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NO. 89620-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JONATHAN LEE GENTRY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

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REPLY BRIEF OF APPELLANT

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 ORIGINAL

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STATUTES

RCW 4.12.050 ..... 1

**I. RESPONDENT'S AUTHORITY SUPPORTS MR. GENTRY'S REQUEST FOR RECUSAL.**

Respondent does not dispute that Mr. Gentry was entitled to a change of judge under RCW 4.12.050, or that his counsel<sup>1</sup> asked Judge Forbes for such a change, both orally and in writing, before she made any discretionary rulings. Resp. Br. at 10-11.

Respondent's argument that the motion to recuse was not effective as an affidavit of prejudice rests on two quite dated cases, *State v. Smith*, 13 Wn. App. 859, 861, 539 P.2d 101 (1975), and *Bargreen v. Little*, 27 Wn.2d 128, 177 P.2d 85 (1947). In both those cases the judges did not know that any claim of prejudice had been made and the party allowed the proceedings to go forward without objection or without alerting the judge. See Resp. Br. at 12. In this case it was clear from the outset that defense counsel was alleging that the judge could not fairly hear the proceeding. RP(9/20/2013) 9. Respondent's argument that Judge Forbes was entitled to ignore the request because it was based on stated reasons, rather than a rote recitation of the statutory language, is the epitome of form elevated over substance.

The Court need not reach that issue, however, because the authorities both sides have cited support Mr. Gentry's alternative

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<sup>1</sup> Mr. Gentry was not present at the hearing before Judge Forbes.

argument that Judge Forbes abused her discretion by refusing to recuse herself for cause. Respondent's principal case authority, *Buechler v. Wenatchee Valley Coll.*, 174 Wn. App. 141, 298 P.3d 110, *review denied*, 178 Wn. 2d 1005, 308 P.3d 642 (2013), is supportive even though counsel for the appellant in that case, unlike Mr. Gentry's, did not file any motion or request for recusal but simply argued on appeal that the judge should have withdrawn *sua sponte*. *See id.* at 160. The decision in *Buechler* is supportive because it said this:

Under the Code of Judicial Conduct (CJC), a judge shall disqualify herself in a proceeding in which the judge's impartiality might reasonably be questioned. CJC Canon 2.11. Among the circumstances in which a judge should disqualify herself under the CJC are where the judge served as a lawyer in the matter in controversy or served in governmental employment and, in that capacity, participated personally and substantially as a public official concerning the proceeding. CJC Canon 2.11(A)(6)(a), (b). Here, there is no suggestion that Judge Allan had any involvement in this matter. She served as an assistant attorney general assigned to WVC 12 to 20 years before she was assigned Ms. Buechler's case.

174 Wn. App. at 160-61.

Although Judge Forbes did not literally "serve as a lawyer in the matter in controversy," she was a member of the law office that was prosecuting Mr. Gentry for this crime, while it was doing so. *See* RP (9/20/13) at 2-3. There is no indication that she was insulated or walled off from the case in any way. *Cf. State v. Stenger*, 111 Wn.2d 516, 522-

23, 760 P.2d 357 (1988) (disqualification of prosecutors' office required where deputy is disqualified and is not effectively screened and separated from any participation or discussion of the matter). To the contrary, Judge Forbes acknowledged that while she was employed by the Kitsap County Prosecuting Attorney's office (and while Mr. Gentry's case was going on) she worked with the lead trial prosecutor, Brian Moran. RP(9/20/13) at 3, 8. Judge Forbes also indicated she was in the same office with Pamela Loginsky, the lawyer primarily responsible for opposing Mr. Gentry's personal restraint petition while that opposition was ongoing—and Judge Forbes apparently worked with Ms. Loginsky (*id.* at 3), although the record is unclear regarding the nature of their working relationship.<sup>2</sup>

This is a far cry from what the Court approved in *Buechler*. Moreover in this case, unlike *Buechler*, there were and are allegations of misconduct by Judge Forbes' colleagues at the Kitsap County Prosecuting Attorney's office, including the one Judge Forbes acknowledged working with there, Brian Moran. The results of DNA testing of the most

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<sup>2</sup> Judge Forbes and Ms. Loginsky were both handling criminal appeals as Kitsap County deputy prosecutors shortly after the denial of Mr. Gentry's personal restraint petition. *See, e.g., State v. Payne*, 117 Wn. App. 99, 69 P.3d 889 (2003) (Ms. Loginsky); *State v. Van Buren*, 123 Wn. App. 634, 638, 98 P.3d 1235, 1237 (2004) (Ms. Forbes). (Judge Forbes apparently continued to prosecute the *Van Buren* case, as cocounsel with Respondent's present counsel, Randall Sutton, after leaving the Kitsap County Prosecutor's office. *State v. Van Buren*, 136 Wn. App. 577, 579, 150 P.3d 597 (2007).)

important item of evidence that had been ordered to be tested—the allegedly “negroid” hair found on the victim’s body—could potentially bear directly on those misconduct allegations. See *In re Gentry*, 179 Wn.2d 614, 622-623, 633-634, 316 P.3d 1020 (2014).

In addition to that, of course, there was much more at stake in this case than there was in *Buehler*.

[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion.

*Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (emphasis added).

“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing.” *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). Few disinterested observers would so conclude here. Judge Forbes was being asked to reverse the decision of another judge and stop DNA testing that could have undermined a capital conviction that was obtained and defended by the prosecutors’ office she was part of, when she was part of it. The

results of that testing also could have bolstered a claim of misconduct against one of her colleagues there. She had not ruled or had any involvement in the case as a judge, and there was no reason the pending motions could not have been heard just as easily by a judge who did not share that compromising history. Judge Forbes abused her discretion by denying the request and motion for recusal.

