme Court after the initial reversal in 2006. Even though the Supreme Court opted against using its discretion to review claims that Mr. Gregory argued should be reconsidered in light of new case law or new facts, the State does not deny that guilt phase issues were still on appeal until 2018. The State’s position would mean that everyone who unsuccessfully raises any issues on their direct appeal would be time-barred from filing a

PRP unless they filed the PRP while the appeal was still pending, an absurd result that would encourage needless litigation.¹

Notably, the State fails to cite to any case supporting the position it currently advances.² The reason the State does not cite to authority is that controlling Washington precedent completely rejects its arguments. In *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007), our Supreme Court made it clear that a judgment is not final for purposes of RCW 10.73.090 until challenges to *both* a conviction *and* sentence are resolved. As this Court summarized *Skylstad*'s holding in 2017:

In *Skylstad*, our Supreme Court considered whether a judgment was final while the defendant's sentence was still under appeal. *Id.* at 945. The timeline and procedural posture was determinative. *Id.* at 946.

On February 8, 2002, Skylstad was convicted in the trial court. *Id.* On October 7, 2003, the Court of Appeals affirmed the conviction but reversed the sentence. *Id.* On May 4, 2004, the Supreme Court denied review. *Id.* On May 14, 2004, the Court of Appeals issued its mandate. *Id.* On July 28, 2004, the trial court resentenced Skylstad, and he appealed his resentencing. *Id.* On October 11, 2005, the Court of Appeals

¹ If Gregory had filed a PRP in 2013 attacking only the conviction, but not the death sentence, then lost the appeal and later tried to file a PRP attacking the death sentence, the State would undoubtedly be arguing that the second petition was a successor petition.

² See *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (courts may assume that where no authority is cited, counsel has found none after diligent search).

affirmed Skylstad’s appeal from the resentencing. *Id.* On November 21, 2005, Skylstad filed a PRP. *Id.* On December 15, 2005, the Court of Appeals dismissed the PRP as untimely, citing the May 14, 2004 mandate as the date of the final judgment. *Id.* On September 6, 2006, the Supreme Court denied review of Skylstad’s appeal from the resentencing. *Id.* Finally, on September 15, 2006, the Court of Appeals issued its mandate on Skylstad’s appeal from the resentencing. *Id.* at 947.

Our Supreme Court held that the Court of Appeals erred in relying on the May 14, 2004 mandate to dismiss Skylstad’s PRP as time-barred. *Id.* at 946, 952. The court explained, “Skylstad’s direct appeal from his conviction cannot be disposed of until both his conviction and sentence are affirmed and an appellate court issues a mandate terminating review of both issues.” *Id.* at 954. The court reasoned that, because “[t]he sentence is the judgment” in criminal cases, the judgment is effectively vacated when a sentence is reversed. *Id.* at 950 (alteration in original) (quoting *Berman v. United States*, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937)). Thus, when the mandate was issued on May 14, 2004, there was no judgment in place because the sentence had been reversed; rather, the mandate was issued only with respect to the conviction. *Id.* at 953. Therefore, the judgment was not final when the May 14, 2004 mandate was issued because litigation on the merits of Skylstad’s sentence continued. *Id.* at 955.

In re Pers. Restraint of Sorenson, 200 Wn. App. 692, 696-97, 403 P.3d 109

(2017).³

³ *Accord: State v. Contreras-Rebollar*, 177 Wn.2d 563, 565, 303 P.3d 1062 (2013) (fact that sentence was reversed meant there was no final judgment until litigation on the merits of the sentence was concluded, and thus motion to supplement PRP claims was timely); *In re Pers. Restraint of George*, 2020 Wash. App. LEXIS 533 (COA No. 52216-1-II, 3/3/20) (unpub), Slip Op. at 5 (“The Supreme Court has interpreted RCW 10.73.090 as providing that judgment becomes final when all litigation on the merits ends.

(continued...)

In contrast to *Skylstad* is *In re Personal Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013), where a prisoner was resentenced in 2009 due to an error in his offender score, and unsuccessfully tried to argue that he could file a timely PRP contesting a conviction from 2000 that had never been appealed. Finding Adams' PRP untimely, the Court distinguished *Skylstad* because Adams never appealed his judgment, which became final in 2000, whereas Mr. Skylstad's sentence was still on direct review and thus was not final for purposes of RCW 10.73.090. *See Adams*, 178 Wn.2d at 427.⁴

In this case, the Supreme Court reversed the death sentence in 2006. *State v. Gregory*, 158 Wn.2d 759, 867, 147 P.3d 1201 (2006) ("*Gregory I*"), *after remand* 192 Wn.2d 1, 427 P.3d 621 (2018) ("*Gregory II*"). While the State again obtained a death sentence, the judgment never became final as it

³(...continued)
... *Finality under RCW 10.73.090 does not occur until both the conviction and the sentence are final.*") (internal quotes and cite omitted) (emphasis added).

