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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of

JONATHAN LEE GENTRY,

Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 88-1-00395-3

ANSWER TO BRIEF OF AMICI CURIAE
AMERICAN CIVIL LIBERTIES UNION &
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should consider arguments and issues not raised by the parties?
2. Whether Amici seek a new rule of law not applicable on collateral review?
3. Whether Amici fail to show any justification for the extension of *Monday* to conduct not affecting the jury's deliberations or for the imposition of an automatic reversal standard in capital cases?
4. Whether Amici's statistical claims have any bearing on Gentry's case or the death penalty in Washington State?

II. ARGUMENT

A. THE ARGUMENTS OF AMICI WERE NOT PRESENTED BY GENTRY, CALL FOR NEW RULES THAT MAY NOT BE APPLIED IN THIS COLLATERAL APPEAL, AND WHICH ARE NOT JUSTIFIED BY POLICY CONSIDERATIONS.

1. Amici's arguments are based on the false premise that there was misconduct falling within Monday's purview.

Amici offer no citation to the record for the "facts" contained in their brief. Indeed, they explicitly note that they relied upon the facts as set forth in Gentry's petition. *See* ACLU Brief, at 2 n.1. As discussed at length in the State's original brief, Gentry's contention that racial impropriety permeated his trial is without basis. *See* Brief of Respondent,

at 57-75. As discussed in the State's original brief, the condition precedent for *Monday*'s application is that the "prosecutor flagrantly or apparently intentionally appeal[ed] to racial bias in a way that undermine[d] the defendant's credibility or the presumption of innocence." *State v. Monday*, 171 Wn.2d ¶ 23, 257 P.3d 551 (2011).

2. Amici fail to show any compelling justification for extending Monday beyond the trial context or for imposing an automatic reversal standard.

a. The requirement of a "searching review" of penalty-phase proceedings has no bearing in the standard of review.

Citing *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), Amici suggest that because this Court is required to perform a "searching review" of the record in capital cases, *Monday* must be applied more broadly in reviewing Gentry's trial and sentencing proceedings. ACLU Brief, at 4. *Lord*'s holding, however, was not as broad as Amici suggest.

First, the Court specifically rejected the notion that the "heightened scrutiny" required in the sentencing phase applies to the guilt phase proceedings. *Lord*, 117 Wn.2d at 888 n.19. More importantly, the Court was quite clear that "heightened scrutiny" went to the examination of the fact; it did not raise the standard of review:

[H]eightedened scrutiny means just that: a closer, more careful review of the record. Heightened scrutiny does not raise the standard of review. For example, in reviewing a challenge to an evidentiary ruling by the trial court, we still employ the abuse of discretion standard in the penalty phase. We will, however, more carefully review

the factual basis upon which the trial court relied to ensure that the ruling complies with that standard.

Lord, 117 Wn.2d at 888.¹ In any event, this Court applied such a standard to Gentry's direct appeal and found no error:

After thoroughly reviewing the entire record, we conclude that the Defendant was not denied a fair trial because of his race.

State v. Gentry, 125 Wn.2d 570, 611, 888 P.2d 1105 (1995).

b. Amici fail to justify the imposition of per se reversal standard in capital cases.

Amici argue that not only should *Monday* be expanded beyond the context of prosecutorial misconduct that affects the jury, it should also result in automatic reversal in capital cases. These contentions are beyond the scope of Gentry's argument, require the enunciation of new rules of procedure that Amici fail to show should be retroactively applied, do not increase the protections available against improper race-based charging decisions, and, ultimately are without justification as a matter of policy.

i. Amici raise issues beyond those presented by Gentry.

First, it must be noted that Amici's argument goes well beyond that presented by Gentry, who argues only that the State invoked racial bias during trial, and that *Monday*'s harmlessness standard applies. PRP, at 21-

¹ Amici also cite to *Monday* and *Lord* for the proposition that the Court should "engage in a searching review to determine whether there were explicit or 'subtle' but equally 'insidious' comments by the prosecutor that could have triggered racial bias." ACLU Brief, at 4. *Lord* in no way addresses this issue.

