

No. 86585-0

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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PERSONAL RESTRAINT PETITION

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ORIGINAL

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Jonathan Gentry petitions for relief from personal restraint on the grounds described below.

### **STATUS OF PETITIONER**

1. Petitioner Jonathan Lee Gentry is incarcerated at the Washington State Penitentiary at Walla Walla, under sentence of death, in solitary confinement at the Penitentiary's Intensive Management Unit.

2. Petitioner was sentenced to death on July 22, 1991, in Kitsap County Superior Court Cause No. 88-1-00395-3. *See* Exhibit 1.<sup>1</sup>

3. Petitioner appealed his conviction to this Court in Washington Supreme Court No. 58415-0. This Court affirmed his conviction and sentence on January 6, 1995. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995). Exhibit 2. Certiorari was denied on October 2, 1995. 513 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995).

4. A Personal Restraint Petition challenging Petitioner's conviction and sentence was initiated on his behalf in November, 1995. *See* Washington Supreme Court No. 62677-4. That Petition was denied by this Court on February 18, 1999. *In re Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999). Exhibit 3.

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<sup>1</sup> Unless otherwise noted, the Exhibits referenced in this Petition are attached to and identified in the Declaration of Timothy K. Ford ("Ford Dec.") submitted in its support.

5. A Petition for a Writ of Habeas Corpus was filed on Petitioner's behalf in the United States District Court for the Western District of Washington on March 1, 1999. *Gentry v. Lambert*, W.D. Wa. No. 2:99-CV-00289-RSL. That Petition was dismissed by Judgment entered on April 24, 2009. Rehearing was denied and a notice of appeal was timely filed on October 2, 2009. The appeal is now pending in the United States Court of Appeals for the Ninth Circuit. *Gentry v. Sinclair*, 9<sup>th</sup> Cir. No. 09-99021. Copies of the Briefs in that Appeal are attached as Exhibits 4-6. Argument on that appeal is set for November 17, 2011. A copy of an order in that case relating to Petitioner's claim of race discrimination is attached as Exhibit 7.

6. On February 9, 2009, Petitioner joined as a plaintiff in a lawsuit in Thurston County, Washington, seeking to enjoin the execution protocol used by the State of Washington. *See Cal Colburn Brown and Jonathan Gentry v. Eldon Vail*, Thurston County Superior Cause No. 09-2-00273-5. The plaintiffs' claims were denied by the Thurston County Superior Court and by this Court on appeal. *See Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010). This lawsuit and appeal raised no issues relating to those raised by this Petition, and so documents describing it are not appended here.

7. On December 30, 2009, Petitioner Gentry filed a Personal Restraint Petition in this Court, seeking release from the solitary confinement in which he has been held since January, 2009, on the grounds that it constituted an additional punishment attached to his crime *ex post facto*. See *In re Gentry*, Washington Supreme Court No. 84039-3. On December 30, 2010, this Court dismissed that petition. *In re Gentry*, 170 Wash.2d 711, 245 P.3d 766 (2010). A petition for certiorari to the Supreme Court of the United States is now pending; *Gentry v. Sinclair*, USSCt No. 10-10814. The solitary confinement petition raised no issues relating to those raised by this Petition, so documents describing it are not appended here.

8. On February 3, 2011, Petitioner filed a Motion for DNA Testing in Kitsap County Superior Court Cause No. 88-1-00395-3. A copy of this Motion and a supporting Declaration are attached as Exhibits 8 and 9. The State filed a Response to this Motion agreeing that testing is appropriate, and an order authorizing and requiring testing was issued on July 25, 2011. Exhibit 10. Proceedings in that action are ongoing.

9. No petitions, appeals or applications on Petitioner's behalf have been filed other than those listed above. This Petition is based on a significant change in the law that has occurred since Petitioner's previous

postconviction petitions. That change in the law is set forth in this Court's decision in *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (June 9, 2011).

**Ground One: Race Discrimination.**

10. Petitioner's trial, conviction and death sentence were tainted by race discrimination and that discrimination cannot be found harmless beyond a reasonable doubt with respect to his aggravated first degree murder conviction or his death sentence. As a result, Petitioner's continued imprisonment or execution on the basis of this conviction and sentence violates the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 12, 14 and 22 of the Washington Constitution.