Notably, in *Skylstad*, the Supreme Court specifically noted the absurdity of the State's current argument by reference to a hypothetical second special sentencing proceeding in a capital case, *Skylstad*, 160 Wn.2d at 953 n.7, a hypothetical that played itself out in Mr. Gregory's case.

⁴ It is not clear why the State fails to mention the *Skylstad/Adams* line of cases as the Pierce County Prosecutor's office has been involved in other cases, some very recent, that directly address them. *See State v. Contreras-Rebollar*, 177 Wn.2d 563, 303 P.3d 1062 (2013); *In re Pers. Restraint of George*, 2020 Wash. App. LEXIS 533 (COA No. 52216-1-II, 3/3/20) (unpub).

was under review by the Washington Supreme Court. Ultimately, the sentence was vacated once again and the case remanded for imposition of a life without parole sentence. *Gregory II*, 192 Wn.2d at 36; Ex. 5 at 30 (mandating case to superior court for further proceedings). Under *Skylstad*, the one-year non-jurisdictional time-bar⁵ did not begin to run at least until the mandate from the second appeal issued on November 7, 2018, whatever the disposition was on the guilt phase arguments (that were still being considered).⁶ This petition is timely.

2. *The State Wants to Deny Mr. Gregory Any Opportunity to Review the Defects with the Warrants in the Now Dismissed Rape Case*

The State does not dispute that it withheld significant evidence about Robin Sehmel's⁷ regular employment with the Tacoma Police Department

⁵ A court has the inherent power to continue the one-year time limit. *See In re Pers. Restraint of Davis*, 188 Wn.2d 356, 362 n.2, 395 P.3d 998 (2017), *abrogated on other grounds in Gregory II, supra* (granting continuance beyond one-year time limit where attorneys simply wanted more time to file PRP).

⁶ The deadline was actually June 28, 2020, since on June 28, 2019, the superior court exercised discretion and eliminated the \$10,000 in LFOs. Ex. 4 at 27-28. *See In re Pers. Restraint of Fowler*, 9 Wn. App. 2d 158, 163, 442 P.3d 647 (2019), *rev. granted* 195 Wn.2d 1007 (2020) (judgment became final when superior court amended the LFOs and there was no appeal) (citing *In re Pers. Restraint of Sorenson*, 200 Wn. App. at 696). However, because Mr. Gregory filed the petition before the one anniversary of the mandate, it is not significant for purposes of the timeliness of this petition.

⁷ The State claims that Ms. Sehmel is deceased. *Resp.* at 11. Yet in September 2019, the Secretary of Health conditionally granted Ms. Sehmel a chemical dependency professional credential. *See* <https://www.doh.wa.gov/Newsroom/2019NewsReleases/> (continued...)

(“TPD”) from Mr. Gregory’s counsel in the murder case (Mr. Schwartz and Mr. Thornton). The State also does not dispute that Gregory’s lawyers (as opposed to Gregory’s lawyer in the rape case) did not even know about Sehmel’s job as a professional operative for the TPD at the very time of her encounter with Mr. Gregory. Ex. 19 at 151-152.

Rather than address the issues substantively, the State wants to bar review of its own misconduct and the misconduct of its police operative. The State’s theory is that it can withhold evidence about Ms. Sehmel from the lawyers in the murder case in the late 1990s. but when the evidence came out years later, it can claim that issues about Sehmel should have been raised earlier, at a time when Gregory’s attorneys did not know about the information. When the Supreme Court ruled that Gregory should have raised the issue at the 2000 trial and in the first appeal, *Gregory II*, 192 Wn.2d at 30, and Gregory then raised an ineffectiveness argument in a timely PRP, based on non-record based evidence from his attorneys that they did not know about

⁷(...continued)
19117 DisciplineR1933NewsRelease (viewed 4/21/20).

Sehmel's occupation as a police agent, Ex. 19 at 151-152, the State again wants to bar review, claiming the issue had already been decided.⁸

This is game playing which seeks to deny Mr. Gregory any redress for what clearly is a wrong. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803) (quoted in *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009)). The State's position would bar Mr. Gregory forever from the protection of the courts since he would have no redress for any possible violations of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978), *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052,

⁸ The State cites to *In Pers. Restraint of Fero*, 190 Wn.2d 1, 15, 409 P.3d 214 (2018), for authority regarding newly discovered evidence. *Resp.* at 13; *see also Resp.* at 9. However, the State cites to a minority opinion (Justice González, joined by Justices Yu, Johnson and Owens), without noting this fact. Justice Yu wrote separately to observe, "Unfortunately, this court is unable to come to a holding on this important issue and instead allows an erroneous Court of Appeals decision reversing Fero's conviction to stand." *Fero*, 190 Wn.2d at 24 (Yu, J., concurring in part). In other words, this Court's decision granting Ms. Fero's PRP is what has precedential value, *In re Pers. Restraint of Fero*, 192 Wn. App. 138, 367 P.3d 588 (2016), *aff'd* 190 Wn.2d 1, 409 P.3d 214 (2018), not the minority views of only four justices.

80 L.Ed.2d 674 (1984) and their associated constitutional rights under the Fourth, Sixth and Fourteenth Amendments and article I, sections 3, 7 and 22.

