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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. ~~58415~~-0

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN LEE GENTRY

Appellant.

No. 86585-0

In re the Personal Restraint of
JONATHAN GENTRY,

Petitioner.

PETITIONER/APPELLANT'S REPLY BRIEF

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I. STATE V. MONDAY SHOULD BE HELD RETROACTIVE AND APPLIED TO CASES ON POSTCONVICTION REVIEW WHERE THERE IS SUBSTANTIAL EVIDENCE THAT A CRIMINAL CONVICTION OR DEATH SENTENCE WAS TAINTED BY RACE PREJUDICE.

The State concedes that *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011) "announces a new rule." Response to PRP ("Resp.") at 47. It neither disputes that this Petition was filed less than a year after *Monday* was decided, nor argues that this is a second or successive petition prohibited by RCW 10.73.140. It nonetheless tries to avoid application of *Monday's* new rule to Mr. Gentry's race discrimination claim with two procedural arguments: that there are not sufficient reasons to "require retroactive application of the changed legal standard" under RCW 10.73.100(6) (Resp. at 47); and that, contrary to *Monday's* rule, convictions and even death sentences should be upheld in postconviction proceedings although it cannot be said beyond a reasonable doubt that they were unaffected by racial bias (*id.* at 48). Neither argument should deter the Court from consideration of Mr. Gentry's race bias claim.

A. Retroactivity

The State argues that *State v. Monday* should not be applied retroactively to cases past direct appeal, because *Monday* did not create a fundamental right to a conviction "not based on racial bias," but instead

merely held that “the constitutional harmless error standard applies if such misconduct is established.” Resp. at 51. As such, according to the State, under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *Monday’s* holding is not the kind of watershed procedural rule that should apply to cases that were already final at the time it was created. *Id.*

This is triply wrong. To begin with, the State is mistaken in its assumption that *Teague* dictates how RCW 10.73.100(b) will be interpreted and applied. This Court said clearly in *State v. Evans*, 154 Wn.2d 438, 114 P.3d 627 (2005), that although RCW 10.73 has been interpreted “along the lines” of *Teague*, *Teague* is “grounded in important considerations of federal-state relations” that do not restrict state post conviction review. 154 Wn.2d at 448-49, 454 (quoting *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Evans cited *Personal Restraint of Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992), as authority for this proposition that post conviction review may be available under state law where it would not be under federal law. In *Vandervlugt*, this Court held the ends of justice would be served by considering a challenge to an aggravating factor supporting an exceptional sentence which was upheld on direct appeal. *Vandervlugt* in turn relied on in *In re Taylor*, 105 Wn.2d 683, 717 P.2d 755 (1986), which held “[e]ven if the same ground was rejected on the

merits on a prior application ... the applicant may be entitled to a new hearing upon showing an intervening change in the law.” *Taylor*, at 688 (quoting *Sanders v. United States*, 373 U.S. 1, 16-17, 83 S. Ct, 1068, 10 L. Ed. 2d 148 (1963)). *See also, Matter of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997) (allowing a second state petition on the same issue based on intervening decision regarding calculation of offender score).

Moreover, even if *Teague* controlled here, the State is wrong that under *Teague* retroactivity is limited to “substantive” rules.

Teague’s nonretroactivity principle has two exceptions. One applies when “the rule places a class of private conduct beyond the power of the state to proscribe.” The other reaches “‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Teague*, 489 U.S. at 311 (emphasis added). The first of these is substantive; the second, by its terms, is procedural. Thus, *Teague’s* exceptions do not require a new rule to be both “substantive” and “watershed,” just one or the other.

The State is correct that, if *Monday* had announced a rule that people cannot be convicted of a crime because of their race—which we agree would not be anything new—that would be the type of substantive rule falling within *Teague’s* first exception. But the State is not correct in its contention that, because *Monday’s* rule instead is that substantial race

prejudice claims in criminal trials are subject to the more protective procedure of the *Chapman* standard of review, that is outside any *Teague* exception because nonretroactivity would “merely raise the possibility that someone convicted [through race bias] ... might have been acquitted otherwise” (Resp. at 48)—or, in this case, “merely” spared a death sentence. As the decision in *Monday* makes clear, the rule it fashioned to insure against such wrongful convictions is the very kind that is subject to second *Teague* “watershed” exception: a rule of “*criminal procedure*.”

The question under *Teague* is not whether *Monday*'s rule is “substantive” but whether it is “watershed”—that is, whether it “implicat[es] the fundamental fairness and accuracy of the criminal proceeding.” *Teague*, 489 U.S. at 311. The language of this Court's opinion in *Monday* leaves little doubt that it meets this test:

The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained. 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. The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless. 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.

Monday, 171 Wn.2d at 680.

This is qualitatively different from other cases holding that a new procedural rule was not a “watershed” rule. *State v. Abrams*, 163 Wn.2d 277, 178 P.3d 1021 (2008), for example, involved a holding that the jury rather than a judge must determine materiality in perjury cases. As in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the Court held that this procedural difference did not “so impact the reliability of a conviction to justify disturbing finality.” *Id.* at 351-52.

Racial bias and stereotyping is not only inherently unfair, it makes fact finding less accurate.¹ So *Monday* qualifies for a *Teague* exception on both scores.

