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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
JONATHAN GENTRY,

PETITIONER.

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON

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ORIGINAL

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INTEREST OF *AMICI CURIAE*

Amici the American Civil Liberties Union (“ACLU”) and the American Civil Liberties Union of Washington (ACLU-WA) are nonpartisan nonprofit organizations dedicated to the principles of liberty and equality embodied in the constitution. They strongly oppose the death penalty and are concerned by its discriminatory application.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether racial bias in a capital case by the prosecution “undermines the principle of equal justice” and requires reversal, without proof of its impact on the jury’s decision?

STATEMENT OF THE CASE

Jonathan Gentry, an African American defendant, faced a trial for his life in which he was accused of murdering and sexually assaulting a young white female victim.¹ He was tried by an all-white jury, and by white prosecutors. The elected prosecutor at the time, C. Danny Clem, authorized the death penalty against Gentry. During the course of Gentry’s trial, Clem made a “totally inappropriate” and “racially offensive statement” to Gentry’s defense counsel. *State v. Gentry*, 125 Wn. 2d 570, 610, 888 P.2d 1105, 1130 (1995). At the conclusion of a pre-trial hearing,

¹ The facts in this section are based on Petitioner Gentry’s Personal Restraint Petition.

Clem asked Gentry's counsel, Jeffery Robinson, an African American attorney, "Where did you learn your ethics – In Harlem?"

The State presented its theory of guilt to the jury through a racial prism: the State attempted to depict the victim's world as exclusively white, and then argued heavily that Gentry was to blame for the girl's murder because two "negroid" hair fragments had been found on her body. Under this racially framed theory, the presence of any African American hair could only be seen as unwelcome and malevolent. The State then elicited for the all-white jury testimony of a white jailhouse informant who referred to playing a "nigger" card game with Gentry. The State further deliberately elicited testimony that the informant had received poor treatment by African Americans.

Gentry's counsel Robinson described the trial as the "most racially charged" case that he has experienced in thirty years as criminal defense lawyer. It is in the context of this racially charged and racially biased prosecution that this Court must address the novel question of how the *State v. Monday* standard should be applied in capital cases.

ARGUMENT

"If justice is not equal for all, it is not justice." *State v. Monday*, 171 Wn. 2d 667, 680, 257 P.3d 551, 557-558 (2011). With these words, this Court announced that its previous efforts to deter prosecutorial

appeals to racial bias had “proved insufficient.” *Id.* Henceforth, the Court ruled, the State’s repugnant injection of race into a criminal matter would be judged under a more exacting standard. *Id.* Any appeal by prosecutors to racial bias so “undermines the principle of equal justice” that it requires the State to prove harmlessness beyond a reasonable doubt. *Id.*

Jonathan Gentry’s case affords the Court the opportunity to decide how the *Monday* standard should be applied in the capital arena. As shown in this amicus brief, it would be only fitting for the Court to apply *Monday* broadly, in light of the special protections due in death penalty cases and the unique role prosecutors play in capital prosecutions.

Gentry’s case was regrettably ripe for a race-based decision on whether he should live or die: an African-American defendant charged with a crime against a white female victim, an all-white jury, a circumstantial case, and a racially infused presentation of evidence. Combined with these facts, the attitudes shown by the racially derogatory comment of the prosecutor should entitle Gentry to relief under either of the two applications of *Monday* for capital cases outlined below.

I. *Monday* should be applied broadly in capital cases.

A. The Court must conduct a searching review of the record to ensure *Monday* error did not infect the outcome.

At a minimum, application of the *Monday* standard to capital cases

will require that the Court conduct a searching review of the record to determine whether the State proved beyond a reasonable doubt that its racially-biased conduct did not impact the verdict or sentence, in line with the heightened protections the Court has always applied in capital cases.