The State argues: “R.S. was not working as a police agent when she accepted a ride from the Defendant and was raped. Her work as an informant in narcotics investigations was irrelevant to the facts of her rape and to the warrant.” *Resp.* at 12. The State does not give a citation to the record for its conclusions, and the State conspicuously fails to submit any declaration from Sehmel’s employer, TPD, to verify its assertion.⁹ In contrast is undisputed evidence that Sehmel’s work for the police was based on her prostitution activities that gave her knowledge about various activities of interest,¹⁰ that she was paid a lot of money for her services during the month of August 1998, and the police paid Sehmel \$200 the same day she gave a statement to the police about Mr. Gregory. *See PRP* at 15-18. Accordingly, whether anyone else in 1998-2000 knew that Sehmel made a false allegation against Mr. Gregory, she was in fact a professional police operative in August 1998 and should be treated as one for purposes of *Franks*.

⁹ ““Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it.” *Miller-El v. Cockrell*, 537 U.S. 322, 345, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (quoting *Pierre v. Louisiana*, 306 U.S. 354, 361-362, 59 S. Ct. 536, 83 L. Ed. 757 (1939)).

¹⁰ *See PRP* at 14 & n.9 & n. 10, and exhibits referred to therein.

The State also ignores what took place in 2010 when, in contrast to her sworn testimony at the rape trial, Sehmel admitted having consensual oral and vaginal sex with Gregory in exchange for a fee (although claiming anal sex was non-consensual), tracking in many respects Gregory’s testimony at the 2000 rape trial.¹¹ The State now minimizes Sehmel’s material misrepresentations, simply claiming now that the “State did not believe it could prove the crimes beyond a reasonable doubt in the face of ‘inconsistent statements.’” *Resp.* at 9. Yet, the State’s own motion to dismiss the rape case was not just based on “inconsistencies” but on that fact that during the defense interview Sehmel “made material representations that were inconsistent with her prior statements about this case and inconsistent with her testimony at the 2000 trial” making it “impossible” for the State to proceed with trial on Counts I and II. As for Count III, the “State does not believe there is any reasonable probability of proving the defendant is guilty.” CP II 519. There were not just “inconsistent” statements, but rather were material misrepresentations (i.e. lies) that went to very core of her original story. The fact that Ms. Sehmel, a professional police operative, did not tell

¹¹ Compare *Gregory I*, 158 Wn.2d at 778, 780 (Sehmel’s claim of forced oral and vaginal intercourse, Gregory’s testimony about consent) with Ex. 15 at 123-24 (Sehmel describes agreement to have consensual vaginal and oral sex at school for money before she claimed anal rape).

the truth in 1998, is itself a basis to invalidate the warrant to search Mr. Gregory's car and the two orders for blood under *Franks*, the Fourth and Fourteenth Amendments and article I, section 7.

Moreover, both the police and the deputy prosecutors who sought warrants and blood draw orders between 1998 and 2000 failed to disclose information in their possession or in the possession of their agencies that Sehmel was in fact an employee of the TPD in August 1998 and was not just a "citizen informant," that she was part of the criminal underworld and was not just a "normal" citizen giving information to the police, and that Sehmel had huge credibility problems apart from the 2010 revelation of her falsehoods (i.e. she was caught trying to sell her baby at a bus stop close in time to the time she made false allegations against Mr. Gregory). These are the facts under *Franks* that should have been included in the certification of probable cause, arguably used for the first blood draw, Ex. 8 at 52-54 & Ex.14 at 94-96, in Det. Pollard's search warrant application, Ex. 7 at 48-51, or the deputy prosecutor's motion to Judge Van Deren for a second warrant to seize Mr. Gregory's blood. Ex. 9 at 55-64.

In the end, other than simply claiming that it did not violate the law, the State has not provided any substantive response to the fact Ms. Sehmel,

a professional police operative, lied, that the State profited from her lies by using them to obtain evidence against Mr. Gregory, that the existence of these lies was not revealed until after Gregory was convicted, and that his lawyers in the murder case were unaware of all the facts at the time of the trial. Mr. Gregory's murder conviction is marred by this combination of violations of the Fourth, Sixth and Fourteenth Amendments and article I, sections 3, 7 and 22.

Finally, as for the issue regarding the lack of a sworn affidavit to support the search warrant for the car, the State claims the affidavit was signed under oath. *Resp.* at 11. The signature line, though, is blank. Ex. 7 at 50. The State's argument should be rejected.

3. *Mr. Gregory Should Not Have Been Tried While Being Forced to Wear a Stun-Belt*

The State justifies the forced restraint of Mr. Gregory with a stun belt during the murder trial by claiming that Mr. Gregory had a record of "violent offenses beginning at the age of 14." *Resp.* at 14. The State fails to explain how a juvenile disposition for theft in the first degree is a "violent offense" since it is not listed in RCW 9.94A.030(55). Nor would a 14-year old's theft of a skateboard in 1986 (which is what the juvenile offense involved, Ex. 20 (attached)) normally be considered a "violent offense." While at the time of

the first trial, Mr. Gregory in fact had been convicted of rape, the convictions not yet being reversed and dismissed, the State should not profit again from Ms. Sehmel's lies to justify a trial court's decision based on misinformation. Moreover, the State again concentrates on Mr. Gregory's size, ignoring the racist implications of such arguments. *See Opening Brief* at 29 n. 18.