¹ See, e.g., Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (Nov. 2007) (judges and juries misremember case facts in racially biased ways; racial biases affect the way judges and jurors encode, store and recall relevant case facts); C. Neil Macrae et al, *Creating Memory Illusions: Expectancy-Based Processing and the Generation of False Memories*, 10 MEMORY 63 (2002) (racial stereotyping can affect juror recollections and contribute to false memories); Mona Lynch and Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the ‘Empathic Divide*, 45 LAW & SOCIETY 69 (March 2011) (racial stereotyping helps process information, but produces inaccuracies); Task Force on Race and the Criminal Justice System: *Preliminary Report of Race and Washington’s Criminal Justice System*, 2011, at 20 (“The research on bias tends to show that a juror who associates Blacks (as opposed to Whites) with a particular crime will be more likely to convict Blacks (as opposed to Whites) of that crime on the same evidence”); Christian A. Meissner and John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Facts: A Meta Analysis Review*, PSYCH., PUBLIC POLICY & LAW 3-35 (2001) (recounting cases involving positive, but erroneous identification of persons of other races).

But again, this Court is not bound by *Teague*. See *State v. Evans*, *supra*; *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 169 L.Ed.2d 859(2008) (*Teague* is not binding on state courts). Under the less rigid and more justice-focused standards of our state’s law, the answer to the retroactivity question is obvious from the language and logic of the *Monday* decision itself. All that need be considered is this: if it is true, as we contend, that there were “intentional appeals to racial prejudice” in Jonathan Gentry’s trial, could this Court consistent with *Monday*’s principles let his capital conviction stand and his death sentence be carried out without proof beyond a reasonable doubt that they were not tainted by that prejudice? We think it would not, and the State does not seriously argue otherwise. If not, there can be no retroactivity bar here and therefore no real question of timeliness. Mr. Gentry’s race discrimination claim should be considered on its merits.

B. The Prejudice Standard.

The State’s next procedural argument is that, even if the holding of *Monday* applies to Mr. Gentry’s case—that is, even if his prosecutors “flagrantly or apparently intentionally appeal[ed] to racial bias in a way that undermine[d] ... the presumption of innocence,” *Monday*, 171 Wn.2d at 680—he is not entitled to the benefit of *Monday*’s review standard.

This, the State says, is because “*Monday* is inconsistent with the standards for collateral relief” which impose on Mr. Gentry the burden to demonstrate actual and substantial prejudice in order to prevail. Resp. at 76. In other words, under the State’s analysis, it should not have to show that the prosecutor’s racial bias was harmless, even if *Monday* holds that it must, because this case is past direct review. *Id.* This argument is essentially a restatement of the previous one. It is also inconsistent with the reasoning and holding in *Monday* and of this Court’s recent decision in *In re Crace*, ___ Wn.2d ___, 2012 WL 2924609 (2012); and it is not even supported by the authority the State cites for it.

In *Crace*, this Court “consider[ed] the intersection between the prejudice requirement on collateral attack of a judgment and the prejudice requirement on direct appeal” where the claim was ineffective assistance of counsel, and concluded that the standard set in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies equally in each instance. *Crace*, ¶¶ 9, 15. The *Crace* majority noted that *Strickland* relied on cases in which evidence had been withheld, in which the important consideration was whether the accused received a fair trial and a verdict worthy of confidence:

“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a

trial resulting in a verdict worthy of confidence.” Kyles v. Whitney, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (emphasis added).

Likewise, “[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable.” *Strickland*, 466 U.S. at 694. Thus, *Strickland* suggests that a petitioner who shows there is a reasonable probability that his trial lacked one of the crucial assurances of fairness also necessarily shows actual and substantial prejudice.

Crace at ¶14.

As in *Crace*, *Monday* applies where a defendant has established that a trial lacked a “crucial assurance of fairness”: “The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless. . . [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.” *Monday*, 171 Wn.2d at 680. Meeting the *Monday* standard, like meeting the *Strickland* standard, necessarily demonstrates actual and substantial prejudice, and should require the State to demonstrate beyond a reasonable doubt why it isn't harmful.

The State's cited authority does not require a different prejudice standard. *Matter of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992), does not hold that any “error that would be presumptively prejudicial on direct

review will nevertheless require a petitioner to show prejudice on collateral review,” as the State claims. Resp. at 76. It is true that in *St. Pierre* the Court “decline[d] to adopt any rule which would categorically equate *per se* prejudice on collateral review with *per se* prejudice on direct review.” Resp. at 77 (quoting *St. Pierre* at 328-329). But the very next sentence of the opinion in *St. Pierre*—which the Response omits—says “some errors which result in *per se* prejudice on direct review *will* also be *per se* prejudicial on collateral attack.” *Id.* at 329 (emphasis added). None of the other authority cited by the State holds to the contrary, that error is *never* presumptively prejudicial on collateral review.²

Consistent with the decision in *Crace*, and the acknowledgment in *St. Pierre* that the same standards of prejudice may in some instances be appropriate on appeal and post conviction, the *Monday* prejudice standard

² *In re Lile*, 100 Wn.2d 334, 668 P.581 (1983) reversed because the trial court’s instructions failed to provide an instruction on presumption of innocence and placed the burden of proof of self defense on Mr. Lile; the Court found it more likely than not that his right to a fair trial was actually prejudiced. In so holding, the Court noted that these errors could have been, but were not, raised on direct appeal. *Lile*, at 335. *In re Haverty*, 101 Wn.2d 498, 681 P.2d 835 (1984) held that Mr. Haverty was unable to show substantial and actual prejudice from the giving of an erroneous burglary inference of intent instruction. The erroneous instruction had not been challenged on appeal; and, in light of the overwhelming evidence, the error was deemed harmless. *In re Benn*, 134 Wn.2d 868, 940, 952 P.2d 116 (1968) held that Mr. Benn’s challenge to a self-defense instruction was time barred, and then noted that *per se* prejudice would not apply, citing *St. Pierre*, *in dictum*. *In re Mercer*, 108 Wn.2d 713, 741 P.2d 559 (1987), involved a challenge to an instruction proposed by defense counsel at trial. *In re Sims*, 118 Wn. App. 471, 73 P.3d 398 (2003) reversed Mr. Sims’ conviction. *In re Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004) held that the hearsay statements at issue were admissible on alternate grounds so the error was harmless.

