

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
-Apr.06, 2012, 8:08-am-
BY RONALD R. CARPENTER
CLERK

4-5-12
4:59 pm

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

E CDL
RECEIVED BY E-MAIL

NO. 58415-0

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN GENTRY,

Appellant.

NO. 86585-0

In re the Personal Restraint of

JONATHAN GENTRY,

Petitioner.

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

RESPONSE TO PRP AND MOTION TO RECONSIDER APPEAL

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Timothy Ford
Ste. 1500, 705 2nd Ave
Seattle, WA 98104

A copy of this brief was sent via U.S. Mail or the recognized system of interoffice communications to petitioner or petitioner's counsel, as noted at left.
I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED March 26, 2012, Port Orchard, WA *Ronald*
Original filed at the Supreme Court, P.O. Box 40929, Olympia WA 98504-0929

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF the ISSUES1

II. RESPONSE TO PRP AND SUMMARY OF ARGUMENT1

III. STATEMENT OF THE CASE.....3

 A. PROCEDURAL HISTORY3

 B. FACTS4

 1. Cassie's disappearance.....4

 2. Crime-scene processing9

 3. Autopsy13

 4. Further investigation18

 5. Forensic evidence35

 a. Fiber analyses.....36

 b. Blood splatter analysis36

 c. Hair analyses37

 d. Blood marker and blood type testing.....40

 e. Sentencing information41

IV. AUTHORITY FOR PETITIONER'S RESTRAINT44

V. ARGUMENT44

 A. GENTRY'S PETITION IS UNTIMELY AND HE FAILS TO SHOW THAT *MONDAY* SHOULD BE RETROACTIVELY APPLIED ON COLLATERAL REVIEW.....44

 1. Gentry's petition, filed more than 15 years after his conviction became final, is untimely.45

 2. The "new law" exception to RCW 10.73.090 does not apply to Gentry's claim.46

a. Alleged systemic bias.....	53
b. Clem’s out-of-court comment to Robinson.....	57
c. Cross-examination of Dyste.....	62
d. Use of identification evidence	64
e. State’s closing argument	69
f. Other prophylactic measures.....	74
B. GENTRY FAILS TO SHOW HE IS ENTITLED TO COLLATERAL RELIEF.....	75
1. Monday is inconsistent with standards for collateral relief.....	76
2. Any purported misconduct would be harmless beyond a reasonable doubt.....	79
C. GENTRY FAILS TO SHOW ANY JUSTIFICATION FOR RECALLING HIS DIRECT APPEAL MANDATE	85
VI. CONCLUSION	87

TABLE OF AUTHORITIES
CASES

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986)	55
Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004)	51
Brown v. Vail, 169 Wn.2d 318, 237 P.3d 263 (2010)	4
Gentry v. Sinclair, 576 F. Supp. 2d 1130 (W.D. Wash. 2008)	4, 32, 45, 46
In re Benn, 134 Wash.2d 868, 952 P.2d 116 (1998)	83
In re Eastmond, ___ Wn.2d ___, ¶ 15 n.5, 2012 WL 340246 (Feb. 2, 2012)	92
In re Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999)	4, 75, 76
In re Grasso, 151 Wn.2d 1, 84 P.3d 859 (2004)	83
In re Greening, 141 Wn.2d 687, 9 P.3d 206 (2000)	56, 57
In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982)	82
In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984)	83
In re Lile, 100 Wn.2d 224, 668 P.2d 581 (1983)	82
In re Mercer, 108 Wash.2d 714, 741 P.2d 559 (1987)	83

In re Sims, 118 Wn. App. 471, 73 P.3d 398 (2003)	83
In re St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992)	50, 82
In re Woods, 154 Wn.2d 400, 114 P.3d 607 (2005)	81, 82
Kosten v. Fleming, 17 Wn.2d 500, 136 P.2d 449 (1943)	92
Lambrix v. Singletary, 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)	51
Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999)	60, 63, 89, 90
Reeploeg v. Jensen, 81 Wn.2d 541, 503 P.2d 99 (1972),	92
Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)	54
Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)	52, 53, 54, 55
Shumway v. Payne, 136 Wash.2d 383, 964 P.2d 349 (1998)	92
State v. Abrams, 163 Wn.2d 277 30, 178 P.3d 1021 (2008)	50
State v. Edmondson, 43 Wn. App. 443, 717 P.2d 784 (1986)	58
State v. Evans, 154 Wn.2d 438, 114 P.3d 627,	50
State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993)	59

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)	passim
State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)	71
State v. Hanson, 151 Wn.2d 783, 91 P.3d 888 (2004)	51
State v. Lord, 117 Wash.2d 829, 822 P.2d 177 (1991)	59
State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011)	2, 3, 55, 67, 85, 93
State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968)	71
Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989)	50, 51, 55

STATUTES

RCW 10.73.090	49, 50, 91
RCW 10.73.090(1)	49
RCW 10.73.090(3)(b)	50
RCW 10.73.100(6)	50
RCW 10.73.170	4

RULES

RAP 2.5(c)	91
RAP 12.4(b)	91
RAP 12.9	92
RAP 16.4(d)	91

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Gentry has met his burden of showing that the untimeliness of his petition should be excused?

2. Whether *State v. Monday* is a new rule of law that should not apply retroactively on collateral review?

3. Whether *Monday* should be applied on collateral review, where the petitioner traditionally has the burden of establishing prejudice, even when prejudice would be presumed on direct appeal?

4. Whether Gentry fails to show that his trial prosecutor flagrantly or apparently intentionally appealed to racial bias in a way that undermined the defendant's credibility or the presumption of innocence, which is the condition precedent for application of the prejudice standard in *Monday*?

5. Whether under any standard the record fails to show that there was any prejudice to Gentry right to a fair trial flowing from any alleged misconduct?

6. Whether Gentry shows any justification for recalling the direct appeal mandate in this case?

II. RESPONSE TO PRP AND SUMMARY OF ARGUMENT

The State respectfully moves this court for an order dismissing the

petition with prejudice because it is untimely and without merit.

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 seeks to revisit issues rejected in his direct appeal. Gentry argues that this Court's recent decision in *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), requires the Court to revisit his conviction.

State v. Monday, however, 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.

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 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.

It follows 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 follows that *Gentry* presents no reason for consideration of issues already rejected on direct appeal. Finally, it also follows 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.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gentry was charged in 1990 with first-degree aggravated murder. CP 168.¹ Following a trial and conviction, he was sentenced to death. CP 2757.

Gentry appealed, and this Court affirmed. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). The direct appeal

¹ *Gentry*'s motion to incorporate the direct appeal record herein was granted on January 6, 2012. References to Clerk's Papers and Reports of Proceedings are to that record.

mandate issued on October 5, 1995. Gentry thereafter filed a prior personal restraint petition in this court, which was also denied. *In re Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999).

In 1999, Gentry filed a federal habeas corpus petition, which was ultimately denied. *Gentry v. Sinclair*, 576 F. Supp. 2d 1130 (W.D. Wash. 2008). That case is presently pending before the Ninth Circuit Court of Appeals. *Gentry v. Sinclair*, No. 09-99021.

Gentry also unsuccessfully challenged the State's lethal injection protocol, *See Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010). He also obtained an order for DNA testing pursuant to RCW 10.73.170. That proceeding is pending at this time.

B. FACTS

1. Cassie's disappearance.

On Saturday June 11, 1988, twelve-year-old, Cassandra "Cassie" Holden, flew from Pocatello, Idaho, to visit her mother and step-brother in Bremerton, Washington. 52RP 3664, 3692, 3697.² Cassie lived in Pocatello, Idaho, with her father, Frank Holden, and her step-mother, Diane Holden. 52RP 3664, 3697.

² On December 10, 1992, in Gentry's direct appeal proceedings, the Court granted the parties' agreed motion for order establishing citation form for verbatim report of proceedings. Attached to the motion was a "Gentry Transcript Register" or key. For ease of reference the State will follow this key in its citation to the report of proceedings from Gentry's direct appeal. A copy of the key is attached hereto as App. C.

Cassie's mother, Teresa Jean Hanson, and her step-brother, Jamie, picked Cassie up at the SeaTac airport at around 3:00 p.m., and then went to Hanson's Bremerton home. 52RP 3698, 3710. Hanson's home was a duplex on 6482 Haneberg Lane in Kitsap County. 52RP 3696. This duplex, as indicated on Exhibit 1,³ is near the Rolling Hills Golf Course. 52RP 3648.

At approximately 6:00 p.m., after Cassie unpacked her things, Hanson drove Jamie and Cassie to Skateland skating rink. 52RP 3698-99. Jamie and Cassie walked home from the rink, which is behind the golf course, at approximately 8:30 p.m. 52RP 3699. The path they took home cuts through to the golf course, and then actually cuts across the golf course. 52RP 3699, 3711; 53RP 3743-44. This path is routinely traveled by children cutting between McWilliams Road and the skating rink. 53RP 3801. Cassie specifically noted the ferns and flowers that were growing along this path, and commented on them to Jamie. 53RP 3746.

Sunday, June 12, 1991, was spent by Cassie, Jamie, and Hanson at the Illahee Park beach. 52RP 3700. Cassie spent the day in Hanson's presence. 52RP 3710.

On Monday, June 13, 1991, Cassie, Jamie, and Hanson spent the day in Poulsbo, going through gift shops and looking at the boats. 52RP 3700.

³ Exhibit 1 was a scale diagram of an area of Central Kitsap County, approximately one mile North of the Northeast Bremerton City limits. 52RP 3645-46.

Cassie dressed for this outing in jeans with little zippers up the sides, a blue sweatshirt, a T-shirt, interchangeable earrings that had gold around them with white centers, and pink slip-on tennis shoes, and glasses. 52RP 3704, 3713. Cassie had not previously worn the sweatshirt and jeans in Washington state; they came directly from her suitcase. 52RP 3713-14.

Cassie, Hanson and Jamie returned home from Poulsbo at approximately 4:00 p.m. 52RP 3701. Cassie ate some cantaloupe and pineapple, and then indicated she wanted to go exploring. 52RP 3701. Cassie left home, wearing the same clothing she had worn in Poulsbo, at approximately 4:30 p.m. to go for a walk. 52RP 3704, 3713. Jamie left at the same time to go to a friend's house. 52RP 3701-02. Both children were advised to be home by six for dinner. 52RP 3702.

Hanson had dinner ready at six as planned, but only Jamie was there. 52RP 3702. Hanson became immediately concerned about Cassie's absence because Cassie was the type of child who ordinarily was on time. 52RP 3702-03. Hanson walked around looking for Cassie, while calling her name. When this did not produce any results, Hanson got in the car and drove around the neighborhood. 52RP 3702. During this search, Hanson kept going home to check whether Cassie had arrived. 52RP 3703.

After her search was unsuccessful, Hanson called the police to report Cassie's disappearance. 52RP 3703. Deputy Glenn Heisler responded and

arrived at Hanson's house, while it was still light out, at approximately 8:52 p.m. 52RP 3718, 3721. Deputy Heisler obtained a description of Cassie and what she was wearing which was broadcasted via police radio to other patrols and law enforcement agencies. 52RP 3718. Deputy Heisler spent 30 to 45 minutes searching the area around the golf course and the roller skating rink without success. 52RP 3719-22. He stopped when the light failed, and turned the matter over to his supervisor and the Kitsap County Search and Rescue team. 52RP 3719-20.

Search and rescue teams from Kitsap, Thurston, Pierce, King, and possibly Skagit and Jefferson Counties scoured the area around the Rolling Hills Golf Course looking for Cassie beginning in the early morning hours of June 14, 1988. 53RP 3734, 3740. In addition to the people scouring the golf course and wooded areas to the West of the golf course, walking patrols consisting of reserve officers, Sheriff's cadets, and U.S. Navy personnel, checking the nearby residential areas. 53RP 3735, 3741-42, 3745-46.

Hanson and Jamie assisted the search and rescue efforts by making up and distributing flyers of Cassie. 52RP 3704-05; 53RP 3743; Ex. 3. Jamie also took Detective Pendergast and Sergeant Wayne Gulla along the trails he and Cassie used to get home from Skateland on June 11, 1988, because Cassie had expressed an interest in going back to that location to gather flowers and ferns. 53RP 3743-44, 3746-47; 55RP 187. The search

participants worked late into the night with no success. 53RP 3735.

The search was resumed early in the morning on June 15, 1988. 53RP 3736, 3763, 3777. A search and rescue team from Thurston County located Cassie's body between 9:00 a.m. and 10:00 a.m. 53RP 3764, 3808; 55RP 188. Hanson was promptly notified of this fact. 52RP 3706.

Eldon Kelly and Charles Garner located Cassie's body when they saw something purple through the bushes. 53RP 3764; 64RP 4410. Her body was in a small clearing, in the woods, approximately 148 feet from the trail. 53RP 3764-65; 56RP 102. The underbrush, foliage, and trees in the area where Cassie's body was found is exceptionally thick, blocking out most sunlight. 53RP 3794-95. This underbrush effectively shielded Cassie's body from persons on the trail. 52RP 3660; 53RP 3765, 3795.

Kelly notified James Faustina, the field and operations leader for his area, of their find. 53RP 3765, 3778. Garner, meanwhile, "secured the scene" by preventing anyone from nearing Cassie's body or from disturbing the bushes and other undergrowth. 53RP 3766. Kelly remained at least 10 feet away from Cassie's body. 53RP 3766. They did not touch Cassie's body. 53RP 3766, 3780-81; 64RP 4410-11.

Once Faustina learned that Cassie's body had been found, he directed all the searchers to remain in their areas and to stand by for further instructions. 53RP 3778-79. Faustina went to Kelly's location, and

personally viewed Cassie's remains. 53RP 3779-80. Faustina got within three feet of Cassie's body, but he did not touch her body at all. 53RP 3780.

Cassie did not appear alive to the searchers. 53RP 3767; 64RP 4412. She was on her back, her left arm was up over her head, and her eyes were open. Cassie's pants were pulled down to approximately mid-thigh. Her shirt and bra were up over her chest. Injuries to the left-side of Cassie's head were clearly visible. Exhibits 16, 17, 19, 20, and 25, are a fair and accurate representation of how Cassie appeared when her body was found on June 15, 1988. 53RP 3767-69, 3781, 3798, 3810-11; 64RP 4411-12; 55RP 225-26, 260-61; 68RP 4655-57.

Faustina notified law enforcement of the location of Cassie's body. 53RP 3782. They immediately closed off the area adjacent to Cassie's body and arranged for the searchers to depart. 53RP 3792-93, 3809.

2. Crime-scene processing

Crime scene investigators carefully scoured the area for evidence and closely scrutinized the ground upon which Cassie's body laid. The ground immediately adjacent to Cassie's head was splattered with blood, and blood had leaked onto the ground below her head. 55RP 288. Blood saturated the ground directly below Cassie's head to a depth of 10 inches. 56RP 15.

A large stick from a fallen branch extended beneath Cassie's head. 55RP 288; Ex. 30. An unidentifiable, bloody, partial finger or palm print was

found on this stick at a spot Cassie could have reached from her position on the ground, and in fact, her hand was lying adjacent to that portion of the stick. 55RP 242-47. The portion of the stick that was directly below Cassie's head was broken in two or three places. 55RP 289; 56RP 63-64. The broken pieces and Cassie's head rested in a 2 to 3 inch deep depression that was of the same overall size and shape as Cassie's head. 55RP 289; 56RP 65-66. Several blue fibers were located in this immediate area. 56RP 115, 120-21.

Cassie's eyeglasses, Ex. 11, were located on the 3-foot wide trail by Sheriff Pat Jones. 52RP 3706; 53RP 3795, 3848-49. Scuff marks near the glasses indicated that a struggle possibly occurred at this location. 68RP 4663. If a person were to stand on the trail at the point where Cassie's glasses were found, s/he could see 50 to 100 feet to the north, but not very far to the south because the trail slopes downward. 53RP 3796, 3813-14; 55RP 258.

