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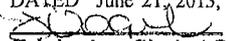
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 21, 2013, Port Orchard, WA

Original: e-filed at Supreme Court
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IN THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of

JONATHAN GENTRY,

Petitioner.

)
) No. 86585-0
)
) STATE'S REPLY
) RE: MOTION TO STRIKE APPENDIX
) TO GENTRY'S BRIEF IN RESPONSE
) TO BRIEFS OF AMICI
)
)
)

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN GENTRY,

Appellant.

)
) No. 58415-0
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Gentry asserts implies that the State is shirking its duty to see that justice is done by expecting him to follow the law and the rules of this Court. This office and the undersigned personally take the prosecutor's duty to seek justice very seriously.

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However, as the State has shown in its briefing, the evidence in this case was neither racially motivated nor inadequate to show Gentry's guilt.

The State again points out that Gentry makes no argument in any of his briefing that his untimely petition¹ is permissible based on anything other than his *Monday* claim. As discussed in the State's briefs and other pleadings filed in this case, that claim applies only to prosecutorial misconduct affecting the jury.

The document attached to Gentry's latest brief purports to be a letter from the Department of Justice, but has no authenticating documentation. His latest affidavit does nothing to cure that deficiency. The affiant was neither the author nor the recipient of the letter. Nor does the memo opinion of the Mississippi Supreme Court contain any grounds for its ruling or concede the validity of the letter's content. To the contrary, it issued a stay for the very purpose of assessing its validity. That stay only issued in May of this year, and a Westlaw search fails to show that any resolution of the issue has actually been reached. Moreover, the dissenting justice points out the very issues that the State raises: the authenticity of the document and its relevance.

Gentry partly concedes the State's point that the document is not relevant to the issue of whether the prosecution improperly invoked race at his trial. He nevertheless argues that it is relevant on the issue of harmlessness. Again, however, his argument presupposes evidence that simply was not introduced in his trial.

¹ The State maintains that Gentry's so-called motion for rehearing of his direct appeal is wholly improper, and therefore does not address it here. See Brief of Respondent, at 85-87.

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The letter Gentry offers criticized the hair examiner in the Mississippi case for overstating his or her findings:

We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included additional statements that exceeded the limits of science and was, therefore, invalid. In response to inquiries regarding whether the errors identified in the notification letter had any bearing on the examiner's opinion regarding the racial classification of the hair, the FBI states the following: The scientific analysis of hair evidence permits an examiner to offer an opinion that a questioned hair possesses certain traits that are associated with a particular racial group. However, since a statistical probability cannot be determined for classification of hair into a particular racial group, it would be error for an examiner to testify that he can determine that the questioned hairs were from an individual of a particular racial group. Thus, an examiner cannot testify with any statement of probability whether the hair is from a particular racial group, but can testify that a hair exhibits traits associated with a particular racial group.

Exhibit, at 1-2.

Here, the examiner testified precisely in the manner that the letter states is proper. He testified only that the hair was consistent with a black person, and excluded particular individuals as contributors of the hair:

Q. Are there characteristics or distinguishing features in hair that distinguishes between races?
A. Yes. The broad racial categories are caucasoid, mongoloid and negroid, and they each have their own hair characteristics. Negroid hairs tend to be in cross sections and fairly flat and ribbon-like. That's directly related to the amount of curl that you see in black people's hair.

59RP 43. The examiner subsequently addressed his findings regarding the Negroid hairs from Cassie's T-shirt:

In examining the t-shirt or inner shirt from Cassie Holden, a couple of small hairs fell off the shirt which I recovered. There . was actually one

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hair and another hair fragment, both of which exhibited negroid characteristics.

59RP 48. The prosecutor subsequently explored this testimony:

Q. Were you able to tell what race those hairs came from?

A. It was my determination that both of those exhibited negroid characteristics. They would be from a black individual.

Q. When you say they exhibited negroid characteristics, would those hairs be microscopically similar to all black people? Are you able to break it down further in your comparison?

A. After we determine that the hair falls into a broad racial category, it is then possible to compare the hairs microscopically with specific black individuals. We can say the hair is similar to this black individual or it is not similar this black individual. It may be similar to a number of black individuals but it will also be dissimilar to a large number of black individuals. It will fall into a segment of the black population.

Q. Did you compare or analyze those two hair fragments in relation to the known hair controls you previously identified as coming from Jonathan Gentry, the defendant in this case?

A. Yes.

Q. Can you tell us what your analysis detected?

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

Q. With regard to the longer fragment, would fewer black individuals have the characteristics with the larger fragment as opposed to the shorter fragment?

A. Yes.

Q. Did you later have occasion to analyze those two short negroid or black hairs with relation to known hairs from Edward Gentry, the defendant's brother?

A. Yes, I did.

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59RP 48-49. The examiner then explained his additional findings with regard to Gentry's brother's hair sample:

Q. Did you again make an analysis with Edward Gentry's hair?

A. Yes, I did.

Q. Were you able to make any conclusions with regard to those?

A. Yes. Again, it was Edward Gentry's known arm hair samples which were found to be similar to the hairs, specifically the longer hair from the shirt so that hair could also have come from him. The results on the smaller hair fragment were inconclusive. Again, it's a short fragment and not much to really look at.

Q. Is that surprising or an unusual discovery to learn that Edward Gentry's hair was comparable in characteristics to Jonathan Gentry's hair?

A. It's not unusual if you have siblings that have similar hair characteristics. I have seen that in a number of cases where there have been siblings involved. The characteristics of the hair have genetic traits and you would expect to see some familial similarities.

59RP 50.

On cross-examination, the examiner confirmed the limits of the science:

Q. You are not in any way telling the jury those hairs came from Jonathan Gentry or Edward Gentry and those are the only two people they could have come from, are you?

A. No. They could have come from some other black individual who had similar hair characteristics.

Q. What you can do with microscopic hair comparison, however, is to say that a hair definitely could not have come from a particular individual, is that right?

A. That's right.

59RP 54. It is thus apparent that even if the Court were to accept the provenance of the letter and the truth of its contents, it is utterly irrelevant, except to support the validity of the examiner's testimony in Gentry's trial.

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Finally, Gentry does not even address the point that he 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, or explained why such a claim would not be time-barred under RCW 10.73.090. He claims that this evidence should be considered in evaluating harmlessness. But that calculus asks whether the alleged impropriety would have affected the jury's verdict. He fails to explain how consideration of evidence that was not before the jury is at relevant this determination. If he wishes to have this Court consider the validity of the forensic evidence he needs to file a proper petition for that purpose, explain why it should be considered at this late date, and support it with evidence that actually pertains to his trial and the evidence introduced in it. Attempting to slip hearsay-evidence from an entirely unrelated Mississippi case under the guise of harmless error analysis is improper.

The State respectfully requests that its motion be granted.

DATED June 21, 2013.

RUSSELL D. HAUGE,
PROSECUTING ATTORNEY



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

OFFICE RECEPTIONIST, CLERK

To: Lori Vogel
Subject: RE: In re: the Personal Restraint of Jonathan Gentry # 86585-0

Rec'd 6/21/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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To: OFFICE RECEPTIONIST, CLERK
Subject: In re: the Personal Restraint of Jonathan Gentry # 86585-0

- **Case name:** In re the Personal Restraint of Jonathan Gentry
- **Case number:** 86585-0
- **Name of the person filing the document:** Randall Avery Sutton
- **Phone number of the person filing the document:** 360-307-4301
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