26. It is well-settled that this Court does not consider issues raised first and only by amici. *Madison v. State*, 161 Wn.2d 85, 104, 163 P.3d 757, 769 (2007). This Court should therefore decline to consider any issues raised only by Amici.

ii. Application to Gentry's case of the rules proposed by Amici would violate Teague and the Washington precedent adopting its rule.

As discussed thoroughly in the State's brief, Gentry fails to show that the holding of *Monday* should apply retroactively to his long-final conviction and sentence. Brief of Respondent, at 46-74 (discussing *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *State v. Abrams*, 163 Wn.2d 277, ¶ 30, 178 P.3d 1021 (2008), *State v. Evans*, 154 Wn.2d 438, ¶¶ 7-10, 114 P.3d 627, cert. denied, 546 U.S. 983 (2005), *In re Markel*, 154 Wn.2d 262, ¶¶ 10-12, 111 P.3d 249 (2005), and *In re St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). Since Amici seek not only to apply *Monday* to this case, but also to expand its reach to the State's charging decision, and to change the remedy, it follows *a fortiori* that its proposed rules cannot be applied to Gentry's case.²

iii. Defendants already have a remedy for race-based charging decisions

The courts have generally refused to allow defendants to challenge

² Moreover, as discussed *infra*, that there already exists a remedy for improperly motivated charging decisions, which has existed since well before the time of Gentry's trial. Any such claim would thus be time-barred.

the prosecutor's charging decisions. As noted by the United States Supreme Court many years ago and as demonstrated in the instant case,³ a rule that allows defendants to challenge the nature of the information considered in making the charging decision "would result in interminable delay [and] add nothing to the assurance of a fair trial." *Costello v. United States*, 350 U.S. 359, 364, 76 S. Ct. 406, 100 L. Ed. 2d 397 (1956); accord, *United States v. Calandra*, 414 U.S. 338, 350-52, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (it is uncertain that any benefit may be obtained from extending various adjudicatory rights to the accusatorial process while it is clear that allowing litigation over the information considered would frustrate the public's interest in the fair and expeditious administration of the criminal laws).

Moreover, it is a long-recognized principle that prosecutors are vested with wide discretion in determining how and when to file criminal charges, and that the exercise of their discretion involves consideration of numerous factors, including the strength of the case, pending conviction on another charge, the defendant's relative level of culpability, confinement on other charges, the prosecution's general deterrence value, the government's enforcement priorities, available resources, the victim's wishes, and the cost of prosecution. *State v. Howard*, 106 Wn.2d 39, 44,

³ The instant challenge was filed 20 years after the charging decision was made.

722 P.2d 783 (1985); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984); RCW; National District Attorney's Association, *National Prosecution Standards*, Std. 4-2.4 (3rd ed. 2012); ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 3-3.9 Discretion in the Charging Decision (3d ed. 1993). So long as the prosecutor has probable cause to proceed upon the charge, the legislature has sought to prevent judicial review of the prosecutor's charging decisions. See RCW 9.94A.401; D. Boerner, *Sentencing in Washington* § 12.24, at 12-47 (1985); see also, *State v. Rice*, 174 Wn.2d 884, 888, 279 P.3d 849 (2012) (“a prosecutor’s broad charging discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution.”).

This legislative determination is consistent with a host of judicial pronouncements recognizing that “the decision to prosecute is particularly ill-suited to judicial review.” *Wayte v. United States*, 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985). It is also consistent with the principle that the decision of what charges to file and whether to engage in plea bargaining are executive branch, not judicial branch functions. *Finch*, 137 Wn.2d at 810 (“A prosecutor’s determination to file charges, to seek the death penalty, or to plea bargain are executive, not adjudicatory”).