Cassie's earring, Ex. 12, was found on the West side of the trail, near where her glasses had been found. 68RP 4683-84; 52RP 3706. A small bunch of flowers were found on the trail, 10 feet away from Cassie's glasses. 53RP 3855-56; 56RP 90; 68RP 4667; Ex. 21-22. Flowers similar to those in the bouquet were not seen growing in the immediate vicinity of Cassie's glasses. Similar flowers were found north of this area along the trail, but not to the south. 53RP 3857; 68RP 4668-70; Ex. 23.

A 2.2 pound rock, Ex. 31, was located by Detective Denis on June 17,

1988, at the base of a Maple tree that stood approximately 45 feet from the trail. 53RP 3837-38, 3862; 54RP 106; 55RP 303-04; 56RP 96-102; Ex. 32. The exact location is marked with a blackened dot on Ex. 2. 56RP 96. Ex. 31 rock stood out from its background, because the other rocks were noticeably smaller. 53RP 3863. Rocks, that varied from grapefruit size to pebbles, however, could be found around the trail to the north of Cassie's glasses. 53RP 3800, 3850. Ex. 31 was also noteworthy because it had blue material imbedded in it and reddish spots. 55RP 267-70; 56RP 97; Ex. 23. No fingerprints were found on Ex. 31 which was not unusual, given its texture. 55RP 273.

Reddish spots were found on the underbrush near where Cassie's glasses were found. 53RP 3851; 56RP 12. These spots were tested with a chemical called phenolphthalein, which will react with blood. 53RP 3852. The phenolphthalein reacted positively with these spots. 53RP 3852.

Attempts were made to locate the route Cassie's assailant had taken between the spot where Cassie's glasses had been found and where her body was dumped. 55RP 291, 296; 68RP 4673. A chemical commonly referred to as "luminol", which reacts with blood by glowing, played a major part in this portion of the investigation. The luminol revealed a definite path that varied in width from 2 feet to just 4 or 5 inches. 55RP 292-98; 56RP 9-10, 54. The accuracy of this path was confirmed when the investigators found a red

substance on the surrounding ground and foliage that resembled blood and which reacted positively with two chemicals, tetramethyl benzidine and phenolphthalein, that are regularly used to test for the presence of blood. 55RP 298-302. This path is denoted with red ink on Ex. 2. 55RP 302.

The path, starting at the top of Ex. 2, near the trail, curves downhill to the base of a large maple tree. 55RP 302. This 23 foot portion of the path passed two alders, that appear on Ex. 2 as two open blue circles. 55RP 101. The southern most of the two alders had a big smear of red substance that extended from the bottom of the tree to a height of four-and-a-half feet. 55RP 302. Huckleberry bushes along the edge of this trail were speckled with blood. The luminal made this section of the path look like a starry sky. 55RP 302-03; 56RP 10-11.

At a point 45 feet from where Cassie's glasses were found, near the big maple tree, the luminal glowed particularly heavily. 56RP 15, 99-102; Ex. 2. Several leaves, that were between 6 and 8 inches in diameter, lay crumpled on the ground at this spot. These leaves looked as if they had been discarded after a person had used them to wipe his hands, and they were saturated with a red substance. 56RP 16-17. The moss on the base of the maple tree also glowed heavily with the luminal. 56RP 12-13.

The luminal trail eventually crossed the large, three to four foot diameter log depicted in Ex. 2. 55RP 261. Footprints adjacent to the log,

and other signs indicated that a person had crossed over the top of the log. 55RP 262-66; Ex. 26-28; 56RP 13-14.

3. Autopsy

An autopsy was performed on Cassie's body by Dr. Stuart Myster to determine the cause of death. 54RP 38. There was a considerable odor to Cassie's remains due to decomposition. 54RP 41. Her body was partially clothed, and there was a lot of external material, such as leaves, twigs, sticks, and insects, attached to the body. 54RP 41, 55-56; Ex. 34-35.

Cassie's clothing was carefully removed from her body, and packaged for transmittal to the crime laboratory. 54RP 42; 55RP 277-83. She was wearing a blue sweatshirt that had been removed from one arm. This sweatshirt was pulled up over Cassie's head, leaving her chest bare. Cassie had on a multi-colored T-shirt that was also pulled up above the breasts. Cassie's bra was more or less across the nipple line. Cassie's jeans were mid-thigh. Her panties were at the lower end of the thigh below the level of the jean's waist. 54RP 41-42, 51-52.

Cassie's body, which measured 65 inches in length and weighed approximately 115 pounds, revealed significant areas of purplish or bluish discoloration. 54RP 53-54, 57. These discolorations, which are referred to as lividity, generally relate the position of the body at the time of death. 54RP 54. Lividity was visible in the small of Cassie's back around her

shoulders, her buttock, the back of her thighs, and the upper portion of her legs. 54RP 59-62; Ex. 36, 37, 38, 39, 40, 41. This pattern of lividity was consistent with Cassie being killed in the position her body was found in at the crime scene. 54RP 62-53.

There was a bruise across the top of the bridge of Cassie's nose, and a fracture of the nasal bones. This injury, which can be seen in Ex. 43, was the result of a blunt trauma. 54RP 65-67. Significant discoloration appears around Cassie's eyes. The ring shaped bruises, commonly referred to as "raccoon eye", can be caused by blows to the head that do not cause any lacerations or other blunt trauma. 54RP 93-95; Ex. 33. "Raccoon eye" does not occur if the blow to the front of the face occurs after a victim is dead. 54RP 114.

Another small blunt trauma was sustained on Cassie's forehead, right between the eyebrows. 54RP 67. A very severe wound was inflicted to the right forehead, resulting in a triangular shaped injury. 54RP 67-68; Ex. 44. Brain matter was found mixed with Cassie's hair near this injury, and the bone fragments found at the crime scene correspond to this injury. 54RP 67-72; Ex. 17, 18.

Cassie's head was shaved to get a better view of the injuries. 54RP 72-73. Viewing her shaved head from the right, five to six separate wounds can be seen. 54RP 73-74; Ex. 46. Behind Cassie's right ear is a penetrating

blunt injury that exposed bone. 54RP 74-75; EX. 47. The injury behind Cassie's ear, which measured about two-and-one-half inches square, could possibly have rendered Cassie unconscious, but would not, in and of itself, result in her death. 54RP 76, 81. A small laceration appears towards the top of Cassie's head on the right side. This wound did not penetrate Cassie's skull and while it might have rendered her unconscious, it would not have killed her. 54RP 77-78, 81-82; Ex. 48.

The wound to Cassie's right forehead penetrated the skull, allowing brain tissue to be seen. 54RP 74, 87. This injury could, in and of itself, kill Cassie. Death would have resulted in less than five minutes. 54RP 88; 70RP 4898-99. Blue fibers were found in this wound. The presence of blue fibers indicates that Cassie's sweatshirt was pulled up over her right forehead when the blow that cause this wound was inflicted. 54RP 95, 128-31, 152; 70RP 4933. The sweatshirt would prevent the attacker from being splashed by blood from this wound. 54RP 159-60.

From the back of Cassie's head, additional injuries can be seen. 54RP 78; Ex. 49. Slightly below the right ear abrasion is a blunt trauma laceration that exposes the skull bone. This could possibly render Cassie unconscious, but would not have killed her. 54RP 79-80. One explanation for these injuries is that Cassie's assailant struck her from behind. 54RP 151.

The left back side of Cassie's head contains a large gaping wound in

which brain tissue is visible. 54RP 69-70, 84-85; Ex. 45, 50. This wound is accompanied by a shifting of the pieces of bone that form the top of the skull. 54RP 84-85. The complexity of this wound precluded a determination of whether it was caused by one or two blows. 54RP 87; Ex. 51. This injury, in and of itself, could have killed Cassie within a matter of minutes. 54RP 87-88; 70RP 4898-99. The extensive pattern of complex fractures only truly becomes visible after Cassie's scalp is reflected. 54RP 96-97; Ex. 54.

The left side of Cassie's head reveal fewer injuries. A light, scraping type abrasion is visible slightly above the ear. A small tear was sustained to the left ear. 54RP 89; Ex. 52. Cassie's lower, left ear lobe was also lacerated. 54RP 90; Ex. 53. This second tear could have been caused by the forceful removal of a pierced earring. 54 RP 90.

Looking at the top of Cassie's head, one can see a laceration that penetrates the scalp, but not the skull. 54RP 91; Ex. 57. This injury could have rendered Cassie unconscious, but would not have caused her death. 54RP 91-92.

The above injuries to Cassie's head could not have been caused by one blow, because of the distance between them. 54RP 104-05. In fact, between eight and fifteen separate blows would have been needed to cause all of these wounds. 54RP 115; 70RP 4928-29. The order in which these blows were struck or the length of time needed to inflict all of Cassie's injuries

cannot be determined with any specificity. 54RP 64; 70RP 4936-37. Cassie's head injuries could have been inflicted when she was standing up, sitting down, or lying down. 54RP 139-40.

An object of considerable weight, such as the rock found by Detective Denis, Ex. 31, would be needed to inflict Cassie's head wounds. 54RP 105-08. The force needed to cause Cassie's deepest head injuries is consistent with a car striking a pedestrian or a person falling from a great height, hitting the ground head-first. 70RP 4936-37.

Superficial abrasions appear on Cassie's neck. The marks were not consistent with a strangulation attempt, but could have been caused by a tightening or rubbing of Cassie's T-shirt. 54RP 58, 63-64, 85; Ex. 50. Cassie had a circular "poke" injury to the inside of the elbow and other scratches and abrasions that would be consistent with her body being carried or dragged through underbrush, twigs, and bushes. 54RP 92-93; Ex. 42. Additional small scratches appear on Cassie's back. Ex. 36, 37, 39; 42RP 116-17.

Cassie's genitalia was examined for signs of sexual intercourse. 54RP 109. There were abundant maggots in the area of the external genitalia. 54RP 109. No trauma to the external genitalia was visible, but this does not rule out the possibility of sexual intercourse. 54RP 109-10. No evidence of sperm or seminal fluid was found, but this could be the result of the decomposition caused by the warm weather in the days leading up to the

discovery of Cassie's body and insect activity. 54RP 110-12, 147. Cassie's anal area had no visible injuries, but the anus was "loose." This "looseness" could have been caused by the putrefaction. 54RP 112.

4. Further investigation

The detectives contacted many people during their investigation of Cassie's death. Fred Buxton, a Puget Sound Naval Shipyard welding instructor, called the Kitsap County Sheriff's Department on June 16, 1988, after reading about the investigation in the newspaper. 53RP 3815; 57RP 181-82, 197-98. Buxton and a friend, Charlie Ginther, had been riding mountain bikes on the trail where Cassie's glasses were found on June 13, 1988, and Buxton thought he might have seen something that could assist in the investigation. 57RP 172, 182-85, 197.

Buxton and Ginther quit work at the shipyard on June 13, 1988, at 4:20 p.m. 57RP 172, 183. They rode their bikes the 2 to 3 miles from the shipyard to the trails outside the Rolling Hills Country Club, enjoying the warm, sunny day. 57RP 172, 185-86. The two men entered a trail head at Riddell Road at approximately 4:45 p.m., and followed the trail to the golf course clubhouse. 57RP 173-74, 187-88. Their route is depicted in orange on Ex. 1. 57RP 174-75. Buxton and Ginther remained in the clubhouse parking lot for 3 to 5 minutes, drinking water and talking. 57RP 176, 189.

Buxton and Ginther left the clubhouse parking lot at approximately

5:05 p.m., to return to Riddell Road. 57RP 176, 189. During this return trip, the two men stopped on the path, at the place marked with a blue circle on Ex. 1, so that Ginther could adjust his pant legs. 57RP 176-77, 189. After this brief pause, the two men continued along the path to Riddell Road. 57RP 189-91. Upon reaching Riddell Road the men said their goodbyes, and then parted company between 5:15 p.m. and 5:25 p.m. 57RP 177, 191. Ginther left for his home at this time, while Buxton reentered the trail. 57RP 177, 191.

Buxton, taking the path marked on Ex. 1 in green, headed toward McWilliams Road. 57RP 191. At a steep, rugged area of the path, marked with a green "x" on Ex. 1, Buxton saw an individual, he had never seen before, standing directly ahead of him on the side of the trail. 57RP 192-94. This spot is approximately 40 yards from where Cassie's body was found. 53RP 3818. Buxton puts the time of this encounter at 5:30 p.m. 57RP 194.

Buxton had two opportunities to observe this individual, the first when Buxton was 45 feet away and the second when Buxton was 20 feet away. 57RP 192-93. Buxton, who occasionally draws portraits, described the individual as a black male with a clean shaven face and very distinctive eyes. 57RP 194-95. The black man was approximately 6 feet tall and had sloping shoulders. 57RP 195. Buxton estimated this man's age as late twenties to mid-thirties. 57RP 195.

The stranger's clothing was out of place for the day, as the clothing appeared too warm for the weather. 57RP 195-96. Most of his attire was loose fitting and drab-colored. 57RP 195. The black man was wearing some sort of long-sleeved coat or shirt that opened in the front, and long pants. 53RP 3819, 3824-25, 3828-29; 57RP 195-96. His clothing was somewhat ruffled in appearance. 57RP 196.

The stranger appeared to be "just kind of hanging out, not going anywhere." 57RP 196. This seemed somewhat odd to Buxton, since most people on these trails seem to be "going somewhere." 57RP 196. Although Buxton greeted the stranger by saying "Hi", the stranger did not verbally respond. 53RP 3820; 57RP 196-97. The investigating officers easily recognized the potential importance of Buxton's information, and they contacted Buxton on a number of occasions to obtain additional details. 57RP 198-99. During one of these contacts, Buxton was shown a photo montage without success. 57RP 199-200. Gentry's photograph was not included in this montage. 57RP 200.

On another occasion, Kitsap County Sheriff's Detective Wright made arrangements for Buxton to meet with Thurston County Sheriff's Detective Schoening to make a composite sketch of the man Buxton had seen on the trail. 58RP 3891-92; 68RP 4677-79. Buxton was taken to Detective Schoening's Olympia office on June 24, 1988, by Detective Smed Wagner.

56RP 104-05; 57RP 201; 58RP 3892. During this drive, Buxton and Detective Wagner discussed the man he had seen on the trail, and for the first time Buxton recalled that the stranger had been wearing a hat. 56RP 105-08; 57RP 201-04. Buxton described this hat as being low profiled, with a small bill like a golfer's cap or welder's type hat. 57RP 203-04.

Detective Schoening met with Buxton alone, so that Detective Wagner would not inadvertently influence the drawing. 57RP 205; 58RP 3892-93. At the beginning of the session, Detective Schoening explained how a composite drawing is done. 57RP 205; 58RP 3890-91. Buxton was told by Detective Schoening to focus on facial features, and not to worry about hair, clothing, or other things a suspect can readily alter. 57RP 205-06; 58RP 3896-97. The composite drawing, Ex. 63, most accurately depicts the stranger's eyes. 57RP 206-07; 58RP 3898-900, 3912, 3915; Ex. 63A. This composite drawing was released to the local newspapers at the end of July or very first part of August, 1988. 68RP 4684.

About one month after Cassie's death, Eilene Starzman, an Indian Educational Cultural Liaison Officer, phoned the Kitsap County Sheriff's Department after seeing the composite drawing of a gentleman the police wanted to question with regard to Cassie's disappearance. 57RP 150, 158, 165-66. This phone call was the first of many contacts between Starzman and various investigators. 55RP 196-97, 235-36.

In June of 1988, Starzman lived on Charlie Johnson Road near the Rolling Hills Golf Club with her husband, her daughter, and her foster son. 57RP 142-43; see also Ex. 1. Because of her home's proximity to the Rolling Hills Golf Club, Starzman became aware of the June 14, 1988, search for Cassie. 57RP 143-44. When Starzman saw a notice in a later newspaper asking people to come forward with anything unusual they noticed in the area around the time of Cassie's disappearance, no matter how unimportant they may think it was, Starzman thought back to what she had been doing on June 13, 1988. 57RP 144, 165-66.

