

NO. 86585-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of

JONATHAN LEE GENTRY,

Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 88-1-00395-3

ANSWER TO BRIEF OF AMICUS CURIAE NAACP LEGAL
DEFENSE & EDUCATIONAL FUND, INC.

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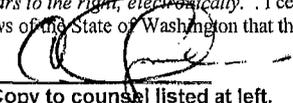
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I. ARGUMENT

A. AMICUS DOES NOT ADDRESS THE ISSUES OF TIMELINESS, RETROACTIVITY OR WHETHER THE *MONDAY* STANDARD IS APPROPRIATE ON COLLATERAL REVIEW..

Amicus does not address the issues of timeliness, retroactivity or whether the standard announced in *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), is appropriate on collateral review. The State has fully briefed these questions in its brief, Brief of Respondent, at 44-74. It will therefore not repeat those arguments here. *See* RAP 10.3(f). By responding to the arguments of Amicus, the State in no way intends to waive those arguments.

B. AMICUS'S CLAIMS BASED ON THE FACTS OF TRIAL REFLECT A MISREADING OF THE RECORD.

Amicus argues that Gentry is entitled to relief because of alleged misconduct on the part of the State in attempting to inject race into the trial. Amicus, however, grossly misrepresents the record in an attempt to support this contention.

1. Identification testimony

Amicus first discusses the testimony of the two witnesses who saw a man near the scene of the crime, one of whom positively identified Gentry as the man they saw. NAACP Brief, at 10. Amicus selectively

quotes their testimony to make the witnesses sound racist. An actual review of their testimony shows Amicus's argument to be unfair and misleading.

The first witness, Katharyna Tincher, is quoted as saying the that "he didn't fit in with the neighborhood," presumably, Amicus implies, because he was black. No such implication may be drawn from the testimony, however. Tincher initially described him as "wearing a weird hat and he had dirty clothes and ... wearing a suit, slacks, dress shoes on a dirt road." 56RP 126. She is asked to elaborate on the sighting:

Q. Was there anything about him that attracted your attention?

A. He didn't fit in with the neighborhood.

Q. What do you mean by that?

A. Our neighborhood, if you're walking around you're in jeans, shorts, sweats but not a suit.

Q. You indicated that you noticed a hat on this individual?

A. Yeah.

Q. Can you describe that hat.

A. It was at that time very strange because I only seen it on Channel Nine in the English – England documentaries.

56RP 127-28.¹ Clearly the focus of the quoted comment was on Gentry's clothing, not his race.

Amicus next assaults Tincher's mother, Eilene Starzman, for

¹ The witness confirmed that the hat was similar to the one introduced into evidence. 56RP-128.

noting that he “just didn’t look like he belonged out there.” Again, in context, this testimony was a reflection of his odd clothing. Starzman, who was the Indian Education Cultural Liaison for the Bremerton and Central Kitsap School Districts, 56RP 142, testified as follows:

Q. On that day, June 13th, 1988, that Monday that you returned home, did you notice anyone that struck you as noteworthy or particular or odd or something that you observed?

A. There was a gentleman that was out of place because it was warm and this man had on a different hat than I had seen and he had a sports jacket and slacks on, when everybody else was either in jeans or shorts, something that looked cool.

* * *

Q When you say “scruffy”, could you explain what you mean by that?

A Like dirty. He just didn’t look like he belonged out there.

Q. When you say the weather was warm, did the clothes appear to be appropriate for that particular day?

A. No.

Q. Could you explain how they didn’t appear to be appropriate.

A. They were too warm. Everyone else was wearing jeans. There was other people that care through in shorts. It was just too hot to be dressed that warm.

57RP 145-46. Again, his looking out of place was related to his inappropriate clothing, not that he was black.

Starzman, unlike her daughter, positively identified Gentry, both in a photo montage, and in court. 57RP 149, 152. She explained, further, that when Gentry walked by, it was right in front of her car window, while

her daughter was seated on the opposite side of the car. 57RP 149.

Starzman, but not Tincer, was asked about the man's race, but only briefly, and only as a matter of identification, and in concert with other relevant physical characteristics:

Q. Could you describe the race of that man you saw that day.

A. He was a black man.

Q. Do you recall the approximate age of the individual you saw that day?

A. Between 25 and 35.

Q. Do you recall the height of that individual?

A. He was probably taller than I was, because I was in my car, and when he went by the driver's window of the car he was taller than the car.