This Court has long upheld its special obligation to heightened scrutiny and a searching review of the record in capital cases. *See, e.g., State v. Lord*, 117 Wn. 2d 829, 888, 822 P.2d 177, 211 (1991). The Court has been equally clear that its constitutionally and statutorily mandated review must entail efforts to “alleviat[e] the types of major systemic problems identified in *Furman*: random arbitrariness and imposition of the death sentence based on race.” *Lord*, 117 Wn. 2d at 910, 822 P.2d at 223 (emphasis added).²

To meet these solemn commitments here, the Court should first engage in a searching review to determine whether there were explicit or “subtle” but equally “insidious” comments by the prosecutor that could have triggered racial bias. *Monday*, 171 Wn. 2d at 678, 257 P.3d at 557; *Lord*, 117 Wn. 2d at 888, 822 P.2d at 211. Second, and as illustrated in Section III, *infra*, the Court should require the State to prove beyond a

² The cruel punishment clause of the state constitution further requires “fundamental fairness” because “the death penalty is the ultimate punishment.” *State v. Bartholomew*, 101 Wn. 2d 631, 640, 683 P.2d 1079, 1085 (1984).

reasonable doubt that the sum total of such racially-biased comments by the State did not impact Jonathan Gentry's conviction or death sentence.

B. Because of the prosecutor's unique role in capital cases, this Court should hold that evidence of racial bias by the prosecution in capital cases requires reversal, without inquiry as to whether the bias directly affected the verdict.

The Court should additionally find that application of *Monday* to a capital case requires automatic reversal when the prosecutor exhibits racial bias due to the prosecutor's unique power to authorize a death sentence. *See* RCW 10.95.040(3) (if the prosecutor does not give written notice of intent to seek the death penalty, the death penalty cannot be imposed).³ In this context, the Court can only have confidence that its goal in *Monday* - to eradicate racial bias from the criminal justice system - has been met when discretion-wielding prosecutors are subject to the same strict rules policing racial bias as jurors. As shown further below, such a rule is needed to ensure the pernicious role of race does not infect any capital sentencing decision in this State.

Under Washington statutory law, the prosecutor must weigh the mitigating evidence at the outset to decide if it is "sufficient to . . . to merit

³ *See also*, Stephen Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 450 (1995) ("The most important decisions that may determine whether the accused is sentenced to die are those made by the prosecutor.").

leniency,” or if the state will seek death in a special proceeding. RCW 10.95.040(1). Thus, “[i]n a sense, **the prosecutor participates in the sentencing process** by choosing to request a special sentencing proceeding.” *State v. Campbell*, 103 Wn. 2d 1, 26, 691 P.2d 929, 943 (1984) (emphasis added).

The prosecutor has great discretion in this decision, as well as in his or her decision during the course of the trial whether to ask the jury to impose life. *See Koenig v. Thurston County*, 175 Wn. 2d 837, 846, 287 P.3d 523, 527 (2012) (“The prosecutor is empowered with substantial discretion and autonomy in making the determination to seek a sentence of death.”); *State v. Bartholomew*, 104 Wn. 2d 844, 850, 710 P.2d 196, 200 (1985) (finding no harm in prosecutor expressing “his own personal view to the jury that the defendant should receive mercy”).

The risk inherent in the prosecutor’s wide discretion is that, either consciously or unconsciously, it may be influenced by racial prejudice and thus lead to the discriminatory imposition of capital punishment. *Cf.* Research Working Group, *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 629 (2012) (Washington criminal justice task force finding that “when official actors

exercise discretion ... bias often plays a role”).⁴

In light of the prosecutor’s decisive role in a capital case, this Court should hold that where a prosecutor injects racial bias into a capital prosecution (or reveals racial bias within such a prosecution), automatic reversal is required. *See Turner*, 476 U.S. at 35, 106 S. Ct. at 1687-688 (“The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.”); *State v. Judge*, 100 Wn. 2d 706, 713, 675 P.2d 219, 223 (1984) (quotation and citation omitted) (barring discretion based upon “an unjustifiable standard such as race, religion, or other arbitrary classification”).