**Facts Supporting Relief on this Ground:**

11. On June 9, 2011, this Court issued a decision in a noncapital murder case involving an African-American defendant, *State v. Monday, supra*.

11.1 In that decision, the Court majority held that "appeals by a prosecutor to racial bias" are "so repugnant to the concept of an impartial trial" that they are subject to the most stringent constitutional harmless error review:

We will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict. We hold that when a prosecutor flagrantly or apparently

intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State.

171 Wn.2d at 680. The majority opinion in *Monday* acknowledged this was a change in the law, explaining that “if past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven methods.” *Id.*

11.2 Three concurring Justices in *Monday* wrote that the Court should go even farther and hold that the “appeals to racism here by an officer of the court are so repugnant to the fairness, integrity, and justness of the criminal justice system that reversal is required” without any of harmless error review, “because the integrity of our justice system demands it.” *Id.* at 682.

11.3 Justice James Johnson dissented and stated that the Court’s majority had departed from “tried, tested, and controlling precedent.” *Id.* at 692.

12. One of the precedents superseded by the majority decision in *Monday* was the decision in Petitioner Gentry’s case.

12.1 Petitioner Gentry is African-American and was convicted and sentenced to death for the murder of a twelve-year-old white girl. The elected Prosecuting Attorney in whose name Petitioner

was charged with aggravated murder, and who personally sought to have the death penalty imposed on him by filing a Notice pursuant to RCW 10.95.020, was C. Danny Clem. *See* Exhibits 11 and 12. Although Mr. Clem made what this Court found was a “racially offensive statement” that “was totally inappropriate and offensive” in an off-the-record, in-court argument with Petitioner’s African-American trial lawyer, this Court took no corrective action. *See State v. Gentry*, 125 Wn.2d at 610. The majority opinion said this was because Petitioner’s appeal lawyers had cited “[n]o authority ... that reversal of the conviction for aggravated first degree murder is required under these facts,”<sup>2</sup> and “it would be inappropriate for this Court to show its disapproval of a prosecuting attorney’s racially offensive out-of-court statement by reversing a Defendant’s conviction or sentence” absent “evidence that *the remark* prejudiced the Defendant’s right to a fair trial ...” *Id.* (emphasis added). The opinion thus placed the burden on the defendant to prove prejudice; and it did not consider as prejudicial the fact it was the same racially-prejudiced Prosecuting Attorney who decided to put Petitioner on trial for his life, and under whose authority and supervision the prosecution was conducted.

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<sup>2</sup>Although it was literally correct that Petitioner’s appeal lawyers had not cited caselaw holding that reversal of a conviction “was required” under these specific facts, they did present substantial legal authority and argument regarding the unconstitutionality and unacceptability of racial influences on capital trials and sentencing. *See* Exhibit 13 at pages 00016894-00016903.

12.2 This Court's decision on appeal also denied a related claim that Petitioner "was deprived of a verdict free of racial influences due to the manner of the State's presentation of evidence." *Id.* at 610-11. It did so despite record evidence that the prosecutors filled their questioning and arguments with racial references and relied heavily on the testimony of a white racist jailhouse informant who referred in his trial testimony to Petitioner playing a "nigger" card game. *Id.* at 611.

12.2.1 The majority opinion said it rejecting the first of these claims "*the tone* of the prosecuting attorney's questions was aimed at proving the identity of the Defendant as the murderer and not at prejudicing the jury..." *Id.* at 610-611 (emphasis added). It did not address Petitioner's argument and evidence showing that the "identity" justification was false and pretextual, because Cassie Holden had multiple contacts in the 24 hours before she disappeared with other African-Americans whose hair and DNA were never tested. *See* Exhibit 13 at 72-76; *see also* Exhibit 8 at 2-4, 12-13.

12.2.2 The majority decision similarly said that the prosecution's questioning of its informant, Brian Dyste, about his reference to Petitioner as a "nigger" "*appears* to have been a strategic attempt to soften the impact of apparent racist attitudes" and not "to evoke racial prejudices in the jury." *Id.* at 611 (emphasis added). The opinion

did not describe how the Prosecutor had “soften[ed] the impact” of this racial slur: he invited Dyste to explain his use of the word “nigger,” which Dyste did by claiming that “as a young person ... I was harassed by black people, verbally assaulted by black people, treated very roughly by black people.” *See* Exhibit 13 at 00016890.

