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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

Boat
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 RESPONSE TO GENTRY'S
) MOTION TO STRIKE STATISTICAL
) ARGUMENTS

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN GENTRY,

Appellant.

) No. 58415-0

I. IDENTITY OF MOVING PARTY

The respondent, STATE OF WASHINGTON, asks this Court for the relief designated in Part II of this motion.

STATE'S RESPONSE TO GENTRY'S
MOTION TO STRIKE STATISTICAL
ARGUMENTS;
PAGE 1 OF 6

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II. STATEMENT OF RELIEF SOUGHT

The State respectfully asks the Court to Gentry’s motion, or in the alternative, to accept his suggestion of striking all statistical discussions from the briefs of Amici.

III. FACTS RELEVANT TO MOTION

Some 20 years after he murdered 12-year-old Cassie Holden, 17 years after his conviction became final, and 13 years after his last personal restraint petition was denied, Jonathan Gentry filed a successive personal restraint petition and, in his direct appeal case, a “motion for rehearing.” In these pleadings, Gentry seeks to revisit issues rejected in his direct appeal. Gentry argues that this Court’s decision in *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), requires the Court to revisit his conviction.

In response, the State argued that *State v. Monday* is immaterial to this case. *Monday*’s holding is quite specific:

We hold that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant’s credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury’s verdict. We also hold that in such cases, the burden is on the State.

Monday, 171 Wn.2d at ¶ 23.

The State noted that Gentry raised the very issues he raises in the instant petition in his direct appeal. In that appeal, this Court held that there was “no evidence” that former Prosecutor C. Danny Clem’s “totally inappropriate and offensive” out-of-court remarks to defense counsel during an argument between the two men “prejudiced the

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Defendant's right to a fair trial in any way." *State v. Gentry*, 125 Wn.2d 570, 610, 888 P.2d 1105 (1995). It further rejected as unfounded Gentry's claims that the State's presentation of the evidence, examination of witnesses, and closing argument evinced racial bias. *Gentry*, 125 Wn.2d at 610-11, 643. Because the condition precedent for the application of *Monday's* new prejudice standard, *i.e.*, the prosecutor's flagrant or apparent intentional appeal to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, did not exist, there is nothing for *Monday's* holding to act upon in this case.

The State thus concluded that there is no significant change in the law affecting this case that would justify an exception to long-expired statute of limitations for collateral review. It likewise concluded that Gentry presents no reason for consideration of issues already rejected on direct appeal. Finally, it also concluded that since there has been so change in the law controlling this case, that Gentry's claims would have to be rejected even were they again considered on their merits.

After the instant case was fully briefed, this Court filed its opinion in *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012). In a 7 to 3 decision, the Court upheld the imposition of the death penalty upon Cecil Davis. Contrary to the impression given by Gentry, only one justice questioned the racial proportionality of Washington's capital sentencing scheme. *Davis*, 175 Wn.2d at ¶¶ 182-210 (Wiggins, J., concurring in dissent). Although Justice Fairhurst, joined by Justice Stephens, dissented on other grounds, the main dissent did not address the issue of race and did not join Justice

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Wiggins's dissent. *Davis*, 175 Wn.2d at ¶¶ 159-81 (Fairhurst, J., dissenting).

In an extensive response to Justice Wiggins, the majority opinion rejected, on both legal and statistical grounds, the premise that Washington's death penalty is applied in a racially disparate manner. *Davis*, 175 Wn.2d at ¶¶ 145-56. Indeed, after consideration of the statistical evidence it concluded that capital sentences in Washington are imposed at a virtually equal rate upon African-American and Caucasian death-eligible defendants. *Davis*, 175 Wn.2d at ¶ 155.

After the present case was fully briefed, Gentry filed a motion for a reference hearing and for oral argument. In that motion and in an attached Appendix thereto, Gentry raised numerous issue that had no relevance to his *Monday* claim. As he conceded in that motion, Motion for Oral Argument, etc., at 2, that claim relies upon the facts of this case that already appear in the record.

This Court accordingly granted the State's motion to strike the extraneous materials.

Subsequently, this Court accepted briefs from Amici ACLU and NAACP. Both briefs contain extensive discussions of statistics that purport to show racial disparities in capital cases. In both its responsive briefs, the State prefaced its arguments by noting that Amici had not addressed the procedural and factual deficiencies of Gentry's claims, and that Amici were seeking to raise issues not raised by Gentry, which should not be considered. Only then did the State discuss the deficiencies of the statistical claims

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2 Amici raised. Despite the fact that the State continues to believe have no relevance to
3 the very limited issue presented in this case, the State addressed Amici's argument for
4 fear that if it did not it might be deemed to be conceding Amici's claims.
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7 **IV. GROUNDS FOR RELIEF AND ARGUMENT**

8 Gentry makes no argument in any of his briefing that his untimely petition¹ is
9 permissible based on anything other than his *Monday* claim. As discussed above and in
10 the State's brief, that claim applies only to prosecutorial misconduct affecting the jury.
11

12 The State's discussion of the statistical claims was only in response to the claims
13 raised by Amici, and was only presented as a secondary response for the sake of
14 argument. The State's primary response to Amici was that their arguments were without
15 factual basis in the record, failed to acknowledge the procedural default, and attempted
16 to inject issues beyond those raised by the petition. The State would be more than
17 amenable to taking Gentry's suggestion of striking all statistical references from the
18 briefs of Amici as well as the State's responses thereto. Failing that, it is disingenuous
19 for Gentry to complain about fairness because the State successfully excluded irrelevant
20 evidence, but then to seek to exclude the State's response to yet more extraneous
21 material proffered by third parties.
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26 The State respectfully requests that Gentry's motion to strike be denied.
27 Alternatively, the State asks that if the statistical discussion is stricken from the State's
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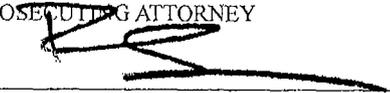
29 ¹ The State maintains that Gentry's so-called motion for rehearing of his direct appeal is wholly improper, and therefore does not address it here. *See* Brief of Respondent, at 85-87.

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briefs, that the discussions of Amici to which they respond also be stricken.

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

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Please see the attached document. Thanks!

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