

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

ALLEN EUGENE GREGORY,

Petitioner.

NO. 53849-1

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. STATUS OF PETITIONER:

Petitioner/Defendant, Allen Gregory, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 98-1-04967-9. Appendix at 1-13.

B. INTRODUCTION:

Following the Washington Supreme Court's last death sentence review of this case, the only orders entered were a conversion of the death sentence to life without parole and a striking of attorney fees. No new judgment and sentence was entered. The Defendant did not appeal from these actions and does not now seek review of them.

Rather he makes time-barred challenges to the 2001 jury conviction (affirmed by 2007 mandate) and 2012 sentence. Under a plain reading of the statute, the Defendant's judgment became final for purposes of RCW 10.73.090 on June 3, 2012. This 2019 petition is untimely and must be dismissed.

When the Washington Supreme Court announced in the last appeal that the law of the case precluded further challenges to the conviction, it necessarily held that the conviction had long been final. This Court must abide by the higher court's decision to deny review of any further or renewed challenges to the long-final conviction.

C. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Where the Defendant asserts no exception to the time bar and the date of finality is June 13, 2012, whether the petition is time barred?
2. Whether the law of the case disposes of claims to suppress the evidence and of prosecutorial error?
3. Whether the Defendant has raised a constitutional claim to LFOs by citing immaterial cases regarding non-convicted persons' challenges to other state laws?

D. STATEMENT OF THE CASE:

The Defendant Allen Gregory robbed, raped, and brutally murdered G.H. in 1996, resulting in his conviction for aggravated murder in 2001 and death sentence. *State v. Gregory*, 158 Wn.2d 759, 811-13, 147 P.3d 1201, 1212 (2006) (*Gregory I*, 71155-1); *State v. Gregory*, 192 Wn.2d 1, 6, 427 P.3d 621, 627 (2018) (*Gregory II*, 88086-7); PRP, Exh. at 17-18, 21; Consolidated Brief of Respondent [CBOR] at 20-29, *State v. Gregory*, No. 71155-1 (Wash. Mar. 23, 2004); PRP Exh. at 18 (special verdicts of aggravating circumstances of rape and robbery under RCW 10.95.020(11)(a) and (b)).

In the direct appeal, Gregory's conviction was affirmed. *Gregory I*, 158 Wn.2d at 777-78. Only the death sentence was reversed. *Id.* The mandate on the decision affirming the conviction issued January 17, 2007. App. at 14-15.

The matter was remanded for resentencing only, at which time a jury sentenced Gregory to death again. *Gregory II*, 192 Wn.2d at 6; App. at 1-13. “Gregory appealed his sentence.” *Gregory II*, 192 Wn.2d at 7. However, the Defendant’s 279-page opening brief in the Death Sentence Review did not confine itself to sentencing issues. Opening Brief of Appellant [OBOA], *State v. Gregory*, No. 88086-7 (Wash. Mar. 20, 2014). Gregory also attempted to relitigate the 2001 jury verdict, for example, complaining of the admission of blood samples, DNA evidence, and the knife (OBOA at 152-91) and arguing that the prosecutors’ “declare the verdict” language was error (OBOA at 20-32).

The Washington Supreme Court was not pleased.

Gregory’s first degree murder conviction has already been appealed, reviewed by this court, and affirmed. *Gregory I*, 158 Wash.2d at 777-78, 147 P.3d 1201. Despite this, Gregory continues to raise arguments pertaining to his conviction.

Gregory II, 192 Wn.2d at 27. The opinion addresses three issues, the third being: “Whether the court should reconsider arguments pertaining to the guilt phase of Gregory’s trial.” *Id.* at 8. It rejected all the guilt-phase claims, citing the law of the case.

In June 2011, following remand, Gregory brought a pretrial motion that again challenged the admissibility of the DNA evidence. Gregory moved to dismiss his death penalty proceeding and to order a new guilt phase trial. Gregory also moved to suppress evidence used to obtain his first degree murder conviction or, in the alternative, to order a *Franks* hearing to determine the State’s knowledge regarding potentially exculpatory evidence used as a basis to find probable cause for the warrant and orders in question. Gregory argued that despite our holding in *Gregory I*, law of the case did not bar his challenge. He also argued that the State had in its control *Brady* information concerning R.S. that evidenced its lack of probable cause to prosecute Gregory for rape. The trial court ruled the information regarding R.S. was not *Brady* material and was not withheld by the prosecution. Regarding the DNA and blood samples, the trial court denied Gregory’s motions because this court had “thoroughly analyzed and decided” those issues in Gregory I. 5 Verbatim Report of Proceedings (June 24, 2011) (VRP) at 284. Gregory filed a motion to reconsider, but the trial court denied the motion.

Gregory now attempts to reassert many of the same arguments from his first appeal. He claims the State withheld relevant information about R.S. when obtaining the orders to procure a sample of his DNA and a warrant to

search his vehicle where the knife was found. Specifically, he asserts that the trial court would not have authorized the warrant or the orders if it was aware that R.S. had a history as a paid confidential informant. We decline to address this argument because reconsideration is barred by law of the case doctrine. Alternatively, review is not warranted under RAP 2.5, nor has Gregory shown grounds for overruling our precedent.

Gregory II, 192 Wn.2d at 28–29 (emphasis added).

The primary justification Gregory asserts for revisiting this issue is the information surrounding R.S.’s history as a confidential informant. However, the trial court found that this information was either known or made available to Gregory’s attorney prior to the first trial. Gregory does not challenge this finding on appeal.

Id. at 30. In concluding, the Washington Supreme Court indicated that Gregory’s conviction became final at the conclusion of his first appeal.

We decline to reconsider Gregory’s arguments pertaining to the guilt phase of his trial. His conviction for aggravated first degree murder has already been appealed and affirmed by this court.

Id. at 36 (emphasis added).

Instead, the Washington Supreme Court’s decision addressed Gregory’s sentence, striking down the death penalty in Washington. *Gregory II*, 192 Wn.2d at 35-36. “All death sentences are hereby converted to life imprisonment.” *Id.* at 36.

Following this decision, the Defendant filed a Motion to Enter Amended Judgment and Sentence. App. at 16-42. The Defendant waived his presence and advised that any amended judgment would be “a mere formality and can be entered without a court hearing.” App. at 17-18, 26. The motion also argued that the court should strike all LFOs from the judgment except for the crime victim assessment and restitution. App. at 19. The Defendant’s motion did not address interest. App. at 18-19.

The superior court did not enter a new judgment. Instead, on June 28, 2019, the superior court entered an Order Converting Death Penalty to Life Without Parole. App. at 43-45. The order notes that, while the Washington Supreme Court’s decision “did not

formally remand this case,” the superior court was aware that, as a result of the *Gregory II* decision holding the death penalty unconstitutional, the supreme court had directed the entry of “orders converting the death sentence to a sentence of life without parole” in other death penalty cases. App. at 44 (referencing *Davis, Yates, Elmore, and Gentry*).

In each of those cases, the Superior Court entered its order as a ministerial act, because it had no other authority. It is axiomatic that the Washington Supreme Court’s decision in *Gregory* was binding on every Superior Court in this state. As such, this court does not have the authority to act other than to enter an order converting the death sentence that was previously imposed to a sentence of life imprisonment without the possibility of release or parole.

App. at 44. The Order Converting Death Sentence directed that all other provisions “entered June 13, 2012, remain in full force and effect, other than may be ordered in separate orders filed this date.” App. at 45. The Defendant registered an objection but did not appeal from this order. App. at 45.

Although the superior court had acknowledged it lacked authority to do anything more than convert the death sentence to life, nevertheless it addressed the Defendant’s motion on LFOs that same day in a separate Order Vacating Attorney’s Fees. App. at 46-47. Finding that “the law has changed, and indigent defendants can no longer be ordered to pay those fees,” the superior court vacated the \$10,000 in attorney fees, leaving a principal of \$3264.90. App. at 47. The order did not address interest. The Defendant registered an objection but, again, did not appeal from this order. *Id.*

On October 10, 2019, the Defendant filed a “Personal Restraint Petition” (hereinafter PRP) and “Opening Brief of Petitioner” (hereinafter OBP). Both filings argue identical issues. The briefs assert that the interest, which had accrued on the \$10,000 in attorney fees, should have been vacated. PRP at 35-37; OBP at 48-50.

In addition, the briefs raise issues which were rejected in *Gregory II*, namely challenges to the admission of blood samples, DNA evidence, and the knife (PRP at 5-24; OBP at 1-26) and to the prosecutor’s closing argument (PRP at 31-34; OBP at 44-48).

E. ARGUMENT:

1. The petition must be dismissed as time barred.

A defendant may file a collateral attack on a judgment and sentence up to one year after the date of finality. RCW 10.73.090(1).

For the purposes of this section, a judgment becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090(3). The date the judgment was filed with the superior court clerk was June 13, 2012. App. at 3. The date that an appellate court issued its mandate disposing of the direct appeal *from the conviction* was January 17, 2007. App. at 19. There has been no petition for certiorari to the United States Supreme Court. The last of these dates and the date of finality is June 13, 2012.

The Defendant appears to cite November 7, 2018 as the date of finality. PRP at 2. This ignores the plain, unambiguous language of the statute. *State v. Roggenkamp*, 153 Wn.2d 614, 632, 106 P.3d 196 (2005) (courts accept that the legislature means precisely what it says). *See also In re Haghghi*, 178 Wn.2d 435, 448, 309 P.3d 459, 465 (2013) (refusing to expand the interpretation of finality beyond the plain language of the statute). The 2018 mandate is from an appeal of the death *sentence* imposed in 2012, *not* of the March 22, 2001 *conviction*, which was affirmed in the first appeal. App. at 4; *Gregory I*, 158 Wn.2d at 777; *Gregory II*, 192 Wn.2d at 7 (second appeal was of the sentence only). In the second appeal, Gregory could not challenge his conviction, which had “already been ... affirmed”

many years ago. *Gregory II*, 192 Wn.2d at 36. It is of no moment that the Defendant attempted to challenge in that appeal what he could not. Its finality was undisturbed.

In its most recent review, the Washington Supreme Court invoked the law of the case doctrine. *Gregory II*, 192 Wn.2d at 29-35. Questions determined on appeal or which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case. *State v. Bailey*, 35 Wn. App. 592, 594, 668 P.2d 1285, 1286 (1983); *State v. Sauve*, 33 Wn. App. 181, 185, 652 P.2d 967, 969 (1982), *aff'd*, 100 Wn.2d 84, 666 P.2d 894 (1983). It is of no moment if there has been an intervening change in law after the appeal was final. *State v. Kilgore*, 167 Wn.2d 28, 34, 216 P.3d 393 (2009) (refusing to resentence defendant when *Blakely* issued after the conclusion of his appeal). The decisions in the original appeal were the “law of the case,” because the appeal of the conviction was final. The underlying goal of the “law of the case” doctrine is to promote finality and efficiency in the judicial process and encourage general notions of fairness. *State v. Johnson*, 188 Wn.2d 742, 757, 399 P.3d 507, 515 (2017).

This petition was filed October 10, 2019, more than seven years after the June 13, 2012 date of finality. It is not timely under RCW 10.73.090.

