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Death-row inmate cites racial bias in petition for a retrial

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State Supreme Court Justice Debra L. Stephens, left, questions defense attorney Tim Ford, not pictured, who represents death-row inmate Jonathan Lee Gentry. Listening at right is Justice Mary E. Fairhurst.



Attorney Tim Ford, right, who represents death-row inmate and defendant Jonathan Lee Gentry, states his case on Tuesday before the justices of the state Supreme Court.

An attorney for Jonathan Lee Gentry, Washington's longest-sitting death-row inmate, asked the state Supreme Court on Tuesday for a new trial on the basis of racially charged prosecutorial misconduct.

Gentry, 56, has been on death row since 1991, when he was convicted of killing 12-year-old Cassie Holden, of Pocatello, Idaho, who was visiting her mother in Bremerton in June 1988. An autopsy found Holden had been beaten with a large rock.

Witnesses had reported seeing a black man matching Gentry's description in the area. Gentry, who had a long criminal history, was arrested in the knife-point rape of another young woman in Kitsap County and was then linked to Holden's death by hair and blood found on his shoelaces.

Tuesday marked the third time the case has been brought before Washington's court of last resort. In January 1995, the court upheld Gentry's death sentence in a 6-3 decision. Later that year, it denied Gentry's appeal to overturn his conviction.

Four years later, the court again upheld Gentry's death sentence, in a 7-2 decision.

On Tuesday, Tim Ford, Gentry's attorney, asked the court to take another look, focusing on then-Kitsap County Prosecutor Danny Clem's comment to Gentry's African-American trial lawyer during a courtroom break: "Where'd you get your ethics, in Harlem?"

The trial court found the remark to be "totally inappropriate" and "racially offensive," but not grounds to halt the prosecution.

Ford relied on a 2-year-old standard set by the state Supreme Court, arguing that Clem's remark displayed prejudice on the prosecution's part and constituted grounds for the case to be retried.

"When somebody says something like that ... you can't assume that they're going to act in an evenhanded manner when they're making a decision, particularly an emotional and difficult decision such as the decision to seek the death penalty," Ford told the justices. Furthermore, he said, witnesses for the prosecution used epithets — including the N-word — that evoked racial bias in the trial.

Ford urged the court to follow the new standard established in a case called *State v. Monday* — a June 2011 ruling that held that the prosecution bears the burden of proving that racially based prosecutorial misconduct didn't affect the outcome of the case.

In that case, the Supreme Court reversed a King County murder conviction and ordered a new trial because, it said, a prosecutor improperly cast doubt on the credibility of the witnesses based on their race. The court said the prosecution could not prove beyond a reasonable doubt that the impropriety didn't affect the jury.

How the Supreme Court decides to interpret the *State v. Monday* ruling with respect to Gentry's case will likely determine the outcome.

Ford said it should be retroactively applied to the 1991 case, and the burden to prove that racially based prosecutorial misconduct didn't weigh on the outcome should be shifted to the prosecution — especially because, in a death-penalty sentence, the stakes are higher.

“Everybody talks about racial discrimination,” Ford said. “But, in Monday, this court did something about it. ... If you compare the approach that this court took with this case in 1995 to the approach it took in Monday, it shows a dramatic difference.”

Kitsap County Deputy Prosecutor Randall Sutton said the Monday case ruling shouldn't come into play. He made a point of condemning Clem's comments, but argued that they hadn't tainted the trial in the way the misconduct had in the Monday case.

“Despite the fact that [Gentry's attorney has] taken Mr. Clem's comments and attempted to paint that brush all over this trial, Mr. Clem wasn't even the trial prosecutor in this case,” Sutton said in his rebuttal. “There's no evidence whatsoever either of the trial prosecutors harbored any racial bias toward Mr. Gentry or anyone else. There is no evidence.”

Sutton admitted he'd never met Clem but had heard him described as a “hotheaded jerk.” Nevertheless, he argued, Clem's comments were made out of the presence of the judge and the jury. Because they weren't directly part of the trial, he said, they don't fall under the jurisdiction of the Monday ruling.

“I'm not in any way trying to justify his statement, because I don't believe it is justifiable,” he said. “But the fact is, Monday is about the fairness of the trial and the perception and the effect on the jury. There is nothing in this case that the jury heard or saw or was even motivated by the state to present to the jury that suggests that racial bias was involved.”

Sutton also said evidence in the defense's brief had been “grossly taken out of context.” He referenced testimony identifying Gentry as looking “out of place” on the day of the murder and said it was based on what he was wearing — a suit on a hot day — not on his race. He added that Gentry's race only came up in the trial during a line of questioning that included other physical characteristics, such as height, weight, eye color and clothing.

In response to questioning from the justices, Ford said the Monday precedent ought to be retroactively applied to every criminal conviction, especially in capital-punishment cases, since the stakes and the responsibility of review are higher.

“I think most people would think that if there's a reasonable doubt the person was sentenced to death because of their race, they shouldn't be put to death,” Ford said in an interview after the hearing. “That seems like a pretty simple proposition, but in court, sometimes it can get pretty complicated.”

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