While the Legislature⁴ has provided standards to guide prosecutors in the exercise of their discretion, the standards do not create rights that are enforceable against the state. RCW 9.94A.401. The legislative guidelines, whether worded as suggested criteria or as mandatory exhortations, do not limit the charging discretion of prosecuting attorneys. *Rice*, 174 Wn.2d at 896. A deviation from the guidelines carries no legal repercussions. *Rice*, 174 Wn.2d at 896; *accord State v. Heaton*, 21 Wash. 59, 62, 56 P. 843 (1899) (“The prosecuting attorney, in the faithful discharge of his duties, must exercise his independent judgment as to the prosecution or dismissal of an information or indictment, and it is in the interest of sound public policy that his discretion in the exercise of his duties should not be in any wise controlled by legal consequences unpleasant or unfavorable to himself.”).

Nevertheless, Courts may review a prosecutor’s charging discretion to protect an individual from prosecutorial misconduct that is based upon an unconstitutional motive or carried out in bad faith. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process or otherwise prejudices the defendant. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446(1962) (constitutional equal

⁴ The Constitution of this state authorized the Legislature to establish the powers and duties of the county prosecutor. Const. Art. XI § 5.

protection principles prohibit basing the decision whether to prosecute on “an unjustifiable standard such as race, religion, or other arbitrary classification”). *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (prosecution may be dismissed when prosecutor engages in vindictive prosecution, selective enforcement of a statute, or other prejudicial misconduct under CrR 8.3(b)). A defendant, however, must satisfy an extremely high threshold to obtain discovery or a hearing on such a claim. *See generally United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Bonisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). The reluctance to entertain these motions absent a compelling initial showing arises from the same concerns that bar most other challenges to a charging decision – a concern that examining the basis of a prosecution delays the criminal proceeding, may chill effective law enforcement, and diverts prosecutor’s resources from other duties. *Armstrong*, 517 U.S. at 465, 468. The rule that a defendant may generally not require a prosecutor to explain his reasons for making a particular charging decision applies equally to capital cases. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986).

In this case, however, despite a three-day hearing on the matter, Gentry produced no evidence in the trial court that the prosecutors’

decision to file a notice of special sentencing proceeding in his case was based upon an improper classification. *See* Brief of Respondent, at 58-61. Indeed, after consideration of the evidence, Pierce County Judge Karen Strombom⁵ rejected any finding of improper racial motivation by the State:

While the Court considers the statement to have been in a moment of extreme anger, with the stated goal of getting even with Mr. Robinson, the Court cannot and does not conclude that this then reflects or raises a presumption that Mr. Clem is racially prejudiced as to people of Afro-American heritage.

The testimony is quite clear, and is uncontradicted, that no discretionary decision has been made because of a racial bias or motivation. I don't find that the statement of Mr. Clem made in this moment of anger establishes the potential or an appearance of racial bias on the part of Mr. Clem such that he is no longer a disinterested prosecuting attorney.

17RP 429. Gentry presents no new evidence of impropriety now.

Amici fail to show any justification for expanding *Monday* into the realm of prosecutorial charging discretion. Nor do they cite any evidence that would justify relief in this case. Their proposal, even if it should be considered, should be rejected.

iv. There is no persuasive justification for a per-se reversal standard in capital cases.

Amici next argue that rather than the heightened *Monday* standard

⁵ Judge Strombom is now Chief Magistrate Judge for the Western District of Washington. *See* <http://www.wawd.uscourts.gov/CourthouseInformation/MagistrateJudges.htm>

for showing harmless error, in capital cases, racial impropriety should be subject to a rule of per se reversal in capital cases. Amici fail to offer compelling justification for a such a standard.

Firstly, the prosecutor's role in the decision to seek the death penalty does not justify a differing outcome. The prosecutor's decisions routinely affect the sentence that the court may impose upon conviction. For example, if the prosecutor charges a defendant with first-degree murder, the court must impose a minimum sentence of twenty years if the defendant is convicted. *See* RCW 9.94A.540(1)(a). However, the prosecutor could choose to charge that same defendant with a lesser offense, in which case the court could impose a lower sentence upon conviction. The prosecutor could even choose not to charge the defendant with any crime whatsoever. The prosecutor's decision is not without checks and balances, for the magistrate must determine that probable cause exists to believe that the defendant committed the charged offense, and the trier of fact must determine at trial whether the defendant is guilty beyond a reasonable doubt of the charged offense. *See State v. Campbell*, 103 Wn.2d 1, 26, 691 P.2d 929 (1984), *cert. denied*, 417 U.S. 1094 (1985) (explaining why the prosecutor's charging decision does not violate separation of powers). Moreover, as discussed above, a remedy already exists for racially-motivated charging decisions.