12.3 The majority decision also rejected arguments that racial bias infected the penalty phase of Petitioner’s trial in several other ways: by the prosecutor’s emphasis on the testimony of its white jailhouse informants that Petitioner had referred to the victim as a “bitch”; by the prosecutor’s comparison of Petitioner to the biblical giant Goliath preying on the “children of Israel;” and by the presentation of inflammatory victim impact testimony. *See* Exhibit 13 at 00016900-16903; Exhibit 15 at 00018189-18193. The majority rejected all these claims by stating it found “*no evidence* that race was a motivating factor for the jury.” *Id.* at 655 (emphasis added).

12.4. The majority decision also denied that statistical disparities in death sentencing in Washington supported Petitioner’s race discrimination claims, saying “contrary to the Defendant's suggestion, a review of the first degree aggravated murder cases in Washington does not reveal a pattern of imposition of the death penalty based upon the race of the Defendant or the victim.” *Id.* at 655.

12.6 On none of these points did the Court’s opinion purport to apply anything like the constitutional harmless standard announced in *Monday*. Unlike the decision in *Monday*, it considered each of these claims in isolation, and did not consider the impact of these racial influences cumulatively or in relation to one another. Nor did it give any consideration to what the *Monday* decision recognized: “Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references.... [A] careful word here and there can trigger racial bias.” *Monday*, 171 Wn.2d at 678

13. The constitutional review standards adopted by the majority and concurring opinions in *Monday* require reversal of Petitioner’s conviction and death sentence. Race prejudice played at least as damaging a role in the trial and sentencing of Petitioner Jonathan Gentry as it did in the *Monday* trial—a role that cannot be said to have been harmless beyond a reasonable doubt.

13.1 Petitioner was charged with the most racially-inflammatory kind of crime: the alleged rape murder of a white girl child by an African American man. “There is a special risk of arbitrariness in cases that involve black defendants and white victims.” *Walker v. Georgia*, 129 S.Ct. 453, 455, 172 L.Ed.2d 344 (2008) (dissenting opinion of Justice Stevens); *see also Turner v. Murray*, 476 U.S. 28, 33-37, 106 S.

Ct. 1683, 90 L.Ed.2d 27 (1986) (discussing the heightened risks of prejudice that inhere in the prosecution of interracial capital offenses); Phyllis L. Crocker, *Crossing The Line: Rape-Murder And The Death Penalty*, 26 OHIO N.U. L. REV. 689, 701 (2000); Leon Higginbotham, *Racism in American and South African Courts*, 65 NYU LAW REV. 479, 535-36 (1990); HARPER LEE, *TO KILL A MOCKINGBIRD* (1961).

13.2 The elected Prosecuting Attorney who decided to charge Mr. Gentry with aggravated first degree murder and seek to impose the death sentence on him, C. Danny Clem, was so racially prejudiced that in the course of pretrial proceedings in Mr. Gentry's case he made a "racially offensive statement [that] ... was totally inappropriate and offensive" to Mr. Gentry's African American lawyer, Jeffrey Robinson."—and then falsely denied it.

13.2.1 In hearings on the issue, Mr. Clem and his deputies attempted to explain away or justify the racist comment as a reference to what he mistakenly believed was Mr. Robinson's law school. *See* Exhibit 16 at 00001833-34. The Superior Court Judge who conducted the hearing (now U.S. Magistrate Judge Karen Strombom) found Mr. Clem's explanations for the slur were false and his comments were "not, by any stretch of the imagination, racially neutral in content." *Id.* at 00001833. This Court affirmed that finding, and rejected the arguments

and excuses offered by Mr. Clem and his deputies on appeal. *State v. Gentry*, 125 Wn.2d 610; *see* Exhibit 16 at 0017802-03, 0017821.