Starzman recalled that she and her daughter, Katharyna Tincher, had gone shopping on Monday, June 13, 1988. 57RP 144. As they returned home from the stores between 4:00 and 7:00 p.m., Starzman observed a gentleman walking across a "hump" in the road in a southbound direction. 57RP 144-45, 147.4 Although Starzman had lived in the neighborhood since 1975, she had never seen this particular individual before. 57RP 156.

The gentleman walked directly past Starzman's car window, affording her with a good opportunity to observe his attire and personal attributes. 57RP 147-48. The man's pace was steady and he appeared to be going somewhere. 57RP 149.

This man appeared out of place because, despite the warm weather, he was wearing a hat, sports jacket and slacks. 57RP 144-45; 55RP 194-96.

His clothing was somewhat scruffy, and in a light color such as tan. 57RP 145-46. The hat was unusual, shaped round like a baseball cap but with a smaller brim. 57RP 148. The gentleman, himself, was black, between 25 and 35 years old, and between 5'8" and 5'11" tall. 57RP 146-47.

Tincher's recollections parallel her mother's recollections to a large degree. Tincher recalls that she and her mother arrived home from shopping on June 13, 1988, between 4:00 and 6:00 p.m. 56RP 128. From the passenger seat of the car, Tincher saw a black man wearing a "weird hat", similar to that worn by people in English documentaries, and dirty clothes walk over a hump in the dirt road. 56RP 126-28. This man's apparel, consisting of a tan, gray, or light blue suit, slacks, and dress shoes, did not "fit in" with the neighborhood. 55RP 237-38; 56RP 126-28, 135-36. Although Tincher had lived in the same house for 16 years, this was the first time that she had ever seen this man. 56RP 124, 127.

Sometime after her first meeting with law enforcement, Starzman made efforts to discover who the man was that she saw on June 13, 1988. 57RP 154. Starzman spoke to her neighbors on her street and other acquaintances that lived in the general area. 57RP 154. Eventually, Starzman learned that this individual lived in the house labeled "Gentry residence" on Ex. 1. 57RP 156; 68RP 4692. Starzman relayed this information to Detective Wright. 57RP 156.

Detective Wright was escorted by Starzman to a house at the intersection of Wembley and Sheffield in August. 68RP 4692. The house located at 7320 Wembley Avenue was identified by Starzman as being the residence of the man she saw walking south toward the Rolling Hills Golf Course on June 13, 1988. 68RP 4692. This house was the residence of Edward and Juliette Gentry. 68RP 4693.

On August 15, 1988, Detective Wright went to the Gentry residence wherein he contacted a woman by the name of Moira Blanchard. 68RP 4693.

Blanchard referred Detective Wright to a hair styling salon named Tosh Maginnes. 68RP 4693. At the salon, Detective Wright met with Juliette Gentry. 57RP 262. During this meeting, Juliette produced a hat that belonged to her husband, Edward, from the trunk of her car. This hat, which is consistent with the hat Tincher, Starzman, and Buxton had described as being worn by the black man they had passed on June 13, 1988, was occasionally worn by Gentry. 56RP 83-84, 128; 57RP 148, 204, 263, 277; 58RP 3931; Ex. 65.

On August 16, 1988, Detective Wright and Detective Hudson went to the Gentry residence to serve a search warrant. 56RP 20; 68RP 4694. They were met at the residence by Juliette, who assisted them in locating Gentry's personal belongings. 56RP 21; 57RP 264-66; 68RP 4694. Included in the items Juliette gave to the detectives was a pair of gray oxford dress shoes.

These shoes were found at the base of the stairs, sitting on a plastic floor mat. 56RP 21-23; 57RP 264-65; 68RP 4694-95; Ex. 67.

Detective Wright and Detective Hudson met with Gentry on August 16, 1988, in the corrections facility to obtain hair samples. 56RP 30-31; 68RP 4696. The detectives told Gentry that they were there with relationship to the investigation into Cassie Holden's death and they informed Gentry that hair had been found on Cassie's body. 68RP 4717-78.

While the detectives were collecting the hair samples, Gentry struck up a conversation with the men. 57RP 252-53; 68RP 4697. Gentry discussed his whereabouts on the evening of June 13, 1988, during this conversation. 68RP 4697. Gentry initially indicated that he had been working on the day that Cassie Holden disappeared, but after Detective Wright indicated that Cassie had disappeared on a Monday, Gentry changed his mind and indicated that he might have been working the next day. 57RP 253; 68RP 4698. Finally, Gentry indicated that he had stayed home on the evening of June 13, 1988. 68RP 4702.

Once Gentry broke the ice by starting the conversation, the detectives asked him some questions. 57RP 253. Gentry was asked if he knew where the Rolling Hills Golf Course was located. Gentry initially professed ignorance of its location, but a moment later admitted that he knew where the golf course could be found. 57RP 253-54; 68RP 4699-700. Gentry admitted

to taking walks through the neighborhood surrounding his brother's house, but claimed that he avoided the trails because he once saw someone standing at the top of the hill with a gun. 68RP 4700-01. Gentry indicated that his normal route took him to the main road via an apartment complex parking lot. 68RP 4698-99.

Detective Hudson asked Gentry if he had cut himself, had a nosebleed, or been around a person or animal who had cut themselves and bled since the first part of May. Gentry responded that he had not. When Detective Hudson inquired whether Gentry was sure of that response, Gentry stated "I'm sure I was not around any source of bleeding." 57 RP 255; 68RP 4702.

Detective Wright recontacted Gentry on August 17, 1988, to get Gentry's signature on the search warrant form. 68RP 4702-03. During this contact, Gentry indicated that he had spent the evening of June 13, 1988, at home with his brother. Detective Wright informed Gentry that his brother, Edward, had left for sea on the 7th of June. 68RP 4703. Gentry responded to this information by stating that he had possibly walked into Bremerton to buy a fifteen pack of beer. Gentry recalled that he brought this fifteen pack of beer home, and that the neighbor behind his house saw him. 68RP 4704.

Detective Wright and Gentry discussed the gray dress shoes that had been seized from the Gentry residence on August 16, 1988. Gentry acknowledged

that the shoes were his. In fact, Gentry stated that he was the primary owner of the shoes, that he wore the shoes, that he did not loan the shoes out, and that he had purchased the shoes in Florida. 68RP 4704.

Finally the two men spoke again about the trail that leads to where Cassie's body was found. This time Gentry indicated that he had spoken about the trail with some employees at the Silverdale Hotel, but he did not recall these peoples' names and Detective Wright was never able to confirm the discussion. 68RP 4704-05. Gentry stated that he was aware that the trail could be entered from McWilliams Road, and he acknowledged that he knew the trail could be used to reach Bremerton. 68RP 4704-06. Gentry admitted to having been on this trail, which he referred to as "Devil's hole", in the past, but he claimed that he never went past the top of the hill. 68RP 4705-06.

Following this meeting with Gentry, Detective Wright began to recontact witnesses. 68RP 4706. He met with Starzman on August 18, 1988, to show her a photo montage containing five pictures of black men. 56RP 134; 57RP 151-52; 68RP 4706-07, 4756; Ex. 78. Starzman selected the fourth photograph from the top as being the man she saw when she came home from shopping on June 13, 1988. 57RP 151-52; 68RP 4707. This photograph is a picture of Gentry. 57RP 152-53; 68RP 4707.

Detective Wright took steps to confirm or rebut the information he received from Gentry. During this process, Detective Wright met again with

Juliette. Juliette, who is married to Gentry's brother Edward, welcomed Gentry into her Wembley house in February of 1988, and Gentry was living with her in June of 1988. 57RP 259-60, 264. When Gentry first moved to the area, Juliette and Edward showed him around the neighborhood. The Rolling Hills Golf Course was included in this tour. 57RP 269-70. According to Juliette, Gentry's normal mode of transportation was walking. 57RP 269-70. A neighbor, Donald Robinson, confirmed this fact. 58RP 3931-32.

Juliette was working at Tosh Maginnes on June 13, 1988, which coincidentally was Juliette's daughter's birthday. 57RP 266. Juliette had planned a family evening with ice cream and cake to celebrate her daughter's birthday. Juliette arrived home from work sometime after 6:00 p.m. on June 13, 1988. Juliette, who admitted that she had to pick her children up from their babysitter before she went home, could not recall if Gentry was at their Wembley residence when she arrived. 57RP 266-67. Juliette was able to tell Detective Wright that she had seen Gentry wiping off his gray shoes around the time Cassie was slain. 68RP 4715-16.

Cheryl Guinn, Juliette's children's babysitter, had a clearer recollection of the period between June 13, 1988, and June 15, 1988, than did Juliette. Guinn, who babysat for Juliette's children on the average of five times a week in June of 1988, was first told of Cassie's disappearance by

Juliette when Juliette came by to pick up her children on June 13th or June 14th. 57RP 298-99.

On June 15, 1988, Juliette and Gentry came to Guinn's home to pick up Juliette's children after the evening newspaper had been received. 57RP 300. This was not the first time Guinn had met Gentry. She had been introduced to Gentry in April of 1988, and came into frequent contact with him. 57RP 298-99. Guinn recollected that virtually every time she saw Gentry, he was wearing Edward's clothing. 57RP 300. Gentry was also clean shaven during this period of time. 57RP 303.

When Juliette entered the house, Guinn held up the newspaper and told her that they found the little girl's body. 57RP 301. Gentry, who had entered the house right behind Juliette, immediately asked "Do they have any clues? Was there any suspects?" 57RP 301. Gentry then jerked the newspaper from Guinn's hand as she was handing the paper to Juliette, taking the paper over to the sofa where he read the article. 57RP 301. After concluding the article, Gentry took Juliette's car to the liquor store for a bottle of Jack Daniel's. 57RP 301. When Gentry returned to Guinn's house with the liquor, he went directly to the kitchen to talk to Guinn. 57RP 301.

Detective Wright met with Edward Gentry. Edward, a cook on a U.S. Navy nuclear submarine, was out to sea on June 13, 1988. 57RP 274-75; 58RP 3927-28. Edward identified Ex. 65 as a hat his wife had given him as a

gift, that his brother, Gentry, occasionally wore. 57RP 276. Edward voluntarily provided Detective Wright with hair samples. 68RP 4716.

Detective Wright determined that the area behind Gentry's house was predominately wooded. 58RP 3936-37. He contacted the resident of the only house that reasonably could be considered to be "behind" the Gentry home. 68RP 4718-19. Timothy Meeson, a resident of this house, did not see Gentry carrying a fifteen pack of beer or any other item on June 13, 1988. 58RP 3936. Meeson was able to specifically recall events that occurred on June 13, 1988, because it was his son's birthday and he was finishing out his college exams. 58RP 3938-39.

Detective Wright contacted John Golbeck, the catering manager for the Silverdale Hotel. Golbeck had hired Gentry at the beginning of June of 1988. 58RP 3941. Golbeck checked Gentry's employment records, and determined that Gentry worked on June 10, 1988, and then was off until June 14, 1988. 58RP 3941; Ex. 73. Gentry's employment was terminated shortly thereafter on June 23, 1988. 58RP 3942. The reason for the discharge was that Gentry was growing a beard in violation of the dress code. 58RP 3942-43.

The investigation into Cassie's death was unexpectedly assisted in May of 1989, when Kitsap County Sheriff's Detectives White and Prendergast contacted a man, Brian Dyste, who had been incarcerated with

Gentry in June of 1988, about an unrelated crime. During this contact, Dyste indicated that he wished to disclose some admissions Gentry had made in relationship to Cassie's death. 55RP 193; 64RP 4438. Dyste came forward with this information because Cassie's murder was an "unspeakable crime" and not because of any personal "beef" with Gentry. 64RP 4442.

Detective Wright met with Dyste in September of 1989, to probe the actual depths of Dyste's knowledge. 68RP 4722. This meeting took place in the Kitsap County jail. 68RP 4723.

Dyste reported that while he was serving time for a number of burglaries in the Kitsap County Jail, he had an occasion to play cards with Gentry. 64RP 4436-37, 4439. This game was interrupted when Gentry was summonsed to meet with some detectives regarding Cassie Holden. 64RP 4439. Gentry returned from this meeting looking frustrated, angry and upset. 64RP 4439.

When Dyste inquired about Gentry's meeting with the detectives, Gentry responded by saying "They found my hair on the bitch." 64RP 4440. At this point, Dyste asked whether Gentry meant he had killed Cassie. Gentry mumbled this reply: "Yeah, I did, but they can't prove it." 64RP 4440. In subsequent conversations, Gentry never retracted this confession. 64RP 4460-61.

On June 14, 1990, after seeing a television report regarding Gentry's

murder prosecution, Timothy Hicks, an inmate at the Larch Correctional Center, contacted a staff member to tell the staff member that he had some information regarding Gentry's offense. 66RP 4476-78, 4481, 4491. Hicks, who was serving time for a number of crimes, indicated that he had been incarcerated at the Washington State Correctional Center in Shelton, with Gentry in December of 1989 to January of 1990. 66RP 4483-84, 4486-87.

Hicks reported that during this period of time, he, Gentry, Leonard Smith and Mark Johnson, were playing cards when a television program came on regarding Earl Shriver. 66RP 4487-88. This program generated a significant amount of discussion, during which Gentry volunteered that he was under investigation for a homicide in Kitsap County. 66RP 4488-89.

Gentry indicated that the homicide victim was a 10-year-old girl, and that Gentry had killed her because he thought she was leading him on. 66RP 4489. Gentry indicated that the murder occurred while he was living with his brother, whose house was kitty-corner, or directly across the street from the victim's house. 66RP 4489. Gentry also stated that the police were looking for clothes with blood on them. 66RP 4490. Gentry opined, however, that the police investigation would not result in his being charged with murder because the police believed his brother had committed the crime. 66RP 4489-90.

Hicks did not immediately come forward with this information

because he did not initially believe Gentry. 66RP 4490. Another concern for Hicks, who still had a lengthy prison term to serve, was that he did not wish to be labeled a "snitch" or "rat." 66RP 4491-92. Hicks indicated that he ultimately came forward because the offense involved a child, and because of changes Hicks had made in his life during the past four-and-one-half years. 66RP 4491-92. Hicks indicated that he had not requested any special favors or promises in exchange for coming forward, and that he did not expect to receive anything of that nature. 66RP 4491, 4496.

After Hicks came forward, steps were taken to locate the other people who had been playing cards with Gentry when Gentry made disclosures regarding Cassie's death. Leonard Smith was located in Oregon, where he was working as a meat cutter. 65RP 9. Smith indicated that he was serving time in the Shelton Correctional Center for possession of stolen property and burglary when Gentry and Hicks were also incarcerated there. 65RP 9-10.

Smith indicated that he often played cards with Gentry while in prison to kill time. 65RP 11-12. Smith recollects that during one game, after a television report about Shriener aired, Gentry stated that "Well, yeah, I killed my girlfriend." 65RP 12. After this statement, Smith left the table to go to the bathroom. 65RP 13. When he rejoined the game, Timothy Hicks or one of the other men at the table asked Gentry if he really did kill his girlfriend. Gentry answered this question with a "yes". 65RP 13.

Smith sought more information about this from Gentry when they went to their adjoining cells at lockup time. 65RP 14. Smith asked Gentry if he really killed her. Gentry responded to this by stating "Yeah, she was a bitch." 65RP 14. Smith brought the subject up one more time the next morning after everyone was released from their cells. This time, Gentry affirmed that he killed his girlfriend and disposed of her body. 65RP 14.

Smith did not come forward with this information prior to moving to Oregon because he did not want a "snitch jacket" and because he liked Gentry. 65RP 15. Smith was not promised anything in exchange for his testimony. 65RP 18, 39. Smith made the decision to testify against Gentry because he has kids the same age as Cassie, and if the victim had been one of his children, he would want people to come forward with any information they possessed. 65RP 18.