Q. How tall are you, Mrs. Starzman?

A. I'm five foot six and-a-half.

Q. Do you have an estimate as to how much taller?

A. He was at least 5'8", between 5'8" and 5'11". He wasn't short. My daughter's short.

Q. Did you have an opportunity to observe his hair?

A. No, he had a hat on.

57RP 146-47.

Amicus also accuses Starzman of willy-nilly assuming that Gentry was the suspect the police were looking for. In fact, she testified that there was a picture in the paper of the suspect the police were looking for, and contacted them because it looked like the man she had seen. 57RP 150-55. Nothing in her testimony suggests that her calling the police was race-

based. Indeed, she repeatedly noted that it was Gentry's eyes that stuck in her memory. 161, 165.²

Amicus next suggests that Starzman testified essentially that "a Black man would only be in a White neighborhood to commit a crime." NAACP Brief, at 10. Again, the record does not so reflect. During cross-examination, the defense elicited the following testimony:

Q. You did know that there was a black family living on the corner of Sheffield and Wembly before?

A. I know Mr. Singleton lived there. The other family I was not sure of. I had heard from my husband that there was a black family there that was causing an uproar with one man that moved, but I didn't know if it was Mr. Singleton or who it was there.

Q. My question was, you were aware of a black family living --

A. Yes, I was.

Q. -- at that corner.

Had you seen black people --

A. Yes.

Q. -- walking back and forth on the path that we've talked about?

A. Yes.

57RP 161-62. Amicus's interpretation is overbroad. The testimony suggests a neighborhood dispute of some sort, not criminal activity. Moreover, there was no evidence that it was a "White neighborhood." Indeed, the evidence showed that Cassie's young brother had African-

² Another witness, Fred Buxton, also commented on his "very distinct eyes." 57RP 195.

American friends who presumably lived nearby. In any event, this testimony was not even elicited by the State. The question presented is whether the *State* impermissibly injected race into the trial. This evidence thus in no way supports Gentry's claim, regardless of how it is interpreted.

2. Hair evidence

Amicus also accuses the State of improperly focusing on the Negroid hairs found on Cassie's undershirt.³ Again, Amicus fails to address all the evidence.

The forensic examiner testified that 39 hairs were recovered from Cassie's outer sweatshirt. Of those 39, 38 were similar to Cassie's, and one was possibly from her, but inconclusive. 59RP 45.

Twenty one hairs were recovered from Cassie's body. Of those, 17 were similar to her head hair. There was one Caucasian pubic hair on her leg, and an animal hair. The remaining two were inconclusive but could have come from Cassie. 59RP 46.

Finally, from Cassie's inner T-shirt, there was one hair and one fragment, both of which had Negroid characteristics. 59RP 47-48. The examiner testified that they were consistent with Gentry and his brother:

I found that the longer hair was microscopically similar to the known arm hair samples from Jonathan Gentry and so

³ As noted in the State's brief, "Negroid" is term of art used in hair examination. Brief of Respondent, at 64-65.

we concluded that the hair could have originated from him. The shorter hair fragment I was not able to exclude from Mr. Gentry as the source, but I also stated that due to its short length, the comparison was somewhat limited and I said a large number of black individuals could share the characteristics exhibited in that fragment.

59RP 49. Additionally, the DNA test for the hair showed DQ Alpha type the same as Gentry's brother, and the same as only 6 percent of the black population. 71RP 5015, 5041.

Amicus faults the State for not focusing on other black individuals who may have been in contact with Cassie. However, the testimony, as argued by the State in closing, was that those individuals did not actually meet Cassie, who had just arrived from Idaho. 53RP 3820, 3826-27, 3829-30; 55RP 213. The testimony further explained that it would be relatively unlikely for hair to transfer absent close physical contact. 59RP 46, 50.