For capital cases, where the prosecutor’s decisive role spans beyond the jury trial, automatic reversal would serve as a more effective standard. Under the non-capital standard, a conviction would be subject to the constitutional harmless error test “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.” *Monday*, 171

⁴ *See also* Bright, 35 SANTA CLARA L. REV. at 434 (prosecutor’s wide discretion “provides ample room for racial prejudice to influence whether the accused lives or dies”); *Turner v. Murray*, 476 U.S. 28, 35, 106 S. Ct. 1683, 1687-688, 90 L. Ed. 2d 27 (1986) (“Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”); *Castaneda v. Partida*, 430 U.S. 482, 497, 97 S. Ct. 1272, 1281-282, 51 L. Ed. 2d 498 (1977) (a “highly subjective” selection process is “susceptible of abuse as applied” and thus a greater risk for discrimination).

Wn. 2d at 680, 257 P.3d at 558. While a potent check on racial bias injected into a jury trial, the harmless error standard leaves un-policed evidence that racial bias has infected the ultimate decision through the biases of the prosecutor who made the capital charging decision.

The proper application of *Monday* in capital cases then is to broadly require reversal in any case where there is demonstrated racial bias or prejudice by the prosecution. *Cf., Monday*, 171 Wn. 2d at 682, 257 P.3d at 558-59 (Madsen, C.J., concurring) (“Regardless of the evidence of [the] defendant’s guilt, the injection of insidious discrimination into this case is so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint.”). Such a rule would harmonize this Court’s treatment of prosecutorial bias (at least when the prosecutor’s decision is one of life and death) with case law requiring new trials upon a showing of racial bias by jurors. *See Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243, 1246 (2009) (granting a new trial where evidence showed racial bias by jurors because even if the racial bias did not directly affect the verdict, it denied the plaintiffs a fair trial); *State v. Jackson*, 75 Wn. App. 537, 540, 879 P.2d 307, 309 (1994) (ordering a new trial because comments of two jurors raised an inference of racial bias); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (court’s must be

“ever vigilant” in guarding against the influence of a racially “biased individual [whose] certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law.”).⁵

In sum, when there is reason to believe a decision maker in a capital case – whether a juror or a prosecutor – harbors stereotypes which “may prevent him from making decisions based solely on the facts and law,” this Court must act to ensure equality and fairness. *Heller*, 785 F.2d at 1527. A bright line rule that prohibits evidence of racial bias by decision makers in capital cases will serve both as a check against the discriminatory application of the death penalty and a clear message of the need to take steps necessary to avoid such discriminatory conduct in future cases. *Monday*, 171 Wn. 2d at 680, 257 P.3d at 558 (citing need to deter future prosecutorial misconduct); *id.* at 682 (Madsen, C.J., concurring) (a prosecutor’s racial bias “cannot be countenanced at all”).

⁵ See also *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002) (new trial required where juror was overheard making a racially discriminatory statement to his peers because such comments “serve only to impugn the integrity of the fact-finding process and pose a serious threat to a fair trial”); *State v. Johnson*, 630 N.W.2d 79, 83 (S.D. 2001) (new trial required after two jurors made a lynching joke with racial overtones); see also *Tobias v. Smith*, 468 F. Supp. 1287, 1289-90 (W.D.N.Y. 1979) (requiring an evidentiary hearing when the petitioner presented a juror affidavit describing two racially charged statements allegedly made during deliberations, including the remark “[y]ou can’t tell one black from another. They all look alike.”).

