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STATE OF WASHINGTON  
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No. 86585-0

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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.

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PETITIONER'S RESPONSE TO AMICUS CURIAE BRIEFS  
OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.  
AND THE AMERICAN CIVIL LIBERTIES UNION

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ATTORNEYS FOR PETITIONER

ORIGINAL

The Amicus Curiae Briefs of the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union largely reinforce the points Petitioner has made, regarding the need for judicial scrutiny of evidence of race discrimination in criminal prosecutions, and the inability of the record in this case to survive such scrutiny.

Of particular note is their reference to important new evidence indicating that the foundation for the prosecution's race-based argument for guilt in this case—the presence of a “negroid” hair on Cassie Holden's clothing—is flawed for an additional reason: the very determination that this hair was “negroid”, offered at Petitioner's trial, is unscientific. *See* LDF Amicus Brief at 16 n.22; ACLU Amicus Brief at 17. A copy of the May 4, 2013 letter from FBI Special Counsel John Crabb is attached to this Brief as Appendix A. As it indicates,

[S]ince a statistical probability cannot be determined for classification of hair into a particular racial group, it would be error for an examiner to testify that he can determine that the questions hairs were from an individual of a particular racial group. Thus, an examiner cannot testify with any statement of probability whether the hair is from a particular racial group, but can testify that the hair exhibits traits associated with a particular racial.

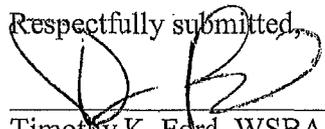
Thus, as a factual matter, the State's racial theory of the case was multiply flawed, even beyond what was previously known. As we have shown, there were other hairs from unknown sources, classified as both “Negroid” and “Caucasian,” found on Cassie Holden's body. Petition,

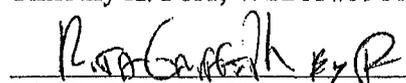
¶13.5.1. There also were several other potential, likely innocent sources of any “Negroid” hair on Cassie Holden’s body. *Id.* at ¶13.5.1. And now it appears that the very testimony that the particular hair was “Negroid” “exceeded the limits of science and was, therefore, invalid.” App. A at 1. This provides yet another reason why the racial influences on this trial cannot be held to be harmless—or an additional subject for a reference hearing if the State disputes this evidence.

Also of significance in the Amicus Brief of the NAACP Legal Defense Fund is the social science research regarding race prejudice and stereotyping. *See* LDF Amicus at 17-20 and notes 23-26. This undisputed sociological evidence underscores the difficulty in perceiving and demonstrating the influence of race prejudice, and the consequent need for the searching standards of judicial review set forth by this Court in *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).

DATED this 14 day of June, 2013.

Respectfully submitted,

  
\_\_\_\_\_  
Timothy K. Ford, WSBA #5986

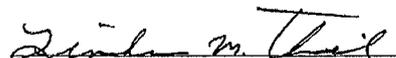
  
\_\_\_\_\_  
Rita J. Griffith, WSBA #14360

Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on June 14, 2013, a copy of the foregoing 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  
Port Orchard, WA 98366-7148

  
Linda M. Thiel, Legal Assistant

# APPENDIX A



U.S. Department of Justice

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950 Pennsylvania Ave., NW  
Washington, DC 20530

VIA E-MAIL

May 4, 2013

Deforest R. Allgood, Esq.  
District Attorney's Office  
Oktibbeha County, P.O. Box 1044  
Columbus, MS 39703

Re: Manning v. Mississippi, 2013-DR-00491-SCT

Dear Mr. Allgood:

We write to advise you of additional results of a review by the United States Department of Justice (the "Department") and the Federal Bureau of Investigation ("FBI" and collectively with the Department "DOJ") of laboratory reports and testimony by FBI Laboratory examiners in cases involving microscopic hair comparison analysis. Through this review, we previously determined that testimony containing erroneous statements regarding microscopic hair comparison analysis was used in this case. (*See* Letter dated May 2, 2013.) That error and the process through which it was identified were explained in more detail in our May 2, 2013 letter.

**I. Additional Error Identified in this Matter**

We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included additional statements that exceeded the limits of science and was, therefore, invalid. In response to inquiries regarding whether the errors identified in the notification letter had any bearing on the examiner's opinion regarding the racial classification of the hair, the FBI states the following: The scientific analysis of hair evidence permits an examiner to offer an opinion that a questioned hair possesses certain traits that are associated with a particular racial group. However, since a statistical probability cannot be determined for classification of hair into a particular racial group, it would be error for an examiner to testify that he can determine that the questioned hairs were from an individual of a particular racial group. Thus, an examiner cannot testify with any statement of probability

whether the hair is from a particular racial group, but can testify that a hair exhibits traits associated with a particular racial group. (A copy of the FBI Microscopic Hair Analysis Report, dated May 4, 2013, is attached.)

**II. Potential DNA Testing**

In the event that your office determines that further testing is appropriate or necessary, we reiterate that the FBI is available to provide mitochondrial DNA testing of the relevant hair evidence or STR testing of related biological evidence if testing of hair evidence is no longer possible, if (1) the evidence to be tested is in the government's possession or control, and (2) the chain of custody for the evidence can be established.

**III. Report of Action Taken**

To assist us in monitoring the status of cases involving microscopic hair analysis comparisons, we ask that you please advise us by May 6, 2013, if you intend to take any action based on the information that we are providing to you. Please send this information to [USAEO.HairReview@usdoj.gov](mailto:USAEO.HairReview@usdoj.gov), and let us know if we can be of any assistance.

**IV. Additional Notifications**

You should be aware that we are also notifying the governor's office and the defense, as well as the Innocence Project and the National Association of Criminal Defense Lawyers of the error. The Innocence Project and the National Association of Criminal Defense Lawyers have expressed an interest in determining whether improper reports or testimony affected any convictions and, if so, to ensure appropriate remedial actions are taken. To assist them in their evaluation, we will provide them with information from our files, including copies of FBI Laboratory examiners' reports and testimony, as well as our assessment of those reports and testimony.

If you have any questions regarding this matter please contact us at the email address provided above.

Sincerely,

                  /s/                    
John Crabb Jr.  
Special Counsel

Encl.

cc: David Voisin, Esq. (via e-mail)  
Jack Wilson, Deputy Counsel, Office of the Governor (via e-mail)  
Peter J. Neufeld, Esq., Co-Director, Innocence Project (via e-mail)  
Norman Reimer, Esq., Director, NADCL (via e-mail)

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Attached for filing in this case is Petitioner's Response to Amicus Curiae Briefs of the NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union. Thank you.

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