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No. 86585-0



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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In Re the Personal Restraint of

JONATHAN LEE GENTRY,

Petitioner.

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PETITIONER'S MOTION TO STRIKE STATISTICAL  
ARGUMENTS IN STATE'S RESPONSE TO *AMICI*

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 ORIGINAL

## IDENTITY OF MOVING PARTY

Petitioner Jonathan Gentry moves to strike the statistical arguments contained in the State's Response to the Briefs of *Amici Curiae*. See State's Answer to Brief of ACLU at 15-19; State's Answer to Brief of NAACP Legal Defense Fund at 10, and sources there cited. Alternatively, Petitioner asks that the Court reconsider its Order striking the statistical evidence and arguments previously proffered by Petitioner. See Pet. Motion for Argument and/or Remand at 5-6, filed October 12, 2012; State's Response and Motion to Strike at 6-7, filed November 1, 2012; Pet. Reply, filed November 7, 2012; Order of December 13, 2012.

## FACTS UNDERLYING MOTION

The Petition includes allegations of statistical disparities, based on the race of the defendant, in capital cases from Kitsap County in particular and the State of Washington generally. See Petition at ¶¶ 15-16. The State answered this part of the Petition by contesting the relevance of the Kitsap County data and questioning whether the statewide data related to Petitioner's present legal claims. See Answer to Petition at 53-56. Petitioner answered the last point by explaining that the statewide evidence was consistent with data from studies elsewhere which showed that racial disparities are greatest in "midrange" aggravation cases like his,

and that this is relevant to the harmless error issue raised by this Petition. *See* Pet.-Appellant’s Reply Brief at 17-24.

After this Court issued its decision in *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012), Petitioner proffered additional, up-to-date statistical evidence showing that, as elsewhere, the most substantial race of defendant disparities in Washington capital cases occur in “mid-range” aggravation cases like his—specifically, cases involving single victims and only one aggravating factor. *See* Petitioner’s Motion for Argument or Remand (October 10, 2012) at 5-6 and Appendix. Respondent moved to strike this proffer, saying it went beyond the issues presented by this Petition. State’s Response and Motion to Strike filed November 1, 2012. The Court granted the Motion to Strike by Order of December 13, 2012.

Then, when Amicus Briefs referenced race disparity statistics, the State responded by citing out of state studies and the majority opinion’s statistical analysis in *State v. Davis, supra*. *See* State’s Answer to Brief of ACLU at 15-19; State’s Answer to Brief of NAACP Legal Defense Fund at 10. Because the State successfully moved to exclude more relevant and current statistics proffered by Petitioner, and has resisted a reference hearing on this or other subjects, Petitioner is filing this Motion to Strike.

## ARGUMENT

The most fundamental right of due process is the equal opportunity to submit evidence supporting a legal claim. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (rights “basic in our system of jurisprudence” “include, as a minimum, a right ... to offer testimony”). It is a violation of this principle not to allow a party to rebut arguments or evidence submitted by the other side. *See Skipper v. South Carolina*, 476 U.S. 1, 9–15, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (concurring opinion of Justice Powell) (death sentence should be vacated because the defendant “was not allowed to rebut evidence and argument used against him”); *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (unconstitutional to impose death sentence “on the basis of information which he had no opportunity to deny or explain”).

Petitioner has argued, and respectfully maintains, that statistics regarding the death sentences imposed in other Washington cases similar to his—“midrange” aggravation cases—should be considered in deciding whether the racial influences on his trial were harmless. *See* Pet. Reply Brief at 17-24; Motion for Argument or Remand at 5-6. However, the State has argued otherwise and has persuaded the Court to exclude Petitioner’s statistics. Order of December 13, 2012. Having done so, the State should not be permitted to make statistical arguments of its own.

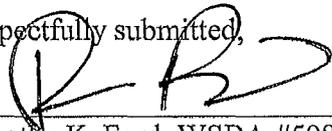
It would be fundamentally unfair to hold that the racism that infected Petitioner's trial must have been harmless because "studies show no evidence of race-of-defendant bias" (St. Answer to ACLU at 15, 17-19), while refusing to consider (or conduct a reference hearing on) statistics indicating that in cases like Petitioner's, such bias exists. See Appendix to Motion for Argument or Remand (750% disparity in death sentencing rate between black- and white- defendant cases with one victim and one aggravator). If statistical evidence is to be excluded from consideration on this petition, that exclusion should apply to both parties.

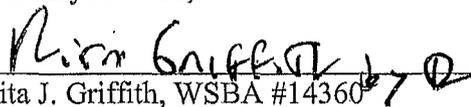
#### CONCLUSION

The State's arguments designated above should be stricken; or, alternatively, the Order of December 13, 2012 should be reconsidered, and the statistics proffered by Petitioner should be considered and/or tested at a reference hearing. See Motion for Argument or Remand, at 5-6.

DATED this 19 day of June, 2013.

Respectfully submitted,

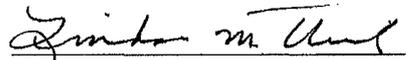
  
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Timothy K. Ford, WSBA #5986

  
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Rita J. Griffith, WSBA #14360  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies, under penalty of perjury under the laws of the State of Washington, that on June 19, 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

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Attached for filing is Petitioner's Motion to Strike Statistical Arguments in State's Response to *Amici* in this case. Thank you.

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