13.2.2 “[R]eject[ion of] ... proffered nondiscriminatory reasons as unbelievable” is sufficient to “infer ‘the ultimate fact of intentional discrimination’ without additional proof of discrimination.” *Chuang v. Board of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000)). This logical inference applies to public prosecutors like anyone else. *See Snyder v. Louisiana*, 552 U.S. 472, 485, 128 S.Ct. 1203, 170 L.Ed.2d 172 (2008) (the “prosecution's proffer of [a] ... pretextual explanation naturally gives rise to an inference of discriminatory intent”); *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

13.3 The jurors who convicted Petitioner and sentenced him to death were all white. *See* Exhibit 17 at 00013774; *Gentry*, 125 Wn.2d at 609-610, 653. White jurors are least likely to argue for or impose life imprisonment when the defendant is black and the victim is white. *See, e.g.*, BRYAN EDELMAN, RACIAL PREJUDICE, JUROR EMPATHY, AND SENTENCING IN DEATH PENALTY CASES at 5, 21-156 (2006).

13.4 The prosecution alleged, but could not prove, that Cassie Holden was murdered in the course or furtherance of a rape. *See*

Exhibit 11. The jury nonetheless convicted Petitioner of aggravated murder, and sentenced him to death, on the basis of a vague finding that he committed the murder to conceal his identity as the perpetrator of some other, unspecified crime. See *State v. Gentry*, 125 Wn.2d at 582. Racial prejudice is particularly likely to infect decisions where interracial sexual assault is alleged (see ¶13.1, above) and where sentencing standards are vague, see *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Furman v. Georgia*, 408 U.S. 238, 257, 310, 364, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (concurring opinions); *State v. Bartholomew*, 98 Wn.2d 173, 186-187, 654 P.2d 1170 (1982), *vacated on other grounds*, 103 S.Ct. 3530, *reaffirmed* 101 Wash.2d 631, 683 P.2d 1079 (1984).

13.5 At Petitioner's trial, the prosecution's case was steeped in race. The transcript of testimony and argument before the jury reveals some 254 explicit references to race using the words "black," "negroid" and "nigger" (misspelled "niger"). See Griffith Dec., Exhibit 18. Virtually every witness was asked by the prosecutor to testify that Cassie Holden had no black friends, that no black people used the laundry where her clothing was washed, that no black people were involved in the investigation of her murder. RP(5/14/91) 3665, 3694, 3709; RP(5/16/91) 3762, 2797; RP(5/17/91) 177, 179, 257; RP(5/23/91) 47-48. In closing

argument, the prosecutor argued that because two of the many hairs found on Cassie Holden's body were "negroid" (RP(6/25/91) 5394-5395) and three white witnesses reported, days and weeks after the crime, that they saw a black man in the area, "[t]he uncontroverted evidence in this case, ladies and gentlemen, is that we're looking for a black individual, a black individual killed Cassie Holden." RP(6/25/91) at 5405.

13.5.1 The prosecution's constant references to race in Petitioner's trial were unnecessary and pretextual. Numerous hairs that were not hers were found on Cassie Holden's body. A medium brown, probably Caucasian pubic hair was recovered from her left leg. RP(5/23/91) 46, 54. A short red Caucasian hair fragment was found on her shoe. RP(5/23/91) 51-52. Only two of the many hairs collected from the body and clothing were said to have "Negroid" characteristics. One of those hairs was said to have DNA similarities to arm hair samples from Petitioner's brother Edward, whose clothing Petitioner admitted he sometimes wore. RP(5/23/91) 54. Establishing that molecular similarities did not require constant reference to race.

13.5.2 Moreover, the prosecutors knew that Cassie Holden was in direct contact with at least one African American child the night before her murder, and on the day of her disappearance two African American boys were at her mother's home—with her brother, the last

person known to have seen Cassie alive—both before and afterwards. RP(5/15/91) 3819, 3826-3827; RP(5/17/91) 209; *see* RP(5/15/91) 3820, 3826-3827; RP(5/17/91) 208 -210; *see also* Exhibit 8 at 2-6, 8-9; Exhibit 13 at 00016893-16894. No DNA testing was done to eliminate (or include) these possible source of either of the “Negroid” hair fragments. *See* Exhibit 7.

13.6 At both the guilt and penalty phases of trial, the prosecution’s arguments repeated over and over the racially-charged testimony of three white jailhouse informants that Petitioner had called Cassie Holden a “bitch.” *See* Exhibit 4 at 70-73.