Moreover, Amicus also fails to acknowledge the other evidence that the State presented. No other suspect was positively identified as being near the scene of the crime, 57RP 149, 152; no other suspect had hair that was similar to that found on Cassie's inner shirt, which was pulled up over chest during the assault; no other suspect had a hat consistent with that worn by the likely perpetrator, 56RP 83-84, 128; 57RP 148, 204, 263, 277; 58 RP 3931; Exh 65; no other suspect confessed to three other inmates, 64RP 4440; 65RP 12-14; 66RP 4489-90;

no other suspect was seen (by his sister-in-law) wiping off his shoes around the time of the murder, 68RP 4715-16; no other suspect's shoes had human blood on them, 59RP 34, 36; and no other suspect's shoes had blood that could not be excluded as coming from Cassie, and which was similar to only 0.2 percent of the Caucasian population, 61RP 15; 62RP4108-09; 71RP 5038; 64RP 4405; 71RP 4978-79; 71RP 5040.

The State discussed Gentry's race because it was relevant to identification, both forensically, and through the eyewitnesses. There simply is no evidence that Gentry was targeted or prosecuted because he was black, or that the State sought to evoke racial prejudice. Gentry was targeted because the evidence pointed to him, and his race was discussed only where it was relevant.

Finally, as with Amici ACLU, Amicus complains that the hair analysis was scientifically questionable. This contention is a red herring. The issue is whether the State improperly invoked race. Regardless of any subsequent forensic developments nothing in the record suggests that the State or its experts were acting with anything but a good faith understanding of the state of the science at the time of the trial. Deciding whether racial animus tainted the trial must be determined based upon the prevailing norms regarding scientific evidence that were in existence at the time of trial. After adopted guidelines or standards are irrelevant. *Cf.*

Bobby v. Van Hook, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009) (after-adopted standards for defense counsel are irrelevant in determining whether counsel was ineffective in a case tried before the standards were adopted). Moreover, Gentry has not raised any claim regarding the validity of the hair evidence or provided any valid evidentiary basis for considering such a claim in this proceeding. As such Amicus's musings about the validity of the hair analysis should be disregarded.

3. *Dyste testimony*

The claim regarding Dyste's use of the term "Nigger" was raised on direct appeal. As discussed in the PRP response, Brief of Respondent, at 62-64, this claim was raised on direct appeal, and specifically found to have been a proper attempt to "draw the sting." A review of the cross-examination shows that the attempt was warranted. The defense brought up the issue several times, 64RP 4450-51, 4454-56, and concluded the cross-examination by accusing Dyste of lying about the conversation he had with Gentry and asking:

Well, it wouldn't bother you much to tell a lie, especially if it was only about a niger [sic]; isn't that right?

64RP 4459-60.

C. BECAUSE NEITHER GENTRY ESTABLISH ANY *MONDAY-TYPE* MISCONDUCT, AMICUS'S RESORT TO STATISTICAL STUDIES HAS NO BEARING ON THE ISSUE PRESENT, AND MOREOVER, IS MISLEADING.

Contrary to the impression given by Amicus, the statistical studies, even that involved in the much-cited *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986), do not support the claim that either the race of the defendant or the race of the victim is determinative of who will receive a sentence of death. See Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 Ohio St. J. of Criminal Law 147 (2012).⁴

Moreover, and of somewhat more relevance here, defendants in Washington have yet to establish either a statistical pattern of differential treatment based upon race or specific racial animus. See *State v. Davis*, 175 Wn.2d 287, 364, 290 P.3d 43 (2012) (reaffirming that African-Americans are not disproportionately subjected to the death penalty in Washington).

Regardless, however, neither Amicus, nor Gentry, have established the only claim raised in this proceeding: that *during trial* the “prosecutor

⁴ *McCleskey* itself held that a statistical pattern of differential treatment was insufficient to demonstrate discriminatory intent with respect to the death penalty; a defendant must establish evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. *McCleskey*, 481 U.S. at 297.

flagrantly or apparently intentionally appeal[ed] to racial bias in a way that undermine[d] the defendant's credibility or the presumption of innocence." *Monday*, 171 Wn.2d ¶ 23. Although *Monday* places the burden of proving harmlessness on the State, nothing in that opinion relieves the defendant of establish the existence of misconduct in the first instance. Gentry has not met this burden.

II. CONCLUSION

For the foregoing reasons, Amicus's argument should be rejected, and Gentry's petition should be denied.

DATED June 17, 2013.

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