Detective Wright's investigation and the forensic evidence led to Gentry being charged with the premeditated murder of Cassie Holden. Gentry's appearance changed in the period between June 13, 1988, and Gentry's trial on this charge. Gentry gained 20 to 30 pounds, his face filled out and he grew a heavy beard. 56RP 43; 57RP 302-03; 68RP 4735. Buxton could not identify Gentry in court as the person he saw on the trail on June 13, 1988, at approximately 5:30 p.m., but Gentry's sloping shoulders and eyes are consistent with Buxton's memory of that individual. 57RP 207-

08.

On May 21, 1991, Starzman made an in-court identification of Gentry as the man who walked past her car on June 13, 1988. 57RP 149. Starzman's identifications were heavily based upon Gentry's eyes. 57RP 161, 165. Starzman and Buxton have never met, and they did not discuss their testimony with each other. 57RP 157, 207.

5. Forensic evidence

Cassie's clothing, a sample of her blood that was taken during the autopsy, and hair samples that were also gathered during the autopsy were sent to the Washington State Patrol Crime Laboratory for analysis. In addition, the crime laboratory received the rock, Ex. 31, that was suspected of being the murder weapon, and other trace evidence gathered from the crime scene. Finally, the Washington State Patrol Crime Laboratory received a sample of Gentry's blood, known hair samples from both Edward and Gentry, and the clothing collected from Gentry's house pursuant to the search warrant. 54RP 112-13; 55RP 284-87; 59RP 11-22.

The Washington State Patrol Crime Laboratory performed fiber, hair, blood splatter, ABO typing, and GM testing on the above items. See generally, 59RP 8-52; 60RP 3992-4039. The Washington State Patrol Crime Laboratory were assisted in their analysis by two private forensic laboratories which performed additional, more specialized tests on certain items. See

generally, 62RP 4074-4110; 71RP 4966-5042.

a. Fiber analyses

Michael Grubb of the Washington State Crime Patrol Laboratory performed the fiber analyses on these exhibits. Grubb determined that the blue material embedded in the rock, Ex. 31, was identical to fibers from Cassie's sweatshirt. 59RP 26-27. These fibers could not have become embedded on the rock by the rock merely rubbing against the sweatshirt. Rather, a significant amount of force would be needed to crush these fibers into the rock. 59RP 27-28.

b. Blood splatter analysis

Grubb, who had observed blood stain or blood splatter patterns on numerous occasions and who had attended numerous seminars on blood splatter interpretation, examined Gentry's gray dress shoes for signs of blood. 59RP 28-29, 32. A microscopic examination revealed numerous stains the color of blood on the shoes themselves, 20 splatters on the left shoelace and four splatters on the right shoelace. A tetramethyl benzene chemical test confirmed that the stains were consistent with blood. 59RP 33-34, 35. Another crime laboratory technician performed further tests to determine whether the blood was human. His results are reported infra. 59RP 34.

The gray shoes, which were made of vinyl, had a tendency to crack. Down inside these cracks or disrupted areas, Grubb was able to find blood.

59RP 34, 36. The locations of the blood stains is diagramed on Ex. 80. 59RP 35. The blood splatters ranged in size from 0.5 millimeter to 5.0 millimeter, and were consistent with blood spattered by a beating. 59RP 36-37. The direction from which the blood came from could not be determined from the shoes. 59RP 36.

The shoes showed signs of cleaning. One area on the left shoe could have originally been one large stain that was wiped off, resulting in a number of small stains within the shoe's cracks and crevices. 59RP 35-36. Detective Hudson who also examined the shoes under a microscope when he first obtained them, noted that some of the blood stains appeared to have been covered by shoe polish. 56RP 24. The shoelaces appeared to have been exposed to bleach. 59RP 38.

c. Hair analyses

Grubb also performed the hair analysis on this evidence. Hair analysis is an important part of crime scene investigation because hairs are constantly being shed by the body. A normal individual will lose 75 to 100 head hairs a day, more if the person is involved in violent activity. 59RP 41. This shedding hair can be transferred from one individual to another through physical contact. 59RP 46. For this reason, a suspect's hair is often found on the victim and a victim's hair may often be found on a suspect. 59RP 41. Hair, however, can also be transferred to an individual and his or her clothing

by using a lavatory or restroom or by doing one's laundry in a washing machine or dryer that has been used by someone else. 59RP 46.

A trained scientist can determine whether a hair was pulled or plucked, cut, or whether it simply fell out naturally. 59RP 46. The amount of curl a hair has, its pigment characteristics, the medulla, and cross-section pattern differ between broad racial categories, permitting the trained scientist to determine whether an unknown hair came from a Caucasian, Negro, or Mongoloid individual. 59RP 43-45. Once the scientist determines that an unknown hair falls into a broad racial category, it is possible to compare the unknown hair microscopically with a known hair from a particular individual to determine whether the unknown hair is similar or dissimilar to that particular individual's hair. 59RP 48-49. For instance, an unknown Negroid hair may be similar to a number of black individuals but it will also be dissimilar to a large number of black individuals. 59RP 49.

Grubb examined the 39 hairs that were found on Cassie's blue sweatshirt, 21 hairs that were recovered loose on Cassie's body, and a number of hairs he removed from the sole of Cassie's shoes. 59RP 45-46, 51-52. Most of these hairs could be identified as being similar to Cassie's own hair or having come from animals. *Id.* The unidentified hairs included one medium brown coarse hair, probably a pubic hair, from a Caucasian that was recovered from Cassie's left thigh, and a short, Caucasian, red pigmented hair

that was recovered from Cassie's shoe. 59RP 46, 51-52.

In addition to the above hairs, Cassie's T-shirt, or inner shirt, contained one hair and a fragment of another hair. 59RP 48. These hairs, both of which were less than one inch in length, exhibited Negroid characteristics. 59RP 48.

"Benign" or "innocent" sources for these Negroid hairs were ruled out when it was determined: (1) that both Cassie's father and mother do their families laundry in a washer and dryer that are not utilized by any blacks, 52RP 3665, 3694, 3704; (2) that Cassie did not have any known black friends or acquaintances in Pocatello, Idaho, 52RP 3665, 3693-94; (3) that Hanson, who was with Cassie all day June 12th and on June 13th until 4:30 p.m. did not know of any black children or adults that Cassie would have met or had contact with during those two days, 52RP 3703, 3714; and (4) that none of the search and rescue group members who found Cassie's body, none of the individuals who processed the crime scene, none of the people who transported Cassie's body or who were present during the autopsy, and none of the employees of the Washington State Patrol Crime Laboratory were black. 53RP 3765, 3796-97; 55RP 176-79, 257; 59RP 48; 64RP 4412. The discovery of these Negroid hairs was not released to the general public until late 1990 or early 1991, well after the time Dyste came forward with his information. 68RP 4726-27.

The Negroid hairs, which were probably deposited by Cassie's attacker, were compared microscopically with known hair samples collected from both Gentry and Edward. The longer hair was microscopically similar to the known arm hair samples from Gentry, and so Grubb concluded that this hair could have come from Gentry. 59RP 49. The longer hair was also microscopically similar to Edward's known arm hair sample. 59RP 50. This is not unusual because siblings' hairs often have similar characteristics. 59RP 50.

In addition to the microscopic analysis, PCR-DNA testing was performed on these Negroid hairs by Dr. Edward Blake. 71RP 5007-08. Dr. Blake tested the hairs on August 10, 1989. 71RP 5009. His analysis established a DQ α type for the hair of "1.2, 1.2".5 71RP 5008-09. This DQ α type was different from that of both Cassie Holden and Gentry. 71RP 5009. Edward's DQ α type, however, is "1.2, 1.2", the same as that of the Negroid hairs found on Cassie's T-shirt. 71RP 5016. DQ α type "1.2, 1.2" occurs in approximately six per cent of the black population. 71RP 5041.

d. Blood marker and blood type testing

Various tests were performed on stains from three separate locations on Ex. 31, the suspected murder weapon, and on the blood splattered shoelaces by three eminently qualified forensic scientists, George Chan, Dr. Blake, and Brian Wraxall. The results of four of these tests, ABO, Gm,

haptoglobin, and DQ α , are summarized on the next page. None of these tests excluded Cassie as the source of the blood. 61RP 15; 62RP 4108-09; 71RP 5038. A fifth test, PGM, that was performed on the shoelaces, also failed to exclude Cassie as the source of the blood found on the shoelaces. 64RP 4405; 71RP 4978-79.

ABO, Gm, haptoglobin, and DQ α are genetically independent factors, permitting the application of the product rule.⁶ 61RP 6-8; 62RP 4109; 64RP 4317-19; 71RP 5039; Pursuant to the product rule, only 6 percent of Caucasians could have contributed the blood found on the rock. 61RP 6-8. The blood on the shoelaces could have come from only 0.2 percent of Caucasians. Stated another way, only 1 out of every 555 Caucasians have the same ABO, Gm, haptoglobin, and DQ α types as those found in the blood stains on the shoelaces and in Cassie's blood sample. 71RP 5040.

e. Sentencing information

Holden briefly described Cassie's hopes and dreams about the future, and the activities she regularly engaged in before her untimely death. Holden discussed how Cassie's death had impacted his professional life, his private life, and how he viewed the world. 79RP 5663-67.

Gentry's prior convictions for the burglary of a dwelling, the burglary of a structure, manslaughter, first degree rape, and reckless driving, were placed before the jury via certified copies of the various judgment and

sentences. See 79RP 5668-84; S-Ex. 1-4. These documents generally contained the date of conviction, the title of the offense, and the sentence imposed. In addition, the judgment and sentences for the Kitsap County convictions included the date of the offense, the date Gentry's guilt was determined, the statutory maximum for the offense, the actual sentence imposed, and the date the sentences were pronounced. *Id.*

Gentry's mother, Annie Bell Suluki, who raised him as a single parent following Gentry's father's untimely death, received assistance from her brother, her mother, neighbors, and church, in raising her six sons. 79RP 5702-07, 5711-12. Suluki was a strong woman who, instead of meekly submitting to her first husband's violent attack, killed Gentry's father in self defense when Gentry was 6-years-old. 79RP 5704-05, 5710-11. The family never talked about Gentry's father's death, a fact that Suluki, other family members, and friends presently regretted. 79RP 5705-06, 5717, 5753-54. Despite Suluki's husband's violent death, Gentry's two older brothers and his three younger brothers all became productive members of society. 79RP 5733-35, 38-40, 48, 54-55.

Sergeant Willie Herman Fedd, who grew up with Gentry and his five brothers, recalled how the seven of them would spend time on Sunday mornings with Sergeant Fedd's father preparing for church. 79RP 5712, 5715-16. In addition to spending time prior to church with the Gentry boys,

Sergeant Fedd's father took pains to discipline them when they misbehaved and to teach them proper values. 79RP 5712, 5720, 5741. Suluki reinforced and supplemented Sergeant Fedd's father's teachings, and successfully instilled a strong sense of right and wrong in Gentry's five brothers. 79RP 5739-40, 57.

When Gentry strayed from the values he had been taught, his friends and family attempted to guide him back to the straight and narrow. Abdul Muneet Suluki, Gentry's mother's second husband, gave Gentry a job in his janitorial system after Gentry committed his last Florida offense. 79RP 5723, 5729. Gentry was a good worker who showed up on time, and "jumped" right into the job. 79RP 5723-24. On one occasion when Gentry and Suluki were cleaning a bank, Gentry discovered an open safe which the men secured. 79RP 5726. Sometime after this, Suluki and Gentry learned that the safe had contained \$15,000. 79RP 5726.

Howard Tate Gentry, Jr., one of Gentry's two older brothers, described the circumstances surrounding Gentry's manslaughter conviction. 79RP 5748. Gentry's manslaughter victim was, according to Howard, a known bully who had a confrontation with Howard shortly before Gentry shot him. 79RP 5751. Howard was able to break away from this confrontation to call the police. 79RP 5757. Gentry, who had viewed the confrontation, took advantage of this lull in the fight to retrieve a rifle from

his home. 79RP 5758, 60. Gentry returned to the scene of the altercation, and went up onto a roof top. Gentry then shot and killed the victim who was standing on the ground. 79RP 5758, 60. Immediately after the shooting, Gentry ran home and turned himself in. 79RP 5752.

IV. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of Jonathan Gentry lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on July 22, 1991, in cause number 88-1-00395-3, upon Gentry's conviction of aggravated first degree murder.

V. ARGUMENT

A. GENTRY'S PETITION IS UNTIMELY AND HE FAILS TO SHOW THAT *MONDAY* SHOULD BE RETROACTIVELY APPLIED ON COLLATERAL REVIEW.

Washington law provides for a one-year statute of limitations in which to challenge a facially-valid judgment. Gentry's judgment evinces no facially invalidity. Nor is there any ambiguity in the judgment that would justify looking beyond its four corners. Instead, Gentry argues that the statutory exceptions to the limitations period for "new law" applies. As will be seen, however, this assertion is incorrect. As such, his petition is grossly untimely and should be dismissed.

1. Gentry's petition, filed more than 15 years after his conviction became final, is untimely.

Gentry's conviction became final when the United States Supreme Court denied certiorari and this Court issued its mandate on October 5, 1995. Gentry filed the instant petition on October 7, 2011. The petition is thus more than 15 years late and should be dismissed.

The Legislature has placed reasonable time limitations upon a criminal defendant's ability to collaterally attack a judgment and sentence. RCW 10.73.090. This limitation furthers the State's legitimate interest in the finality of judgments. This limitation also reduces the prejudice caused when a case must be retried after a significant passage of time. With the passage of time, both parties are hindered by the likelihood that key witnesses and evidence will no longer be available for presentation to the trier of fact. Because, however, it is the State that has the burden of proof in a criminal trial, the prospect of trying a case without access to all of the evidence which was available originally is especially oppressive on the State.

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

The judgment becomes final when the judgment is filed with the court, when the mandate from the direct appeal issues, or when the U.S. Supreme Court

finally denies a timely-filed petition for certiorari. See RCW 10.73.090(3)(b).

2. The “new law” exception to RCW 10.73.090 does not apply to Gentry’s claim.

Gentry alleges that the exception to the statute of limitation set forth at RCW 10.73.100(6), relating to significant changes in the law, renders his petition timely. This Court has generally construed this provision as being consistent with *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989). *State v. Abrams*, 163 Wn.2d 277, ¶ 30, 178 P.3d 1021 (2008) (citing *State v. Evans*, 154 Wn.2d 438, ¶¶ 7-10, 114 P.3d 627, cert. denied, 546 U.S. 983 (2005), and *In re Markel*, 154 Wn.2d 262, ¶¶ 10-12, 111 P.3d 249 (2005)). Gentry fails to meet his burden of showing an exception to the proposition that such new rules do not apply to collateral attacks.

Except in certain narrowly construed circumstances, a “new rule” of constitutional law may only be applied to cases not yet final on direct appeal. *Evans*, 154 Wn.2d at ¶¶ 7-8 (citing *In re St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992), and *Teague*). The Supreme Court has explained that the *Teague* analysis “involves a three-step process”:

First, the court must determine when the defendant’s conviction became final. Second, it must ascertain the “legal landscape as it then existed,” and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually “new.” Finally, if the rule is new, the court must consider whether it falls within either of the two

exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (citations omitted). There is no apparent dispute that Gentry's conviction was final at the time that *Monday* was decided and that *Monday* announces a new rule. The question, then is whether the new rule falls into the exceptions to nonretroactivity.