II. The circumstances of Gentry’s trial heighten concern about racial bias.

A. Gentry, an African-American defendant, was tried for the murder of a white victim.

A wealth of statistical evidence shows that racial disparities pervade the application of the death penalty in this country. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 613-18, 122 S. Ct. 2428, 2446-448, 153 L. Ed. 2d 556 (2002) (Breyer, J., concurring) (summarizing the vast body of evidence that "the race of the victim and socio-economic factors seem to matter").⁶ The statistically significant evidence of racial disparities based on the race of the victim is “remarkably consistent across data sets, states, data collection methods, and analytic techniques.” U.S. GENERAL

⁶ *See also*, John J. Donohue III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4600 MURDERS TO ONE EXECUTION (2008) available at http://works.bepress.com/john_donohue/55, at 6 (finding black defendants received death sentences at three times the rate of white defendants in cases with white victims in Connecticut); *People v. Cahill*, 809 N.E.2d 561, 612 (N.Y. 2003) (Smith, J., concurring) (from 1995 to 2001 in New York, the State sought the death penalty twice as often when the victim was white than when the victim was black); David C. Baldus *et al.*, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1683-1770 (1998) (finding disparities in death sentencing based on race of the defendant and race of the victim in study of Philadelphia); Stephanie Hindson *et al.*, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549, 549 (2006) (concluding that the death penalty in Colorado is “most likely to be sought for homicides with white female victims”); Raymond Paternoster *et al.*, *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS, MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 40-41 (2004) (finding that race of the victim was important predictor of who received the death penalty); Glenn L. Pierce and Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 38 (2005) (study of California found disparities in death sentencing based on race and ethnicity of homicide victims and geography).

ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH

INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

Washington's capital punishment system has not escaped the stain of racial bias.⁷ Of the eight male defendants currently on Washington's death row, four – a full fifty percent – are African American men.⁸ Past statistical analyses of the trial judge reports supports the conclusion that disparities exist. *See State v. Stenson*, Case No. 82332-4, ACLU Amicus Brief, Affidavit of Professor David Baldus (describing statistically

⁷ In the context of Gentry's own case, this Court briefly considered and rejected the notion that race of victim or defendant has impacted capital sentencing in Washington, but it did so only upon woefully inadequate briefing. *State v. Gentry*, 125 Wn. 2d 570, 612, 655, 888 P.2d 1105, 1131, 1154 (1995) ("Because of the inadequate briefing on this claim, we are unable to meaningfully respond to the defendant's challenge.") And although the Court has engaged in its own analysis of some of the available numbers, *see State v. Davis*, 175 Wn. 2d 287, 363-373, 290 P.3d 43, 78-84 (2012), it has never considered the expert conclusion that there are statistically significant race of the victim disparities, nor inquired whether black defendants convicted of murder of white victims are charged or sentenced to death at higher rates than other racial combinations. Nor has the Court ever had the benefit of expert statistical testimony on the disparities. See generally *See David H. Kaye and David R. Freedman, Reference Guide on Statistics NATIONAL RESEARCH COUNCIL, THE REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, THIRD EDITION*, at 215 (discussing benefit to courts of statistical experts). This case offers a fitting opportunity to take a more in depth look by appointing a special master with statistical expertise to review the quality of the existing data, collect additional data as necessary, analyze the data, and present the results to the Court. *See In re Proportionality Review Project*, 735 A.2d 528, 536 (N.J. 1999); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice,"* 87 J. CRIM. L. & CRIMINOLOGY 130, 190 (1996) (reviewing the New Jersey Supreme Court's order appointing a special master with broad powers to undertake this task); *see also, Claims of Racial Disparity v. Commissioner of Corr.*, No. CV054000632S, 2008 WL 713763, at *1 (Conn. Super. Ct. Feb. 27, 2008) (similar).