Nor does the fact that a case involves the death penalty prevent harmless error analysis. *See, e.g., State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, 999-1003 (1999) (shackling during penalty phase subject to harmless error review); *Clemons v. Mississippi*, 494 U.S. 738, 754, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) (death penalty verdict subject to harmless error analysis after one aggravating circumstance stricken); *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (unconstitutional admission of coerced confession at guilt stage of capital case subject to harmless error review); *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (unconstitutional admission of evidence at sentencing stage subject to harmless error review); *Mitchell v. Esparza*, 540 U.S. 12, 17, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (Supreme Court rejects the notion “that because the violation occurred in the context of a capital sentencing proceeding” it was not subject to harmless error review); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (improper prosecutorial argument during guilt phase of capital trial harmless).

Nor do Amici’s comparisons to cases involving juror bias withstand scrutiny. In those cases, the actual finder of fact is the one who harbors the bias. *See Gomez v. United States*, 490 U.S. 858, 876, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (“Among those basic fair trial rights

that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.") (internal quotation marks omitted). As discussed above, the prosecutor's role is accusatory, not adjudicatory. While this role requires the prosecutor "to seek justice, not merely to convict," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987), *Monday* provides an adequate remedy where there is actual prejudice to the right to a fair trial. .

Under Amici's formulation, however, the public at large will pay the price for the prosecutor's error, even if there was no discernible impact on the fairness of the defendant's trial. An otherwise valid conviction should not be set aside where a reviewing court is convinced beyond a reasonable doubt that the error was harmless. Errors are inevitable, and many errors, even constitutional ones, do not call the fundamental fairness of the trial into question nor affect the final outcome. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Upholding fair criminal convictions "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, 475 U.S. at 681. It avoids the myriad costs associated with retrials, both to the justice system and to the witnesses haled into court again and again. *See United States v. Hasting*, 461 U.S. 499, 509, 103 S.

Ct. 1974, 76 L. Ed. 2d 96 (1983). In contrast, reversing for harmless errors “encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Van Arsdall*, 475 U.S. at 681 (quoting Roger J. Traynor, *The Riddle of Harmless Error*, 50 (1970)).

The rationale in *Monday* for applying a constitutional harmless error standard was that “our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct.” *Monday*, 171 Wn.2d at ¶ 22. Amici fail to show that the requirement of showing that improper racial appeals are harmless beyond a reasonable doubt is not an adequate deterrent. They also fail to cite anything different about capital cases that would justify reversal where there is no discernible effect on the fairness of the trial. While it is certainly true that the penalty is irreversible once carried out, the *Monday* error is apparent from the face of the trial record. In modern capital litigation, in which the conviction and sentence are subject to thorough examination on direct appeal and collateral review in this Court and inevitably in the federal court system, there can be no doubt that the nature of the penalty does not preclude an adequate remedy under the existing *Monday* formulation.

Amici’s position is particularly untenable in the present context of a successive collateral attack. A collateral petitioner, even in a capital case, has the burden of showing actual prejudice as to claimed

constitutional error; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice. *In re Finstad*, ___ Wn.2d ___, ¶ 8, 2013 WL 2255786 (May 23, 2013); *In re Yates*, 177 Wn.2d 1, ¶ 14, 296 P.3d 87 (2013); *In re Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992); *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The actual prejudice standard of review for collateral attack places the burden upon the petitioner, as opposed to the harmless error standard on direct appeal, because “[c]ollateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).