None of this authority forbids that prejudice ever be presumed on collateral review.

should apply here. Moreover, the *Monday* standard *is* its holding; if its prejudice standard does not apply, then Mr. Gentry will be denied the benefit of the holding. And, since Mr. Gentry challenged the racial bias on direct appeal, and this Court was required to review for such bias in any event, *see* RCW 10.95.130, this is not a collateral attack brought to salvage an issue missed on appeal.

Finally, the State's reasons for not applying *Monday* misconstrue the basis of the holding in that case. They assume that the purpose of the holding is to punish the attorneys in the case. Resp. at 78-79. *Monday's* principles are higher than that. "[A]ppeals by a prosecutor to racial bias" are not mere misconduct, they are "repugnant to *the concept of an impartial trial.*" *Monday*, 171 Wn.2d at 680 (emphasis added). There should be no time limit on correcting such injustice, cf, e.g., *Hirabayashi v. United States*, 828 F2d 591 (9th Cir. 1987)—especially where, as here, life itself is at stake.

II. THE STATE CANNOT PROVE BEYOND A REASONABLE DOUBT THAT THE VERDICTS IN THIS CASE WOULD HAVE BEEN THE SAME IN THE ABSENCE OF RACIAL BIAS.

The State's argument on the merits is devoted to a recounting of evidence presented at Mr. Gentry's trial, which it says proves him guilty. *See* Resp. at 83. The State asks the Court to conclude from this recounting

that racial prejudice can have played no part in Mr. Gentry's conviction or sentencing: "[t]here is no likelihood that the verdict would have been different absent the alleged misconduct." *Id.*

This argument is irreconcilable with this Court's decision in *Monday*, where the evidence of the defendant's guilt was many times stronger than it is in this case, by any measure. *See Monday*, 171 Wn.2d at 669-670. It ignores the fact that the prosecutors in this case, like the prosecutor in *Monday*, were unwilling to rest their argument on evidence specific to him, and resorted to "generalizations about racial groups in order to obtain [a] conviction." *Id.* at 680 n. 4. In short, this argument is unconvincing for the reasons it was unconvincing in *Monday*.

A. The State Does Not Fairly Describe the Evidence.

Remarkably, in its "Statement of the Case," the Kitsap County Prosecutor's Office is still making the same race-based arguments to this Court that it made to the jury at trial. It is still asking this Court to conclude that Mr. Gentry is guilty in large part because it thinks a black man committed the crime and Mr. Gentry is black. It is still refusing to concede that its argument that a black man committed the crime is based on its factually unsupportable claim that Cassie and her family did not associate with black people. It says:

“Benign” or “innocent” sources for these Negroid hairs were ruled out when it was determined: (1) that both Cassie’s father and mother do their families laundry in a washer and dryer that are not utilized by any blacks, (2) that Cassie did not have any known black friends or acquaintances in Pocatello, Idaho,(3) that Hanson, who was with Cassie all day June 12 and on June 13 until 4:30 p.m. did not know of any black children or adults that Cassie would have met or had contact with during those two days, and (4) that none of the search and rescue group members who found Cassie’s body, none of the individuals who processed the crime scene, none of the people who transported Cassie’s body or who were present during the autopsy, and none of the employees of the Washington State Patrol Crime Lab were black.

Resp. at 39 (citations to the record omitted). This not only repeats the same sort of racial generalities the prosecution relied on in Mr. Gentry’s trial, it is simply untrue.

First of all, to focus on the so-called “negroid” hair fragments is a “generalization about racial groups” in itself. There were also unidentified Caucasian hairs found on Cassie Holden’s body during the autopsy – including a Caucasian pubic hair on her thigh and a red-pigmented Caucasian hair on her shoe. *See* Resp. at 38 and RP(5/23/91) at 46, 51-52, 54. The source of both these hairs is unknown—either of them could have come from the attacker, just like the “negroid” hairs that are, and always have been, the prosecution’s exclusive focus.

Second, it simply is not true that Cassie had no “benign” or “innocent” contacts with black people in the days and hours before her

murder. The prosecutors knew then and know now that Cassie was in contact with an African American child the night before she disappeared, and on the day of her disappearance two African American friends of her brother were at her mother's home where she was staying.³ Moreover, as the State concedes, after her arrival in Bremerton Cassie went skating with her brother and to the beach and shopping with the family. No doubt these places are frequented by people of color as well as Caucasians. Even the State now acknowledges that, in fact, hair fragments are readily transferred from strangers in public places. Resp. at 37.

For these reasons, it cannot be fairly concluded from two tiny hair fragments among many others that Cassie Holden's attacker necessarily was African American—that, as the prosecutor told Mr. Gentry's all white jury, “[t]here's *absolutely no doubt* ... that the person that we were looking for, that the police were looking for, the person who was responsible for Cassie Holden's death was a black individual” RP(6/25/91) 5393-5394 (emphasis added).