⁸ Another white defendant, Bryon Scherf, was sentenced to death on May 15, 2013. *See e.g., Associated Press, Inmate Who Killed Wash. Guard Sentenced to Death* (May 15, 2013), available at: <http://abcnews.go.com/US/wireStory/inmate-sentenced-death-washguards-slaying-19185056#.UZvF-LXkt8F>.

significant evidence that Washington prosecutors sought death sentences more than three times as often if one or more of the victims was white).⁹ This evidence of disparities in Washington's death penalty system is consistent with the findings of the Research Working Group of the Task Force on Race and the Criminal Justice System ("Task Force"). After an extensive review of Washington's criminal justice system, the Task Force concluded that "race and ethnicity influence criminal justice outcomes over and above commission rates." 35 SEATTLE U. L. REV. at 627. The Task Force found significant disparities in charging and sentencing. *Id.* at 636, 648. The verdict of the Task Force is sobering: "within Washington State's criminal justice system, race and ethnicity matter in ways that are inconsistent with fairness, that do not advance legitimate public safety objectives, and that undermine public confidence." *Id.* at 638.

Existing capital data strongly suggest particularly troubling racial bias against black defendants charged with crimes against white victims. *See* Larranaga, at 26 (finding, based on review of Washington death sentencing data, "African-American defendants charged with killing a Caucasian victim have a significantly higher percentage of death notices

⁹ *See also*, Mark A. Larranaga, *Where Are We Heading?: Current Trends of Washington's Death Penalty*, at 26 (April 2004), available at http://www.jamlegal.com/Race_and_Jurisdiction_Report_May_2004.pdf ("[D]eath has been imposed at a higher rate against African-Americans as compared to Caucasians.")

filed and death sentences imposed”).¹⁰

B. Gentry, an African-American defendant, was tried by an all-white jury.

The racial composition of the juries that convicted Washington’s condemned are as striking as the racial composition of the row itself: **all four of Washington’s African American death row inmates, including Jonathan Gentry, were sentenced to die by all-white juries.** The remaining four white death row inmates were sentenced to death by juries with only one minority juror.

Nationally, the capital trials of African American defendants by all-white or nearly all-white juries stretch back into history for over 100 years, when such trials were the products of official and de facto discriminatory laws. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 894-96 (1994) (citing Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 253-72 (AMS Press, 1969).

¹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 287, 107 S. Ct. 1756, 1764, 95 L. Ed. 2d 262 (1987) (“Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.”); accord, Bright, at 437 (“A prosecutor’s unconscious racism, his or her fear or misunderstanding of people of a different race or culture, may well be ‘stirred up’ in a case involving an interracial crime and influence the prosecutor to seek the death penalty in that case, but not in similar cases that are not interracial.”); *Turner*, 476 U.S. at 36-37 (a capital defendant accused of an interracial crime faces sufficient risk that racial prejudice may infect his or her capital sentencing such that a special voir dire rule is required).

Systemic exclusion of non-whites from juries today, even if not the result of discrimination based in law or official policy, undermines equal justice just the same. The jury stands as a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder v. West Virginia*, 100 U. S. 303, 309, 25 L. Ed. 664 (1879). The scientific community has consistently found that non-diverse juries engage in less rigorous fact finding. *See e.g.*, Neil Vidmar, AMERICAN JURIES: THE VERDICT (2007), at 74, (summarizing the evidence that diverse juries are better fact-finders, and noting that "when whites anticipate participating in a diverse jury, they tend to give more careful assessments of the evidence").¹¹

Particularly troubling in the absence of the check of a diverse jury is evidence that "conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U.S. 42, 69, 112 S. Ct. 2348, 2364, 120 L. Ed. 2d 33

¹¹ *See also* Judge Royal Furgeson, *The Jury in To Kill A Mockingbird: What Went Wrong?*, 73 TEXAS BAR J. 488, 490 (June 2010) (quoting Professors Valerie Hans and Neil Vidmar) ("Heterogeneous juries have an edge in fact finding, especially when matters at issue incorporate social norms and judgments as jury trials often do."); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI-KENT L. REV. 997, 1028 (2003). ("Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial...").

(1992) (O'Connor, dissenting).