13.6.1 One of these jailhouse informants, Brian Dyste, was an avowed racist who used the word “nigger”<sup>3</sup> in reference to Petitioner, in a recorded statement, and in responding to prosecution questions in open court. Exhibit 19 at 00008614-8615. After the prosecution brought out the statement, it invited Dyste to explain that he used such language because when he was young he “was harassed by black people ... treated very roughly by black people.” *Id.*

13.6.2 In the late 1980s, the word “bitch” was strongly associated with negative stereotypes of African American men

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<sup>3</sup> *See* Exhibit 19 at 00008614. As noted above, the court reporter who transcribed this testimony rendered the word “nigger” as “niger”.

and “gangsta rap.” See Christopher J. Schneider, *Culture, Rap Music, “Bitch,” and the Development of the Censorship Frame*, 55 AM. BEHAV. SCIENTIST 36, 45-46 (2010).

13.6.3 The testimony from Mr. Dyste and the other informants that Petitioner used the word “bitch” referring to Cassie Holden was inconsistent with the recorded statements each of them gave when first contacted by the police. *See* RP(5/31/91) 4452; RP(6/25/91) 5520. Evidence uncovered after trial showed the informants falsely denied they were being rewarded for their testimony, and the State has responded to that revelation by arguing that the informants so obviously lacked credibility no further impeachment of them was necessary or even possible. *See id.* at 49-69; Exhibit 5 at 45-46. Yet the prosecutors repeated the word “bitch”—which came only from these informants—thirteen times in closing argument of the guilt phase, and left it ringing in the jury’s ears as one of the last words spoken in the State’s closing argument on death. *See* Exhibit 4 at 70-73; RP(6/25/91) 5401, 5403, 5411, 5418, 5419, 5542, 5543; RP(7/2/91) 5798.

13.7 At the penalty phase of Petitioner’s trial the prosecution was permitted to offer victim impact testimony. “Admission of victim impact statements ... increases the risk that the jury will act in an arbitrary and capricious manner or make invidious distinctions as to the

relative worth of the victim.” *State v. Gentry*, 125 Wn.2d at 679 (dissenting opinion of Justices C. Johnson, Madsen and Utter); *see also State v. Muhammad*, 678 A.2d 164, 203 (N.J. 1996) (Handler, J., dissenting) (“[v]ictim-impact evidence will be the Trojan horse that will bring into every capital prosecution a particularly virulent and volatile form of discrimination ... discrimination based on the victim's race”); A. Dugger, *Note: Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 382-83 (1996); J. Levy, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027, 1046-47 (1993); A. Phillips, *Note: Thou Shalt Not Kill Any Nice People: The Problem of Victim-Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997).

14. Petitioner’s trial counsel, Jeffrey Robinson, who is African-American, and who was present throughout the trial proceedings, has averred as follows:

I have personally experienced many racially charged situations in my life. The nature of this case, the racial hostility apparent in Prosecutor Dan Clem’s insult to me, the prosecution’s pervasive references to race, the racial slurs from the prosecutors’ jailhouse informants, and the inflammatory victim impact testimony created a racially charged atmosphere in this trial that is unique in my 30 years of experience as a criminal defense lawyer, and clearly impacted the fairness of Mr. Gentry’s trial, in my opinion.

Exhibit 20 at 2.

15. Petitioner is the only African American defendant charged with or convicted of aggravated murder in Kitsap County since 1981, and he is the only defendant of any race who has been charged with that crime in that County and is under death sentence. *See* Exhibit 21. Every non-African American defendant charged with that crime in Kitsap County has received a life sentence, on a plea, at trial, or after appeal. *Id.* In other words, only Petitioner, the lone African American defendant from Kitsap County, stands condemned to die.

16. The majority decision affirming Petitioner's death sentence on appeal said that the sentence could not be the result of race discrimination because

The large majority of those sentenced to death in Washington under the current statute have been Caucasian (e.g., Charles Campbell, Gary Benn, Brian Lord, David Rice, Patrick Jeffries, Mitchell Rupe, Wesley Dodd, Dwayne Bartholomew, Michael Furman, James Brett).