The prosecutors had to resort to these sorts of race-based generalizations in part because neither of the so-called “negroid” hairs fragments were shown to be Jonathan Gentry's. One of them was said to

³ See PRP ¶ 13.5.2, Pet. Ex. 9, Ex. B (1st J. Holden Interview) at 3, Ex. C (2nd J. Holden Interview) at 8, 10; RP(5/15/91) 3826-3827; RP(5/17/91) 209-210 (describing Jamie's report that there were “three black kids” in the neighborhood that he “hung out” with).

have the same DQ alpha type as his brother Edward—and thousands of other people—and the other was insufficient to be tested because it had no root attached to it. RP(6/17/91) 5007-5008, 50016. When compared microscopically, the result for the untested hair fragment was inconclusive. RP(5/23/91) 49.

Try as the State might to make it otherwise, the truth is that the evidence of Jonathan Gentry's involvement in this crime was unusually thin for a capital case. It consisted of tentative cross-racial identifications,⁴ white jailhouse informants who cut deals for testimony⁵ that included racial slurs of Mr. Gentry and attributed racially inflammatory language to him,⁶ and weak serology and DNA

⁴ No one has ever claimed to have seen the crime in progress, or someone fleeing from it. The State's three "eyewitnesses" reported only that they saw an African American man on the trail beside the golf course around the time Cassie disappeared. *See* RP(5/20/91) 126-127; RP(5/21/91) 145-146, 191, 194. Of those three, only Eileen Starzman—who initially described the man she saw as of mixed race or half black and without a "full black nose"—identified Mr. Gentry, who clearly has black features, as the man she saw. RP(5/21/91) 164-165. Neither of the other "identification" witnesses actually identified Mr. Gentry. RP(5/20/91) 130; RP(5/21/91) 209; RP(5/20/91) 134.

⁵ It is now established (1) that Brian Dyste was working at the time as an undisclosed paid drug informant for the lead detective investigating the murder, (2) that Timothy Hicks testified in exchange for a letter from the trial prosecutor to the Parole Board and had his parole reinstated, and asked for other favors, and (3) that Leonard Smith testified after his felony charges in Oregon had been reduced to misdemeanors (RP(6/3/91) 41-42). *See* Pet. Ex. 4 at 33-34, 51-52, and records there cited.

⁶ The State defends the prosecutors' decision to rely on a witness (Brian Dyste) who called the defendant a "nigger," and to have that witness explain that his animosity toward black people stemmed from being "harassed" and "assaulted" by them, as a trial technique to remove the "sting" of this "weakness" in his testimony. *See* Resp. at 62,

evidence.⁷ These are three of the types of evidence that have most often been found to result in wrongful convictions. “[R]esearch has identified seven central categories of sources [of wrongful convictions], including problems involving (1) *mistaken eyewitness identification*; (2) false confessions; (3) *tunnel vision*; (4) *informant testimony*; (5) *imperfect forensic science*; (6) prosecutorial misconduct; and (7) inadequate defense representation. Apart from these primary sources, the literature also discusses the potential role of race effects, media effects, and the failure of postconviction remedies.”) J. Gould and R.

citing T. Mauet, FUNDAMENTALS OF TRIAL TECHNIQUES at 95-96 (1980). In other words, the State admits it was trying to save the credibility of Dyste’s racist testimony.

The State’s Response says nothing about the fact that, although all three jailhouse informants testified that Mr. Gentry referred to his victim as a “bitch” in separate conversations, none of them used that word in their original interviews with police and the prosecutor. RP(5/31/91) 4451-4452; *see* Pet. Ex. 4 at 21, 23, 56-57, 61 81, and state record there cited. That word only appeared later, as they were being prepared to testify, and then at trial, where it was used over and over in prosecution argument to inflame the white jurors against Mr. Gentry. *See* RP (5/31/91) 4440 (Dyste); RP(6/3/91) 13 (Smith); RP(6/4/91) 4489 (Hicks); RP(6/25/91) 5391-5430; Pet. Ex. 4 at 70-73.

⁷ Even crediting the prosecution experts and assuming their forensic results as accurate and independent, the best that could be said of the DNA blood evidence is that it could have come from Cassie Holden or 1 in 55 randomly chosen others, which would include thousands of people in Kitsap County alone. *See In re Gentry*, 137 Wn.2d 378, 403, 972 P.2d 1250 (1999). But there were many reasons not to give that credit. The initial DNA testing of the shoelaces produced no results. RP(6/17/91) 5023. To compensate, the State’s expert made adjustments to the protocol before he got results he said were consistent with Cassie Holden’s DQ alpha type. RP(6/17/91) 4998, 5043, 5079-5080, 5084-05087. Even then, there were indications of alleles inconsistent with Cassie’s DQ alpha type on the shoelaces (RP(6/17/91) 5034) and of a blood type different from hers as well. RP(5/28/91) 4027 (afternoon) 29, 34-35.

Defense experts with equally eminent credentials had multiple criticisms of this testing and different interpretations of its results—and they testified that if any of the test results were unreliable, that would dramatically change the result of multiplying the statistical findings together, as the prosecution’s experts did. RP(6/21/91) 80.

Leo, *100 Years Later: Wrongful Convictions After a Century of*

Research, 100 CRIM. LAW & CRIM. 825, 841 (2010) (emphasis added).