While the State argues that “[j]ail officers were under orders to shoot the Defendant if he tried to escape,” *Resp.* at 14, this fact demonstrates the extreme emotionally charged atmosphere of the murder trial, with the State seeking to kill Mr. Gregory multiple ways. Thus, the State has no response to Mr. Gregory's lawyer's declaration that the stun belt made Mr. Gregory appear stiff and emotionless during the trial, Ex. 19 at 152-53, giving the State an unfair advantage before the jury. The State also ignores Gregory's lawyer's declaration that he believed the jurors knew that Mr. Gregory was wearing something under his clothing that was not natural and likely involved restraints, Ex. 19 at 152, a fact put on the record at the time of trial. RP

(2/6/01) 3628-29.¹² The State has chosen not to put forth any evidence in response.

Accordingly, the Court should conclude that Mr. Gregory's rights to due process of law, to a fair jury trial, to be present and consult with counsel were violated. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3, 21, 22: ICCPR, art. 10. The Court should vacate the conviction.

4. *The State Fails to Rebut the Fact that the Verdict Was Tainted by Racial Bias*

While the State asserts "*Gregory II* did not hold that Gregory's jury was different from other juries," *Resp.* at 17, in fact, there is now statistical evidence, no longer disputed by the State, that the jurors who imposed death sentences in Washington State over a 34-year period of time acted in a racially biased manner. The jury at the 2001 murder trial *was* different from other juries in Washington State between 1981 and 2014.

While the State mentions *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020), *Resp.* at 17, the State ignores a key aspect of that case – that even the prosecutors now recognize that "death-qualifying" juries exacerbates racial bias. In *Pierce*, the Supreme Court overruled *State v. Townsend*, 142

¹² The State claims that Mr. Gregory's own attorney did not know he was wearing a stun belt. *Resp.* at 14, Yet, this assertion was made by the deputy prosecutors themselves, without even a supporting declaration, in their pretrial briefing supporting the restraints and referred to, not the lawyers in the murder case, but Mr. Gregory's lawyer, Leslie Tolzin, in the rape trial in 2000, the year before. CP I 1220 (now Supp. CP 76).

Wn.2d 838, 846, 15 P.3d 145 (2001), where the Court previously held it was error to tell the potential jurors during jury selection that they are not being asked to sit on a death penalty case. While the “underpinnings” of *Townsend* have “disappeared in light of” *Gregory II, Pierce*, 194 Wn.2d at 244 (Stephens, C.J., concurring), the decision was also based on the impact on race of the practice of “death qualifying” jurors:

As WAPA [Washington Association of Prosecuting Attorneys] cogently argues, death-qualifying juries disproportionately exclude people of color. Br. of Amicus Curiae WAPA at 14 (quoting Noelle Nasif, Shyam K. Sriram & Eric R.A.N. Smith, Racial Exclusion and Death Penalty Juries: Can Death Penalty Juries Ever Be Representative?, 27 Kan. J.L. & Pub. Pol’y 147, 148 & n. 15 (2018) (citing Eric P. Baumer et al. Explaining Spatial Variation in Support for Capital Punishment: A Multilevel Analysis, 108 Am. J. Soc. 844, 853 (2003); Samuel R. Gross & Phoebe C. Ellsworth, Hardening of the Attitudes: Americans’ Views on the Death Penalty, 50 J. Soc. Issues 19, 21 (1994)). This research is consistent with a recent Pew Research Center survey finding significant racial disproportionality in support for the death penalty. J. Baxter Oliphant, Public Support for the Death Penalty Ticks Up, Pew Res. Ctr. (June 11, 2018) [citation omitted] Hewing to a rule that has a disproportional effect of eliminating people of color undermines our commitment to fostering juries that reflect our society. . . .

This case vividly illustrates the harm caused by *Townsend*. The judge and counsel tried hard to follow *Townsend* during voir dire, leading directly to the State's attempt to dismiss juror 6 *As WAPA argues in this court, however, Townsend leads to death-qualification and death-qualification has a racially disproportionate impact.*

We therefore hold that exercising a peremptory challenge to remove a juror who does not “qualify” under death-qualification questioning is a presumptively invalid basis for exercising a peremptory challenge.

State v. Pierce, 195 Wn.2d at 242-43 (González, J., opinion) (emphasis added).

This concession by the WAPA, adopted by the Supreme Court, that death-qualification promotes racial bias, directly relates to the jury that decided whether the State had met its burden of proof in the murder trial in this case. There is no dispute that the jury in 2001 was “death qualified.” *See* CP II 549 (“Beginning in January of 2001, a death-qualified jury was seated”). Gregory even raised on appeal the granting of a “for cause” challenge to a juror based upon her views of the death penalty. *Gregory I*, 158 Wn.2d at 813-15, and one of the two Black jurors in the jury pool was also dismissed for the same reason. *See* PRP at 30.