The Defendant does not allege the existence of any exception under RCW 10.73.100. PRP at 2. He is precluded from arguing an exception to the time bar for the first time in reply. *King v. Rice*, 146 Wn. App. 662, 673, 191 P.3d 946 (2008) (argument raised for first time in reply brief comes too late); *State v. Goodin*, 67 Wn. App. 623, 628, 838 P.2d 135 (1992), *review denied*, 121 Wn.2d 1019 (1993) (noting that the court generally will not consider arguments raised for first time in reply brief); *State v. Peerson*, 62 Wn.App. 755, 778, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012 (1992) (striking reply brief containing issues to which State had no opportunity to respond and holding that a reviewing court was not obliged to address errors raised for the first time in reply); *State v. Bell*, 10

Wn. App. 957, 963, 521 P.2d 70 (1974) (assignment of error and argument raised for first time in reply robs opponent of fair opportunity to respond; rules do not permit second briefing; delays and additional expense of second brief is undesirable). Therefore, the petition must be dismissed as time barred.

2. Legal Standards in a Personal Restraint Petition.

The courts' review of personal restraint petitions is constrained, and relief gained through collateral relief is extraordinary. *In re Fero*, 190 Wn.2d 1, 14, 409 P.3d 214, 222 (2018). In a personal restraint petition, the burden of proof shifts to the petitioner. *In re Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). And there is a heightened showing of prejudice. *Fero*, 190 Wn.2d at 15.

If the challenge is in the context of constitutional error, petitioners have a threshold burden of demonstrating actual and substantial prejudice or the petition will be dismissed. *Cook*, 114 Wn.2d at 810. For non-constitutional claims, the preliminary showing is higher: the claimed error must constitute a fundamental defect which inherently results in a complete miscarriage of justice. *Cook*, 114 Wn.2d at 811.

3. Challenges to admission of the evidence are not permitted under both the law of the case and the time bar.

The Defendant challenges the admission of his blood, DNA, and knife. PRP at 5-24; OBP at 1-26. This claim was raised at the original trial, upon remand to the trial court for resentencing, and in both appeals. *Gregory I*, 158 Wn.2d at 779, 820-29; *Gregory II*, 192 Wn.2d at 28; Opening Brief of Appellant [OBA] at 159, *State v. Gregory*, No. 88086-7 (Wash. Mar. 20, 2014); Consolidated Brief of Respondent [CBOR] at 6, 18, *State v. Gregory*, No. 71155-1 (Wash. Mar. 23, 2004). He claims the warrants were based on the false accusation of R.S..

Two years after the murder of G.H., R.S. accused the Defendant of raping her in his car at knifepoint. *Id.* at 778-79; CBOR at 9-12. R.S. fled to a convenience store in a state of hysteria and reported the rape. CBOR at 10. She was covered in scratches, bruises, welts, and the Defendant's DNA. *Gregory*, 158 Wn.2d at 779 (a DNA profile was generated from that semen). R.S. provided police with the Defendant's license plate and his first name. *Id.* The Defendant claimed he had recently had sex with three women, but denied that any of them were R.S. or occurred in his car. *Id.*; CBOR at 14. Police obtained a warrant to search the Defendant's car where they found a knife and condom. *Gregory I*, 158 Wn.2d at 779; CBOR at 15. A warrant for his blood resulted in a DNA match with the semen left on R.S.. *Id.* [That blood would later be used for DNA testing in the murder case. RP (2/21/01) at 4735.] At trial, the Defendant claimed that he had consensual, commercial sex with R.S.. *Gregory I*, 158 Wn.2d at 779; CBOR at 16-17.

The Defendant has repeatedly asserted that R.S. was a liar. Contrary to the Defendant's assertion, the State did not dismiss R.S.'s case, because she "admitted far more serious lies" in 2010. PRP at 12-13. Rather, the State did not believe it could prove the crimes beyond a reasonable doubt in the face of "inconsistent statements." *Gregory II*, 192 Wn.2d at 7. R.S.'s 2010 interview does not "essentially" show that she was acting as a prostitute and consented to two acts of consensual sex. PRP at 12. It shows that when the Defendant propositioned her while he was giving her a ride, she rejected the Defendant. PRP Exh. at 123. But she was intoxicated and trapped in his car, and he did not accept her rejection. *Id.* In this predicament, she acquiesced¹ for a time, but when she told him they were done, he pulled a knife and beat her. *Id.* She fought him, but he anally raped her for an agonizing, painful two and a half hours. PRP Exh. at 124-25. Contrary to his assertion,

¹ A victim does not consent simply because she does not physically resist. *State v. McKnight*, 54 Wn. App. 521, 525, 774 P.2d 532 (1989) (recognizing that a victim's resistance increases the likelihood of the attacker's use of violence).

R.S. did not claim that there were likely to be scratch marks on the Defendant's body, but only that she "had tried" to scratch her assailant during the rape. PRP at 17; PRP Exh. 92.

In the second appeal, the Defendant claimed that new information about R.S.'s history as a confidential informant justified reconsideration under an exception to the law of the case doctrine. *Gregory II*, 192 Wn.2d at 30; OBA at 164-67. The Washington supreme court disagreed.

... the trial court found that this information was either known or made available to Gregory's attorney prior to the first trial. Gregory does not challenge this finding on appeal. Thus, Gregory failed to timely raise the issue in the trial court either prior to or during his first appeal. *See State v. Robinson*, 171 Wash.2d 292, 304, 253 P.3d 84 (2011) (explaining that the general rule is that **a failure to raise an issue before the trial court constitutes a waiver**, unless the party can show a manifest error affecting a constitutional right); *see also* RAP 2.5(a). The decision regarding the propriety of the warrant and orders to obtain physical evidence are therefore **law of the case and not subject to review. Law of the case also precludes consideration of the *Franks* issue and the probable cause required to obtain the search warrant and blood draw orders.**

Gregory II, 192 Wn.2d at 30 (emphasis added). The Defendant acknowledges the Washington Supreme Court has already ruled on this matter, but fails to explain what would justify his continued attempts to challenge the law of the case in this untimely collateral attack. PRP at 20-21.

Under our law of the case doctrine, "once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wash.2d 664, 672, 185 P.3d 1151 (2008); *see also Humphrey Indus., Ltd. v. Clay Street Assocs.*, 176 Wash.2d 662, 669-70, 295 P.3d 231 (2013) (concluding that " 'the parties, the trial court, and this court are bound by the holdings of [this] court on a prior appeal' " (alteration in original) (quoting *Greene v. Rothschild*, 68 Wash.2d 1, 10, 414 P.2d 1013 (1966))).

Matter of Canha, 189 Wn.2d 359, 365 n.1, 402 P.3d 266, 269 (2017). *See also Fuller v. United States*, 398 F.3d 644, 650 (7th Cir. 2005) (a claim raised and dismissed in the direct appeal may not be revisited by means of a collateral attack).

The Defendant asks for a reference hearing in order to discover additional information to attack the credibility of the now-deceased R.S.. PRP at 25; OPD at 13. Because he could have made this claim earlier, i.e. in the original appeal, the issue is foreclosed.

The claims are also frivolous. The Defendant complains that the affidavit in support of the warrant to search the car is unsworn. OPD at 14. In fact, the affidavit indicates with two signatures that the judge took the detective's oath orally.

COMES NOW Detective Chris Pollard #272, being first duly sworn, under oath, deposes and says:

App. at 48.

SUBSCRIBED AND SWORN to before me this 25 day of August 19 98
Presented By: Det. C. Pollard #272 T20 [Signature]

App. at 49.

The Defendant asks this Court to review the decision of the Washington Supreme Court. OBP at 16-17 (disagreeing with *Gregory II*). This Court lacks that authority.

The January 2000 blood draw was requested to forestall any claims of ineffective assistance of counsel related to counsel's signature on the 1998 order. *Gregory I*, 158 Wn.2d at 823, n.34. Because this blood draw has been affirmed (*Gregory I*, 158 Wn.2d at 825; *Gregory II*, 192 Wn.2d at 33), there is no reason to review the September 8, 1998 blood draw. However, the Defendant's claims there are without merit as well.

There is a factual basis for the CrR 4.7 motion for a blood draw in the rape case in the declaration of probable cause which was specifically brought "to the attention of the issuing judge" in the written motion. PRP, Exh. at 53-54, 95-96; *State v. Garcia-Salgado*, 170 Wn.2d 176, 187, 240 P.3d 153 (2010). The declaration explained that there was physical violence, oral/anal/vaginal sex, the condom broke, and the victim immediately reported the

rape. PRP Exh. at 95-96. According great deference in the light of common sense this provides probable cause that there is evidence to compare the blood draw against. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002) (probable cause is generally resolved in favor of issuing the warrant).

The Defendant attempts to reframe the warrant claim as ineffective assistance of counsel where counsel did not challenge the warrant based on later-learned information which the Defendant would use to challenge the rape victim's credibility at trial. OBP at 22. Any witness' credibility can be challenged at trial. This is not the standard when reviewing a warrant.

A tolerance for factual inaccuracy is inherent to the concept of probable cause. Probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial. ... In evaluating whether probable cause supports the search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward. **The fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true.** Probable cause requires more than suspicion or conjecture, but it does not require certainty. " 'Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred.' "

State v. Chenoweth, 160 Wn.2d 454, 475-76, 158 P.3d 595, 606 (2007) (citations omitted) (emphasis added).

The Defendant argues that R.S. should have been treated as a police informant in the warrant. OBP at 12. R.S. had spent the night drinking at bars and was getting ready to walk home when the Defendant offered her a ride. PRP Exh. at 121-23. She told him she did not have far to walk, but he insisted. PRP Exh. at 123. 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.

The *Franks* challenge is without merit, because the prosecutor did not intentionally omit any material facts related to R.S.'s veracity. *Gregory II*, 192 Wn.2d at 28.

Notwithstanding the law of the case that R.S.'s history "was either known or made available to Gregory's attorney prior to the first trial" (*Gregory II*, 192 Wn.2d at 30), the Defendant claims that her history is "newly discovered evidence." OBP at 23. This does not meet the legal standard of due diligence.

To prevail on a claim of newly discovered evidence, a personal restraint petitioner must show evidence that (1) will probably change the result of the trial, (2) was discovered since the trial, (3) **could not have been discovered before trial by the exercise of due diligence**, (4) is material, and (5) is not merely cumulative or impeaching. *Id.* If any of these factors is missing, the petitioner is not entitled to relief. *Id.*

Fero, 190 Wn.2d at 15 (citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)) (emphasis added).

The *Brady* claim in this regard is also the law of the case. *Gregory II*, 192 Wn.2d at 28 ("The trial court ruled the information regarding R.S. was not *Brady* material and was not withheld by the prosecution.")

Under the time bar and the law of the case, these frivolous claims are foreclosed.

4. The court did not abuse its discretion in ordering, based on the *Harzog* factors, that the Defendant wear a stun belt under his suit and which the jury could not observe.

The Defendant challenges the use of trial restraints. PRP at 25-27; OBP at 27-31. At trial back in 2001, the defense asked the court to reconsider its granting of the State's motion to have the Defendant wear a stun belt under his suit. CPI 1135-98. The Defendant concedes the court had "broad discretion" to determine security measures. OBP at 28 (citing *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001)). The record amply supports the trial judge's decision.

A court considers several factors when determining courtroom restraints:

[T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the

risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and the mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

State v Finch, 137 Wn.2d 792, 848, 975 P.2d 967 (1999); CPI 1214.