Moreover, it will frequently be the case on collateral review, especially in protracted capital litigation, that the actors at whom *Monday*'s deterrent “message” is directed will no longer even be involved in the case. Such is the case here. None of the original participants in this case are still employed by the Kitsap County Prosecuting Attorney. Indeed, the elected prosecutor who uttered the offensive language lost his reelection bid shortly after this case was tried, and is no longer even admitted to practice in Washington State. The only people who will bear the brunt of an automatic reversal are the family of Cassie Holden, who have been waiting more than 20 years for justice to be carried out, the

public, who will bear the cost of an expensive and needless retrial, and who will also, should the evidence or witnesses be unavailable at this late date, bear the risk of a two-time murderer and two-time rapist being released into their community. Amici fail to justify an automatic reversal standard in general and in the present context in particular.

B. THE CIRCUMSTANCES OF GENTRY'S TRIAL DO NOT INDICATE RACIAL BIAS

1. Amici's allegations of systemic bias have been repeatedly rejected as unfounded by this Court.

Amici next cite numerous studies, mostly from other states, they claim show a systemic racial bias in the imposition of the death penalty in Washington. However, nearly all the studies of post-1972 capital sentencing show no evidence of race-of-defendant bias.⁶ This result is particularly striking given that many of the studies are conducted or sponsored by opponents of capital punishment for the specific purpose of attacking it. While a study result that supports a sponsor's argument should be regarded with suspicion, a result that contradicts the sponsor's argument conversely warrants special confidence. The authors of the best known of these studies, the Baldus study in Georgia, noted, "What is most striking about these results is the total absence of any race-of-defendant

⁶ As in any field of study, there are some outliers. The Baldus study in Philadelphia is an outlier, finding a race-of-defendant effect. See Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

effect.” D. Baldus, *G. Woodworth, & C. Pulaski, Equal Justice and the Death Penalty* 44 (1990).

This result has been repeated many times in many jurisdictions, including Connecticut,⁷ New Jersey,⁸ Nebraska,⁹ Virginia, and the federal system.¹⁰ Overall, though, this result is sufficiently consistent that even a prominent death penalty opponent concedes, “It’s not the race of the defendant that is the major factor, and I don’t think there are many studies that claim that.”¹¹

Ever since the Baldus study in Georgia in the 1980s, the primary discrimination claim has been that the death penalty is imposed less often when the victim is black. Even if that were true, it would not mean that a single person is on death row who does not deserve to be there. The claim is not valid, though. Time after time, when the data are properly analyzed and confounding factors properly controlled, the claimed race-of-victim

⁷ N. Weiner, P. Allison, & G. Livingston, *The Connecticut Study of Capital Case Charging*, Executive Summary (2003).

⁸ D. Baime, *Report to the Supreme Court Systemic Proportionality Review Project*, 2000-2001 Term, p. 61 (2001).

⁹ Baldus, Woodworth, Grosso, & Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 Neb. L. Rev. 486, 661 (2002)

¹⁰ Klein, Berk, & Hickman, *Race and the Decision to Seek the Death Penalty in Federal Cases* 125-126 (2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/214730.pdf>.

¹¹ Virginia Sloan, President of the Constitution Project, on PBS Newshour, Supreme Court Renews Death Penalty Debate (Nov. 7, 2007), http://www.pbs.org/newshour/insider/social_issues/july-dec07/deathpenalty_1107.html.

bias has vanished into the statistical grass. *See generally* *McCleskey v. Zant*, 580 F. Supp. 338, 367-368 (N.D. Ga. 1984) (original Baldus study did not establish that the race of the defendant or the race of the victim has any statistically significant effect on the jury's decision to impose the death penalty or on the prosecutor's decision to seek a death sentence); Klein & Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 *Jurimetrics J.* 33, 44 (1991); Klein, Berk, & Hickman, *Race and the Decision to Seek the Death Penalty in Federal Cases* 125 (2006);¹² R. Paternoster et al., *An Empirical Analysis of Maryland Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* 34-35 (2003); Baldus, Woodworth, Grosso, & Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 *Neb. L. Rev.* 486, 661 (2002).