The jury that decided that Mr. Gregory was guilty of murder was part of a small pool of jurors in Washington where it is now known that they were infected with racial bias. Accordingly the conviction should be vacated because of the violation of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22, and the murder charges retried with a jury that is free from either explicit or implicit racial bias.

5. *The Prosecutorial Misconduct Claim Raised in this PRP Has Never Been Litigated Previously*

At the murder trial, the deputy prosecutors persistently, in opening statement and in closing arguments, told the jurors that they should “declare the truth,” and speak for the community to decide whether G.H. deserves justice. RP (2/14/01) 4076; RP (3/19/01) 6700-01, 6806. The State now claims that issues related to this misconduct have already been decided arguing that Mr. Gregory challenged the 2001 “declare the truth” argument in the appeal from the 2012 death verdict. *Resp.* at 3 & 18. This is incorrect. What was at issue in the second appeal was the State’s “declare the truth” argument in the second special sentencing proceeding *in 2012*, not the 2001 trial.¹³ The fact that State repeated its misconduct at the second sentencing proceeding, though, was never adjudicated because of the Supreme Court’s decision striking down the death penalty.

While Mr. Gregory raised in the first appeal the prosecutors’ misconduct at the first trial, some of which led to the reversal of the death sentence, he did not raise an argument based on “declare the truth.” The sections of Gregory’s brief addressing prosecutorial misconduct during the

¹³ See Opening Brief of Appellant, Sup. Ct. No. 88086-7 (3/20/14) at 22-25 (referring not to argument in 2001, but to the State’s argument on *May 14, 2012*).

“guilt phase” of the first trial rest on (1) the denigration of defense counsel, (2) the prosecutor’s argument about the defense not calling another suspect (“Now the defense didn’t call Mike Barth. They didn’t call him and say, did you kill her?”), and (3) the prosecutor’s statistical argument based on the testimony of the disgraced DNA expert, John Brown. *Appellant’s Opening Brief*, Sup. Ct. No. 71155-1 (filed 4/11/03), at pp. 138-145. In light of the record as to what Mr. Gregory actually raised in the first appeal, the State’s argument – “Although the Defendant conceded in *Gregory II* that the claim had been raised in *Gregory I*, he wants to revoke that concession here in an untimely collateral attack upon the law of the case.” *Resp.* at 19 – lacks any relation to the reality of what actually was raised in the first appeal and what Mr. Gregory tried to preserve in the second appeal.¹⁴

On the other hand, the State ignores completely the fact that Mr. Gregory’s attorney for the first appeal, Suzanne Elliott, submitted a declaration stating that she did not raise the issue of “declare the truth” in the first appeal for any tactical reason. Ex. 17 at 139. Thus, it is apparent the “declare the truth” issue has never been resolved in any appeal, and one must

¹⁴ Mr. Gregory asked the Supreme Court to revisit various issues from the first appeal because undoubtedly, had he not, the State would argue at some later point that he had not exhausted his state court remedies sufficiently.

judge the issue not just as a free-standing misconduct issue, but also as ineffective assistance of counsel on direct appeal under *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), and a violation of the right to due process, the right to counsel and the right to appeal. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3 & 22. The State ignores this issue.

The State tries to minimize its own misconduct by arguing, “The challenged language is only a few paragraphs in approximately 70 pages of the prosecutors’ opening statement and closing argument.” *Resp.* at 20. But in fact “a few paragraphs” demonstrates not only that this was not a minor off-hand comment made in passing, but that the comments were a persistent theme and were certainly flagrant and ill-intentioned in the sense of being non-spontaneous, but planned out, arguments. The arguments were also tied to other arguments about the jury’s role supposedly being to provide justice for G.H., *see e.g.*, RP (3/19/01) 6701, which was not the jury’s role at all.¹⁵

To be sure, the trial court gave general instructions about the burden of proof and to ignore statements of the lawyers that conflict with the instructions. The same can be said for every case involving prosecutorial

¹⁵ Appeals to seek “justice” have traditionally been prohibited as an improper appeal to emotion. *See United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986).

misconduct. As for a lack of objection below, that too is not fatal. In both *State v. Walker*, 182 Wn.2d 463, 477-78, 341 P.3d 976 (2015), and *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012), the Supreme Court granted relief despite lack of objection at trial. At some point, in case where the State's case against Gregory rested on DNA evidence only, and the defense consistently attacked the validity of the results, the State's flagrant and ill-intentioned arguments must become a basis for vacating the conviction based on the denial of due process of law, a fair jury trial and effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.