The 6'3", 200 lb. Defendant had violent offenses beginning at the age of 14, had recently been convicted of three first-degree rape convictions, and was being held on a capital offense. CPI 1209-10, 1217. The Defendant was classified as "high maximum" security. CPI 1213. He had demonstrated that he would not be compliant to lawful directives necessary to maintain order even while under the custody of corrections. CPI 1210-11, 1213. And he had made a recent escape attempt just three weeks before his rape trial and been found in possession of contraband (screws and cigarette lighter). CPI 1212-13, 1217. Sentenced to 28.5 years in the rapes and facing death, the Defendant had "nothing to lose from attempting [an escape] from an unsecured area." CPI 1222. However, the public was at great risk. Jail officers were under orders to shoot the Defendant if he tried to escape. CPI 1219; RCW 9A.16.040(1)(c)(iii) (justifiable homicide to prevent escape of person convicted of or charged with a felony).

The prosecutor noted that little could be drawn from the Defendant's failure to attempt to escape while in court as he was always either shackled or wearing a stun belt. CPI 1218. Unlike ankle shackles or a belly chain, the stun belt was invisible to the jury. CPI 1219-20 ("the jury would never know it"). The Defendant's own attorney "who was standing and sitting right next to the defendant did not know the defendant was wearing the stun belt" and had previously stipulated to its use. CPI 1220.

The court found that the stun belt apparatus was covered by the Defendant's coat so as to be not visible to the casual observer and completely hidden while seated. CP II 6117-18. The finding was not challenged in either appeal.

The concern with trial restraints is that it prejudices the jury against the Defendant. *State v. Finch*, 137 Wn.2d 792, 843-45, 975 P.2d 967 (1999). Here the court chose restraints that the jury could not see and would not be aware of.

The Defendant argues potential jurors may have entered the courtroom one day, briefly sat behind the prosecutor, and observed a bulge in the Defendant's jacket. OBP at 31. In fact, no persons who sat down behind the prosecutor's table that morning were potential jurors. RP (2/6/01) at 3630. Any potential jurors who entered the courtroom were intercepted immediately and directed downstairs. *Id.* The judicial assistant sat in the witness chair where jurors would be questioned that day and affirmed that the belt was not visible. RP (2/6/01) at 3630-31. The judge then said, "Okay. We will do it that way. We will put the jurors in the witness chair" – and they continued with individual voir dire. RP (2/6/01) at 3631. There is no dispute that the jurors observed the belt. The court saw to it that they did not.

Speculation based on a misrepresentation of the record does not meet the Defendant's burden in a collateral attack.

Restraints are also discouraged insofar as they interfere with the client's ability to assist counsel. *Finch*, 137 Wn.2d at 845. No record indicates this occurred.

On this record, the Defendant cannot show an abuse of discretion, much less actual and substantial prejudice.

5. The Defendant was not denied his right to an impartial jury.

The Defendant argues it was the holding of *Gregory II* that a death qualified jury which imposes the death penalty is necessarily racially biased, and therefore such a jury's conviction must also be reversed. OBP at 40. Plainly this is not *Gregory II*'s conclusion, or the Washington Supreme Court would have reversed the conviction already. *Gregory I*'s conclusion is limited to how the death penalty is imposed. *Gregory II*, 192 Wn.2d at 18-19.

Gregory II held that the death penalty was not being imposed proportionately in Washington and that the court's own proportionality review could not remedy the flaw.

The court began its proportionality review under the capital punishment statute, RCW 10.95.130(2)(b), with the goal of ensuring the death penalty's imposition was not freakish, wanton, random, or based on race or other suspect classifications. *Gregory II*, 192 Wn.2d at 10. It considered the Beckett study, which Gregory commissioned to determine the role of race in capital sentencing. OBOA, Amended Appendix A at 1, 31-33; *Gregory II*, 192 Wn.2d at 12. The study did not look at the role of race in guilty verdicts.

The study found that prosecutors were significantly more likely to file a death notice when the case was adjudicated in a county with a relatively large black population. OBOA, Amended Appendix A at 31-32. And it found that black defendants were between 3.5 and 4.6 times as likely to be sentenced to death than similarly situated white defendants. *Gregory II*, 192 Wn.2d at 19. Based on the Updated Beckett Report, Gregory argued "the death penalty is imposed in an arbitrary and racially biased manner." *Id.* at 13.

The *Gregory II* court did not require the social science to be "indisputably true." *Gregory II*, 192 Wn.2d at 21. In fact, it simply took judicial notice that implicit and overt racial bias against black defendants exists in Washington State. *Id.* at 22. It is a truism. "[W]e all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them." *State v. Berhe*, 193 Wn.2d 647, 651-52, 444 P.3d 1172 (2019) (quoting *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013)).

Discrimination and other forms of biased intergroup judgment result from ordinary, routine and completely normal cognitive mental processes. *Saintcalle*, 178 Wn.2d at 47 (Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and The Peremptory*

Challenge, 85 B.U. L. Rev. 155 (2005)). The use of schemas, categories, and cognitive shortcuts is necessary, but has the unfortunate, intractable result of discrimination. *Id.*

The fact that human beings are biased does not mean there should be no criminal justice system. But death is different. A case which fails to recognize that death is different will be incorrect. *State v. Pierce*, -- Wn.2d --, 455 P.3d 647, 652 (2020) (Gonzalez, J.) (lead plurality opinion). *See also Furman v. Georgia*, 408 U.S. 238, 286, 92 S. Ct. 2726, 2750, 33 L. Ed. 2d 346 (1972) (discussing how death is different).

Gregory II recognized local, national and international trends which disfavor capital punishment. *Gregory II*, 192 Wn.2d at 24. Compounded with the Beckett data which showed how strongly the imposition of death was associated with the defendant's race and in the context of RCW 10.95.130(2) which prohibits the disproportionate imposition of death, the court held the capital punishment law lacks fundamental fairness where it imposes the death penalty disproportionately on black defendants. *Id.* The court noted that its own proportionality review could not save the statute, because this review was at its heart a subjective judgment, and therefore subject to the justices' own implicit biases. *Id.* at 26. The court concluded that the death penalty could not be applied proportionately. *Id.* at 26-27.

Gregory II did not hold that Gregory's jury was different from other juries. It did not hold that Gregory's jury came to a verdict of guilt based on racial bias. There is neither proportionality data nor a proportionality requirement related to guilty verdicts. The claim is without merit or basis in law.

6. In this case, the Washington Supreme Court has rejected the challenge to "declare the verdict" language which is not prejudicial error in the context of the trial as a whole.

The Defendant renews a claim regarding the prosecutors' opening and closing statements. PRP at 31-34; OBP at 44-47; Opening Brief of Appellant at 20-32, *State v. Gregory*, No. 88086-7 (Wash. Mar. 20, 2014) (arguing prosecutor improperly told the jury its job was to "declare the truth").

At trial, there was no dispute that G.H. was murdered. The only question was the identity of the perpetrator. The defense had argued that Mike Barth was the murderer. RP (2/14/01) at 4078, 4080-82; RP (3/19/01) at 6721.

It's a person like Mike Barth. The defense has no burden to prove to you who committed this crime. It's not a contest of who can prove it. It's their burden. They are the ones who must prove that Allen Gregory committed the crime.

RP (3/19/01) at 6752. In opening statement, the State advised the jury would be asked to declare that the truth was that the Defendant was the perpetrator. "It's the defendant, Allen Gregory, who decided to rob [G.H.], who decided to rape her, and he decided to murder her." RP (2/14/01) at 4076. In closing, the prosecutor argued that truth and justice were intertwined and that a guilty verdict would only be justice if the Defendant were G.H.'s actual killer. RP (3/19/01) at 6700-01 ("her killer gets convicted for what he did"). The prosecutor argued that the State "willingly accept[ed]," "met and surpassed" "the highest burden that is placed on any party in a court of law" – proof beyond a reasonable doubt. RP (3/19/01) at 6734. Because the State had proved G.H.'s death was "at the hands of Allen Gregory," the State asked the jury to convict. RP (3/19/01) at 6806.

In the first appeal, the Defendant claimed prosecutorial error in many respects, including by burden-shifting. Appellant's Opening Brief at 141-42, *State v. Gregory*, No. 71155-1, (Wash. Apr. 11, 2003). The court found no prosecutorial error. *Gregory I*, 158 Wn.2d at 810. In the second appeal, the Defendant claimed the prosecutors committed error

by saying that the jury's verdict declared the truth. OBOA at 22. This language is improper, because it misstates the burden of proof. *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125, 132 (2014). The Washington Supreme Court held that the question of prosecutor error in regard to the burden of proof was the law of the case:

2. Law of the case doctrine bars review of challenges already rejected in Gregory I

Lastly, Gregory raises several federal constitutional challenges¹⁶ that were rejected in his first appeal. Opening Br. of Appellant at 278; *Gregory I*, 158 Wash.2d at 813-18, 838-46, 147 P.3d 1201. Gregory concedes that we addressed and rejected these arguments in his first appeal but nonetheless argues that we should reconsider these issues under RAP 2.5(c)(2). As explained in Section III.D.1.c, *supra*, RAP 2.5(c)(2) restricts the law of the case doctrine by providing us the discretion to reconsider issues from a prior appeal when there has been an intervening change in the law and “justice would best be served” by our reconsideration. *Schwab*, 163 Wash.2d at 673, 668, 185 P.3d 1151 (citing *Roberson v. Perez*, 156 Wash.2d 33, 42, 123 P.3d 844 (2005)). Gregory failed to assert any intervening changes in the law or mistakes in the record that would render our rulings in *Gregory I* erroneous. We decline to exercise our discretion to revisit these issues.

Gregory II, 192 Wn.2d at 34-35 (emphasis added). Footnote 16 lists “prosecutorial misconduct in closing argument – improperly shifting the burden of proof” among these renewed claims.

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. PRP at 34; OBP at 46. The proper way to challenge the Washington Supreme Court's decision would have been in a motion for reconsideration. *Gregory II* is now final. PRP Exh. at 30-31. The Defendant may not ask this Court to review the Washington Supreme Court's decision, which is now the law of the case.

A defendant claiming prosecutorial error must show both error and prejudice in the context of the trial as a whole. *In re Gentry*, 179 Wn.2d 614, 631, 316 P.3d 1020, 1029

(2014). Prejudice is a substantial likelihood that the alleged error affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). When there was no timely objection at the trial level, which the Defendant concedes here (PRP at 33; OBP at 44), the defendant must show the alleged error was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Thorgerson*, 172 Wn.2d at 443.

The Defendant's failure to timely object suggests that the alleged error was not flagrant or prejudicial in the context of the trial as a whole. The challenged language is only a few paragraphs in approximately 70 pages of the prosecutors' opening statement and closing argument. The burden of proof is clearly stated in the court's instructions. CP I 2505. The court further instructed the jury to disregard any remark, statement or argument by the attorneys that is not supported by "the law as stated by the court." CP I 2504. The prosecutor frequently addressed that the jury was being asked to determine the identity of the perpetrator beyond a reasonable doubt. RP (3/19/01) at 6725, 6734, 6803. As did the defense. *Id.* at 6740-42, 6776, 6785. In this context, the Defendant cannot show that the etymology of the word "verdict," actually and substantially caused the jury to convict. And he cannot show that, triggered by a timely objection, the trial judge's reminder to the jury of the correct legal standard would not have been an adequate remedy.

This claim has been adjudicated. It is the law of the case. There was no prejudicial prosecutor error.

7. This Court must dismiss the challenge to LFO interest as frivolous where the Defendant has not been released from incarceration, where HB 1783 did not apply retroactively to the Defendant's final case, and where the Defendant has not been acquitted.