Initial evaluation of the first DNA exoneration cases has identified recurring factors that have contributed to the wrongful convictions. The first study of the DNA exoneration cases, conducted by the National Institute of Justice, evaluated twenty-eight cases in which DNA proved that an innocent person had been convicted and found that *eyewitness identification error played a role in almost all of the studied cases*. Other features of those twenty-eight wrongful convictions included reliance on apparently *erroneous or misleading forensic evidence, and alleged government malfeasance or misconduct, including perjured testimony at trial, intentional withholding from the defense of exculpatory evidence, and intentionally erroneous laboratory tests and expert testimony*. Scheck, Neufeld, and Dwyer subsequently analyzed sixty-two DNA-based exonerations in the United States and concluded that *mistaken eyewitness identification was a factor in eighty-four percent of the cases; jailhouse snitches or informants played a role in twenty-one percent; false confessions were present in twenty-four percent; inadequate representation by defense counsel in twenty-seven percent; prosecutorial misconduct in forty-two percent; and police misconduct in fifty percent*. Professor Saks and his students thereafter updated that study to include eighty-one DNA exoneration cases. They concluded, again, that *mistaken eyewitness identification was the leading contributing factor, present in sixty of the eighty-one cases*. Additionally, they found that *erroneous forensic science was present in fifty-three of the eighty-one cases; prosecutorial misconduct in thirty-two; police misconduct in twenty-six; fraudulent or tainted evidence in twenty-five; bad lawyering in twenty-three; false confessions in fifteen; reliance on snitch or informant testimony in fourteen; and false witness testimony in fourteen*.

Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. WESTERN L. REV. 333, 339-40 (2002).⁸

And again, the evidence Respondent focuses on all went only to the question of whether Jonathan Gentry was involved in this murder. Notably, for all its effort to dispel any taint of racism by showing that Jonathan Gentry is the assailant, the State's Response has nothing at all to say about the proof of premeditation and aggravating circumstances—both of which were equally necessary predicates to his conviction of this capital crime.

B. The Guilt Evidence Provides No Assurance that Race Played No Part in Mr. Gentry's Conviction and Death Sentence.

For all the Respondent's efforts to puff it up, the evidence of Mr. Gentry's involvement in this crime was much weaker than that in any other case in this state in which a death penalty has been or remains to be

⁸ Citing E. Connors et al., *Convicted By Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (U.S. DOJ, National Institute of Justice 1996) at 15, 29; B. Scheck et al., *Actual Innocence: Five Days to Execution And Other Dispatches from the Wrongly Convicted* at 246 (2000); Saks, et al., *Toward a Model Act For the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 671 (2001); see also Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011); National Innocence Project, *Understanding the Causes* (www.innocenceproject.org/understand/) (last visited 8/6/12) (listing as the primary causes of wrongful convictions "eyewitness misidentification, unvalidated or improper forensic science, false confessions/admissions, government misconduct, informants, and bad lawyering").

carried out—and certainly weaker than the evidence in any case involving a white defendant.⁹ The evidence of premeditation and the aggravating circumstance of concealment of an unidentified “crime” was weaker still, wholly circumstantial and largely speculative.

The circumstantial evidence at the crime scene, though horrible, was largely consistent with a spontaneous assault rather than premeditated murder. It gives no indication the crime was planned or there was prior contact between Cassie and her killer. The apparent murder weapon was a rock found at the scene, not a weapon brought there. RP(5/15/91) 3801, RP(5/17/91) 268-270. There were multiple blows, consistent with the opportunity to premeditate. RP(5/16/91) 64, 74, 138. But as this Court

⁹ Although the 1981 Washington statute repealed the requirement that the jury find the defendant guilty with “clear certainty,” see *State v. Frampton*, 95 Wn.2d 469, 485, 627 P.2d 922 (1981), there does not appear to have been any possible doubt about the involvement in the crime of the vast majority of defendants who have been executed under it or are currently under death sentence. See *State v. Charles Campbell*, 103 Wn.2d 1, 7, 691 P.2d 929 (1984) (victims were witnesses against defendant whose car was identified by eyewitnesses and an earring ripped from a victim found in it); *State v. Dayva Cross*, 156 Wn.2d 580, 592, 132 P.3d 80 (2006) (*Alford* plea; committed crimes in front of step-daughter); *State v. James Elledge*, 144 Wn.2d 62, 67-68, 26 P.3d 271 (2001) (plea); *State v. Wesley Dodd*, 120 Wn.2d 1, 88-89, 838 P.2d 86 (1992) (plea); *State v. Jeremy Sagastegui*, 135 Wn.2d 67, 954 P.2d 1311 (1998) (plea); *State v. Robert Yates*, 161 Wn.2d 714, 731-732, 168 P.3d 354 (2007) (plea and convictions of multiple similar crimes); *State v. Clark Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999) (confession); *State v. Cal Brown*, 132 Wn.2d 529, 543, 940 P.2d 546 (1997) (detailed confession, second victim survived and testified). (Conner Schierman is not included in this list because this Court has not yet reviewed his case and Darrold Stenson is not included because this Court has vacated his conviction.)