A new rule is one that breaks new ground or imposes a new obligation. *Evans*, 154 Wn.2d at ¶ 9 citing *Teague*, 489 U.S. at 301. "A new rule is a 'result ... not *dictated* by precedent existing at the time the defendant's conviction became final.'" *State v. Hanson*, 151 Wn.2d 783, 790, 891, 91 P.3d 888 (2004) (emphasis and ellipses the Court's) (*quoting Teague*, 489 U.S. at 301). The focus of the inquiry is whether reasonable jurists could differ as to whether precedent compels the sought-for rule. *Banks*, 542 U.S. at 413. A decision is "dictated" by then-existing precedent when the "unlawfulness of [defendant's] conviction was apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).

The State would agree that *Monday* qualifies as a new rule to the extent that it changes the standard for evaluating prejudice as a result of intentional racial misconduct *during* trial. Moreover, to the extent that Gentry is seeking to further expand *Monday* beyond the bounds of its

holding, he is seeking a further new rule that cannot be applied to his case unless he shows that one of the exceptions apply.

Neither *Monday* nor Gentry's proposed extrapolations from it fall within either of the narrow "exceptions" to *Teague*. These "exceptions" were addressed in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). In *Summerlin*, Justice Scalia explained that while the courts commonly speak of the *Teague* exceptions, they are more accurately characterized as *substantive* rules that are not subject to *Teague's* bar. *Summerlin*, 542 U.S. at 352 n.4. Such rules generally apply retroactively:

New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish[.] Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.

Summerlin, 542 U.S. at 351-52 (emphasis the Court's; footnote and citations omitted). New procedural rules, on the other hand, because they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise, generally do not apply to cases already final. *Summerlin*, 542 U.S. at 352. Procedural rules that so impact the reliability of a conviction as to justify disturbing

finality are thus extraordinarily rare:

Because of this more speculative connection to innocence, we give retroactive effect to only a small set of “‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” That a new procedural rule is “fundamental” in some abstract sense is not enough; the rule must be one “without which the likelihood of an accurate conviction is *seriously* diminished.” This class of rules is extremely narrow, and “it is unlikely that any ... ‘ha[s] yet to emerge.’”

Summerlin, 542 U.S. at 352 (emphasis and editing the Court’s; citations omitted).

Applying these principles, the Court explained that procedural rules are those that affect the manner of determining the defendant’s culpability, not what facts must be found:

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa.

Summerlin, 542 U.S. at 354. *Monday* does not alter the elements of any offense or the range of conduct that may be punished. Indeed, it only tangentially even affects the manner of determining culpability. It is clearly procedural, not substantive.

Nor is *Monday* a “watershed” procedural rule. Such rules “implicat[e] the fundamental fairness and accuracy of the criminal proceeding.” *Summerlin*, 542 U.S. at 355. Thus in *Summerlin*, where the issue was the right to a jury, the Court concluded that although the

Constitution may mandate jury factfinding, fairness and accuracy do not:

The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges (perhaps so--they certainly thought juries were more independent). Nor is the question whether juries actually are more accurate factfinders than judges (again, perhaps so). Rather, the question is whether judicial factfinding so “*seriously* diminishe[s]” accuracy that there is an “impermissibly large risk” of punishing conduct the law does not reach. The evidence is simply too equivocal to support that conclusion.

Summerlin, 542 U.S. at 355-56 (emphasis and editing the Court’s; citations omitted). The Court thus concluded that a jury was not essential to an accurate finding of aggravating circumstances for death penalty purposes, and that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating circumstances had to be found by a jury, was not a watershed procedural rule subject to retroactive application. *Summerlin*, 542 U.S. at 358.

Procedural rules that so impact the reliability of a conviction as to justify disturbing finality are thus extraordinarily rare:

Because of this more speculative connection to innocence, we give retroactive effect to only a small set of “watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” That a new procedural rule is “fundamental” in some abstract sense is not enough; the rule must be one “without which the likelihood of an accurate conviction is *seriously* diminished.” This class of rules is extremely narrow, and “it is unlikely that any ... ‘ha[s] yet to emerge.’”

Summerlin, 124 S. Ct. at 2523 (emphasis and editing the Court’s; citations

omitted).

While it could be argued that a defendant has a fundamental right to a conviction not based on racial bias, that is not the rule enunciated in *Monday*. To the contrary, *Monday* presupposes such a right. And, indeed, such a right has been recognized for nearly 50 years. See *Monday*, 171 Wn.2d at ¶ 28 (Madsen, CJ, concurring) (*citing cases*). The new rule in *Monday* is much narrower: that the constitutional harmless error standard applies if such misconduct is established.

As noted, the Supreme Court has indicated that it is highly unlikely that any “watershed” rules remain to be uncovered. It does not appear that *Monday* represents such a rule. Indeed in *Teague* itself, the Supreme Court held that an extension of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), which addressed racial issues similar to those presented in *Monday*, would not be a watershed rule. Gentry simply fails to justify retroactive application under controlling precedent.

Even under the arguably broader standard apparently advocated by Gentry, he fails to show that there has been a significant change in the law *for the purposes of his claim*:

While litigants have a duty to raise *available* arguments in a timely fashion and may later be procedurally penalized for failing to do so..., they should not be faulted for having omitted arguments that were essentially *unavailable* at the time. ... We hold that where an intervening opinion has

effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a “significant change in the law” for purposes of exemption from procedural bars.

In re Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000) (Court’s emphasis, footnote omitted).

Here, *Monday* overturns no prior appellate decision that was determinative of the issues Gentry raises. *Monday* only altered the standard for determining the effect of racially-based misconduct affecting trial, once the misconduct *was established*. Since this Court found on direct appeal that no racial impropriety occurred at Gentry’s *trial*, there has been no change in the law affecting a material issue in this case.

On direct appeal, Gentry claimed he was entitled to a new trial because racism allegedly permeated the prosecution and violated the appearance of racial fairness. Pet. Ex. 13 (Direct Appeal Brief of Appellant), at 66-84. He argued (1) that persons of color are, as a statistical matter, treated more harshly by the criminal justice system, (2) that Clem’s remark to Robinson called into question the prosecution’s motives, (3) that the State’s calling an overt racist (Brian Dyste, a jailhouse informant) to testify was improper, (4) that the State admitted the Negroid hairs found on the victim’s T-shirt solely to emphasize the “pristine whiteness of Cassie’s life,” and (5) that the prosecutor’s reference to David and Goliath during the penalty-phase closing argument, although not explicitly mentioning race, was

evidence of racial bias because it was designed to “evoke an image of the outsider from another tribe killing a member of the ‘children of Israel.’” *Id.*

a. Alleged systemic bias

Gentry’s direct appeal brief conceded he had no evidence to support his systemic challenge to Washington’s death penalty. Ex. 13, at 79 n.23. This Court observed that Gentry himself had argued the claim was not ripe and concluded Gentry’s briefing was inadequate to raise a constitutional challenge. *Gentry*, 125 Wn.2d at 611-12. During its separate discussion of the mandatory sentence review, *see id.* at 653-58, the Court returned to the issue of potential racial bias in the imposition of the death sentence and rejected Gentry’s unsupported suggestion that there was a pattern of racial bias in the imposition of death sentences in Washington. *Id.* at 655-56 (citing cases).

In the “facts” section of his brief, Gentry cites a number of statistics that he purports provide more support for this claim. Petition at 17-18. However, Gentry does not address this issue in the argument portion of his brief. Nor does he explain how these statistics bear on a purported claim under *Monday*, which addresses how the question of prejudice is determined once intentional prosecutorial misconduct affecting the fairness of the trial is found. The State assumes that Gentry does not intend to include this claim within his present petition for relief.

The State will nevertheless address one part of this factual presentation that Gentry arguably might claim supports his general bias allegations. Gentry asserts that he is the lone African American charged with or convicted of aggravated murder in Kitsap County since 1981. The State is unsure how this fact would show racial bias on the part of Kitsap County authorities, given that there have been 18 white defendants charged and convicted of aggravated murder during that time frame.⁴

Gentry also asserts that of the defendants sentenced to death in Kitsap County over that time frame, Gentry is the sole one whose death sentence remains intact. This fact also fails to demonstrate his point. The State sought the death penalty in eight cases (including Gentry) during this time period. Pet. Ex. 21. Of those eight cases Gentry was the only African American. Of those eight cases, the jury imposed the death penalty in only three cases.

In the first case, Michael Furman's death sentence was overturned when this Court determined that the death penalty could not be imposed where the defendant was a juvenile at the time of the crime.⁵ *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993). Notably, despite this ruling, Furman's case bore certain salient similarities to Gentry's: the defendant

⁴ In the table contained in Pet. Ex. 21, Rosalina Edmondson is listed as "white," though in point of fact she is a Filipina. See *State v. Edmondson*, 43 Wn. App. 443, 445, 717 P.2d 784 (1986).

⁵ Furman was 17.

raped and killed a vulnerable victim (an 85-year-old-woman) in a violent manner, and had prior instances of sexual misconduct.

The only defendant whose subsequent life sentence was the result of a discretionary act by the Prosecuting Attorney was the very case this Court found was most like Gentry's: Brian Lord. *See Gentry*, 125 Wn.2d at 657. Lord, like Gentry, raped and killed a young girl (Lord's victim was 16), Lord had also previously killed someone, and like Gentry, also had a prior offense involving a violent attack on a female victim. *State v. Lord*, 117 Wash.2d 829, 836-37, 895, 822 P.2d 177 (1991).

Lord's conviction and sentence were reversed for ineffective assistance of counsel by the Ninth Circuit. *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999). The decision not to again seek the death penalty in the Lord case does not demonstrate racial bias, however. On remand, none the attorneys involved in Gentry's case were even still with the office. In any event, the State retried Lord, and was intending to seek the death penalty again. However, due to a number of rulings made by the trial court, the Prosecuting Attorney became concerned that if the State continued to pursue the death penalty, both the conviction and the sentence would again be overturned on appeal. He therefore decided not to continue to seek the death penalty. *See App. A; Baker, Travis, BRIAN KEITH LORD: Suspect won't face death*

penalty, Kitsap Sun, March 23, 2002.⁶ The Sun article quotes the current elected prosecutor:

Prosecutor Russ Hauge had prepared a statement explaining the decision.

“In this case, with this record of proceedings,” Hauge wrote, “if the death penalty were imposed, there exists a substantial likelihood that we would find ourselves faced with yet another retrial many years in the future.

“If that happened, witnesses would be even harder to find; their recollections would have faded even more. In another trial, five or 10 or more years down the road, we would face the real possibility of the defendant's acquittal.”

“We fully support the original decision to seek the execution of the defendant and the first jury's decision to impose the death penalty,” he continued.

“However, now, this far removed in time from the crime, and on the state of the record in the case to date, we have decided that it would be in the best interests of justice and the community to forgo seeking that punishment.”

Thus as can be seen there is simply no evidence that Gentry's race is the explanation for his being the only resident of death row from Kitsap County. Instead, the record shows that the county has sought, and initially obtained the death penalty in murder cases where the victim was vulnerable due to her age, was raped, and the defendant had prior violent criminal history. Further, in none of these cases has the State abandoned the penalty for racial reasons.

⁶ The article is available at <http://www.kitsapsun.com/news/2002/Mar/23/brian-keith-lord-suspect-wont-face-death-penalty>.

b. Clem's out-of-court comment to Robinson

The State does not seek to justify Clem's comment. However, since Gentry claims they show a pervasive racism in the prosecution of this case, it is necessary to examine the comment in context, and to review the proceedings and findings that followed it.

The record shows that Clem and Robinson shared a mutual animosity that dated at least to the oral argument on Gentry's continuance motions that was held on November 26, 1990. The State was represented at this hearing by Clem, due to the unavailability of the assigned deputy prosecuting attorneys. 9RP 87. This hearing was the first time Robinson met Clem. 9RP 96, 112. Robinson objected to Clem's presentation on the grounds that it was "outrageous", "immature and irrational," and that Clem's "presentation [wa]s perhaps the most blatant example of unprofessional behavior that [Robinson had] ever seen as a lawyer." 9RP 94, 96, 100.

Two months later, Gentry filed a motion to strike the State's supplemental memorandum in opposition to his motion to suppress and asked for imposition of terms. CP 631. This motion contained the first of many defense attacks on ethics of the prosecutors assigned to this case.⁷ CP 636. Gentry's motion to strike, motion for sanctions, and motions to suppress were

⁷ Additional unwarranted attacks on the ethics of the prosecution team can be found at 15RP 93, 104-05, 140-41; 16RP 244-45; 30RP 2609.

all denied. 82RP 19; 84RP; CP 2744.

On February 27, 1991, the parties were in the midst of the multi-week *Frye* hearing.⁸ After court had concluded for the day and the judge and defendant had left the courtroom, Clem and the two trial deputies were conferring about the case when Robinson interrupted the meeting with a question. 13RP 698, 701, 787; 15RP 83; 16RP 285, 343. Clem and Robinson then got into a heated argument regarding the defense's multiple claims that the prosecution team was unethical, and Clem's direction that his deputies were not to deal with Gentry's counsel off the record. 13RP 699; 16RP 343-44. Robinson then called Clem a "jerk" and "an unprofessional person." 13RP 699. Clem responded by asking Robinson if he got his ethics in Harlem. *Id.*; 15RP 87-88; 16RP 190, 273-77, 286-87.

The next day Robinson made a record of the confrontation and expressed concern about Clem's motivations:

Those comments lead me to have serious question about the decisions that have been made in this case, about the decision to seek the death penalty in this case, and about the decisions that will be made as this case proceeds, because Mr. Clem has demonstrated, by his comments in the courtroom yesterday, viewpoints which have a racial motivation that have no place in this case whatsoever.

13RP 701. Robinson requested a hearing on the issue. *Id.* The matter was set aside for the day to finish the examination of a witness.

⁸ See *Gentry*, 125 Wn.2d at 580-81.

At the beginning of the next hearing, Gentry made an oral motion to disqualify the prosecution and for the appointment of a special prosecutor. 14RP 861. Judge Hanley suspended the *Frye* hearing and arranged for a visiting judge to consider the issue. 14RP 885-86, 890, 893-96.

The parties next met in court on March 4, 1991, before Pierce County Judge Karen Strombom.⁹ Judge Strombom conducted a three-day hearing on March 4, 5, and 6, 1991, into the allegation that the State's prosecution and seeking of the death penalty against Gentry was racially motivated. Gentry's defense attorneys testified, as did Clem and others from the prosecutor's office.

Uncontradicted testimony at the hearing established that: (1) no orders were issued to anyone to prosecute Gentry because of his race; (2) no orders were made to file any particular motions or to take any particular actions because of Gentry's race or the race of his attorneys; (3) Gentry's race was not an issue in deciding to seek the death penalty; (4) Gentry's race was only related to identification issues in the case; (5) Clem had a proven record of vigorously prosecuting "hate crimes" and crimes involving minority victims; and (6) none of Kitsap County's past prosecutions of minority defendants had been racially motivated. 16RP 279-84, 293-94, 303-04, 308-

⁹ Judge Strombom is now Chief Magistrate Judge for the Western District of Washington. See <http://www.wawd.uscourts.gov/CourthouseInformation/MagistrateJudges.htm>

10, 313-14, 319-20, 346-47.

In addition to this uncontradicted testimony, Gentry admitted that

[I]n all of the writings coming from the Kitsap County Prosecuting Attorney's office there has been no racial overtone, the content is not racial in its tone or racially discriminatory in its tone.

16RP 223. Gentry also conceded that he could not establish a prima facie case that the decision to file the notice of death arose out of a racially discriminatory motivation. 16RP 214. Finally, Gentry's counsel, Frederick Leatherman, vouched for the credibility of Christian Casad, one of the deputy prosecuting attorneys who participated in the meeting that was held to determine whether the death penalty should be sought against Gentry, by stating that

I never had the impression in any of my dealings with Mr. Casad, in this case or any other case, that [race], would be a factor that would play any role in his decision to do anything.

16RP 207.