The Defendant complains about non-restitution interest. It is a debt he is not likely to begin to pay in his lifetime.² He did not request the superior court remit interest, therefore there is no action of the lower court for this Court to review. The claim disregards that HB 1783 had no retroactive application to his final case and that remission of interest is reserved for released persons who are seeking to integrate into the community.

The Legislature has never intended LFO matters to be the proper or common subject of appellate courts. They are the province of *superior courts*, which will address LFOs at “any time after release from total incarceration.” RCW 10.01.160(4). The superior courts’ ruling under this provision is not appropriate for direct appellate review. *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009); *accord State v. Shirts*, 195 Wn. App. 849, 854, 381 P.3d 1223 (2016) (granting discretionary review of remission ruling). And it is not the proper subject of a personal restraint petition which is limited to constitutional questions or fundamental defects resulting in a complete miscarriage of justice. RCW 7.36.130; *In re Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990); *State v. Blazina*, 182 Wn.2d 827, 840, 344 P.3d 680, 685 (2015) (Fairhurst, J., concurring) (LFO questions are purely statutory, not constitutional, creations).

a. The Defendant does not raise a constitutional claim.

Citing inapplicable case law regarding acquitted persons, the Defendant tries to frame this as a constitutional violation. He asserts that interest from the attorney fees “unjustly enriche[s]” the State and violates due process. PRP at 35-37; PRP, Exh. at 148-49; OBP at 48-50 (citing *Nelson v. Colorado*, -- U.S. --, 137 S.Ct. 1249, 197 L.Ed.2d 611

² Payments are applied first to the \$2554.90 in restitution and \$1862.28 in restitution interest and then to the \$500 crime victim assessment. RCW 10.01.170(2); PRP Exh. at 10, 149. He has been paying at a rate of approximately \$100/year. PRP Exh. at 149 (showing a balance of \$675.52 remains on the original \$2554.90 – indicating total payments of \$1879.38 since May 2001).

(2017) and *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)). The Defendant made the same arguments below, albeit then only in reference to the principal. App. at 19. The lower court was not persuaded by the constitutional argument, relying instead on the statutory amendment as authority for striking costs. App. at 47. The cases have no application to him.

In *Nelson*, two Colorado defendants asked for a refund of paid legal financial obligations after their convictions were vacated or reversed with no prospect of reinstatement. *Nelson*, 137 S.Ct. at 1251. Although the sole basis for these assessments was the fact of their convictions, which no longer existed, the Colorado Exoneration Act required the defendants to prove their innocence by clear and convincing evidence. *Id.* at 1253, 1255. The court held that requiring persons to prove their innocence did not comport with due process.

Likewise in *Giaccio*, the defendant was not convicted of any crime. He had been acquitted but was still required to pay the costs of prosecution under a Pennsylvania statute. *Giaccio*, 382 U.S. at 400. The court held the Pennsylvania statute was void for vagueness where it permitted a jury to impose costs on an acquitted person if it found that:

‘he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction (and) * * * his misconduct has given rise to the prosecution.’

Id. at 403-04.

These cases do not aid the Defendant. First, the Defendant is not similarly situated. He is not subject to the vague Pennsylvania law which would permit a jury to impose a cost on a person for some unnamed, uncharged crime. He is not subject to the Colorado statute which would require him to prove his innocence. And most importantly, Gregory remains convicted by a jury beyond a reasonable doubt of aggravated murder.

Second, the Defendant is not asking for the same relief that Giaccio and Nelson demanded. He is not asking for reimbursement.

Even if he were, where the court strikes an LFO because of changes in law under HB 1783, and not because a conviction has been reversed, reimbursement is not available. Here, the superior court vacated the attorney fees under the recent revisions to RCW 10.01.160(3) resulting from HB 1783. When the Legislature amended this provision and others related to legal financial obligations, it directed: “Nothing in this act requires the courts to refund or reimburse amounts previously paid towards legal financial obligations or interest on legal financial obligations.” Laws of 2018, Ch. 69, §20.

There is no constitutional question. The Defendant’s claim may not be raised in a personal restraint petition.

- b. HB 1783 does not apply to the Defendant’s sentence where he challenged the LFOs only after his sentence became final.

After the issuance of the 2018 mandate, the superior court lacked authority to address LFOs for the reasons it gave. HB 1783 only applies prospectively to sentences which were not yet final, because they were still pending on direct review. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714, 722 (2018). The law became effective on June 7, 2018. The Defendant raised the LFO concern for the first time *after* the mandate issued and his sentence was final. App. at 16-42. As the Defendant acknowledged, after mandate, all that remained was a “mere formality.” App. at 16. Converting the sentence from death to life was purely “ministerial.” App. at 44. As of the November 7, 2018 date of mandate, his sentence was final, no longer pending review. RCW 10.73.090(3)(b). The change in law did not apply to him.

- c. HB 1783 does not permit remission of interest while a criminal defendant remains incarcerated.

In recent amendments to LFO laws, the Legislature expressed an intent to reduce debt for offenders seeking to reintegrate into the community. Those amendments left intact the requirement that motions for relief from LFOs will not be entertained from incarcerated persons. Laws of 2018, ch. 169, § 1(2); RCW 10.01.160(4); RCW 10.82.090(2). The interest statute reads now, as it read before:

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 criminal conviction ...

RCW 10.82.090(2). At that time, upon motion, a court would strike all non-restitution interest. RCW 10.82.090(2)(a). In Gregory's case, that time will never come. Because he is serving a life sentence, he will not benefit from a leg up while he reintegrates into society.

HB 1783 does not permit vacation of the accrued interest in this case where the Defendant has not been released from incarceration.

- d. The Court should not compound error as the Defendant requests.

The Defendant complains that interest has been imposed for a debt that has been vacated. PRP at 35. However, the debt was vacated in error, without lawful authority. The interest was not a part of this error. It remains, because the Defendant never addressed it in his motion. He is now seeking to compound error.

If the lawful interest is offensive only because the principal was unlawfully vacated, then the State would ask this Court for a different remedy under RAP 2.4(a). Under this rule, the Court may grant the respondent affirmative relief if demanded by the necessities of the case, notwithstanding the respondent's failure to seek review. The State would ask the Court to consider reinstating the \$10,000 in attorney fees which was erroneously vacated.

The superior court's order striking the attorney fees was a gift, unsanctioned by law. The Defendant should not be rewarded for inviting this error with a second, unwarranted gift.

- e. JIS software calculates restitution interest separately from non-restitution interest and automatically prevents non-restitution interest from accruing after the effective date of HB 1783.

In the Defendant Gregory's case, the superior court imposed different LFOs at different times. In the original 2001 judgment, the court ordered the following:

- \$2554.90 restitution,
- \$500 crime victim assessment,
- \$110 criminal filing fee.

PRP, Exhibit 3 at 19. After resentencing, the 2012 judgment added:

- \$100 DNA database fee and
- \$10,000 court-appointed attorney fees and defense costs.

PRP, Exhibit 2 at 10.

The clerk's record shows the following balance as of 8/16/19:

CODE	MEANING	ACCRUE INTEREST	BALANCE
RTN	RESTITUTION	Y	675.52
CRC	CRIMINAL FILING FEE	N	110.00
EXJ	JUDGMENT EXTENSION (renewal fee)	N	200.00
PCV	CRIME VICTIM ASSESSMENT	N	500.00
DN1	DNA COLLECTION	N	100.00
RTI	INTEREST ON RESTITUTION	N	1862.28
INT	INTEREST ON NON- RESTITUTION	N	7853.19

PRP, Exh. at 149. It reflects that all Gregory's payments have been applied to restitution, as required under RCW 10.01.170(2). The principal is collected before the interest.

The third column in Gregory's accounting illustrates what the Pierce County Prosecuting Attorney's Office has been advising this Court in other cases. Notwithstanding old form language in the 2012 judgment that "financial obligations ... shall bear interest"

(PRP, Exh. at 11, ¶4.5) and without an amendment to the judgment or other order of the court, interest is only accruing on restitution. The toggle in JIS software has been set to conform automatically to HB 1783. As of June 7, 2018, no non-restitution interest can accrue, both by law and as a function of the state-wide JIS software update.

The program does not break down the interest for each financial obligation. We cannot tell how much of the non-restitution interest comes from attorney fees and how much comes from the victim assessment, for example. The program only apportions the interest between restitution and non-restitution, because this is the relevant distinction under HB 1783. RCW 10.82.090(1) (as of June 7, 2018, interest shall only accrue on restitution).

The interest rate is the same as in civil judgments. RCW 10.82.090(1). Civil judgments bear interest at the rate of twelve percent, or one percent a month. RCW 4.56.110(1); RCW 19.52.020.

Where interest accrues at one percent a month and the amounts were imposed on different dates, breaking the interest down further would be a truly tedious process, made all the more offensive by the fact that the Defendant will never begin to pay this interest in his lifetime.

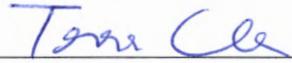
Fortunately for the clerk's office staff, the Defendant's demand for this apportionment must be denied.

F. CONCLUSION:

Based on the foregoing, the State respectfully requests this Court dismiss the petition as frivolous.

DATED: March 9, 2020

MARY E. ROBNETT
Pierce County
Prosecuting Attorney


Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/10/20 
Date Signature

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 98-1-04967-9

vs.

ALLEN EUGENE GREGORY,

Defendant.

WARRANT OF COMMITMENT

DEPT. OF CORRECTIONS

DEAN ROW



JUN 13 2012

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPT. OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

3. Pursuant to the mandatory language of RCW 10.95.170, the defendant shall be imprisoned in the state penitentiary pending his execution.

[] 4. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

By direction of the Honorable

Dated: JUNE 13, 2012

Rosanne Buckner
JUDGE ROSANNE BUCKNER

KEVIN STOCK
CLERK

Melvin Engler
DEPUTY CLERK



CERTIFIED COPY DELIVERED TO SHERIFF

JUN 13 2012 Melvin Engler



STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, 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 hereunto set my hand and the Seal of Said Court this _____ day of _____,

KEVIN STOCK, Clerk

By: _____ Deputy

jmn

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

JUN 13 2012

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 98-1-04967-9

vs.

JUDGMENT AND SENTENCE

ALLEN EUGENE GREGORY

Defendant.