The exceptions appear to be Mr. Gentry and the three other African American men currently under death sentence, all of whom were convicted based largely on circumstantial evidence that left some doubt. See *State v. Cecil Davis*, 141 Wn.2d 798, 809-813, 10 P.3d 977 (2000); *State v. Dwayne Woods*, 143 Wn.2d 561, 570-572, 23 P.3d 1046 (2001), and *State v. Allen Gregory*, 158 Wn.2d 759, 811, 147 P.3d 1201 (2006). Of the cases with African American defendants, Mr. Gentry’s is by far the weakest.

has held, opportunity does not always equate with actual premeditation.

State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986).¹⁰

In its only reference to this critical subject, the State relies heavily on its theory that Cassie was murdered where she was found to establish premeditation, arguing that the pattern of lividity in Cassie's body was consistent with this theory. Resp. at 14. But there was testimony that this pattern was also consistent with the defense theory that Cassie was killed at a different location and her body was moved to the spot where it was found. RP(5/16/91) 127. Again, though the evidence may have been sufficient for the jury to find premeditation, it was not so overwhelming bias can have played no part in the jury's evaluation of it. Again, it pales in comparison to the evidence of premeditation in every white defendant case that has produced a death sentence still in force under this statute.¹¹

¹⁰ As the *Bingham* court noted, a particularly violent attack may indicate *less* premeditation, not more:

The facts of a savage murder generate a powerful drive . . . to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. *The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of passion*, and that these are in law only murder in the second degree. *Id.*, citing *Austin v. United States*, 382 F.2d 129, 138-39 (D.C.Cir. 1967).

¹¹ See *State v. Charles Campbell*, 103 Wn.2d at 7 (defendant went to victims' house and lay in wait for them); *State v. Dayva Cross*, 156 Wn.2d at 592 (argued with his wife the day before killing her and went room to room to kill her daughters); *State v. James Elledge*, 144 Wn.2d at 67-68 (confessed that he considered the crime for over a year); *State v. Wesley Dodd*, 120 Wn.2d at 88-89 (confessed to planning and kept a diary of his planning); *State v. Jeremy Sagastegui*, 135 Wn.2d 67 (abused, stabbed and drowned a three-year-old child and then got a rifle and waited for the child's mother and her friend to come home and killed them); *State v. Robert Yates*, 161 Wn.2d at 731-732

The same is true of the proof of statutory aggravation. Respondent is flat out wrong in stating that Cassie Holden was raped and Mr. Gentry guilty of committing that rape. *See* Resp. at 55, 56. The jury did not find either that the murder was committed in the course or furtherance of a rape or to conceal the commission of a crime. The jury rejected that allegation and the only aggravating factor it found was that the murder was committed to conceal the identity of the person committing some unspecified crime. *See In re Gentry*, 137 Wn.2d at 386. Even giving full weight to this unusually amorphous finding, the fact remains that it is only a single statutory aggravating circumstance. Again, in most cases where death sentences are in force or have been carried out under this statute—and particularly single victim cases—multiple aggravating factors have been found.¹²

Overall, the fairest description of the evidence that Mr. Gentry committed this crime, and did so with premeditation and to conceal the commission of a crime, is that it is legally sufficient if the State is given

(systematically killed a number of women in the same manner); *State v. Clark Elmore*, 139 Wn.2d at 250 (snapped, drove to the end of the lake, raped, removed clothes from and killed victim by bludgeoning her); *State v. Cal Brown*, 132 Wn.2d at 543 (murder and second similar crime took place over several days).

¹² *See State v. Campbell*, 103 Wn.2d at 25 (4 aggravators); *State v. Dodd*, 120 Wn.2d at 25 (3 aggravators—multiple victims); *State v. Cross*, 156 Wn.2d at 633 (1 aggravator—multiple victims); *State v. Elledge*, 144 Wn.2d at 81 (1 aggravator—requested death sentence); *State v. Sagastegui*, 135 Wn.2d at 95 (2 aggravators); *State v. Yates*, 161 Wn.2d at 789 (1 aggravator—multiple victims); *State v. Elmore*, 139 Wn.2d at 309 (2 aggravators); *State v. Brown*, 132 Wn.2d at 557 (4 aggravators).

the benefit of the doubt. This standard applies where the State has won a verdict in a fair and unbiased trial. A verdict alone, however, cannot provide reassurance that there was, in fact, such a trial.

Neither can the nonstatutory aggravating and mitigating aspects of this case provide assurance that there was a fair and unbiased result. As horrible as it was, all indications are this crime was unplanned and (as the jury's penalty verdicts indicate) the motive for it was unclear. The victim was particularly innocent and vulnerable, but there was a single victim. The defendant's criminal record was substantial but not without mitigating aspects.¹³ His background involved significant deprivation and exposure to violence. *See* Pet. Ex. 4 at 25, 42-43.

In sum, this is the kind of "midrange" capital case—in terms of the strength of the evidence and the balance of aggravation and mitigation—the kind of case where race bias can hold most sway. Studies of death sentencing patterns elsewhere have consistently found that the mid-range is where racial disparities most strikingly occur. The study by Professors David C. Baldus and George Woodworth, which provided the evidence

¹³ Mr. Gentry's two most significant prior convictions were for first degree manslaughter (for which he was convicted in Orange County, Florida, for shooting a man who was chasing and shooting at Mr. Gentry's brother, see RP (7/1/91) at 5751-52)), and for first degree rape (for which he was convicted in Kitsap County, after he became a suspect in this case; Mr. Gentry admitted he had sex with the alleged victim but he claimed it was consensual and he had paid her for it, see *State v. Gentry*, Wash Ct. App. No. 12496-II (8/7/1990)).