6. *The State's Response Regarding the Interest on the Attorney Fee Award is Bizarre*

On June 28, 2019, the State presented an order to the superior court eliminating the \$10,000 in LFOs assessed for attorney fees against Mr. Gregory in his efforts to defend against the second death penalty proceeding. Ex. 4 at 27-28. The superior court vacated the \$10,000 fee award and further ordered "that the remainder of the Legal Financial Obligations from the 2012 Judgment and Sentence shall remain as ordered, for a total of \$3,264.90." Ex. 4 at 28. In other words, the superior court ordered that Mr. Gregory pay a total of only \$3264.90 for restitution, Crime Victim Assessment, DNA fee

and filing fee.¹⁶ The court did not order that Gregory pay interest on the vacated attorney fee award. The State did not appeal from this order.

Mr. Gregory has paid a significant portion of LFOs, with the restitution now down to \$675.¹⁷ According to the State, the interest on the restitution alone is \$1862.28. *Resp.* at 25. Apart from the issues of how this interest is calculated (i.e. when is the “start” date for the restitution award and interest—2001, 2012 or 2019?), the Superior Court Clerk’s Office claims that Mr. Gregory owes interest assessed on the now-vacated attorney fee award. *Ex. 18* at 141, 148-49. The State calculates that the interest on the non-restitution debt is currently \$7853.19, although since the non-attorney fee debt is only \$710, the huge interest debt clearly includes significant interest

¹⁶ The State calculates that there was a \$200 “judgment extension” fee assessed. *Resp.* at 25. Where that comes from for a judgment that was only final in 2019 is not explained. This fee should be wiped out if it truly exists. *See State v. White*, 11 Wn. App. 2d 1074, 2020 Wash. App. LEXIS 122 (No. 78209-6-I, 1/21/20) (unpub.) (using court’s discretion to eliminate improperly assessed costs rather than to wait for another collateral proceeding). Similarly, the criminal filing fee (\$110) should also be vacated under Laws of 2018, ch. 269, § 17, since Mr. Gregory’s case was on appeal at the time of the adoption of this new statute. *State v. Ramirez*, 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018).

The State cites *Ramirez*, and admits that “HB 1783 only applies prospectively to sentences which were not yet final, because they were still pending on direct review” when the law took effect in June 2018. *Resp.* at 23. But the State erroneously claims that this does not apply to Mr. Gregory’s case even though it is clear that Mr. Gregory sentence was still on direct review until the mandate issued in November 2018.

¹⁷ Mr. Gregory has two other cases for which he is paying LFOs, and thus his payments have been applied across different cases. Pierce County Sup. Ct. Nos. 00-1-04026-3 & 98-1-03082-0.

on the vacated fee award. In other words, the Clerk’s Office wishes to make Mr. Gregory pay interest on a debt that no longer exists, which was vacated at the State’s request, and which was not ordered by the court on June 28, 2019.

Despite its presentation of the order eliminating the \$10,000 and ordering that Mr. Gregory pay only \$3264.90, the State now complains about it. The State cites RAP 2.4(a) and asks not only that Gregory pay interest on a debt that no longer exists, but also to have the original \$10,000 reinstated, claiming that “the debt was vacated in error, without lawful authority.” *Resp.* at 24. The State’s argument is bizarre and frivolous.

A party cannot invite an error by asking for the attorney fee award to be vacated, by asking that the judge only order payment of a total of \$3264.90, and by not asking for payment of interest on the vacated attorney fee award, and then complain about it.¹⁸ Moreover, once an issue has been decided on its merits, and a party fails to appeal, as the State failed to appeal the June 2019 order, *res judicata* prevents relitigation of that issue later.¹⁹

¹⁸ See *In re Pers. Restraint of Serano Salinas*, 189 Wn.2d 747, 757, 408 P.3d 344 (2018) (regarding invited error)

¹⁹ See *In re Marriage of Shortway*, 4 Wn. App. 2d 409, 422-23, 423 P.3d 270 (2018) (regarding *res judicata*).

Thus, once the judge did not order that Mr. Gregory pay more than \$3264.90 in LFOs, the State cannot now complain that Mr. Gregory should pay more – either the \$10,000 or the thousands of dollars in interest that it specifically did not seek payment for last year.

RAP 2.4(a) which pertains to direct appeals has no bearing on whether the State can seek positive relief to reinstate an LFO award or its associated interest in a PRP proceeding after proposing to vacate it at an earlier proceeding and then failing to appeal the order. Moreover, even under RAP 2.4(a), if the State failed to appeal an order, the Court must find that such action was “demanded by the necessities of the case.” The State cites to nothing showing that the “necessities of the case” *demand* reinstatement of attorney fees assessed for a death sentence that was vacated.

The State appears to agree that the \$10,000 was imposed not for attorney fees chargeable for the 2001 trial, but only for the second, 2012, special sentencing proceeding. *Resp.* at 25. This was a proceeding that could have been avoided had the State not sought to execute Mr. Gregory after the first death sentence was reversed. In other words, in 2006, if the State had simply accepted a life without parole sentence, there would not have been any

second special sentencing proceeding, avoiding the employment of attorneys to defend Mr. Gregory's life.