Judge Strombom denied Gentry's motions for the disqualification of the Kitsap County Prosecuting Attorney's office and the appointment of a special prosecutor, for the dismissal of the information, and for the imposition of a fine against Clem in an oral ruling:

While the Court considers the statement to have been in a moment of extreme anger, with the stated goal of getting even with Mr. Robinson, the Court cannot and does not conclude that this then reflects or raises a presumption that Mr. Clem is racially prejudiced as to people of Afro-

American heritage.

The testimony is quite clear, and is uncontradicted, that no discretionary decision has been made because of a racial bias or motivation. I don't find that the statement of Mr. Clem made in this moment of anger establishes the potential or an appearance of racial bias on the part of Mr. Clem such that he is no longer a disinterested prosecuting attorney.

17RP 429.

On April 10, 1991, Gentry filed a new motion to hold Deputy Prosecuting Attorneys Brian Moran and Irene Asai in contempt of court and to have the Kitsap County Prosecuting Attorney's office removed from further participation with this case. CP 1281. In his oral decision denying the motion after hearing argument, Judge Hanley rejected the premise that the State had acted improperly throughout the prosecution:

I guess the bottom line here is, at this point I find no pattern of misconduct on the part of the State.

33RP 57. Gentry made no further efforts to remove the Kitsap County Prosecuting Attorney's Office from this proceeding at the trial court level.

On appeal, this Court strongly condemned Clem's out-of-court remark to defense counsel but concluded the remark had no effect on the fairness of Gentry's trial:

[W]e agree with the trial court's finding that the racially offensive statement of the prosecutor was totally inappropriate and offensive.

However, there is no evidence that the remark prejudiced the Defendant's right to a fair trial in any way. It

would be inappropriate for this court to show its disapproval of a prosecuting attorney's racially offensive out-of-court statement by reversing a Defendant's conviction or sentence *where the fairness of the trial was not affected by the statement.*

Gentry, 125 Wn.2d at 610 (emphasis supplied).

Nothing in *Monday* in any way affects the Court's original analysis of this issue. Because the Court found no effect on the fairness of the trial caused by Clem's off-the-record, out-of-court statement, *Monday's* change in the law, which relates how to evaluate such an effect once it is established, clearly is not material to this issue.

c. Cross-examination of Dyste

Brian Dyste, Leonard Smith and Timothy Hicks had been incarcerated with Gentry after the date of Cassie's murder. With all three witnesses, the State elicited facts about their background or attitudes that Gentry might choose to exploit on cross-examination to remove some of the sting. *See generally*, T. Mauet, *Fundamentals of Trial Techniques* at 95-96 (1980). All three men had prior convictions and one of the men had used the term "nigger" in his original taped statement. 64RP 4436-37, 4441; 65RP 9-10; 66RP 4482-85.

The State's questioning of Dyste about his use of the term was extremely brief:

Q In that statement, Mr. Dyste, you used the term

“nigger.” Could you explain why you used that term?

A Well, when I was a young person, I went to Seattle a lot, and I was harassed by black people, verbally assaulted by black people, treated very roughly by black people. I'm not saying everyone of them, and I'm sure white people have run into situations of black people-- I'm sure black people met white people like that. I'm not prejudiced at all.

64RP 4441-42. Gentry did not object to this line of questioning. In fact,

Gentry revisited the issue during his cross-examination of Dyste:

Q Would you define for the jury what you mean by the word “nigger” once again?

A “Once again”?

Q Em-hem.

A Like I said before, earlier, I was harassed as a child by black people in Seattle, and my dad used that term in our household when I was younger quite frequently.

64RP 4450.

This Court concluded the prosecutor’s examination of Brian Dyste, including the questions regarding Dyste’s frequent use of racial epithets, was proper:

The State’s questioning of the informant appears to have been a strategic attempt to soften the impact of apparent racist attitudes by bringing them out on direct examination, rather than waiting for defense counsel to expose them on cross examination. That is an accepted trial tactic. The questions do not appear to have been asked in order to evoke racial prejudices in the jury. The testimony of the informant is not challenged on appeal on relevancy grounds. If anything, the State’s examination of this witness appears to have made him a less credible witness.

Gentry, 125 Wn.2d at 611.

Again, *Monday* presupposes the establishment of misconduct before its new standard applies. This Court concluded that there was nothing improper in the State's attempt to "draw the sting" of Dyste's use of racial epithet. As such, *Monday* clearly does not affect this contention either.

d. Use of identification evidence

Gentry also objects to the use of various identification evidence that was relevant to the circumstantial evidence aspects of the case. He asserts that the use of certain terms and evidence was made for the purpose of highlighting Gentry's race.

As a preliminary matter, the State must object to Gentry's implication that the use of the terms "negroid" and "black" show a racial bias on the part of the prosecution. Throughout his brief, he repeatedly places both terms in quotation marks as if they are offensive words.

"Negroid" is not a racist term, but a term of art used in the forensic hair analysis community. It is still in current use in documents on the FBI's website. For example, in Olen, Cary, *Forensic Hair Comparison: Background Information for Interpretation*, Forensic Science Communication (FBI April 2009),¹⁰ the author explains:

A human hair can be classified into one of three racial groups: Caucasian, Negroid, or Mongoloid. A classification of

¹⁰ This article is available at http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/april2009/review/2009_04_review02.htm

Caucasian typically means of European descent. Negroid typically means of Sub-Saharan African descent. Mongoloid typically means of Asian or Native American descent. *It must be understood that designation of these racial groups is based upon an evaluation of the microscopic characteristics present in the hair. The microscopic designation of racial group may or may not coincide with how a person self-identifies his or her racial group.*

(Emphasis supplied); *see also* 59RP 43.

Nor can the use of the term “black” be considered racist, particularly in 1991. Indeed, the campaign to popularize the use of the term “African American,” initiated in 1988 by Jesse Jackson, was barely a few years old at the time. *See, e.g., Negro, Black and African-American*, N.Y. Times, Dec. 22, 1988.¹¹ Moreover, at the time of trial, overwhelming majorities of African Americans responding to Gallup polls on the subject expressed either no preference for “African American” over “black,” or preferred the term “black.”¹²

Turning to the trial, the State had the burden of proving that Gentry murdered Cassie beyond a reasonable doubt. The Negroid hairs supported

¹¹ The cited article, an unattributed editorial generally favoring the use of the new terminology, may be viewed at : <http://www.nytimes.com/1988/12/22/opinion/negro-black-and-african-american.html>.

¹² In 1991, 18% preferred “African American,” 19% preferred “black” and 61% expressed no preference. In 1992 the numbers were 23%, 22%, and 56%, respectively. By Spring 1994, the results were 21%, 13%, and 64%, and at the end of Summer of that year the numbers were 18%, 17%, 60%. As late as 2007, 61% of respondents continued to have no preference. The poll results are available at <http://www.gallup.com/poll/28816/black-african-american.aspx>. The State also notes that the defense used both Negroid and black during the trial as well. *E.g.*, 53RP 3826; 77RP 5513.

the identification of Gentry as Cassie's murderer. Contrary to Gentry's implications, the scientific tests performed on the hair limited those who could have contributed the hair to six percent of the black population. The State properly eliminated exculpatory sources of the Negroid hairs in a matter-of-fact manner that did not convey approval or preference for non-blacks.

Notably, at no time did Gentry object to Cassie's family's testimony that limited the possible sources of the Negroid hairs that were found on Cassie's inner shirt. See 52RP 3664-65, 3693-94, 3703-04, 3713-14. The propriety with which the State presented its identification evidence, including that related to the Negroid hairs, is manifested by Gentry's failure to object to a single question asked in the trial court.¹³

The fact that the tests could not "positively" establish that Gentry left his brother Edward's hair on Cassie's inner T-shirt did not render this evidence inadmissible. See *State v. Smith*, 74 Wn.2d 744, 768-69, 446 P.2d 571 (1968), *judgment vacated in part*, 408 U.S. 934 (1972), *overruled on other grounds*, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). Similarly, the evidence that supported Gentry's identification as Cassie's assailant was not rendered inadmissible simply because other evidence

¹³ As is reflected in the issues that were raised at trial the defense was keenly aware the potential for racial bias. Plainly this lack of objection must be seen as significant.

existed that might support a theory that someone else was the perpetrator of the crime. Gentry has not presented a single case that would support his contention that this rule is different when identification evidence establishes that the defendant's race is different from that of the victim, her friends, and family.

Gentry does not now cite to any testimony that can reasonably be construed as racially motivated. The citations he provides, which he avers are to examples of “racially loaded questions that were . . . intended to convey the idea that African Americans played no legitimate role in Cassie Holden’s life or the investigation of her murder.” Petition at 22. This claim as to what the State “intended” is belied when the questions are looked at in context.

The point of the questions was to exclude the possibility that the Negroid hairs recovered from Cassie’s body could have been inadvertently gotten there from somewhere other than the crime scene. Thus, these questions were asked who Cassie had played with in Idaho and in Bremerton, 52RP 3665, 3709; about where her mother did her laundry, 52RP 3665, 3694; and who had access to the crime scene, 53RP 3797, 55RP 257, the coroner’s office, 55RP 177, 179, and the crime lab. 59RP 47-48. The State Crime Lab expert testified that hairs could be picked up in laundry, and from being in contact with others. 59RP 46.

From there Gentry jumps to the conclusion that because the State

knew Cassie had a Caucasoid hair not her own on her body that the State “imputed this [murder] to ... to black persons only” despite contrary evidence. Petition at 23. But the State did not impute the murder to “black persons.” It imputed it to Gentry. And while there was one unidentified Caucasoid hair on Cassie’s body, there were two Negroid hairs that were consistent with Gentry’s hair, and with his brother’s. The witnesses had observed a black man in the general area and around the time of the crime dressed inappropriately for the weather and behaving oddly. Gentry had blood consistent with Cassie’s on his shoes. And he lied to the police about having blood on his shoes. So the State was not targeting Gentry because he is an African American. The State was targeting Gentry because the *evidence*, forensic and circumstantial, pointed to him as the likely suspect. And indeed that evidence satisfied a jury and this court that he was guilty of the crime beyond a reasonable doubt. That some of that evidence happened also to rely on objective racial characteristics does not mean the State was acting out of subjective racial prejudices.

In view of these facts, this Court rejected Gentry’s suggestion on direct appeal that the evidence was presented for racially motivated purposes, observing that the State was required to prove the identity and physical characteristics of the killer through the circumstantial evidence it had. *Gentry*, 125 Wn.2d at 610-11. “[T]he tone of the prosecuting attorney’s

questions was aimed at proving the identity of the Defendant as the murderer and not at prejudicing the jury against the Defendant because of his race.” *Gentry*, 125 Wn.2d at 611. Again, because no misconduct was found, *Gentry* fails to show that *Monday*’s prejudice standard would be applicable to this issue.

e. State’s closing argument

i. *Gentry*’s reference to “the bitch”

Gentry contends State placed heavy emphasis on the jailhouse witness testimony. In an extraordinary bit of hyperbole, he asserts that the State “exploited the most racially inflammatory of their most unsavory witnesses, repeating over and over in argument the testimony of its white jailhouse informants that Petitioner referred to Cassie Holden as a “bitch.” Petition at 24. This claim is not borne out by the record, and indeed, was rejected on direct appeal.

In context it is clear the term “bitch” was used to highlight *Gentry*’s callousness and misogyny rather than to evoke any racial animus. In any event, the term was not, contrary to *Gentry*’s claim, dwelt upon.

The State’s initial argument in the guilt phase covered a total of 37 pages. 77RP 5391-5428. Brian Dyste’s name was mentioned by the prosecutor for the first time 20 pages into the first closing argument. 77RP 5411. The prosecutor used the term “bitch” at 77RP 5401 without using any

of the jailhouse witnesses' names.¹⁴ The record reflects that the prosecutor then discussed the three jailhouse witnesses by name at 77RP 5418-19. Those are the only named references to the three jailhouse witnesses in the prosecution's first closing argument during the guilt phase.

The prosecution's rebuttal argument in the guilt phase covered a total of 16 pages. 77RP 5537-52. The prosecution's first reference to the jailhouse witnesses by name was made seven pages into the rebuttal argument. 77RP 5541. The prosecutor then summarized the jailhouse witnesses' testimony. 77RP 5541-43. The latter references were the last references to the three jailhouse witnesses by name.

The State never mentioned Dyste and Hicks during the penalty phase. See 79 RP 5649-5832. Instead, the State focused on Gentry's potential future dangerousness, based on his extensive criminal record, which included rape with a deadly weapon. 79 RP 5668-84; 5790-93; *Gentry*, 137 Wn.2d at 386 ("In addition to Mr. Holden's testimony, the State presented documentary evidence showing Gentry's prior conviction for manslaughter, rape, and two burglaries."). The prosecutor also spoke at length about the victim's father's moving testimony about his daughter.¹⁵ 79 RP 5799-5800; *Gentry*, 137

¹⁴ Indeed the argument contains no racial reference, but instead is presenting the argument that rape is a crime of violence and domination, in which the rapist is saying to the victim, "I can treat you like 'a bitch.'" *Id.*

¹⁵ Q. Do you think about Cassie often?

A. Everyday. Everyday Cassie goes through my mind. That's the first thing I

Wn.2d at 407. Finally, the State reminded the jury of the crime scene, where blood marks and the state of the victim's body spoke of a vicious and brutal end to her life. See 79 RP 5797-98. The State mentioned this term only once in its closing argument, which was provided to give context to Holden's penalty phase testimony. 79RP 5798.

The prosecution did not place particular emphasis on the testimony of the jailhouse witnesses in the closing arguments of either the guilt or penalty phases, and certainly did not repeat the term "over and over." Gentry is simply inflating the significance of the role of jailhouse witnesses (and the word "bitch") in his case. This Court thus correctly observed that the State's case against Gentry was at its heart based on the DNA evidence and other forensic evidence. *Gentry*, 125 Wn.2d at 579-81; *see also Gentry*, 137 Wn.2d at 401 ("the State's case relied much more on the forensic evidence than on the informants' testimony.").¹⁶

ii. The David and Goliath reference

This Court, in conjunction with the court's review of Gentry's several other challenges to the prosecutor's closing argument, also considered and rejected Gentry's challenge to the deputy prosecutor's reference in rebuttal closing argument to David and Goliath:

do in the mornings [I] get up and kind of look up and say, "Hello, Cassie."
79 RP 5667;

¹⁶ There were no objections at trial to the statement or its use during argument.

The Defendant argues that the State's reference to the Biblical story of David and Goliath was intended to evoke racist feelings. The Defendant claims that the use of the David and Goliath analogy evokes an image of the outsider from another tribe killing a member of the "children of Israel." In our view, this is a tortured interpretation of the use of this Biblical story.

Instead, the rebuttal here was invited or provoked by defense counsel's extensive use of Biblical stories during his own closing argument. In any event, if the remark was prejudicial at all, it was not so prejudicial that it could not have been cured with a cautionary explanation to the jury, had one been requested.

Gentry, 125 Wn.2d at 644.¹⁷

This conclusion is well-supported by the record. On three occasions during his closing argument, defense counsel stood before the jury, Bible open, and read extensive passages. 80RP 5803-06, 80RP 5810-11, 80 RP 5812-13. The thrust of every defense argument was anchored to a Biblical canon provided to the jury by defense counsel. In this context, the prosecutor's brief biblical allusion was invited. The deputy prosecutor made a brief allegorical reference to a well-known Bible story in response to a defense argument that nearly amounted to a religious sermon.

Moreover, the allusion was brief, and certainly betrays no suggestion of racism:

Ladies and gentleman, I'm not going to take a great deal of time, because I don't think a whole lot more needs to

¹⁷ As the Court noted, defense counsel did not object to the deputy prosecutor's closing remarks. *Gentry*, 125 Wn.2d at 640.

be said.

And we could stand here and cite chapter and verse of the Bible, that book that speaks to us about morality and justice, forever, and everyone would have a different interpretation.

But this particular case brings a particular Bible story to mind, and that is David and Goliath, and everyone, I would submit, has heard that story. And we all know that Goliath was evil, and he was a plague on children of Israel. And David, the hero in that story slew Goliath with a stone.