~~DOX~~ PRISON

~~XX~~ DEATH PENALTY

SID: WA13284722

DOB: 06/09/1972



I HEARING

- 1.1 From January to April, 2001, a jury trial was held in this case, the Honorable Rosanne Buckner, presiding. The State of Washington was represented by John M. Neeb and Mary E. Robnett, Deputy Prosecuting Attorneys. The defendant was at all times present and represented by his attorneys, Michael Schwartz and Philip Thornton. On March 22, 2001, a jury found the defendant guilty of Murder in the First Degree (Premeditated Murder). The jury returned a special verdict finding the defendant committed the murder during the course of, in furtherance of, or in immediate flight from the crimes of Rape in the First or Second Degree and Robbery in the First. On May 25, 2001, the court formally sentenced the defendant to death.
- 1.2 The defendant's conviction and death sentence were automatically appealed to the Washington Supreme Court. On November 30, 2006, the Washington Supreme Court affirmed the defendant's conviction but reversed his death sentence and remanded to this court for a new penalty phase. See *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).
- 1.3 Beginning on March 5, 2012, a new penalty phase proceeding was held, the Honorable Rosanne Buckner, presiding. The State of Washington was represented by Deputy Prosecuting Attorney John M. Neeb. The defendant was at all times present and represented by his attorneys, Zenon Olbertz and Brett Pirtzer. On May 15, 2012, the jury answered "yes" to the question before them, finding that the State had proved beyond a reasonable doubt the absence of sufficient mitigating circumstances to merit leniency. The verdict was unanimous. The jury was polled and confirmed its verdict, which was accepted by the court.
- 1.4 On June 13, 2012, a formal sentencing hearing was held, the Honorable Rosanne Buckner, presiding. The State of Washington was represented by Deputy Prosecuting Attorney John M. Neeb. The defendant was present and represented by his attorneys, Zenon Olbertz and Brett Pirtzer.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 **CURRENT OFFENSE:** The defendant was found guilty on MARCH 22, 2001, by jury-verdict of:

COUNT	CRIME	RCW	DATE OF CRIME	INCIDENT NO.
I	MURDER IN THE FIRST DEGREE W/ AGGRAVATING CIRCUMSTANCES	9A.32.030(1)(a) 10.95.020(1)	July 27, 1996	96-209-0826

as charged in the Third Amended Information

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): N/A

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): NONE

2.2 **CRIMINAL HISTORY (RCW 9.94A.525):**

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	THEFT 1	03/20/1986	Pierce Co / WA	01/11/1986	Adult	NV
2	CHALLENGE FIGHT IN PUBLIC	09/14/1992	Long Beach / CA	07/20/1992	Adult	GM/M
3	CARRYING WEAPON IN VEHICLE	09/20/1994	Long Beach / CA	07/03/1994	Adult	GM/M
4	DWLS 3	07/15/1998	Lakewood / WA	05/02/1998	Adult	GM/M
5	DWLS 3	07/14/1998	Pierce Co / WA	11/16/1997	Adult	GM/M
6	DWLS 3	07/13/1998	Tacoma Muni / WA	09/10/1997	Adult	GM/M
7	UPCS	05/03/1999	Pierce Co / WA	07/12/1998	Adult	NV
8	ATTEMPT ESCAPE 2	05/04/2001	Tacoma Muni Ct / WA	07/01-30/2000	Adult	GM
9	MAL MISCHIEF 3	05/04/2001	Pierce Co / WA	07/01-30/2000	Adult	GM

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): NONE - ALL SEPARATE AND DISTINCT

2.3 **SENTENCING DATA:**

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	N/A for this crime	XV	Life Without Parole or Death Penalty	Life Without Parole or Death Penalty	Life or Death

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

JUDGMENT AND SENTENCE (JS)

(Felony) (6/2006) Page 2 of 8

2.5 **LEGAL FINANCIAL OBLIGATIONS.** The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are as follows: **JURY DECISION. NO SENTENCING AGREEMENT.**

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 [] The court **DISMISSES** Counts _____ []

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTNRJN \$ 2,554.90 Restitution to: CNC RE: VH 92603

\$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office)

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ 10,000.00 Court-Appointed Attorney Fees and Defense Costs

FRC \$ 110.00 Criminal Filing Fee

FCM \$ _____ Fine

\$ 13,264.90 TOTAL

~~(XXX)~~ All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein. Not less than AN AMOUNT SET BY DOC commencing AS ORDERED BY DOC. RCW 9.94.760.

The defendant shall receive credit for any amount paid on this cause number since February 23, 1998.

4.2 RESTITUTION

[] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[] shall be set by the prosecutor.

[] is scheduled for _____

[] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

[] **RESTITUTION.** Order Attached

4.3 COSTS OF INCARCERATION

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations RCW. 10.73.

4.7 [] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 ~~NO~~ DNA TESTING SEPARATE ORDER ATTACHED.

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 ~~NO~~ NO CONTACT

THE DEFENDANT SHALL HAVE NO CONTACT WITH ANY MEMBER OF GENEINE HARSHFIELD'S FAMILY FOR THE REST OF HIS LIFE. "Contact" includes, but is not limited to, personal, verbal, telephonic, written, electronic, or via third party.

4.10 OTHER:

Table with 1 row and 1 column containing a handwritten signature and several empty rows.

4.11 BOND IS HEREBY EXONERATED

4.12 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

THE JURY HAVING FOUND BEYOND A REASONABLE DOUBT THAT THERE WERE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT LENIENCY,

THE DEFENDANT IS HEREBY SENTENCED TO DEATH.

Pursuant to RCW 10.95.170, the defendant is hereby committed to the Department of Corrections, where he shall be imprisoned pending his execution.

1
2
3 4.13 [] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

4 The defendant would ordinarily be subject to a period of community placement for 24 months for a
5 conviction for first degree murder. Because this case involves first degree murder with aggravating
6 circumstances, however, there is no applicable period of post-release supervision because there is going to
7 be no release from confinement.

8 4.14 **WORK ETHIC CAMP** RCW 9.94A.690, RCW 72.09.410 **NOT APPLICABLE**.

9 4.15 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020 **NOT APPLICABLE**.

10 **V. NOTICES AND SIGNATURES**

11 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this
12 Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus
13 petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to
14 arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in
15 RCW 10.73.100. RCW 10.73.090.

16 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall
17 remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to
18 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of
19 all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an
20 offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the
21 purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is
22 completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW
23 9.94A.505.

24 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice
25 of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice
26 of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an
27 amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-
28 withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and
Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document,
legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or
possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall
forward a copy of the defendant's driver's license, identicard, or comparable identification to the
Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. N/A

5.7 **RESTITUTION AMENDMENTS.** The portion of the sentence regarding restitution may be modified as to
amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction,
regardless of the expiration of the offender's term of community supervision and regardless of the statutory
maximum sentence for the crime.

5.8 OTHER _____

DONE in Open Court and in the presence of the defendant this date: JUNE 13, 2012

JUDGE *Rosanne Buckner*
Print name ROSANNE BUCKNER

John M. Neeb
Deputy Prosecuting Attorney
Print name: JOHN M. NEEB
WSB # 21322

Zenon Olbertz
Attorney for Defendant
Print name: ZENON OLBERTZ
WSB # 7060

Brett Purtzer
Attorney for Defendant
Print name: BRETT PURTZER
WSB # 17238

Allen Eugene Gregory
Defendant
Print name: ALLEN EUGENE GREGORY

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: *Allen Eugene Gregory*
ALLEN EUGENE GREGORY



CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 98-1-04967-9

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTERS DURING PENALTY PHASE PROCEEDING:

CARLA HIGGINGS (Primary) / KATRINA SMITH (Back-up)
Court Reporters

IDENTIFICATION OF DEFENDANT

SID No. WA19142642
(If no SID take fingerprint card for State Patrol)

Date of Birth 06/09/1972

FBI No. 377730RA3

Local ID No. DOC#795777

PCN No.

Other

Alias name, SSN, DOB: SSN: 538-68-3173

Race:

Asian/Pacific Islander Black/African-American

Caucasian

Ethnicity:

Hispanic Male

Native American Other :

Non-Hispanic Female

FINGERPRINTS

Left four fingers taken simultaneously

Left Thumb



Right Thumb

Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk Reynold M. Lamm Dated: 6/13/12

DEFENDANT'S SIGNATURE: Shawn Hayes

DEFENDANT'S ADDRESS: In custody



98-1-04967-9 53512636 OR 07-03-19



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 98-1-04967-9

vs.

ALLEN EUGENE GREGORY,

ORDER CONVERTING DEATH PENALTY TO LIFE WITHOUT PAROLE

Defendant.

On Motion Date, this case came before the court for an order converting the sentence of death to a sentence of life without parole, the Honorable Jack G. Nevin,¹ presiding. The State of Washington was represented by Deputy Prosecuting Attorney John M. Neeb, and the defendant was present and represented by his attorneys, Neil Fox / Lila Silverstein.

The court has reviewed the pleadings that were filed by the defense, has reviewed the opinion of the Washington Supreme Court in this case, and has considered what courts have done in other cases affected by the decision in this case. The court accepted the written waiver of presence signed by the defendant on January 24, 2019. Now, being duly advised in this matter, and with full knowledge of the applicable statutes and cases, the court hereby enters the following orders.

In *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), the Washington Supreme Court held "that Washington's death penalty is unconstitutional, as administered." That court ordered

¹ The judge who presided over the trial in Dept. 6, Rosanne Buckner, has retired.

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“[a]ll death sentences are converted to life imprisonment,” pursuant to RCW 10.95.090 (“if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder ... shall be life imprisonment.” *Gregory*, 192 Wn.2d at 35-36. Defendant Gregory is convicted of aggravated first degree murder. *Gregory*, at 36 (“His conviction for aggravated first degree murder has already been appealed and affirmed by this court.”)

The Washington Supreme Court did not formally remand this case, but that court has ordered remand in other cases affected by the decision in this case. *See, e.g., In re Davis*, Wash. S.Ct. Case No. 96395-9. This court is also aware of the orders converting the death sentence to a sentence of life without parole in other superior court cases affected by *Gregory*. *See, e.g., State v. Robert Lee Yates*, Pierce Co. Cause No. 00-1-03253-8; *State v. Clark Richard Elmore*, Whatcom Co. Cause No. 95-1-00310-1; *State v. Johnathan Gentry*, Kitsap Co. Cause No. 88-1-00395-3.

In each of those cases, the Superior Court entered its order as a ministerial act, because it had no other authority. It is axiomatic that the Washington Supreme Court’s decision in *Gregory* was binding on every Superior Court in this state. As such, this court does not have the authority to act other than to enter an order converting the death sentence that was previously imposed to a sentence of life imprisonment without the possibility of release or parole.

Now, being duly advised in this matter, and based on the findings set out herein and the entirety of the record in this case, the Court hereby enters the following orders:

IT IS HEREBY ORDERED that the death sentence imposed on the defendant on June 13, 2012, is converted to a sentence of life imprisonment without the possibility of release or parole;

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7/3/2019

1 **IT IS FURTHER ORDERED** that all other terms and conditions of the Judgment and
2 Sentence entered June 13, 2012, remain in full force and effect, other than as may be ordered in
3 separate orders filed this date.

4 **FINALLY, IT IS HEREBY ORDERED** that the Pierce County Clerk's Office shall
5 attach a copy of this order to the Judgment and Sentence of June 13, 2012, such that any person
6 who obtains a copy of the J&S shall also receive a copy of this order converting death sentence.

7
8 The defendant waived his presence to attend the hearing and entry of this order.
9 This order was signed in open court in the presence of defense counsel this 28th day of
10 June, 2019.

11 Jack Nevin
12 JUDGE JACK NEVIN

13 Presented by:

13 Approved as to form: objection only

14 [Signature]
15 JOHN M. NEEB
16 Deputy Prosecuting Attorney
17 WSB # 21322

14 [Signature]
15 NEIL FOX / LILA SILVERSTEIN
16 Attorney for Defendant
17 WSB # 15277 / 38394



18 NOT PRESENT
19 BRETT A PURTZER
20 Attorney for Defendant
21 WSB # 17283



98-1-04967-9 28808752 MND 01-17-07

FILED
SUPREME COURT
STATE OF WASHINGTON

2007 JAN -8 P 2: 44

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CLERK

FILED
IN COUNTY CLERK'S OFFICE
A.M. JAN 17 2007 P.M.
PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk DEPUTY

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN EUGENE GREGORY,

Appellant.