The State also does not dispute the principle that as a matter of due process of law under the Fourteenth Amendment and article I, section 3, a person cannot be assessed LFOs for a proceeding which they ultimately won. While Mr. Gregory is not seeking reimbursement for what he has already paid since he has been paying the restitution portion of LFOs, he is in fact similarly situated as the defendants in *Nelson v. Colorado*, ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017). Those defendants challenged Colorado's retention of court costs and restitution in cases where their convictions were reversed or vacated, and they were either acquitted upon retrial or the State did not retry them. Like the defendants in *Nelson*, Mr. Gregory, not the State, ultimately prevailed in resisting the State's attempts to execute him and so too, under the Fourteenth Amendment and article I, section 3, Mr. Gregory cannot be charged attorney's fees in a case that he won.²⁰

²⁰ See also *State v. Hecht*, 2 Wn. App. 2d 359, 368, 409 P.3d 1146 (2018) ("When a criminal conviction is overturned by a reviewing court, the State is obliged to refund fees, court costs, and restitution exacted from the defendant as a consequence of that conviction. . . . The State no longer has a legal claim to this property. . . . Restitution is required.").

The State cites RCW 10.82.090 for the proposition that Mr. Gregory can only vacate the interest assessed on the now-vacated attorney fee award by following the remission provisions of the statute if he is released from custody. The State also notes that under this statute no interest will be assessed on non-restitution related LFOs after June 7, 2018. *Resp.* at 24, 26. What the State ignores is the assumption in RCW 10.82.090 that the interest is being assessed on “legal financial obligations” – the use of term “obligation” assumes that Mr. Gregory has been ordered to pay the debt, not a LFO that has been vacated. Where, as here, the judge in 2019 vacated the \$10,000, limited the LFOs to \$3264.90, and did not impose an obligation to pay interest on the vacated attorney fee award, RCW 10.82.090 provides no authority to force payment of interest for something that is not an “obligation.” In such a situation, a defendant need not follow the interest remission provisions of RCW 10.82.090(2) because they were never ordered to pay the principle, let alone the interest.²¹

While it may be difficult to apportion the interest between that assessed for the \$710 of other LFOs and the \$10,000 of attorney’s fees, *Resp.*

²¹ See *State v. White*, 11 Wn. App. 2d 1074, 2020 Wash. App. LEXIS 122 (No. 78209-6-I, 1/21/20) (unpub.) (vacating appellate costs assessed after appeal when subsequent PRP vacated conviction, ruling that defendant need not follow RCW 10.73.160(4)’s procedures for appellate cost remission).

at 26, that is not a legal basis for forcing someone to pay interest on a vacated debt where where the judge in 2019 restricted the LFOs only to \$3264.90. Requiring Gregory to pay more than what has lawfully been ordered or could be ordered is unlawful restraint under RAP 16.4(c)(2), (5), (6) and (7), both because of the violation of the Due Process Clauses of the Fourteenth Amendment and article I, section 3, but also because of the violation of the laws of the State of Washington.²²

B. CONCLUSION

This Court should grant relief, and vacate the murder conviction and/or the interest on the \$10,000 and other illegal LFOs.

Dated this 30th day of April 2020.

Respectfully submitted,

s/ Neil M. Fox

WSBA NO. 15277
Attorney for Petitioner

²² See *In re Pers. Restraint of Spires*, 151 Wn. App. 236, 240-47, 211 P.3d 437 (2009) (granting relief on LFO issues under RAP 16.4); *In re Pers. Restraint of Harwood*, 194 Wn. App. 1041, 2016 Wash. App. LEXIS 1453 (COA No. 34009-1-III, 6/21/16) (unpub.) (same, citing *Spires*).

STATUTORY APPENDIX
Supplemental to Opening Brief

Laws of 2018, ch. 269, § 17 provides in part:

(2) Clerks of superior courts shall collect the following fees²⁰ for their official services: . . .

. . . .

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

RAP 2.4 provides in part:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e) in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

RCW 9.94A.030 provides in part:

(56) "Violent offense" means:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

(v) Indecent liberties if committed by forcible compulsion;

(vi) Kidnapping in the second degree;

(vii) Arson in the second degree;

(viii) Assault in the second degree;

(ix) Assault of a child in the second degree;

(x) Extortion in the first degree;

(xi) Robbery in the second degree;

(xii) Drive-by shooting;

(xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and

(xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

RCW 10.82.090 provides:

(1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations. All nonrestitution interest retained by the court shall be split twenty-five percent to the state treasurer for deposit in the state general fund, twenty-five percent to the state treasurer for deposit in the judicial information system account as provided in RCW 2.68.020, twenty-five percent to the county current expense fund, and twenty-five percent to the county current expense fund to fund local courts.

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction as follows:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018;

(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full and as an incentive for the offender to meet his or her other legal financial obligations. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

(3) This section only applies to adult offenders.

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE PERSONAL RESTRAINT OF:) NO. 53849-1-II
ALLEN E. GREGORY,) EXHIBIT 20
Petitioner.)

EXHIBIT 20
Charging Document and Disposition Order
Pierce County Superior Court (Juvenile) No. 160468 R010

FILED
DEPT. 6
IN OPEN COURT
MAY 27 2012
Plaintiffs
BY [Signature]
DEPUTY

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PLAINTIFFS
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FILED

IN PIERCE COUNTY JUVENILE COURT

A.M.