Additionally, this Court has three times rejected the claim that the death penalty is imposed in Washington in a racially discriminatory manner. *State v. Gentry*, 125 Wn.2d 570, 655 (1995); *State v. Woods*, 143 Wn.2d 561, 620-21 (2001). *State v. Davis*, 175 Wn.2d 287, ¶ 145-56, 290 P.3d 43 (2012).

In *Davis* the Court conducted a thorough review of all aggravated

¹² Available at <http://www.ncjrs.gov/pdffiles1/nij/grants/214730.pdf>.

murder cases since the 1980's, and came to a number of conclusions that are directly contrary to the arguments presented by amici. The Court first noted that likelihood of a white defendant receiving the death penalty in Washington is practically the same as the likelihood of a black defendant receiving it 14 percent of both black and white defendants who were eligible were actually sentenced to death. *Davis*, 175 Wn.2d at ¶ 146. The Court found that a dissenting justice's methodology was flawed because it only considered those cases in which the State saw the death penalty. The Court instead considered all the death-eligible cases, and observed that the State had sought the death penalty in only 13 percent of the cases with an eligible black defendant versus 33 percent of the cases with an eligible white defendant. *Davis*, 175 Wn.2d at ¶ 149. The Court also noted that given the extremely small number of black defendants who even faced the death penalty, it was difficult to draw any statistical significance from the numbers:

The concurrence in dissent fails to consider whether the “disproportionate number of African-Americans sentenced to death” at a special sentencing proceeding is related to the disproportionately low number of black defendants who actually faced such a proceeding. *Id.* at [¶ 182]. Given that nearly five times as many white defendants have faced a special sentencing proceeding, it is not surprising that a number of life sentences have resulted from circumstances unlike those in any of the 13 cases involving a black defendant.

Davis, 175 Wn.2d at ¶ 150 (footnote omitted). After thoroughly

considering various other statistics, particularly mitigating factors, and noting no correlation between the race of jurors and death verdicts, the Court again rejected the claim of any systemic racial bias in the imposition of Washington's death penalty.¹³

2. *Amici fail to show that race "infected" Gentry's trial.*

The State has already addressed this claim in the Brief of Respondent and in its response to Amicus NAACP. It will therefore address only Amici's contention regarding the hair analysis. This contention is a red herring. The issue is whether the State improperly invoked race. Regardless of any subsequent forensic developments nothing in the record suggests that the State or its experts were acting with anything but a good faith understanding of the state of the science at the time of the trial. Deciding whether racial animus tainted the trial must be determined based upon the prevailing norms regarding scientific evidence that were in existence at the time of trial. After adopted guidelines or standards are irrelevant. *Cf. Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009) (after-adopted standards for defense counsel are irrelevant in determining whether counsel was ineffective in a

¹³ As discussed in Brief of Respondent, the data for Kitsap County similarly shows a lack of any disparity in the imposition of the death penalty. Brief of Respondent, at 53-56. Likewise, Amici's complaint that Gentry faced an all-white jury also fails to show that he did not receive a fair trial. The State would note that given that African-Americans made up only 2.7 percent of the county population in 1990, *See* <http://www.ofm.wa.gov/pop/census1990/county/txt/a53035CO.txt>, there is no inference to be drawn of improper exclusion. Moreover, as also discussed in the State's brief, the jury pool was thoroughly vetted on the issue of race. Brief of Respondent at 74.

case tried before the standards were adopted). Moreover, Gentry has not raised any claim regarding the validity of the hair evidence or provided any valid evidentiary basis for considering such a claim in this proceeding. As such Amici's musings about the validity of the hair analysis should be disregarded.

C. GENTRY WOULD NOT BE ENTITLED TO RELIEF UNDER ANY STANDARD

As discussed thoroughly in the Brief of Respondent, Gentry has failed to show any error to which *Monday's* heightened prejudice standard would apply. Thus regardless of whether the Court were to apply the standard in *Monday* or Amici's proposed standard, Gentry would not be entitled to relief.

III. CONCLUSION

For the foregoing reasons, Amici's argument should be rejected and Gentry's petition should be denied.

DATED June 14, 2013.

Respectfully submitted,
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