AMENDED MANDATE

(as to additional court numbers)

NO. 71155-1

Pierce County Nos. ✓
98-1-04967-9 & 98-1-03691-7

C/A No. 26669-5-11

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington
in and for Pierce County.

The opinion of the Supreme Court of the State of Washington filed on November 30, 2006, became final in the above entitled cause on December 20, 2006. This cause is mandated to the superior court from which the appeals were taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

126/92

Page Two
AMENDED MANDATE
71155-1



I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 9th day of January, 2007.

A handwritten signature in black ink, which appears to read "Ronald R. Carpenter", is written over a horizontal line.

Ronald R. Carpenter
Clerk of the Supreme Court, State of
Washington

cc: Hon. Rosanne Buckner, Judge
Honorable Kevin Stock, Clerk
Pierce County Superior Court
David Zuckerman
Suzanne Lee Elliott
Gerald Allen Horne
John Martin Neeb
Kathleen Proctor
Clerk, Division II
Reporter of Decisions

November 13 2018 10:28 AM

The Hon. Jack Nevin

KEVIN STOCK
COUNTY CLERK
NO: 98-1-04967-9

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

STATE OF WASHINGTON,

Plaintiff,

v.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO: 98-1-04967-9

MOTION TO ENTER AMENDED
JUDGMENT AND SENTENCE

MOTION

COMES NOW Allen Eugene Gregory, the defendant, by and through his attorneys, Neil M. Fox and Lila J. Silverstein, and moves this Court for an order amending the judgment and sentence to reflect the new sentence of life without the possibility of parole and to correct the prior LFO order. This motion is based upon the order of the Supreme Court in *State v. Gregory*, No. 88086-7.

DATED this 13th day of November 2018.

Respectfully submitted,

s/ Neil M. Fox

WSBA No. 15277

s/ Lila J. Silverstein

WSBA No. 38394
Attorneys for Defendant

1 **MEMORANDUM OF LAW**

2 In Mr. Gregory’s case, the Supreme Court found this State’s capital punishment
3 system unconstitutional under the Washington Constitution. Under RCW 10.95.090,¹
4 the sentence must be changed to life without the possibility of parole.

5 This Court should enter an amended judgment reflecting the Supreme Court’s
6 decision. This is the order of the Supreme Court, as expressed in the Mandate.² *See*
7 *also State v. Scherf*, ___ Wn.2d ___, ___ P.3d ___, No. 88906-6 (11/8/18), Slip Op. at
8 57 (“We affirm the conviction, vacate the sentence, and remand for imposition of a life
9 without parole sentence.”). Mr. Gregory has waived his presence at the formal entry of
10 the new judgment. App. B. Such an amended judgment is a mere formality and can be
11 entered without a court hearing.

12 The 2012 judgment also imposed \$10,000 for recoupment of appointed counsel
13 fees, a filing fee and a “DNA” fee. Since the time the 2012 judgment was entered,
14 however, the law has been changed, and discretionary LFOs can no longer be imposed
15 on indigent defendants. RCW 10.01.160(3) (“The court shall not order a defendant to
16 pay costs if the defendant at the time of sentencing is indigent. . . .”). *See also State v.*
17 *Ramirez*, ___ Wn.2d ___, 426 P.3d 714, 2018 Wash. LEXIS 627, 2018 WL 4499761
18
19
20

21 ¹ RCW 10.95.090 provides:

22 If any sentence of death imposed pursuant to this chapter is commuted by the
23 governor, or held to be invalid by a final judgment of a court after all avenues of appeal
24 have been exhausted by the parties to the action, or *if the death penalty established by*
25 *this chapter is held to be invalid by a final judgment of a court which is binding on all*
26 *courts in the state, the sentence for aggravated first degree murder if there was an*
affirmative response to the question posed by RCW 10.95.060(4) shall be life
imprisonment as provided in RCW 10.95.030(1).

27 Emphasis added.

28 ² In its opinion, the Supreme Court ordered that Mr. Gregory’s sentence (and the sentences of the
other condemned prisoners) be “converted to life imprisonment.” Slip Op. at 41. The Mandate requires
“court action” in “further proceedings in accordance” with the decision. App. A.

1 (2018)). Mr. Gregory is indigent, having been incarcerated for over twenty years.³
2 Thus, the Court should not order him to pay any discretionary LFOs including
3 recoupment, the filing fee and the DNA fee.⁴

4 Even putting aside issues of indigency, Mr. Gregory should not have to pay
5 recoupment of attorney fees. Notably, the original 2001 judgment did not impose any
6 amount for recoupment of costs for appointed counsel. The \$10,000 was included only
7 on the second 2012 judgment. But since the only issue at stake in 2012 was the death
8 penalty, and that has now been vacated. Mr. Gregory should not be charged with the
9 costs related to that proceeding. *See, e.g., Nelson v. Colorado*, ___ U.S. ___, 137 S. Ct.
10 1249, 1252, 197 L. Ed. 2d 611 (2017) (“When a criminal conviction is invalidated by a
11 reviewing court and no retrial will occur, is the State obliged to refund fees, court
12 costs, and restitution exacted from the defendant upon, and as a consequence of, the
13 conviction? Our answer is yes.”); *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S. Ct.
14 518, 15 L. Ed. 2d 447 (1966) (striking down a statute that required an acquitted
15 defendant to be incarcerated until he paid costs); RCW 10.73.160 (authorizing
16 recoupment of appellate costs only for those convicted); RCW 10.01.160(1)(“Costs
17 may be imposed only upon a convicted defendant.”). Mr. Gregory is no longer
18 “convicted” of a capital offense, and thus should not have to pay recoupment for
19 attorney fees connected to the 2012 proceeding.

20 On the other hand, the proposed judgment maintains the VPA assessment and
21 the restitution order, both of which were included on the 2001 judgment. Therefore,
22 the total amount of LFOs that should be imposed in the amended judgment is
23 \$3054.90, with credit for any amounts already paid.

26 ³ In 2012, the State agreed that Mr. Gregory was indigent, when an order of indigency was entered.
27 *See App. D.*

28 ⁴ In 2018, the Legislature also made it clear that the \$100 DNA fee was not to be imposed if “the
state has previously collected the offender’s DNA as a result of a prior conviction.” Laws of 2018, ch.
269, §18. Mr. Gregory’s DNA has previously been collected, so this fee is improper in this case.

1 Accordingly, the Court should enter the attached proposed judgment and
2 sentence.

3 DATED this 13th day of November 2018.

4 Respectfully submitted,

5 s/ Neil M. Fox
6 WSBA No. 15277

7 s/ Lila J. Silverstein
8 WSBA No. 38394
9 Attorneys for Defendant

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CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare that on the 13th day November 2018, I served copies of the attached pleading by depositing a copy into the United States Mail, with proper first class postage affixed in envelopes addressed to:

John Neeb
Pierce County Prosecuting Attorney's Office
930 Tacoma Ave. S. Room 946
Tacoma, WA, 98402-2102

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 13th day of November 2018, at Seattle, Washington.

s/ Alex Fast
Legal Assistant

APPENDIX A

FILED

NOV - 7 2018

E. Lennon

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN EUGENE GREGORY,

Appellant.

MANDATE

No. 88086-7

Pierce County No.
98-1-04967-9

COURT ACTION REQUIRED

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington
in and for Pierce County

The opinion of the Supreme Court of the State of Washington was filed on October 11, 2018, and became the decision terminating review of this Court in the above entitled case on October 31, 2018. This case is mandated to the superior court from which the appellate review was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Olympia, Washington, this 7th day of November, 2018.

Erin L. Lennon

ERIN L. LENNON
Deputy Clerk of the Supreme Court
State of Washington

Page 2
No. 88086-7
MANDATE

cc: Presiding Judge
Clerk, Pierce County Superior Court
Neil Martin Fox
Lila Jane Silverstein
Kathleen Proctor
John Martin Neeb
Reporter of Decisions

APPENDIX B

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

STATE OF WASHINGTON,

Plaintiff,

v.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO: 98-1-04967-9

WAIVER OF PRESENCE

I, Allen Eugene Gregory, understand I have the right to be present in court at all hearings in my case. I am hereby waiving my right to attend any hearings related to the amendment of the judgment in my case to a life without parole sentence and the entry of an amended judgment and sentence, in accordance with the Supreme Court's ruling in my case. I authorize my attorneys, Neil Fox and Lila Silverstein, to act in my absence at whatever hearings take place regarding this matter.

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

X 10-29-18

DATE AND PLACE

Allen Eugene Gregory

ALLEN EUGENE GREGORY

APPENDIX C

Superior Court of Washington for Pierce County

State of Washington, Plaintiff,

No. 98-1-04967-9

vs.

**Felony Judgment and Sentence -- Prison
(FJS) Amending Judgment Entered on 6/13/12**

Allen Eugene Gregory, Defendant.

DOB: 06/09/1972
SID:WA13284722

- Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8
5.2, 5.3, 5.5, 5.7, and 5.8
 Defendant Used Motor Vehicle
 Juvenile Decline Mandatory Discretionary

I. Hearing

1.1 In light of the decision of the Washington Supreme Court on 10/11/2018, and the mandate from that decision, the sentence of death in this case originally imposed on June 13, 2012, is vacated. By operation of law, RCW 10.95.090, the judgment is amended to impose a sentence of life in prison without the possibility of release or parole. Because the sentence is imposed by operation of law, the defendant's presence has been waived.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
 guilty plea (date) _____ jury-verdict (date) March 22, 2001 bench trial (date)
_____:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
Count 1	MURDER IN THE FIRST DEGREE With AGGRAVATING CIRCUMSTANCES	RCW 9A.32.030(1)(a) RCW 10.95.020(11)	A	July 27, 1996

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

GV For the crime(s) charged in Count _____, **domestic violence – intimate partner** as defined in RCW 9A.36.041(4) was pled and proved.

GV For the crime(s) charged in Count _____, **domestic violence (other)** was pled and proved. RCW 10.99.020.

The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.

- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count 1.
_____. RCW 9.94A.825, 9.94A.533.
- Count _____, is aggravated murder in the first degree committed while the defendant was
 under 16 years of age 16 or 17 years of age when the offense was committed.
- Count _____, was committed while the defendant was under 18 years of age and the time
of confinement is over 20 years.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW
69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school
grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park,
public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center
designated as a drug-free zone by a local government authority, or in a public housing project designated by a
local governing authority as a drug-free zone.
- In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21),
RCW 9.94A._____.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers,
and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count
_____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang-related felony** offense in which the defendant
compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense.
RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal
street gang member or associate** when the defendant committed the crime. RCW 9.94A.702, 9.94A.829.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a
vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner.
The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- GY** In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle.
RCW 9.94A.533.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the
defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer.
RCW 9.94A.834.
- In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other
employee of a law enforcement agency who was performing his or her official duties at the time of the assault,
as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to
be a firearm. RCW 9.94A.831, 9.94A.533.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- Reasonable grounds exist to believe the defendant is a mentally ill person as defined in RCW 71.24.025, and
that this condition is likely to have influenced the offense. RCW 9.94B.080
- In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW
9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be
subject to a mandatory minimum term of 5 years (RCW 9.94A.540).
- Counts _____ encompass the same criminal conduct and count as one crime in determining the
offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are**
(list offense and cause number):

	Crime	Cause Number	Court (county & state)	DV* Yes
1.				
2.				

* DV: Domestic Violence was pled and proved.