considered by the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279, 387, 107 S. Ct. 1756, 95 L. Ed. 262 (1987), showed that the effects of racial bias on capital sentencing are most striking on midrange cases. See *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*. 41 No. 2 CRIM. L. BULL. Art. 11 (2005). A later analysis of cases in Philadelphia from 1978-2000 by the same authors found that where the jury weighs aggravating and mitigating circumstances, “it is at this stage in the process that we detected significant race-of-defendant disparities in an analysis of over 300 jury-weighing decisions.” *Id.* at 12-14. Further, “the race effects are strongest in the mid-range of cases. . . . For example at level 3 (of 5) on the culpability scale, the estimated death-sentence probability for the non-black defendants is about .40, while for the black defendants at that point on the scale the estimated probability is about .80—twice as high.” *Id.* at 14.¹⁴

A study by Dean Brock, Nigel Cohen and Jonathan Sorensen, *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of*

¹⁴ In a follow-up study in Philadelphia, an important determinant of race-of-the defendant disparities was the racial composition of the jury with the number of blacks on the jury significantly associated with “the probability that a black defendant would be sentenced to death.” *Id.* at 15. Washington, to date, has never had an African-American juror sitting on a capital jury; and, of course, there were none in Mr. Gentry’s case.

Offender, 43 AM. J. CRIM. L. 28, 71 (2000), similarly showed that when the authors adjusted for culpability levels in those capital sentences, the effect of race was strongly and inversely associated with culpability. The least culpable had the highest ratio of risk associated with the races of the defendant and victim. *Id.*

Race does not affect all cases equally. Notorious serial killers like Ted Bundy or John Wayne Gacy, both white, are nearly certain to receive the death penalty regardless of their race. In the most highly aggravated cases, the fact that the defendant is black is less of a factor pushing a case toward a death sentence. The same can be said for cases of very low severity: race is less likely to be a factor in cases where there is little inflammatory evidence.

RICHARD DIETER, THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES, "Mid Range Cases Versus Extreme Cases" (2003) (available at [http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#Mid-Range Cases Versus Extreme Cases](http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#Mid-Range%20Cases%20Versus%20Extreme%20Cases)) (last visited 8/7/2012); *see also*, Lynch and Haney, 45 LAW & SOCIETY, at 81-82; D. Baldus et al, *Equal Justice and the Death Penalty: A Legal Empirical Analysis* 163-64, 322 (1990).

These findings are consistent with social science research showing racial discrimination is more likely in situations where prevailing social norms are in conflict or ambiguous. Patricia Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. OF

PERSONALITY AND SOCIAL PSYCHOLOGICAL BULL. 1139-50 (1989); Kerry Kawakami et. al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY AND SOCIAL PSYCHOLOGICAL BULL. (1998).

Race does matter in capital cases, and matters most in midrange cases such as Mr. Gentry's – even where overt racism does not take place. As this Court held in *Monday*, where the prosecutor appeals to racial bias and stereotype, in any criminal case a new trial should be required absent proof beyond a reasonable doubt that this appeal was harmless. Surely, that is doubly so where life is at stake.

III. THE STATE'S REFUSAL TO EVEN ACKNOWLEDGE THE VULNERABILITY OF THIS CASE TO RACIAL PREJUDICE UNDERMINES THE CREDIBILITY OF ITS ARGUMENTS.

The State's total unwillingness to acknowledge the possibility that race prejudice influenced this trial undermines its argument that there is no need here for this Court to apply the review standard set out in *Monday*.

The State nowhere even acknowledges the obvious and indisputable facts that make this case one where race bias is a concern: black defendant, white victim, alleged sexual motive, cross-racial identifications, race-based forensic testimony, all white jury, no African American prosecutors, discretionary death sentencing. Objectively viewed, in every respect this is a case where the concerns about race bias

set forth in *Monday* should be at their greatest. *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 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 Higgenbotham, *Racism in American and South African Courts*, 65 NYU LAW REV. 479, 535-36 (1990).

In addition, there is unusually clear and specific evidence of actual subjective race bias here. That certainly includes the elected Prosecuting Attorney's "racially offensive" insult to Mr. Gentry's African American lawyer, in a courtroom, in a discussion of this case—and his false denials of racial intent. It also includes the racial slur by a key prosecution witness and his attempt to justify it. It also includes significant parts of the prosecution's case—from the argument there was "absolutely no doubt" that the killer was "a black individual" (because Cassie had no "innocent" contact with blacks), to the thirteenfold repetition in closing argument of the word "bitch," which the prosecution's white jailhouse informants helpfully put in Mr. Gentry's mouth.

While claiming that the "State does not seek to justify Clem's comment," the State's Response does just that. Resp. at 57. The State faults Mr. Robinson for provoking Mr. Clem and defends Mr. Clem's

record. Resp. at 57-58, 60. At no point in these long proceedings has the State simply agreed that Mr. Clem's reference to Mr. Robinson's "getting his ethics in Harlem," was a blatant racial insult that his resort to using this derogatory remark in anger revealed a racist attitude, whether conscious or unconscious, that has no place in a capital proceeding—and Mr. Clem's place in this proceeding was central, from beginning to end.

IV. THE STATE'S ASSERTION THAT THIS COURT DOES NOT HAVE THE ALTERNATIVE POWER TO RECONSIDER ITS SENTENCE REVIEW DECISION IN THIS CASE IS CONTRARY TO *STATE V. SCHWAB*.