125 Wn.2d at 655. Two of these men—Campbell and Dodd—were executed before that decision was written (both for committing coldly planned multiple murders). *Every other one* of the white defendants in this list--Benn, Lord, Rice, Jeffries, Rupe, Bartholomew, Furman, and Brett—since has had his death sentence vacated and has had a lesser sentence imposed on remand or retrial. As a result, four (4) of the nine (9) men currently under death sentence in this State (44%) are African

American. *See* Exhibit 21.<sup>4</sup> That is more than ten times the percentage of African Americans (3.6%) in the State population as a whole. *See* <http://quickfacts.census.gov/qfd/states/53000.html>. Although this Court has held that such statistics as these are not “conclusive proof of race discrimination,” *In re Davis*, 152 Wn.2d 647, 754, 101 P.3d 1 (2004), they surely provide no assurance that the racial influences on this trial did not affect the verdict or sentence.

#### LEGAL AUTHORITY SUPPORTING GROUND ONE

**17. This Petition is timely and is not successive because it is based on new law.**

17.1 *State v. Monday*, *supra*, was decided on June 9, 2011; this Petition is being filed less than 4 months later. RCW 10.73.100(6) provides:

The time limit specified in RCW 10.73.090 [one year] does not apply to a petition or motion that is based solely on one or more of the following grounds:

....  
(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction [or] sentence, and ... sufficient reasons exist to require retroactive application of the changed legal standard.

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<sup>4</sup> Death Row USA, the source of these figures, includes all death sentences that have not been finally reversed, and so counts Alan Gregory. *See State v. Gregory*, 153 Wn.2d 759, 867, 147 P.2d 1201 (2006) (remanding for resentencing). The Department of Corrections List of Offenders Sentenced to the Death Penalty ([www.doc.wa.gov](http://www.doc.wa.gov)) does not include Mr. Gregory, but lists 8 prisoners, 3 of whom (37.5%) are African-American.

*In re Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2006), held:

that where an intervening opinion has effectively overruled a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a “significant change in the law” for purposes of procedures.

*Greening*, at 697.

17.2 As shown previously, this Court’s opinion in *State v. Monday* effectively overruled its decision in this case, and changed the standard of review for assessing prejudice from racially prejudicial prosecutorial misconduct. *See* Paragraphs 11-12, above. Both the majority and dissenting opinions in *Monday* acknowledged this was a substantial change in the previously established law. *Monday*, 171 Wn.2d at 680, 692. The majority and concurring opinions also made clear that there were “sufficient reasons” of public policy that justify the retroactive application of *Monday*’s standard.

The Bill of Rights sought to guarantee certain fundamental rights, including the right to a fair and impartial trial. The constitutional promise of an “impartial jury trial” commands jury indifference to race. If justice is not equal for all, it is not justice. ... Because appeals by a prosecutor to racial bias necessarily seek to single out one racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

*Id.* at 680.

[A] criminal conviction must not be permitted to stand on such a foundation. The appeals to racism here by an officer of the court are so repugnant to the fairness, integrity, and justness of the criminal justice system that reversal is required.

*Id.* at 685. “Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality.” *Rose v. Mitchell*, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1977).

17.3 For the same reasons, this is not a successive petition. The statutory prohibition against successive personal restraint petitions in RCW 10.73.140 limits the jurisdiction of the Court of Appeals, not this Court. *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 565, 933 P.2d 1019 (1997). RAP 16.4 requires only a showing “good cause” for filing a second or subsequent postconviction petition in this Court. The announcement of a new, controlling judicial decision after the filing of a previous postconviction petition constitutes such good cause. *In re Personal Restraint of VanDelft*, 158 Wash.2d 731, 738, 147 P.3d 573 (2006).

17.4 This Petition therefore cannot be dismissed as either untimely or successive.

**18. Petitioner’s aggravated murder conviction and death sentence are too badly tainted by racial prejudice to stand under the review standard this Court held is appropriate for claims of race discrimination in criminal justice, in *State v. Monday*.**

18.1 In *Monday*, the sole decisionmaker was the jury, and the racially offensive remarks of the Deputy Prosecuting Attorney could only indirectly influence the outcome of the trial. In this case, the Prosecuting Attorney who made the racially derogatory remark was himself vested with the sole discretion to expose Petitioner to a death sentence by filing a notice of intent to seek the death penalty pursuant to RCW 10.95.020. *See* Exhibit 12. Whereas the Court’s concern in *Monday* was that a prosecutor’s racially biased statements might accept or adopt similarly prejudiced beliefs, here Mr. Clem’s racial slur was direct evidence of then-existing bias in the mind of the very official who to decided to put Petitioner on trial for his life. Moreover, the fact Mr. Clem gave a false race-neutral explanation for his statements is additional strong evidence of actively concealed prejudice. *See Snyder*, 552 U.S. at 485; *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (“implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination”). Because of the magnitude and finality of a death penalty decision, this Court has properly