MAR 04 1986

P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JUVENILE COURT

PIERCE COUNTY WASHINGTON
BRIAN SONNTAG County Clerk

By

DEPUTY

STATE OF WASHINGTON,)

Plaintiff,)

NO. 160468 R010

vs.)

AMENDED
INFORMATION

ALLEN EUGENE GREGORY,
DOB 6/9/72)

Defendant.)

I, WILLIAM H. GRIFFIES, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ALLEN EUGENE GREGORY of the crime of THEFT IN THE FIRST DEGREE, committed as follows:

That the defendant, in Pierce County, Washington, on or about January 11th, 1986, did then and there wrongfully obtain property, to-wit: a skateboard, by taking it from the person of Leonard J. Davis, with intent to deprive such person of such property, which is a violation of RCW 9A.56.030(1)(b) and 9A.56.020(1)(a).

DATED this 3rd day of March, 1986.

WILLIAM H. GRIFFIES

STATE OF WASHINGTON, County of Pierce ss:
I, Ted Rutt, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

PROSECUTING ATTORNEY IN AND FOR SAID COUNTY AND STATE.

IN WITNESS WHEREOF, I hereat set my hand and the Seal of said Court this 28th day of March, 2001

By:

Carolyn Williamson
CAROLYN WILLIAMSON
Deputy Prosecuting Attorney

TED RUTT, Clerk

By: Gregory Bursawski Deputy

FILED
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ADMITTED

PLAINTIFFS
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FENCAD 00131 0000

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF PIERCE
JUVENILE COURT

STATE OF WASHINGTON

vs.

ALLEN EUGENE GREGORY,

D.O.B. 6/9/72

FILED
IN OPEN COURT
Date: 2/20/86
By: Brian S. ... Clerk
Deputy

160468 R010

DISPOSITION ORDER

It has been found beyond a reasonable doubt that the above juvenile, a [XX] boy [] girl of 13 years, has committed the offense(s) of THEFT IN THE FIRST DEGREE, RCW 9A.56.030(1)(b) and 9A.56.020(1)(a)

As a result of this offense, and pursuant to the jurisdiction granted in RCW 13.04.030, the Court orders:

OFFENDER Classification [] Serious [] Middle [] MFO
 COMMUNITY SUPERVISION on conditions:

- The juvenile shall submit to six months supervision by the Probation Officer of the Court.
- Counseling or treatment as ordered by the Probation Officer.
- No violation of the criminal laws of this State, any other State, any political subdivision of this State, or any other State, or United States during the period of probation.
- The Juvenile to reside only at a residence approved by Probation Officer.
- Curfew: at set by P.O.
- No association with: co-defs
- No alcohol, or controlled substances, (including marijuana) except by doctor's prescription.
- Maintain satisfactory effort and attendance at school or place of employment.
- Subject to discipline of Probation Officer.
- 16 hours of community service; proof to be furnished by Juvenile to Probation Officer thirty days prior to termination of supervision.
- Detention at Remann Hall for 3 days. Credit for 3 days served.
- Other: obey rules of home

COMMITMENT to Division of Juvenile Rehabilitation for a period of _____, with credit for _____ days served.

MANIFEST INJUSTICE declared for the following reasons:

- Recent criminal history
- Violations of conditions of release
- Violations of terms of a prior disposition
- Refusal to submit to supervision
- Aggravating factors in disposition report to Court incorporated by reference
- Mitigating factors in disposition report to Court incorporated by reference
- Other: _____

STATE OF WASHINGTON, County of Pierce ss:
I, Ted Rutt, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereto set my hand and the Seal of said Court this 20th day of March, 2001

TED RUTT, Clerk

By: [Signature] Deputy

COST AS FOLLOWS:

- A. To Pierce County:
- B. Records Fee:
- C. Crime Victims Penalty Assessment (RCW 7.68.035): revised
- D. Other:

TOTAL COSTS

(Costs to be paid through the registry of Pierce County Juvenile Court.)

RESTITUTION by separate order.

JURISDICTION extended beyond age 18 to accomplish this order.

It is adjudged and so ordered this 20 day of March, 19 01

[Signature]
JUDGE/COURT COMMISSIONER

10-11-2014

10-11-2014

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10-11-2014



Dated: _____

Fingerprints of: _____

Attested by: _____

Deputy Clerk

Deputy Clerk

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On April 30, 2020, I served a copy of the REPLY BRIEF OF PETITIONER on counsel for the Respondent by filing this brief through the Portal and thus a copy will be delivered electronically.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of April 2020, at Seattle, Washington.

s/ Neil M. Fox

WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

April 30, 2020 - 3:29 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53849-1
Appellate Court Case Title: Personal Restraint Petition of Allen Eugene Gregory
Superior Court Case Number: 98-1-04967-9

The following documents have been uploaded:

- 538491_Briefs_20200430152810D2725126_0087.pdf
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