In the alternative, in case the Court were not to agree *Monday* applies in postconviction proceedings, Mr. Gentry has moved for Reconsideration, pursuant to RAP 2.5(c)(2), of the decision in his direct appeal on "passion and prejudice," which applied a different and much less demanding standard of review than *Monday*'s. See Motion to Reconsider filed 1/25/12, *State v. Gentry*, No. 58415-0. The State argues that Mr. Gentry's case does not fall under this reconsideration rule because this is not the same case before the Court following a remand. Resp. at 86. This narrow interpretation of the rule is wrong.¹⁵

¹⁵ Further, even in the technical sense the State is wrong in its assertion that Mr. Gentry's case is not "before the appellate court following a remand." Mr. Gentry's case was "remanded for issuance of a death warrant," in his direct appeal. *State v. Gentry*, 125 Wn.2d 570, 658, 888 P.2d 1105 (1995). That death warrant was issued, and Mr. Gentry remains confined under it. See *In re Gentry*, 170 Wn.2d 711, 245 P.3d 766 (2011).

In *State v. Schwab*, 163 Wn.2d 644, 185 P.2d 1151 (2007), this Court so held, interpreting RAP 2.5(c)(2) broadly. *Schwab* held that RAP 2.5(c) is “ultimately discretionary,” and permits an appellate court to reconsider a prior decision in the rare circumstance where a prior decision is erroneous and would result in a manifest injustice if not corrected, or there is an intervening change in the law. *Schwab*, at 672-74. The Court in *Schwab* held that the “same case” for purposes of the rule, means that it “arose out of the same trial, convictions, and judgment,” even where the case is *not* in the appellate court “following a remand.” *Id.* at 673.

In *Schwab*, on direct appeal, the Court of Appeals vacated Mr. Schwab’s manslaughter conviction on double jeopardy grounds due to his simultaneous conviction for felony murder arising out of the same acts. Later, in a separate Personal Restraint Petition, the felony murder conviction was also vacated; and, on remand, the trial court reinstated the vacated manslaughter conviction. The Court of Appeals held that the law-of-the-case doctrine did not restrict the trial court, on remand after the PRP, and after the manslaughter conviction had been vacated. *State v. Schwab*, 134 Wn. App. 634, 141 P.3d 658 (2006). This Court affirmed. *Schwab*, 163 Wn.2d at 667. In affirming, this Court explained that RAP 2.5(c) (2) codifies historically-recognized exceptions to the law-of-the-case doctrine.

First, the appellate court may reconsider a prior decision in the same case where the decision is ‘clearly erroneous, . . . the erroneous decision would work a manifest injustice to one party,’ and no corresponding injustice would result to the other party if the erroneous holding were set aside. Second, the language allowing consideration of the law at the time of the later review allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law.

Id., at 677 (citing *Roberson v. Perez*, 156 Wn.2d 33, 41. 123 P.2d 844 (2005)).

Under *Schwab*, RAP 2.5(c)(2) applies to overcome the law-of-the case doctrine here where restriction of the doctrine is necessary to avoid a manifest injustice and to allow this Court to apply an intervening, retroactive change in the law.

Exercise of this power is particularly appropriate with regard to the review in a capital case where this Court has a specific statutory duty, apart and distinct from the direct appeal, to determine “[w]hether the sentence of death was brought about through passion or prejudice.” RCW 10.95.130 or RAP 10.95.100. The Court has that duty regardless of what a defendant does or does not do, to invoke it. *State v. Wesley Dodd*, 120 Wn.2d at 88-89; *State v. Jeremy Sagastegui*, 135 Wn.2d at 94. We submit that gives the Court a special, not-time-limited duty to insure the results of that review is right and consistent with current law.

Further, the Court of Appeals in its *Schwab* decision indicated that it could also have granted the state's motion to recall the mandate, holding it had "authority to recall the mandate in the interests of justice under RAP 2.5(c)(2)," but on review this Court declined to resolve whether this *dictum* was correct. This Court could now adopt the holding of the Court of Appeals on this issue that RAP 12.7 authorizes both a recall of the mandate and provides that the appellate court "retains the power to change a decision as provided in rule 2.5(c) (2)." As in *Schwab*, an important consideration is that Mr. Gentry acted promptly to the change in the law, not how many years had passed since the initial decision. *See Schwab*, 134 Wn. App. at 646-47. And as in *Monday*, the most important consideration is that our law provide the maximum reassurance that imposition of the ultimate penalty is not tainted by racial prejudice.

CONCLUSION

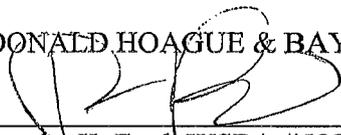
The Personal Restraint Petition and/or Motion to Reconsider should be granted and Mr. Gentry's conviction and death sentence should be reversed.

DATED this 9 day of August, 2012.

Respectfully submitted,

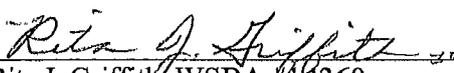
MacDONALD HOAGUE & BAYLESS

By


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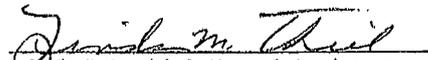
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Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on August 9, 2012, a copy of the foregoing was deposited in the United States Mail, first class postage prepaid, addressed to:

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Kitsap County Prosecutor's Office
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Attached is the Petitioner/Appellant's Reply Brief in these consolidated cases. Thank you.

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