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1	Theft 1	1/11/86	3/20/86	Pierce County/WA	Juv.	Class B	
2	Challenge to fight in public	7/20/92	9/14/92	Long Beach/CA	Adult	GM/M	
3	Carrying weapon in vehicle	7/3/94	9/20/94	Long Beach/CA	Adult	GM/M	
4	DWLS 3	5/2/98	7/15/98	Lakewood/WA	Adult	M	
5	DWLS 3	11/16/97	7/14/98	Pierce Co/WA	Adult	M	
6	DWLS 3	9/10/97	7/13/98	Tacoma Muni/WA	Adult	M	
7	VUCSA	7/12/98	5/3/99	Piece Co/WA	Adult	Class C	
8	Attempted Escape 2/Mal Misc 3	7/1-30/00	5/4/01	Pierce Co/WA	Adult	GM	

* DV: Domestic Violence was pled and proved.

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).
- The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
	N/A for this crime	XV	Life without Parole		Life without Parole	Life

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 9.94A.533(7), (JP) Juvenile present, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude, (ALF) Assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

- Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows: _____

2.4 **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

- below the standard range for Count(s) _____.
 - above the standard range for Count(s) _____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.
 - within the standard range for Count(s) _____, but served consecutively to Count(s) _____.
- Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's financial resources and the nature of the burden that payment will impose. (RCW 10.01.160). The court makes the following specific findings:

- The defendant is indigent as defined in RCW 10.101.010(3)(a)-(c) because the defendant:
 - receives public assistance is involuntarily committed to a public mental health facility receives an annual income, after taxes, of 125 percent or less of the current federal poverty level, and has been incarcerated since 1998.
- The defendant is not indigent as defined in RCW 10.101.010(3)(a)-(c).
 - The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

 - The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.
 - (Name of agency) _____'s costs for its emergency response are reasonable. RCW 38.52.430 (effective August 1, 2012).

2.6 **Felony Firearm Offender Registration.** The defendant committed a felony firearm offense as defined in RCW 9.41.010, and:

- The defendant should register as a felony firearm offender. The court considered the following factors in making this determination:
 - the defendant's criminal history.
 - whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.
 - evidence of the defendant's propensity for violence that would likely endanger persons.
 - other: _____
- The defendant must register as a felony firearm offender because the offense was committed in conjunction with an offense committed against a person under the age of 18, or a serious violent offense or offense involving sexual motivation as defined in RCW 9.94A.030.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589 **Life in prison without the possibility of release or parole. RCW 10.95.030(1).**

- The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
- The confinement time on Count _____ includes 24 months as enhancement for firearm deadly weapon VUCSA in a protected zone manufacture of methamphetamine with juvenile present impaired driving.

Actual number of months of total confinement ordered is: **Life in prison without the possibility of parole.**

(b) **Confinement.** RCW 10.95.030 (Aggravated murder and under age 18.) The court orders the following:

Count _____	minimum term: _____	maximum term: <u>Life</u>
Count _____	minimum term: _____	maximum term: <u>Life</u>

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

This sentence shall run consecutively with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) **Credit for Time Served.** The defendant shall receive credit for eligible time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail and DOC shall compute time served.

(d) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701, RCW 10.95.030(3))

(A) The defendant shall be on community custody for: N/A

- Count(s) _____ 36 months for Serious Violent Offenses
- Count(s) _____ 18 months for Violent Offenses
- Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

- (B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm

compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

- not possess or consume alcohol.
- not possess or consume controlled substances, including marijuana, without a valid prescription.
- have no contact with: _____

- remain within outside of a specified geographical boundary, to wit:

- not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
- participate in the following crime-related treatment or counseling services:

- undergo an evaluation for treatment for domestic violence substance use disorder mental health anger management, and fully comply with all recommended treatment.
- comply with the following crime-related prohibitions: _____

- Other conditions:

Court Ordered Treatment: If any court orders mental health or substance use disorder treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

(C) If the defendant committed the above crime(s) while under age 18 and is sentenced to more than 20 years of confinement:

- (i) As long as the defendant's conviction is not for aggravated first degree murder or certain sex crimes, and the defendant has not been convicted of any crime committed after he or she turned 18 or committed a disqualifying serious infraction as defined by DOC in the 12 months before the petition is filed, the defendant may petition the Indeterminate Sentence Review Board (Board) for early release after the defendant has served 20 years.
- (ii) If the defendant is released early because the petition was granted or by other action of the Sentence Review Board, the defendant will be subject to community custody under the supervision of the DOC for a period of time determined by the Board, up to the length of the court-imposed term of incarceration. The defendant will be required to comply with any conditions imposed by the Board.
- (iii) If the defendant violates the conditions of community custody, the Board may return the defendant to confinement for up to the remainder of the court-imposed term of incarceration.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS/Odyssey CODE

PCV 3101 \$ 500 Victim assessment RCW 7.68.035
 PDV 3102 \$ Domestic Violence (DV) assessment RCW 10.99.080
 \$ Violation of a DV protection order (\$15 mandatory fine) RCW 26.50.110
 CRC 3403 \$ Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
 Criminal filing fee _____ FRC
 Witness costs \$ _____ WFR
 Sheriff service fees \$ _____ SFR/SFS/SFW/WRF
 Jury demand fee \$ _____ JFR
 Extradition costs \$ _____ EXT
 Other \$ _____
 PUB 3225 \$ Fees for court appointed attorney RCW 9.94A.760
 WFR 3231 \$ Court appointed defense expert and other defense costs RCW 9.94A.760
 FCM 3303 \$ Fine RCW 9A.20.021: VUCSA chapter 69.50 RCW, VUCSA additional
 MTH 3337 fine deferred due to indigency RCW 69.50.430
 CDF 3302 \$ Drug enforcement fund of _____ RCW 9.94A.760
 LDI 3308 FCD 3363
 NTF 3338 SAD 3365 SDI 3307
 \$ DUI fines, fees and assessments
 CLF 3212 \$ Crime lab fee suspended due to indigency RCW 43.43.690
 \$ DNA collection fee suspended. **DNA previously collected** RCW 43.43.7541
 FPI 3335 \$ Specialized forest products RCW 76.48.171
 \$ Other fines or costs for: _____
 DEF 3506 \$ Emergency response costs (\$1000 maximum, \$2,500 max. effective Aug. 1,
 2012.) RCW 38.52.430
 Agency: _____
 \$ 2554.90 Restitution to: CVC RE: VH 92603
 RTN/RJN 3801 \$ Restitution to: _____
 \$ Restitution to: _____
 (Name and Address--address may be withheld and provided
 confidentially to Clerk of the Court's office.)
 \$3054.90 **Total With credit for any payments made since 1998.** RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.
 is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

Name of other defendant Cause Number (Victim's name) (Amount-\$)

RJA _____

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760.

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____. RCW 9.94A.760. (Restitution payments must begin immediately. RCW 9.94A.750 and RCW 9.94A.753.)

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760.

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754. **This condition has already been satisfied**

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with Lee Peden, John Walters or any member of their immediate family for life (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party

The defendant is excluded or prohibited from coming within _____ (distance) of:
 _____ (name of protected person(s))'s home residence work place school (other location(s)) _____, or

other location: _____ until _____ (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Stalking No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 Exoneration: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760 and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a violation hearing and DOC finds that you committed the violation, you may receive a sanction of up to 30 days of confinement. RCW 9.94A.633(1).

(b) If you have not completed your maximum term of total confinement and you are subject to a violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.633(2)(a).

5.5a Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.5b **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 **Department of Licensing Notice:** The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action**—The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**

Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of ____.

No BAC test result.

BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.

Drug Related. The defendant was under the influence of or affected by any drug.

THC level was ____ within two hours after driving.

Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.

Vehicle Info.: Commercial Veh. 16 Passenger Veh. Hazmat Veh.

5.8 **Department of Licensing Notice – Defendant under age 21 only.**

Count _____ is (a) a violation of RCW chapter 69.41 [Legend drug], 69.50 [VUCSA], or 69.52 [Imitation drugs], and the defendant was under 21 years of age at the time of the offense **OR** (b) a violation under RCW 9.41.040 [unlawful possession of firearm], and the defendant was under the age of 18 at the time of the offense **OR** (c) a violation under RCW chapter 66.44 [Alcohol], and the defendant was under the age of 18 at the time of the offense, **AND** the court finds that the defendant previously committed an offense while armed with a firearm, an unlawful possession of a firearm offense, or an offense in violation of chapter 66.44, 69.41, 69.50, or 69.52 RCW.

Clerk's Action –The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.265

5.9 Other: _____

DATED this ___ day of _____ 2018.

Judge/Print Name:

Defendant's Presence Waived

Deputy Prosecuting Attorney
WSBA No.
Print Name:

Attorney for Defendant
WSBA No.15277
Print Name:Neil M. Fox

Attorney for Defendant
WSBA No. 38394
Lila J. Silverstein

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: _____

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

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

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter

Print Name

VI. Identification of the Defendant

SID No. WA19142642
(If no SID complete a separate Applicant card
(form FD-258) for State Patrol)

Date of Birth 6/9/1972

FBI No. 37773ORA3

Local ID No. DOC # 795777

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

- Asian/Pacific Islander Black/African-American Caucasian
 Native American Other: _____

Ethnicity:

- Hispanic Non-Hispanic

Sex:

- Male Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document. Fingerprints on Judgment and Sentence entered on 6/13/2012

APPENDIX D

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BE IT REMEMBERED that on the 9th day of
November, 2012, the above-mentioned cause came on duly for
hearing before the HONORABLE ROSANNE BUCKNER, Superior
Court Judge in and for the County of Pierce, State of
Washington; the following proceedings were had, to-wit:

* * * * *

NOVEMBER 9, 2012

HEARING

MR. NEEB: Good afternoon, Your Honor. For the
record, John Neeb for the State. This is State of
Washington versus Allen Eugene Gregory, Cause No.
98-1-04967-9. The defendant is not present. His
attorneys, Brett Purtzer and Zenon Olbertz, are present.

We are here this afternoon to complete the
evidentiary hearing where the Court is making inquiry of
the jurors, and then potentially enter an order relating to
the evidentiary hearing and addressing the issue of the
Report of the Trial Judge.

State is ready to proceed.

THE COURT: Thank you.

Good afternoon, Mr. Purtzer. Good afternoon,
Mr. Olbertz.

MR. PURTZER: Good afternoon. We're ready to
proceed, as well.

MR. OLBERTZ: Good afternoon.

1 THE COURT: I've been presented with an agreed order
2 as to indigency for purposes of appeal. Is that correct?

3 MR. NEEB: Yes. Mr. Olbertz gave me that today. I
4 signed it for the State. I don't think there's any dispute
5 about his indigency.

6 THE COURT: I'm now signing that Order of Indigency.
7 Does defense have any further post-trial motions?

8 MR. PURTZER: No.

9 MR. OLBERTZ: No.

10 THE COURT: All right. Thank you all very, very
11 much.

12 MR. PURTZER: Thank you, Your Honor.

13 MR. OLBERTZ: Thank you, Your Honor.

14 THE COURT: You're welcome.

15 (Adjourned.)