When an all-white jury decides the fate of a minority defendant, this Court should, absent contrary evidence, have less confidence that the jury has fulfilled its role as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Duncan v. Louisiana*, 391 U. S. 145, 156, 88 S. Ct. 1444, 1451, 20 L. Ed. 2d 491(1968). Gentry’s trial by an all-white jury should weigh in the decision whether his trial was truly free from racial prejudice.

C. The case against Gentry is circumstantial and race based.

Studies have shown an unmistakable link between racial bias and wrongful convictions. Race matters all the more when an African American defendant who has steadfastly maintained his innocence is convicted on circumstantial evidence. This is such a case. Gentry was convicted on the kinds of evidence known to be risk factors for wrongful convictions: jail house informant testimony, weak cross-racial identifications, and questionable forensic evidence.¹² *See* Samuel Gross *et al.*, *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM.

¹² *See* Gentry’s Reply, at 14, n.5 (describing the evidence now known undermining the jailhouse informants’ credibility); *id.* at 14, n.4 (recounting that no witness has ever claimed to see the crime or witness fleeing, and that only one witness made an identification, after initially giving a description that did not match Gentry); *id.* at 15, n.7 (describing the limited and conflicting DNA evidence); *see also, infra* (describing flawed hair testimony).

L. & CRIMINOLOGY 523, 542 (2005); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 950 (1984); INNOCENCE PROJECT, THE CAUSES OF WRONGFUL CONVICTION, available at: <http://www.innocenceproject.org/understand/>.

But in addition, race infused the questionable forensic evidence itself: the evidence included testimony from a State expert regarding the existence of two “negroid” hairs on the body or the clothes of the white victim. *See* State’s Resp. at 37-39. The State expert testified that a trained scientist can “determine whether an unknown hair came from a Caucasian, Negro, or Mongoloid individual” and can compare microscopically the hair to known hair samples. State Resp. at. 38.

In fact, today we know that testimony that a particular hair is a “match” for a particular racial group is unsupported by evidence.¹³ *See*,

¹³ The State’s expert hair analysis posed other significant problems. The State’s expert testified that one of the Negroid samples was similar to Gentry’s hair sample, and one was similar to a hair sample of Gentry’s brother. State’s Resp. at 40. No analysis of the single alleged arm hair or the hair “fragment” recovered from the victim should ever have been attempted, much less introduced as evidence of guilt. Arm and other limb hairs “are not considered suitable for comparison” because they “generally do not contain sufficient variation in their microscopic characteristics to reliably distinguish between hairs from different individuals.” Cary T. Oien, *Forensic Hair Comparison: Background Information for Interpretation*, 11 Forensic Sci. Communication (Apr. 2009), available at: http://www.fbi.gov/about-us/lab/forensic-science-communications/review/2009_04_review02.htm.; *see also*, *Nelson v. Zant*, 405 S.E.2d 250, 252, 261 (Ga. 1991). Contrary to the science showing that such comparisons are of limited value, the State’s expert testified that the hair fragment was “microscopically similar to the known arm hair.” 59 RP May 23, 1991 at 49. Such a conclusion is inappropriate with only an arm hair fragment. *Id.*; Scientific Working Group on Materials Analysis *Forensic Human*

e.g., United States Department of Justice letter dated May 4, 2013, available at: <http://www.scribd.com/doc/139767216/DOJ-Letter-Manning-case> (“[S]ince a statistical probability cannot be determined for a 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.**”); see also, SWGMAT Guidelines, at 12 (“Opinions about the racial origin of a hair should be formulated with caution.”).

The State amplified the impact of this racialized presentation of evidence by arguing at trial, as it does now, that no “benign” or “innocent” explanation exists for the victim, a white girl, to have contact with a source of Negroid hair. State’s Response at 38. It did so despite knowing that the victim had direct contact with an African American child, and likely other contact as well. *Gentry*, PRP at 13-14.