But on June 13th, 1988, evil won with a stone. That was the man holding that stone (indicating).

And the Bible talks a lot about justice. And that was just [sic] that Goliath was slain for what he did, for the evil he sought to bring down on the children on the children of Israel.

And it's unfair to put you in the defendant's position; "How would you feel if you had an alcoholic father." Some of you may have, or had an uncle. But people overcome obstacles if they set their mind to it. And the best example of that is the Gentry family. Five boys overcame obstacles. They overcame it with love, with caring, with sense of community, with a father figure who lived next door, and with friends, and by counting on each other. And they chose the path to success and to good. They have jobs, they contribute. And the defendant chose evil, and it was he who wielded the stone.

Clearly this passage in no way suggests that Gentry should be condemned because he is black. To the contrary, it praises the other members of his presumably African-American family for overcoming their difficulties. The prosecutor argued that Gentry should be sentenced to death because of the horrific crime he committed, in terms mirroring Gentry's own biblically based plea for leniency. Because Gentry again fails to show that any racial misconduct was committed, *Monday* simply has no application.

f. Other prophylactic measures

In addition to his specific claims failing to show that racism allegedly permeated his trial, Gentry also ignores the other steps that were specifically taken by the court and counsel to avoid that possibility.

For example, during voir dire, Gentry proposed a number of questions on racism, not because identification evidence such as the Negroid hairs or the eyewitness testimony that identified a black man in the vicinity of the murder scene made Gentry's race an issue,¹⁸ 34RP 106, but because

The issue is black on white, that is the issue. It is not an issue that is in this case from the standpoint of that's why Mr. Gentry is being tried, and I am not suggesting that that is an issue. But what I am suggesting is that there are people in Kitsap County, in King County, in Memphis, Tennessee and anywhere else in this country who will walk into this courtroom and look at Mr. Gentry as a black male charged with killing a young white girl and they wouldn't need to hear anything else.

34RP 107. The court allowed extensive voir dire on the issue of racial bias, 37RP 162-65, and all jurors who indicated that they could not set aside Gentry's race in determining his guilt or innocence, and if guilty, the appropriate sentence, were excused for cause. See 49RP 3225-30.

Additionally, Robinson himself was specifically appointed as a result of Gentry's request that he have an African-American lawyer. Leatherman

¹⁸ On numerous occasions, Gentry conceded that the State's admission of identification evidence that tended to establish that Cassie Holden's attacker was black was not racist. See, e.g., 15RP 116; 36RP 17-19.

argued:

Mr. Gentry is black. Mr. Robinson also happens to have black skin. . . . And I know that [Mr. Gentry] has expressed to me that he would feel much more comfortable and secure if he was being represented by an attorney who happened to have black skin.

9RP 31. The State objected to the appointment of Robinson solely on the grounds that the requested continuance was inordinate. 9RP 35-37.

Leatherman then asserted that he would seek to withdraw if Robinson were not appointed. 9RP 39-40. Leatherman filed a written motion and declaration to withdraw as counsel to reinforce this threat. CP 206. The motion once again emphasizes Gentry's race, the victim's race, and the racial composition of Kitsap County as reasons in support of Robinson's appointment. CP 209, ¶ 10. Judge Hanley thereafter appointed Robinson on May 29, 1990. 8RP 2-3.

In view of the foregoing it is apparent that *Monday*, while a significant change in the law, is not one that is material to any issue decided on direct appeal in this case. Gentry's untimely petition should be dismissed.

B. GENTRY FAILS TO SHOW HE IS ENTITLED TO COLLATERAL RELIEF.

Even if this petition were timely, and the issue was thus properly before the Court, Gentry would fail to meet his burden of showing entitlement to collateral relief.

I. Monday is inconsistent with standards for collateral relief

“In order to prevail on a personal restraint petition, a petitioner must establish that there was a constitutional error that resulted in actual and substantial prejudice to the petitioner or that there was a nonconstitutional error that resulted in a fundamental defect which inherently results in a complete miscarriage of justice.” *In re Woods*, 154 Wn.2d 400, ¶ 16, 114 P.3d 607 (2005). “This threshold requirement is necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes that the petitioner has had an opportunity to obtain judicial review by appeal.” *Id.*

Because of these standards, this Court has frequently recognized that error that would be presumptively prejudicial on direct appeal will nevertheless require a petitioner to show prejudice on collateral review. In *St. Pierre*, the Court held that errors in a charging document are not considered per se prejudicial on collateral review. *St. Pierre*, 118 Wn2d at 329. The Court explained that the differing stance of a collateral attack justifies this rule:

A personal restraint petition is not to operate as a substitute for a direct appeal. *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. *Hagler*, 97 Wn.2d at 824. Therefore, we decline to adopt any rule which would categorically equate per se

prejudice on collateral review with per se prejudice on direct review.

St. Pierre, 118 Wn2d at 328-29.

Other constitutional errors that are considered presumptively prejudicial on direct review have been found not to be so on collateral review. These include the failure to give a presumption of innocence instruction, *In re Lile*, 100 Wn.2d 224, 228, 668 P.2d 581 (1983), improper instructions regarding intent, *In re Haverty*, 101 Wn.2d 498, 504–06, 681 P.2d 835 (1984), and erroneous instructions regarding an affirmative defense. *In re Benn*, 134 Wash.2d 868, 940, 952 P.2d 116 (1998); *In re Mercer*, 108 Wash.2d 714, 721–22, 741 P.2d 559 (1987).

Similarly, those errors that are subject to a harmless error analysis on direct appeal are not considered per se prejudicial on collateral review. Thus, an erroneous accomplice liability instruction that did not require the defendant to have been found to be an accomplice in the particular crime charged is not considered per se prejudicial on collateral review. *In re Sims*, 118 Wn. App. 471, 477–78, 73 P.3d 398 (2003). Additionally, to be entitled to relief, a personal restraint petitioner must show that actual and substantial prejudice resulted from trial court confrontation clause violations. *In re Grasso*, 151 Wn.2d 1, 19, 84 P.3d 859 (2004).

Monday sets forth the reason the new standard was adopted:

If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

Such a test exists: constitutional harmless error. Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict

Monday, 171 Wn.2d ¶ 23 (citations omitted). The facts of this case demonstrate how this purpose would be ill-served by applying this standard on collateral review.

Here, none of the attorneys involved in this case at trial or on direct appeal are still employed by the Kitsap County Prosecuting Attorney's Office. Clem lost his bid for reelection shortly after this trial was completed.¹⁹ Indeed, Clem is no longer even an active member of the Washington State Bar association. *See* App. B. If in fact prejudicial racial misconduct had occurred, Gentry would not be without remedy, so as long as he met his burden of proof. However, there is no justification for imposing on the State the burden of proving a negative some twenty years after the crime occurred.

Imposing such a burden would place the risk on attorneys who had no connection to the misconduct alleged. It would place the risk on the safety of the public that a killer who has not established harm would be freed because

¹⁹ *See Hauge Dumps Clem*, Kitsap Sun, Sept. 21, 1994. The article may be accessed at <http://www.kitsapsun.com/news/1994/sep/21/hauge-dumps-clem>.

of the misconduct long-ago actors. While *Monday*'s burden can be justified to send a message to those directly responsible for misconduct on direct appeal, it cannot be justified in the collateral context. Gentry should be required to show that the alleged improprieties rendered his trial unfair.

As discussed previously, Gentry fails to show that misconduct *at trial* even occurred. It is thus plain that he has also not met his burden of showing prejudice.

2. Any purported misconduct would be harmless beyond a reasonable doubt

Even if it were assumed *arguendo* that this claim were timely, and that the *Monday* prejudice standard applied on collateral review, Gentry would not be entitled to relief.

As previously noted, Gentry has not met his burden of establishing that the "prosecutor 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 his burden.

Finally even if Gentry had met this burden, the alleged misconduct would be harmless beyond a reasonable doubt.

In the factual section of this brief State has set forth in detail the extensive evidence adduced at Gentry's six-week trial. This evidence was summarized in this Court's opinion on direct appeal:

In early June 1988, the 12-year-old victim lived with her father and stepmother in Pocatello, Idaho. On June 11, 1988, she traveled to Kitsap County, Washington, to spend the summer with her mother at her mother's home near Bremerton. On June 13, 1988, at approximately 4:30 p.m., the young victim went for a walk. She was expected home at 6 p.m. for dinner, but never returned.

Her body was found early June 15, 1988, behind a large log at the bottom of a path running from a trail through a wooded area adjacent to Rolling Hills Golf Course, near Bremerton, Washington. The victim's eyeglasses, earring and a bouquet of flowers were found approximately 148 feet up the foot path on and near the main trail.

The victim appeared to have been sexually assaulted, as her jeans and underpants were pulled down and her T-shirt and bra pulled up. Her blue sweatshirt had been removed from one arm and pulled up partially covering her face. She had been struck in the head approximately 8 to 15 times, suffering 10 "significant" injuries.

Kitsap County sheriff deputies investigated the murder scene and determined that a trail of blood was splattered from the main trail, down the footpath about 148 feet to where the body was found. They found a 2.2-pound rock that had blue fibers crushed into it. The fibers matched the fibers in the victim's sweatshirt. The rock also had red spots on it that appeared to be blood. The rock was believed to be the murder weapon.

The autopsy showed that the victim had been killed by one of the blows to her head. The results of the autopsy could not show the order in which the blows were received or which blow actually killed the victim. The autopsy did not conclusively show that the young victim had been raped.

During the autopsy several loose hairs were removed from the victim's body. An examination of the hairs showed

that most of them were consistent with the victim's own hairs. Two of the hair fragments were recovered from her T-shirt and were Negroid hairs. A coarse brown hair, believed to be a pubic hair from a Caucasian, was found on the victim's left thigh and a red pigmented hair was found on one of her shoes. The Negroid hair was later determined to be genetically consistent with the Defendant's brother's arm hair. Defendant's brother was not in Kitsap County at the time of the murder. Evidence was produced to show that the Defendant, who lived with his brother's family, wore his brother's clothes on occasion. There was no identification connected with the Caucasian hair.

The investigation eventually focused on the Defendant. A search of his residence was conducted and clothing samples, including a pair of shoes, were seized. Examination of the shoes indicated that blood had been wiped from the shoes. Spots of blood were found on the shoelaces and those bloodstains were the subject of a number of scientific tests. These included ABO, gamma marker (GM), haptoglobin (Hp), DQalpha polymerase chain reaction DNA (PCR DNA), and phosphoglucomutase (PGM) testing. According to the State's experts, none of the tests performed on the bloodstains on Defendant's shoelaces eliminated the victim as the source of the blood. Since ABO, GM, haptoglobin and PCR DNA are genetically independent factors, the product rule was used to obtain a cumulative frequency showing the percentage of the population from which the blood found on the Defendant's shoelaces could have originated. (The PGM test was determined not to be definite enough to factor into the final statistical probability.) On the ABO test, one of the bloodstains was type O and the victim had type O blood. Type O blood is found in 44.5 percent of the Caucasian population. The GM testing showed that both of the shoelace bloodstains were type 1, 2, 3, 11 and victim also had type 1, 2, 3, 11. This type is found in 14 percent of the Caucasian population. The haptoglobin test showed one of the bloodstains on the shoelace to be Hp type "2" and the victim had type "2". Hp type "2" is found in 36.1 percent of the Caucasian population. There was expert testimony that the number of individuals having ABO type O and GM type 1, 2, 3, 11 and Hp type 2 would be 2.25 percent of Caucasians. The PCR DNA testing on the bloodstains on

both shoelaces showed a PCR type of 1,2, 3 and the victim's type was also 1,2, 3. The frequency of occurrence of type 1,2, 3 is approximately 8 percent in both the Caucasian and African American populations. The forensic scientist who performed the PCR DNA testing testified that the percentage of the Caucasian population that would have type O blood with GM 1, 2, 3, 11 and Hp type 2 and PCR DNA of 1,2, 3 would be .18 percent. PCR testing was also conducted on a hair found in the victim's T-shirt which yielded a PCR type of 1,2, 1,2 which is not the same as the Defendant's type, but does match his brother's type.

* * *

Other evidence linking Defendant to the murder included the testimony of three persons who reported seeing a man matching Defendant's description near the place of the murder and around the time of the murder, and three former jailmates of the Defendant who testified that the Defendant admitted to them he had killed someone. The testimony of these witnesses was essentially as follows.

Witness E.S. and her daughter, K.T., testified that they had seen an African American man walking past E.S.'s home toward Rolling Hills Golf Course between 4 p.m. and 7 p.m. on June 13, 1988. The man was wearing a cap, a sports jacket and slacks. His clothing was described as scruffy and of a light color. E.S. later identified the individual as the Defendant, Jonathan Gentry. At the time of the murder, the Defendant was residing in the home of his brother and sister-in-law a short distance from E.S.'s home and the Rolling Hills Golf Course.

Witness F.B. was a bicyclist who had ridden the trails in the wooded area near Rolling Hills Golf Course a number of times. On June 13, 1988, the day of the homicide, he and a friend went to the area after work and rode the main trail from Riddell Road, south of the golf course, to the golf course and back. F.B. then traveled from Riddell Road, along the main trail to McWilliams Road. During this last time across the path, at approximately 5:30 p.m., he saw an African American man standing just off the main trail. F.B.'s description of the man was consistent with that given by E.S.

Witness B.D. had been incarcerated in the Kitsap

County Jail with the Defendant in the summer of 1988. He testified that he and the Defendant were playing cards when detectives arrived to take samples of Defendant's hair in connection with the investigation of the victim's murder. B.D. testified that when the Defendant returned to the card game, Defendant said, "They found my hair on the bitch." When B.D. asked the Defendant whether he had killed the young girl, he said that he had but that they could not prove it.

Witness T.H. had been incarcerated with the Defendant at the Washington State Correctional Center at Shelton in December 1989 and January 1990. He testified that the Defendant told him that he had killed a 10-year-old girl who lived across the street from his brother's house because he thought she was leading him on. This statement was made, according to T.H., during a card game and others, including inmate L.S., were present.

L.S. testified that the Defendant told him that he had killed his girlfriend and disposed of her body.

Gentry, 125 Wn.2d at 579-82. Plainly, given the extensive impeachment and general lack of credibility generally ascribed to "snitches," the State's most compelling evidence was the forensic testimony including the hair analysis and blood evidence, as well as the identification witnesses. Nothing about this evidence is in any way tainted by the racial impropriety *Gentry* alleges. There is no likelihood that the verdict would have been different absent the alleged misconduct.

Nor would could the alleged misconduct have affected the penalty phase. As this Court noted in its direct appeal proportionality review, this crime was particularly heinous, and mitigation insignificant.

The nature of the crime here was particularly brutal. The facts of this case are very similar to the *Lord* case which

we found not to be disproportionate to other similar cases. Here, the victim was even younger at 12 years old than the 16-year-old victim in *Lord*. The crime in this case apparently spanned a longer period of time and was particularly brutal; the victim was sexually assaulted and bludgeoned to death with a rock. As in the *Lord* case, the pathologist was unable to determine the exact sequence of the blows, and therefore there is no sure way to know how much the victim suffered before she died, but the apparent struggle through the forest indicates suffering and terror before she died.

* * *

The Defendant's prior criminal record showed a history of violent behavior. He had killed before and had raped a 17-year-old girl at knife point not long before this murder. The Defendant's death sentence is not disproportionate on the basis of his criminal record. Furthermore, the mitigating circumstances were not as deserving of mercy as in some other cases where the death sentence was imposed. ... There is no indication of lack of normal intelligence or mental disease and Gentry was not youthful as in some cases where the death penalty was not imposed.