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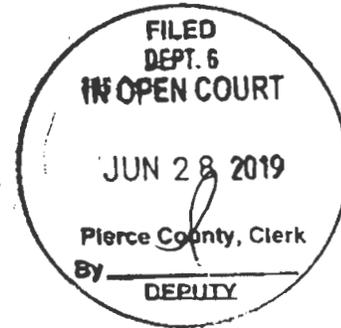
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98-1-04967-9 53512636 OR 07-03-19



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO. 98-1-04967-9

ORDER CONVERTING DEATH PENALTY
TO LIFE WITHOUT PAROLE

On Motion Date, this case came before the court for an order converting the sentence of death to a sentence of life without parole, the Honorable Jack G. Nevin,¹ presiding. The State of Washington was represented by Deputy Prosecuting Attorney John M. Neeb, and the defendant was present and represented by his attorneys, Neil Fox / Lila Silverstein.

The court has reviewed the pleadings that were filed by the defense, has reviewed the opinion of the Washington Supreme Court in this case, and has considered what courts have done in other cases affected by the decision in this case. The court accepted the written waiver of presence signed by the defendant on January 24, 2019. Now, being duly advised in this matter, and with full knowledge of the applicable statutes and cases, the court hereby enters the following orders.

In *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), the Washington Supreme Court held “that Washington’s death penalty is unconstitutional, as administered.” That court ordered

¹ The judge who presided over the trial in Dept. 6, Rosanne Buckner, has retired.

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“[a]ll death sentences are converted to life imprisonment,” pursuant to RCW 10.95.090 (“if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder ... shall be life imprisonment.” *Gregory*, 192 Wn.2d at 35-36. Defendant Gregory is convicted of aggravated first degree murder. *Gregory*, at 36 (“His conviction for aggravated first degree murder has already been appealed and affirmed by this court.”))

The Washington Supreme Court did not formally remand this case, but that court has ordered remand in other cases affected by the decision in this case. *See, e.g., In re Davis*, Wash. S.Ct. Case No. 96395-9. This court is also aware of the orders converting the death sentence to a sentence of life without parole in other superior court cases affected by *Gregory*. *See, e.g., State v. Robert Lee Yates*, Pierce Co. Cause No. 00-1-03253-8; *State v. Clark Richard Elmore*, Whatcom Co. Cause No. 95-1-00310-1; *State v. Johnathan Gentry*, Kitsap Co. Cause No. 88-1-00395-3.

In each of those cases, the Superior Court entered its order as a ministerial act, because it had no other authority. It is axiomatic that the Washington Supreme Court’s decision in *Gregory* was binding on every Superior Court in this state. As such, this court does not have the authority to act other than to enter an order converting the death sentence that was previously imposed to a sentence of life imprisonment without the possibility of release or parole.

Now, being duly advised in this matter, and based on the findings set out herein and the entirety of the record in this case, the Court hereby enters the following orders:

IT IS HEREBY ORDERED that the death sentence imposed on the defendant on June 13, 2012, is converted to a sentence of life imprisonment without the possibility of release or parole;

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IT IS FURTHER ORDERED that all other terms and conditions of the Judgment and Sentence entered June 13, 2012, remain in full force and effect, other than as may be ordered in separate orders filed this date.

FINALLY, IT IS HEREBY ORDERED that the Pierce County Clerk's Office shall attach a copy of this order to the Judgment and Sentence of June 13, 2012, such that any person who obtains a copy of the J&S shall also receive a copy of this order converting death sentence.

The defendant waived his presence to attend the hearing and entry of this order. This order was signed in open court in the presence of defense counsel this 28th day of June, 2019.

Jack Nevin
JUDGE JACK NEVIN

Presented by:

Approved as to form: ohi'eyia only

[Signature]
JOHN M. NEEB
Deputy Prosecuting Attorney
WSB # 21322

[Signature]
NEIL FOX / LILA SILVERSTEIN
Attorney for Defendant
WSB # 15277 / 38394

FILED
DEPT. 6
IN OPEN COURT

JUN 28 2019

Pierce County, Clerk
By [Signature]
DEPUTY

~~NOT PRESENT~~
BRETT A PURTZER
Attorney for Defendant
WSB # 17283

0135

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7/3/2019



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO. 98-1-04967-9

ORDER VACATING ATTORNEY'S FEES FROM 2012 JUDGMENT AND SENTENCE

On June 28, 2019, this case came before the court for an order vacating the attorney's fees that were ordered in the 2012 Judgment and Sentence, the Honorable Jack Nevin, presiding.¹ In this motion, the State of Washington was represented by Deputy Prosecuting Attorney John M. Neeb, and the defendant, who had waived his presence in writing, was represented by attorney Neil Fox. The court accepts the written waiver of presence signed by the defendant.

The court has reviewed the pleadings that were filed by the defense and the opinion of the Washington Supreme Court in *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). In *Gregory*, the Washington Supreme Court held "Washington's death penalty is unconstitutional, as administered." That court ordered "[a]ll death sentences are converted to life imprisonment," pursuant to RCW 10.95.090 ("if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder ... shall be life imprisonment." *Gregory*, 192 Wn.2d at 35-36. An order was entered today that converts the defendant's death sentence to a sentence of life without parole.

¹ The Judge who presided over this case through sentencing in 2012 was the Honorable Rosanne Buckner, who has retired.

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1 This defendant is indigent. In the Judgment and Sentence in 2012, the court ordered the
2 defendant to pay \$10,000 in attorney's fees. Since that time, the law has changed, and indigent
3 defendants can no longer be ordered to pay those fees. The State does not dispute that, because of
4 that change in the law, this court should vacate the order of attorney's fees from the Judgment and
5 Sentence of 2012.

6 Now therefore, being duly advised in this matter, and based on the findings set out herein
7 and the entirety of the record in this case, the Court hereby enters the following orders:

8 **IT IS HEREBY ORDERED** that the \$10,000 order for "Court-Appointed Attorney Fees
9 and Defense Costs" from the 2012 Judgment and Sentence is hereby **VACATED**.

10 **IT IS FURTHER ORDERED** that the remainder of the Legal Financial Obligations from
11 the 2012 Judgment and Sentence shall remain as ordered, for a total of \$3,264.90.

12 **FINALLY, IT IS HEREBY ORDERED** that the Pierce County Clerk's Office shall
13 attach a copy of this order to the "Judgment and Sentence," dated June 13, 2012, such that any
14 person who obtains a copy of that order shall also receive a copy of this order vacating the order
15 for attorney fees.
16

17 The defendant waived his presence to attend the hearing
18 This order was signed in the presence of defense counsel this 28th day of June, 2019.

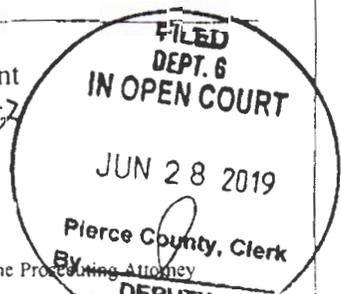
19 Jack Nevin
JUDGE JACK NEVIN

20 Presented by:

20 Approved as to form and content:

21 John M. Neeb
22 JOHN M. NEEB
23 Deputy Prosecuting Attorney
24 WSB # 21322

21 Neil Fox
22 NEIL FOX
23 Attorney for Defendant
24 WSB # 48512 / 5277



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TELE. COUNTY CLERK DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY
COMPLAINT FOR SEARCH WARRANT
(Evidence)

STATE OF WASHINGTON)

County of Pierce)

98 1 No. 07414 2

-ss.

COMES NOW Detective Chris Pollard #272, being first duly sworn, under oath, deposes and says:

That on or about the 21st day of August, 1998 in Pierce County, Washington, a felony, to-wit: RAPE IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE, CASE NUMBER 98-2330140, was committed by the act, procurement or omission of another; that the following evidence, to-wit:

trace evidence, i.e.; hairs, fibers, semen, blood; condoms; folding buck knife; U.S. currency totaling \$8.00; documents establishing dominion and control of the listed vehicle

is material to the investigation or prosecution of the above described felony for the following reasons:

evidence of the crime

that affiant verily believes that above evidence is concealed in or about a particular house or place, to-wit:

could be found in the suspect's 1986 Ford Mustang, two door, black in color, Washington License 715JPI VIN #1FABP28M9GF219818, registered to Allen E. Gregory, 1714 South 9th Street, in Tacoma, Washington, located at Bill's Towing at 1240 South Sprague Avenue, Tacoma, Washington,

in said County and State; that affiant's belief is based upon the following facts and circumstances:

On the 21st of August, 1998, a 41-year old female reported to the Tacoma Police that a black male orally, vaginally and anally raped her, while threatening her with a buck knife, and stole \$8.00 in U.S. currency, after she accepted the offer of a ride in his vehicle. The rape occurred inside the vehicle. During the course of the rape, the suspect wore a condom which ruptured. Upon initially contacting the suspect, the suspect introduced himself as Allen, and further stated that he lived in the City of Tacoma, on the east side of town. The victim described the suspect as a black male, mid-20's, with a slim to medium build, 5'10 or taller in height, wearing glasses.

EXHIBIT
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PAGE 2 OF 3
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98 1 07414 2

The victim described the suspect vehicle as a black two door Ford, with bullet casings covering the door lock mechanisms, a Mickey's beer tap mechanism as a mirror control, and having at least one Looney Tunes air freshener, possibly Tweety Bird. As the suspect left the victim, she noted the vehicle's Washington license plate number as 715JPI, this plate, per Department of Licensing, is a 1986 Ford Mustang, 2 door, black in color, registered to Allen E. Gregory, 1714 South 9th Street, Tacoma, Washington. The victim was transported to Tacoma General Hospital where a standard rape examination was performed by Dr. Fletcher, and evidence of the rape obtained. A photo montage containing Allen E. Gregory's photo was shown to the victim, but she was unable to identify him. Allen E. Gregory is a black male, 26 years of age, 6'03" in height, slim to medium build, who wears glasses. The affiant located the listed vehicle in the alley east of 1714 South 9th Street, adjacent to the home of Allen Gregory. A visual inspection from the exterior of the vehicle showed that bullet casings covered the locking mechanisms on the doors, a beer tap dispenser was present in the vehicle, and air fresheners were also present. Affiant contacted Allen Gregory at his residence at 1714 South 9th Street and took him into custody. Gregory was transported to the County-City Building where he was advised of his rights, and denied any contact with the victim, or involvement in the crime. However, Gregory did state that he does keep a folding buck knife in the vehicle, and that the vehicle was parked outside of 828 South Anderson during the hours this crime was committed. Gregory also stated only he and his grandmother have keys to the vehicle, and he is certain that the vehicle was not driven by anyone from 6:00 p.m. on Thursday, August 20, 1998, through 9:00 a.m. on Friday, August 21, 1998. Affiant believes that the suspect's statement is an attempt at deception. Gregory's vehicle was impounded to Bill's Towing. Affiant consulted with Deputy Prosecutor Sue Sholin. Gregory was booked for Rape First Degree and Robbery First Degree.

Affiant believes the above listed evidence will be located in the listed vehicle.

SUBSCRIBED AND SWORN to before me this 25 day of August, 19 98

Presented By: Det C Pallard #272 TPO [Signature]
JUDGE

PIERCE COUNTY PROSECUTING ATTORNEY

March 10, 2020 - 9:55 AM

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_Personal_Restraint_Petition_20200310094511D2483734_5503.pdf
This File Contains:
Personal Restraint Petition - Response to PRP/PSP
The Original File Name was Gregory PRP Response.pdf

A copy of the uploaded files will be sent to:

- nf@neilfoxlaw.com

Comments:

Sender Name: Aeriele Johnson - Email: aeriele.johnson@piercecountywa.gov

Filing on Behalf of: Teresa Jeanne Chen - Email: teresa.chen@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

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