The only exoneree in Washington from death row, Benjamin Harris, is African-American.¹⁴ This is no anomaly. Nationally, African American defendants are more likely than their white counterparts to be erroneously convicted of capital offenses. Talia Roitberg Harmon, *Race*

Hair Examination Guidelines, 7 FORENSIC SCI. COMM. 2005, 18-19, available at http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/april2005/standards/2005_04_standards02.htm (hereafter SWGMAT Guidelines).

¹⁴ See e.g., <http://www.deathpenaltyinfo.org/innocence-cases-1994-2003#70>.

For Your Life: An analysis of the role of race in erroneous capital convictions, 29 CRIM. JUST. REV. 76, 78 (2004). Overall, African Americans make up at least 40-57% of all death row exonerations. Karen Parker et al., *Racial Bias and the Conviction of the Innocent*, in *Wrongly Convicted: Perspectives on Failed Justice* 114, 127 (Westervelt & Humphrey eds., 2001).¹⁵ Both race of the defendant and race of the victim are correlated to the likelihood of wrongful conviction. Harmon, *Race for Your Life*, *supra*, at 88. The risk of wrongful conviction is greatest not only when the defendant is nonwhite, but also when the victim is white. In particular, nonwhite defendants convicted of killing white victims are the largest and most overrepresented category of exonerees. *Id.* at 87. This context highlights the need for extra vigilance here.

III. Gentry is entitled to relief because of the injection of racial bias in this case under any application of the *Monday* standard.

Ample evidence shows that racial bias infected this case and the Court should grant relief under both of the formulations of the *Monday* standard for capital cases urged in this brief. Under the first formulation,

¹⁵ See also, *Racial Bias and the Conviction of the Innocent*, in *Wrongly Convicted: Perspectives on Failed Justice* 114, 127 (Westervelt & Humphrey eds., 2001). (Although the true number of wrongful convictions is not known, African Americans comprise large percentage of death row exonerations). Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 66 (2008) (African Americans are disproportionately large number of exonerees, even after accounting for their overrepresentation among prisoners and murder convicts).

the Court determines whether – after close scrutiny of the facts – the State has proved, beyond a reasonable doubt, that the racially tainted presentation of the evidence by the prosecution did not affect the jury’s guilt or penalty deliberations. The answer here must be no, because the “Harlem ethics” statement by the elected prosecutor was unquestionably a racially offensive and discriminatory remark. *Gentry*, 125 Wn. 2d at 612, 888 P.2d at 1131. Even though the jury never heard it, it places in proper perspective each piece of racially-biased and -infused evidence the jury did hear, and whether the State has proven those pieces as a whole to be harmless beyond a reasonable doubt.

The prosecutor’s expressed bias only troubles more when considered appropriately in the context of an interracial capital trial against an African-American defendant, tried by an all-white jury. The prosecution’s pursuit of a racialized theory of guilt cannot be considered harmless when he heavily relied on the “negroid” so-called hair match, made the decision to offer the jury a justification for racial hatred by one of the State’s star witnesses, and emphasized the defendant’s purported use of the word “bitch” - all separately subtle, “but just as insidious” references. *Monday*, 171 Wn. 2d at 678, 257 P.3 at 557. “Like wolves in sheep's clothing, a careful word here and there can trigger racial bias.” *Id.*

The need for reversal is equally clear under the second

formulation: under this approach, this Court must reverse if the State cannot prove that the prosecutor, as a decision maker, was free of racial bias. In this way, the Harlem comment is decisive. The Court cannot be sure that the discriminatory biases of the prosecution, revealed through an off-the-cuff discriminatory remark, did not affect his decision to seek the death penalty in this case. Race based “‘humor’ is by its very nature an expression of prejudice on the part of the maker.” *Heller*, 785 F.2d at 1527. The prosecution’s remarks and actions in this case undermined “the impartial decision-making that both the Sixth Amendment and fundamental fair play require,” *Id.* Justice requires reversal.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court reverse Gentry’s conviction and death sentence.

Respectfully submitted this 6th day of June, 2013.

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