required that “[t]he determination of whether a defendant will live or die” through a Notice of Intent to Seek the Death Penalty “must be made in a particularly careful and reliable manner.” *State v. Luvene*, 127 Wn.2d 690, 719, 903 P.2d 960 (1995). The risk of unfairness and error held to be unacceptable in *Luvene* pales in comparison to the risk that race prejudice infected the Notice decision in this case.

18.2. The prosecutors’ repeated racial references before the jury, though less brazen and explicit than those in *Monday*, were much more pervasive and no less pretextual. Unlike *Monday*, where the prosecution itself called a number of African-American witnesses (but then impeached them with racially loaded questions), in this case all the witnesses called by the prosecution were white, and the racially loaded questions that were asked them were intended to convey the idea that African Americans played no legitimate role in Cassie Holden’s life or the investigation of her murder. *See, e.g.*, RP(5/14/91) 3665, 3694, 3709; RP(5/15/91) 3797; RP(5/17/91) 177, 179, 257; RP(5/23/91) 47-48. Just as in *Monday*, the proffered basis for doing this did not square with any evidence. *See Monday*, 171 Wn.2d at 678. The prosecutors well knew that there were other African-Americans identified in the evidence who were possible sources of “Negroid” hairs on Cassie’s body; there were a number of unidentified Caucasian hairs on Cassie’s body which were not

her own or Petitioner's. *See* RP(5/15/91) 3819, 3826-3827; RP(5/17/91) 209—one of which was a pubic hair found on her thigh. RP(5/23/91) at 54-55; *see* RP(5/15/91) 3820, 3826-3827; RP(5/17/91) 208-210; *see also* Exhibit 8 at 2-6, 8-9; Exhibit 13 at 00016893-16894. The State's three "identity" witnesses testified that—days or weeks after the murder—they recalled seeing an African-American man in the area, not at the crime scene. *See* Exhibit 4 at 8-9, 15-16. The prosecutor's argument that this wholly equivocal evidence left "absolutely no doubt ... the person who was responsible for Cassie Holden's death was a black individual" (RP(6/25/91) at 5393) and made it "uncontroverted" that "we're looking for a black individual, a black individual killed Cassie Holden," (RP(6/25/91) at 5405) invited the jury to draw an explicitly race-based conclusion on the flimsiest of grounds. Much as the prosecutor in *Monday* "imputed th[e] antisnitch code to black persons only" without "support or justification," *Monday*, 171 Wn.2d at 678, the prosecutor here "imputed this [murder] to ... to black persons only" despite contrary evidence. *See also* Exhibit 8 at 2-5, 7, 9. Just as in *Monday*, the prosecution here was not content (or willing) to rest its argument on evidence specific to Jonathan Gentry, and so resorted to "generalizations about racial ... groups in order to obtain [a] conviction[]." 171 Wn.2d 683.

18.3 The prosecutors in this case also exploited the most racially inflammatory testimony of their most unsavory witnesses, repeating over and over in argument the testimony of its white jailhouse informants that Petitioner referred to Cassie Holden as a “bitch.” Exhibit 4 at 70-73. These informants all had suspect backgrounds and all gave false testimony about their incentives. *See* Exhibit 4 at 49-51, 57-63; Exhibit 5 at 44-46. The claim that Petitioner called Cassie Holden a “bitch” did not appear in any of their initial statements, but only appeared in subsequent interviews as the case moved toward trial. Exhibit 4 at 49 n.20, 61, 67; RP(5/31/91) 4452; RP(6/25/91) 5520.

18.4 These are just the sorts of “careful word[s] here and there [that] can trigger racial bias.” *Monday*, 171 Wn.2d at 678. “The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white [girl] ... is fertile soil for the seeds of racial prejudice.” *Robinson v. State*, 520 So.2d 1, 7 (Fla.1988). Moreover, the decision facing the jury was much less clear than the decision in *Monday*. The evidence of identity was far from conclusive. *See* Exhibit 4 at 8-9, 15-16. The evidence of premeditation was entirely circumstantial. *State v. Gentry*, 125 Wn.2d at 597-98. The evidence of aggravating circumstances was so thin that the prosecutor’s principal argument was

rejected by the jury, and the aggravating factor that the jury found instead used language so vague it invited speculation. *See id.* at 582.

