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SUPREME COURT
STATE OF WASHINGTON
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No. 86585-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of

JONATHAN LEE GENTRY,

Petitioner.

PETITIONER'S REPLY ON ALTERNATIVE MOTION TO STRIKE
STATISTICAL INFORMATION FILED JUNE 19, 2013

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ATTORNEYS FOR PETITIONER

 ORIGINAL

The parties are in agreement the Court should either consider the statistical arguments regarding racial disparities in Washington death sentencing submitted by all parties and *amici*, or none of them. Petitioner respectfully maintains the better choice would be to consider all of them.

With respect to Petitioner's death sentence, the essential question presented by this petition is whether the review standards announced in *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011) should be applied to this case¹ and incorporated into the special sentencing review mandated by RCW 10.95.130. That sentence review requires two determinations to detect and prevent the influence of race prejudice: whether the sentence in a given case is "excessive or disproportionate" to those imposed in similar cases, and whether it was influenced by "passion or prejudice." RCW 10.95.130(b) and (c).

Those determinations are interrelated. The State acknowledged as much in its Brief on the direct appeal of this case when it invoked statistics to respond to the Appellants' arguments about the influence of race on his sentence. See Resp. Br. on Appeal at 266-267. The majority opinion on appeal did much the same thing. See *State v. Gentry*, 125 Wn. 2d 570, 655, 888 P.2d 1105 (1995). This is logical, for evidence that the outcome

¹In its Response to this Motion (at 5n.1), as elsewhere, Respondent refuses to address the fact this case is before the Court not only as a Personal Restraint Petition but on a Motion for Reconsideration under RAP 2.5(c), in light of *Monday's* "intervening change in the law," *State v. Schwab*, 163 Wn.2d 644, 677, 185 P.2d 1151 (2007).

of a case was similar to that in other, properly tried cases suggests that improper considerations did not affect it.

The opposite is true as well: evidence that the outcome of a given case was different from that in most similar cases logically reinforces the conclusion that passion or prejudice have influenced that result—or, at least, that there is reason to doubt that the outcome was unaffected by such improper influences. Where the passion or prejudice involves race, and the statistical difference appears to turn on race as well—and race is known to have had a historical influence on such outcomes—those differences should not be ignored.

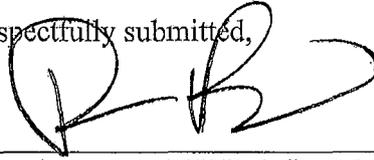
Moreover, the ultimate goal of the special review required by RCW 10.95.130 is that “any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Gentry*, 125 Wn.2d at 682 (dissenting opinion of Justices C. Johnson and Madsen) (quoting *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977)). The statistical racial disparities in “midrange” capital cases that Petitioner has offered to prove (see Motion for Argument or Remand filed October 10, 2012) go both to the reality and to the appearance of racial fairness in this case.

The ostensible purposes of capital punishment—deterrence and moral retribution—are both undermined if death sentences are, or are seen

to be, influenced by race discrimination. Such discrimination can be evident from the record of the proceeding itself, or from comparisons with other, similar cases. Both things should be considered in this case, in determining whether it appears, beyond a reasonable doubt, that racism did not affect the death sentence imposed in this case.

DATED this 24th day of June, 2013.

Respectfully submitted,



Timothy K. Ford, WSBA #5986

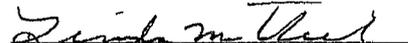


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CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on June 24, 2013, a copy of the foregoing was sent by e-mail to RSutton@co.kitsap.wa.us and also was deposited in the United States Mail, first class postage prepaid, addressed to:

Randall Avery Sutton
Kitsap County Prosecutor's Office
614 Division Street
MS-35A
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Linda M. Thiel, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Rec'd 6-24-13

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From: Linda Thiel [<mailto:LindaMT@MHB.com>]
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Attached is Petitioner's Reply on Alternative Motion to Strike Statistical Information Filed June 19, 2013. Thank you.

Linda Thiel, Legal Assistant to Tim Ford

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