We consider it particularly important in this case that the Defendant had been convicted of a prior violent felony which had resulted in the victim's death, that shortly before this murder the Defendant had raped a teenage girl at knife point, that the Defendant murdered an innocent child, that the child suffered substantial pain and terror before her death and that the mitigating circumstances were relatively weak. Given the brutal nature of the crime, the tender years of the victim, the prior convictions of the Defendant and the lack of compelling mitigating circumstances, we conclude that the sentence was not excessive or disproportionate

Gentry, 125 Wn.2d at 657-58. As noted previously, Gentry's case was remarkably similar to *Lord*'s in terms of the nature of the crime and victim, in terms of the defendant's criminal history, and lack of mitigation. *Lord*,

who is white, was tried around the same time in the same community, and the jury reached the same conclusions as to the appropriate penalty.

For the foregoing reasons, Gentry's petition should be denied.

C. GENTRY FAILS TO SHOW ANY JUSTIFICATION FOR RECALLING HIS DIRECT APPEAL MANDATE

Gentry also asserts, in a motion filed under his original direct appeal, that the Court should recall the mandate in his direct appeal.²⁰ Gentry candidly admits that the reason for this motion is “[t]o remove any procedural obstacle there may be to the merits review” of his current claim. This blatant attempt to avoid the operation of RAP 16.4(d) and RCW 10.73.090 should not be permitted.

Gentry asserts that this Court has the authority to recall its mandate under RAP 2.5(c)(2). Contrary to the contention in his brief, this Court has specifically rejected this argument:

Eastmond also requests that we recall the mandate issued in his direct appeal, citing to RAP 2.5(c)(2). RAP 2.5(c) is limited to cases “again before the appellate court following a remand.” It is plainly inapplicable here. RAP 12.9(b), though closer to the mark, is also unhelpful to Eastmond as there was no “inadvertent mistake” or “fraud of a party or counsel.” Accordingly, we decline to recall the mandate in Eastmond's direct appeal.

²⁰ Gentry styles the motion as a “Motion to Reconsider.” However, since the time for a motion for reconsideration of Gentry's direct appeal expired, RAP 12.4(b), and the mandate issued some 17 years ago, he is clearly seeking to withdraw the mandate.

In re Eastmond, ___ Wn.2d ___, ¶ 15 n.5, 2012 WL 340246 (Feb. 2, 2012).²¹
See also *Shumway v. Payne*, 136 Wash.2d 383, 393, 964 P.2d 349, 354 (1998) (Court will not recall a mandate under RAP 12.9 for the purpose of reexamining the case on its merits); *Kosten v. Fleming*, 17 Wn.2d 500, 505, 136 P.2d 449 (1943) (“[A]n appellate court is without power to recall a mandate regularly issued without inadvertence, fraud, prematurity, or misapprehension, and ... it will not recall the mandate for the purpose of re-examining the cause on the merits, for the purpose of granting supplemental relief.”) (quoting 5 C.J.S. 1560, § 1996); *Reeploeg v. Jensen*, 81 Wn.2d 541, 546, 503 P.2d 99 (1972), *cert. denied*, 414 U.S. 839, 94 S. Ct. 91, 38 L.Ed.2d 75 (1973) (Improperly recalling a mandate “deprive[s] the courts of that stability which is necessary in the administration of justice.”) (quoting *Kosten*, 17 Wn.2d at 505, 136 P.2d 449).

Furthermore, as thoroughly discussed, *supra*, Gentry fails to show that *Monday* even applies to his case. He again repeats his misperception that on direct appeal this “Court repeatedly placed the burden on the defendant to prove prejudice from apparent acts of race discrimination by the prosecution.” Motion at 9. As discussed, this Court found no misconduct of the sort contemplated in *Monday* occurred at all. Since such a finding is a prerequisite to application of the *Monday* prejudice standard, Gentry’s

²¹ Gentry’s motion was filed before *Eastmond* was issued.

argument grossly misstates the direct appeal holding of this Court. It is also thus apparent that *Monday* would provide no ground for recall of the direct appeal mandate even if the court rules and this Court's precedent allowed such a motion. The motion to recall the mandate should be denied.

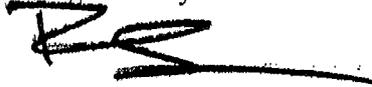
VI. CONCLUSION

For the foregoing reasons, Gentry's petition and motion should be denied.

DATED March 26, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

MACINTOSH HD:USERS:RANDYSUTT:DOCUMENTS:WORK:GENTRY, JONATHAN:C4 2011 PRP:APP DOCS:GENTRY C4 PRP RESPONSE.DOC

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, April 05, 2012 4:59 PM
To: 'Randall A. Sutton'
Cc: 'Tim Ford'
Subject: RE:

You may file the brief but the appendix is too large to send via email. Please send the appendix by mail.

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.

From: Randall A. Sutton [<mailto:RSutton@co.kitsap.wa.us>]
Sent: Thursday, April 05, 2012 4:58 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Tim Ford'
Subject:

Attached is a copy of the State's response in In re Jonathan Gentry, No. 86585-0 and State v. Jonathan Gentry, No. 58415-0, originally served on opposing counsel on March 26, 2012, and intended to be filed with the court on that date as well.

My assistant is out of the office today, so I am unsure why an old extension motion was filed rather than the response. I will investigate, and will update the court, if that is needed.

Thanks

Randall Avery Sutton
Deputy Prosecuting Attorney
Appeals Unit
Kitsap County Prosecuting Attorney's Office
360-307-4301
rsutton@co.kitsap.wa.us
www.kitsapgov.com/pros/

APPENDIX A

APPENDIX B



WSBA.ORG
Website

CLE ONLINE
Store

My
Profile

MCLE
Activities Search

LAWYER
Directory

Lawyer Directory » Lawyer Profile

Lawyer
Directory

Search in:

Lawyer
Directory

Discipline
Notices

Carmon Danny Clem

WSBA Number: 4244
Admit Date: 10/12/1971
Member Status: Inactive
Public/Mailing Address: 2102 Day Break Ln
Enid, OK 73703-2857
United States
Phone: (918) 688-7259
Fax:
TDD:
Email: danclem@suddenlink.net
Website:

Practice Information

[Back to top](#)

Firm or Employer: None Specified
Firm Size: Not Specified
Practice Areas: None Specified
Other Languages Spoken: None Specified

Liability Insurance

[Back to top](#)

Private Practice:
Has Insurance? - [Click for more info](#)
Last Updated:

Committees

[Back to top](#)

Member of these committees/boards/panels:
None

Disciplinary History

No Public Disciplinary History

Only active members of the Washington State Bar Association, and others as authorized by law, may practice law in Washington.

The discipline search function may or may not reveal all disciplinary action relating to a lawyer. The discipline information accessed is a summary and not the official decision in the case. For more complete information, call 206-727-8207.

[Disclaimer +](#)

© 2012 Washington State Bar Association, all rights reserved.

[myWSBA](#)
[My Profile](#)
[My Contact Info](#)
[My Practice Info](#)
[Change Password](#)
[Request Password](#)

[Lawyer Directory](#)
[Search Lawyer Directory](#)

[MCLE](#)
[Access MCLE](#)
[MCLE Activities Search](#)

[WSBA CLE](#)
[Online Store](#)
[Seminar Calendar](#)

[WSBA Sections](#)
[My Section Memberships](#)
[Join a Section](#)

[WSBA Committees](#)
[My Committees](#)

APPENDIX C

GENTRY TRANSCRIPT REGISTER

Volume No.		
1RP	January 18, 1989	Hearing reported by Debbie Zurn
2RP	January 26, 1989	Hearing reported by David S. Kirk.
3RP	February 21, 1989	Hearing reported by David S. Kirk.
4RP	March 14, 1989	Hearing reported by David S. Kirk.
5RP	February 26, 1990	Bail hearing reported by Anita Lopez
6RP	April 11, 1990	Arraignment on amended information reported by Dana Leslie
7RP	May 1, 1990	Motion for filing and service of notice of special sentencing proceeding reported by Valerie J. Gerjets
8RP	May 29, 1990	Pretrial motion reported by Kathryn M. Todd
9RP	Multiple dates August 26, 1988 to Feb. 1, 1991	Volume I reported by Patricia Ancich: Motion for search warrant; entry of plea; and various other pre-trial motions up until the scheduling of the <u>Frye</u> hearing
10RP	February 25, 1991	Volume II: <u>Frye</u> hearing reported by Patricia Ancich
11RP	February 26, 1991	Volume III: <u>Frye</u> hearing reported by Patricia Ancich
12RP	February 27, 1991	Volume IV: <u>Frye</u> hearing reported by Patricia Ancich
13RP	February 28, 1991	Volume V: <u>Frye</u> hearing reported by Patricia Ancich
14RP	March 1, 1991	Volume VI: Disqualification motion reported by Patricia Ancich
15RP	March 4, 1991	Disqualification motion reported by Gerald D. Kohler
16RP	March 5, 1991	Disqualification motion reported by Gerald D. Kohler

17RP March 6, 1991 Disqualification motion reported by
Gerald D. Kohler

18RP March 11, 1991 Volume VII: Frye hearing reported by
Patricia Ancich

19RP March 12, 1991 Volume VIII: Frye hearing reported by
Patricia Ancich

20RP March 13, 1991 Volume IX: Frye hearing reported by
Patricia Ancich

21RP March 14, 1991 Volume X: Frye hearing reported by
Patricia Ancich

22RP March 15, 1991 Volume XI: Frye hearing reported by
Patricia Ancich

23RP March 18, 1991 Volume XII: Frye hearing reported by
Patricia Ancich

24RP March 19, 1991 Volume XIII: Frye hearing reported by
Patricia Ancich

25RP March 21, 1991 Volume XIV: Frye hearing reported by
Patricia Ancich

26RP March 25, 1991 Volume XV: Frye hearing reported by
Patricia Ancich

27RP March 26, 1991 Volume XVI: Frye hearing reported by
Patricia Ancich

28RP March 27, 1991 Volume XVII: Frye hearing reported by
Patricia Ancich

29RP March 28, 1991 Volume XVIII: Frye hearing reported by
Patricia Ancich

30RP April 1, 1991 Volume XIX: Frye hearing reported by
Patricia Ancich

31RP April 2, 1991 Volume XX: Frye hearing reported by
Patricia Ancich

32RP April 8, 1991 Volume XXI: Frye hearing reported by
Patricia Ancich

33RP April 15, 1991 Pretrial motions reported by Syndie
Hagardt

34RP	April 16, 1991	Pretrial motions reported by Syndie Hagar dt
35RP	April 18, 1991	Pretrial motions reported by Nickoline Taft
36RP	April 22, 1991	Jury selection reported by Syndie Hagar dt
37RP	April 23, 1991	Jury selection reported by Syndie Hagar dt
38RP	April 24, 1991	Jury selection reported by Syndie Hagar dt
39RP	April 25, 1991	Jury selection reported by Syndie Hagar dt
40RP	April 29, 1991	Jury selection reported by Maureen Lander
41RP	April 30, 1991	Jury selection reported by Maureen Lander
42RP	May 1, 1991	Jury selection reported by Kathryn M. Todd
43RP	May 2, 1991	Volume XXII: Jury selection reported by Patricia Ancich
44RP	May 3, 1991	Volume XXIII: Jury selection reported by Patricia Ancich
45RP	May 6, 1991	Jury selection reported by Kathryn M. Todd
46RP	May 7, 1991	Jury selection reported by Maureen Lander
47RP	May 8, 1991	Jury selection reported by Maureen Lander
48RP	May 9, 1991	Morning jury selection reported by Maureen Lander
49RP	May 9, 1991	Volume XXIV: Afternoon jury selection reported by Patricia Ancich
50RP	May 10, 1991	Volume XXV: Jury selection reported by Patricia Ancich

51RP	May 13, 1991	Volume XXVI: Jury selection reported by Patricia Ancich
52RP	May 14, 1991	Volume XXVII: Opening Arguments and trial testimony reported by Patricia Ancich
53RP	May 15, 1991	Volume XXVIII: Trial testimony reported by Patricia Ancich
54RP	May 16, 1991	Trial testimony reported by Debbie Zurn
55RP	May 17, 1991	Trial testimony reported by Debbie Zurn
56RP	May 20, 1991	Trial testimony reported by Gayle Wakefield
57RP	May 21, 1991	Trial testimony reported by Gayle Wakefield
58RP	May 22, 1991	Volume XXIX: Trial testimony reported by Patricia Ancich
59RP	May 23, 1991	Trial testimony reported by Leah M. Yates
60RP	May 28, 1991	Volume XXX: Trial testimony reported by Patricia Ancich
61RP	May 28, 1991	Trial afternoon session reported by Kathryn M. Todd
62RP	May 29, 1991	Volume XXXI: Trial testimony reported by Patricia Ancich
63RP	May 30, 1991	Volume XXXII: Trial testimony reported by Patricia Ancich
64RP	May 31, 1991	Volume XXXIII: Trial testimony reported by Patricia Ancich
65RP	June 3, 1991	Hearing entitled "Supplemental Verbatim Report of Proceedings" reported by Gerald D. Kohler
66RP	June 4, 1991	Volume XXXIV: Trial testimony reported by Patricia Ancich
67RP	June 5, 1991	Volume XXXV: Trial testimony reported by Patricia Ancich

68RP	June 6, 1991	Volume XXXVI: Trial testimony reported by Patricia Ancich
69RP	June 10, 1991	Volume XXVII: Trial testimony reported by Patricia Ancich
70RP	June 14, 1991	Volume XXVIII: Trial testimony reported by Patricia Ancich
71RP	June 17, 1991	Volume XXXIX: Trial testimony reported by Patricia Ancich
72RP	June 18, 1991	Volume XXXX: Trial testimony reported by Patricia Ancich
73RP	June 19, 1991	Trial testimony reported by Brian Faxvog
74RP	June 20, 1991	Trial reported by Kathryn M. Todd
75RP	June 21, 1991	Trial reported by Anita Lopez
76RP	June 24, 1991	Volume XXXXI: Trial testimony reported by Patricia Ancich
77RP	June 25, 1991	Volume XXXXII: Jury instruction exceptions and guilt phase closing arguments reported by Patricia Ancich
78RP	June 26, 1991 and June 28, 1991	Volume XXXXIII: Return of guilt phase verdict and argument on penalty phase motions in limine reported by Patricia Ancich
79RP	July 1, 1991	Volume XXXXIV: Penalty phase trial testimony reported by Patricia Ancich
80RP	July 2, 1991 and July 22, 1991	Volume XXXXV: Exceptions to penalty phase jury instructions, penalty phase closing argument, return of verdict, argument on motion for new trial, and sentencing.

Lori Vogel

From: OFFICE RECEPTIONIST, CLERK [SUPREME@COURTS.WA.GOV]
Sent: Monday, March 26, 2012 4:34 PM
To: Lori Vogel
Subject: RE: In er: the Personal Restrain of Jonathan Gentry, # 37238-0, Reponse to PRP and Motion

Received 3-26-12

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.

From: Lori Vogel [<mailto:LVogel@co.kitsap.wa.us>]
Sent: Monday, March 26, 2012 4:33 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: In er: the Personal Restrain of Jonathan Gentry, # 37238-0, Reponse to PRP and Motion

Please see the attached document. Thanks!

- **Case name:** In re the Personal Restraint of Jonathan Gentry
- **Case number:** 58415-0
- **Name of the person filing the document:** Randall Avery Sutton
- **Phone number of the person filing the document:** 360-307-4301
- **Bar number of the person filing the document:** 27855
- **E-mail address of the person filing the document:** rsutton@co.kitsap.wa.us

Lori A. Vogel, Legal Assistant
Kitsap County Prosecutor's Office
614 Division St, MS 35
Port Orchard, WA 98366
360-337-7239
LVogel@co.kitsap.wa.us

*Lori A. Vogel, Legal Assistant
Kitsap County Prosecutors Office
614 Division Street, MS-35
Port Orchard, WA 98366
360-337-7239 - desk
360-337-4949 - fax
LVogel@co.kitsap.wa.us*