18.5 In addition, the likelihood of prejudice was much greater here than in *Monday* because of the highly subjective nature of capital sentencing. *See State v. Finch*, 137 Wn.2d 792, 862, 975 P.2d 967 (1998).

[T]he risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding. In *Turner v. Murray*, 476 U.S. 1, 106 S.Ct. 1683, 1688, 90 L.Ed.2d 27 (1986), in which the United States Supreme Court held that capital defendants accused of interracial crimes have a constitutional right to question prospective jurors on the issue of racial bias, the Court based its decision on two factors unique to the capital sentencing proceeding. First, in a capital sentencing proceeding before a jury, the jury is called upon to make a “highly subjective, ‘unique, individualized judgment regarding the punishment that a particular person deserves.’ ” *Id.* 106 S.Ct. at 1687 (citations omitted). Due to the nature of the individualized judgment that the jury must make in a capital sentencing proceeding, there is a greater opportunity for latent racial bias to affect its judgment than when the jury is acting merely as factfinder. *Id.* at 1688 n. 8. As the Court further explained:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. ....

*Id.* at 1687 (footnote omitted).

Second, the *Turner* Court pointed out that although there is some risk of racial prejudice whenever there is a crime involving interracial violence, the risk of improper sentencing in a capital case is “especially serious” due to the complete finality of the death sentence. *Id.* at 1688.

*Id.* at 520 So.2d 7 -8.

18.6 This Court’s appeal decision did not purport to determine whether any of these racial influences were harmless beyond a reasonable doubt. Instead, the majority decision placed a heavy burden on Petitioner to prove that each of these prosecutorial actions, individually, was prejudicial to him. Accordingly, it limited its consideration to whether “the remark” made by Mr. Clem affected “the trial,” *State v. Gentry*, 125 Wn.2d at 610, ignoring Mr. Clem’s role in filing the death notice and giving no weight to the fact that Mr. Clem gave a false excuse for his racial slur, or that he and his deputies continued to defend it in court and on appeal. The Court held it sufficient that there “appear[ed]” to be neutral explanations for the prosecutors’ race-laden questioning and arguments, because of their “tone.” *Id.* at 610-11. Its final conclusion squarely placed the burden on the defense to produce “evidence race was a motivating factor for the jury” (125 Wn.2d at 655)—the antithesis of the constitutional review standard applied by the Court in *Monday*.

18.7 The numerous and pervasive ways racial influences were brought to bear on this trial thus cannot be said to have been harmless beyond a reasonable doubt.

19. No other remedy under Washington state law is adequate for any of the errors complained of above.

## STATEMENT OF FINANCES

20. Petitioner asks the court to file this petition without making him pay the \$250 filing fee because he is poor and cannot pay that fee. Petitioner has been found indigent at all stages of his trial, appeal, and state and federal postconviction proceedings, and is currently proceeding *in forma pauperis* on his federal appeal. As alleged above, under his current confinement conditions Petitioner is not allowed to do any work by which he could earn even minimal amounts of money. A Declaration of Petitioner establishing his current financial status accompanies this Petition.

## REQUEST FOR RELIEF

21. For the reasons set forth above, Petitioner asks the Court to:
- a. Grant Petitioner leave to proceed on this petition *in forma pauperis* and appoint counsel to represent him;
  - b. Grant Petitioner such other relief as is necessary for a full and fair adjudication of Petitioner's claims and this Petition.
  - c. Refer this matter to a Superior Court Judge to resolve any disputed issues of fact material to the resolution of this petition in a reference hearing;
  - d. Vacate Petitioner's conviction of aggravated murder and sentence of death for the reasons set forth above.

DATED this 7 day of October, 2011.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

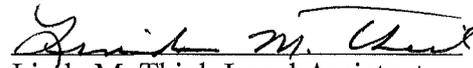
By   
\_\_\_\_\_  
Timothy K. Ford, WSBA #5986  
Attorneys for Petitioner



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on October 7, 2011, 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