**II. RESPONDENT DOES NOT DISPUTE THAT THE COURT ORDERED DNA TESTING OF THE “NEGROID” HAIR WAS NOT DONE BECAUSE OF THE FAILURE OF THE PROSECUTOR’S OFFICE TO RETRIEVE THE EVIDENCE FROM ITS EXPERT.**

Respondent’s Brief says nothing about the reason the “negroid” hair evidence was never tested by the WSP crime lab. That reason, as we have noted (App. Br. 7), was that the prosecution’s expert, Ed Blake, at first declined to release the evidence claiming it to be his “intellectual property”—and when Mr. Gentry’s counsel asked the prosecution to ask Dr. Blake to reconsider, the request first “got buried” and was then declined. CP 546. Although this was called to the trial court’s attention, it was given no weight in its decision. It should have been. A court should look with particular disfavor on a motion to reconsider from a party that has already violated the terms of its previous order. *Cf. State v. Dodds*, 180 Wn.2d 1, 320 P.3d 705 (2013) (defendant forfeits objections by concealment of witness).

**III. RESPONDENT ADMITS THAT THE TRIAL COURT’S DECISION IS IRRECONCILABLE WITH THE STANDARD FOR DNA TESTING ESTABLISHED BY THIS COURT IN *RIOFTA v. STATE*, 166 Wn.2d 358, 209 P.3d 467 (2009) AND *STATE v. THOMPSON*, 173 Wn.2d 865, 271 P.3d 204 (2012).**

In *Riofta v. State*, 166 Wn.2d 358, 209 P.3d 467 (2009), this Court held that motions for postconviction DNA testing “when *exculpatory results* would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator.” *Id.* at 367–68 (emphasis added); *see also id.* at 367 (“whether ... *favorable* DNA test results would raise the likelihood that the person is innocent ...”). In *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012), the Court majority reiterated this standard, *id.* at 872-873, and approved two Court of Appeals decisions that had applied it—the lower court decision in *Thompson* itself and *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009). *Id.* The majority opinion in *Thompson* also rejected the very alternative standard that Respondent is espousing here—whether “DNA test results were unlikely, in fact, to have been favorable to [the] ... defense.” *See id.* at 892 (dissenting opinion).

Respondent argues that the *Riofta* decision did not mean what it said and the holding of *Thompson* was only *dictum*. Resp. Br. 27-28.<sup>3</sup>

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<sup>3</sup> We question whether the State can properly make this argument as justification for the trial court’s order vacating the previously-issued order for DNA testing, when it stipulated to the *Riofta* standard in its response to the original motion. *See* CP 483; *Atkinson v. Ethan Allen*,

Respondent could hardly argue otherwise, because it is clear that “favorable” or “exculpatory” results *would* have raised serious doubts about Mr. Gentry’s guilt and the fairness of his trial, in several ways. If preparations of the blood evidence made prior to trial were inconsistent with the results of the first WSP test on the fragments tested here, whose integrity was subject to question, it would raise a serious question of innocence and of evidence tampering.<sup>4</sup> Even more clearly, serious doubts would be raised if testing on the “negroid” hair not only excluded Mr. Gentry and his brother, but was found to have come from another suspect. Such inclusions, rather than exclusions, are the basis for DNA exonerations.<sup>5</sup> Finally, even if the donor of the hair could not be identified, if testing determined that hair was not “negroid,” it would

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*Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (describing elements of judicial estoppel).

<sup>4</sup>*Cf. Cooper v. Woodford*, 358 F.3d 1117, 1124 (9th Cir. 2004) (ordering testing for preservatives to determine if blood evidence was planted), *Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009) (dissent from affirmance following allegedly flawed testing). Although it was not disclosed at the time of Mr. Gentry’s trial, the lead detective on the case had been fired from a previous department for fabricating evidence, and in this case concealed impeaching evidence regarding the prosecution’s jailhouse informants. *See* CP 108-120.

<sup>5</sup> *See Thompson*, 173 Wn.2d at 874-75 (discussing *State v. Gray*, *supra*); *Haskell v. Harris*, 669 F.3d 1049, 1064 (9<sup>th</sup> Cir. 2012) (out of 273 post-conviction DNA exonerations in the United States since 1989, in 123 of the cases, the true suspects or perpetrators were also identified); *see also* Innocence Project Northwest, “Know the Cases,” Alan G. Northrop ([www.innocenceproject.org/Content/Alan\\_G\\_Northrop.php](http://www.innocenceproject.org/Content/Alan_G_Northrop.php), last visited July 24, 2014) (exoneration based on unknown male profiles in rape kit evidence).

destroy the last shred of justification for the prosecution's race-based theory of this case. *See Gentry*, 129 Wn.2d at 633 n.10 (noting the "troubling" possibility that the prosecution's racial theory of the case "was based on faulty science.").

### CONCLUSION

The orders denying recusal and denying further DNA testing should be reversed.

DATED this 25<sup>th</sup> day of July, 2014.

Respectfully submitted,

/s/ Timothy K. Ford  
Timothy K. Ford, WSBA #5986

/s/ Rita J. Griffith  
Rita J. Griffith, WSBA #14360

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on the 25<sup>th</sup> day of July, 2014, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following via e-mail and first class mail:

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Attached is the Reply Brief of Appellant in this case. Thank you.

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