No. 100922-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAUL RIVERS,

Petitioner.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, AND PUBLIC DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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The identity and interest of amici are set forth in the Motion for Leave to File, submitted with this brief.

INTRODUCTION

Imagine being a Black man in a King County courtroom facing life without parole under Washington's Persistent Offender Accountability Act and seeing potential jurors, none of whom appear to be Black, in the courtroom. Imagine informing the court about the systematic exclusion of Black potential jurors in King County, and asking the court to draw a jury from a fair cross section of your community. The court tells you that the absence of Black jurors in the venire does not violate your right to a fair trial.

This imagination exercise requires those who are not Black to bridge the racial empathic divide to try to understand what Mr. Rivers, a Black resident of King County, may have felt in the courtroom, and to place it within the lived experience of Black people, who have faced persistent race

disproportionality in policing, prosecution, convictions, and sentencing in Washington's criminal legal system. Imagine, then, how you might feel.

SUMMARY OF ARGUMENT

This Court is committed to reckoning with institutional and structural racism in the criminal trial process. This case provides an opportunity to continue that work upstream of the trial itself by ensuring adequate diversity in the venire. This Court has already made meaningful changes in both jury selection and jury deliberation to ensure that jurors of color are not improperly excluded based on race, GR 37 and *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), and, once empaneled, to ensure a meaningful remedy for race-based juror misconduct, *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019). But the reach of these efforts is limited so long as communities of color are underrepresented in the venire.

While GR 37 mitigates how unconscious bias improperly influences jury selection, it does not change the systemic

underrepresentation of jurors of color to begin with. Recent surveys indicate an increase in the underrepresentation of potential jurors of color in Washington's most populous counties, with a corresponding increase in the likelihood of having an all-white jury or an entirely non-Black jury regardless of the court's application of GR 37.[1] This Court's work to protect the trial process from being improperly affected by race is unfinished.

To ensure that this Court's jury selection and juror misconduct jurisprudence is more fully effective, and to further ensure fairness in the trial process, amici urge this Court to adopt the more stringent protections of the fair cross section right under article I, sections 21 and 22 advanced by Mr. Rivers. An accused person should be entitled to a new panel if

[1] Peter A. Collins & Brooke Miller Gialopsos, *An Exploration of Barriers to Responding to Jury Summons: Technical Report to the Washington State Administrative Office of the Courts* 6-23 (2021); Katherine Beckett, *Report: The Under-Representation of Blacks in the King County Jury Pool* 11 (2016).

they show a distinctive group was impermissibly underrepresented—measured by 20% comparative disparity—in their venire, without also having to prove systematic exclusion. Suppl. Br. of Pet'r at 24-25.

This effective remedial approach to fair cross section claims (1) will help counteract our country's racist history of excluding Black people from jury service and addresses the harms that flow from continued underrepresentation; (2) is a principled development of this Court's anti-discrimination jurisprudence that accounts for the operation of systemic racism; and (3) recognizes important empirical evidence that diverse juries engage in a more thorough—and more fair—deliberative process.

ARGUMENT

I. The history of excluding Black people from jury service is rooted in white supremacy and has perpetuated a legacy of harm which must be counteracted with an effective remedial approach.

a. The historical exclusion of Black people permitted white perpetrators of anti-Black terrorist violence to act with impunity and permitted the use of the criminal legal system as a tool of oppression against Black Americans.

Historically, the role of the jury in criminal cases was understood as a "critical check" on the power of the government.[2] But the Constitution denied most Black Americans the opportunity to contest governmental power by classifying enslaved persons as property.[3] Even free Black people were completely excluded from jury service throughout

[2] David M. Coriell, *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 Cornell L. Rev. 463, 466 (2015).

[3] Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2005) [hereinafter *Race and the Jury*], https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf.

the country until at least 1860.[4] This wholesale exclusion left Black people unable to exercise the constitutional mechanism for preventing abusive criminal prosecution, convictions, and sentences.[5] At the same time, all-white juries protected the white perpetrators of murder, rape, assault, and economic exploitation of Black people from criminal liability, permitting racial terror to go unchecked.[6]

During the Reconstruction Era, there was a brief interval during which Black people regularly served on juries in some states.[7] Some of those racially integrated juries held white perpetrators of racial violence criminally accountable for the first time in American history.[8] But backlash was swift. Many

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[4] James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895 (2004).
[5] *Race and the Jury*, *supra*, at 11.
[6] *Id.*
[7] Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 La. L. Rev. 55, 59 (2020); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 886 (1994).
[8] *Race and the Jury*, *supra*, at 11.

white Americans began to view the inclusion of Black people on criminal juries as an existential threat to white supremacy, "even more objectionable than [B]lack suffrage."[9]

The Reconstruction-era inclusion of Black people on some juries was ended in 1879 by a federal statute that all-but explicitly permitted *de facto* exclusion of Black Americans from jury pools.[10] That same year, the U.S. Supreme Court prohibited *de jure* exclusion of Black jurors in *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L. Ed. 664, 664 (1879). But *Strauder* was silent as to Black exclusion that was not explicitly inscribed in statute. *Id.*

Post-*Strauder*, states (in both the North and the South) established vague, subjective standards for jury-eligibility that were used to exclude Black people from jury pools.[11] For example, some jurisdictions required potential jurors to be

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[9] Thomas W. Frampton, *The Jim Crow Jury*, 71 Vanderbilt L. Rev. 1593, 1600 (2019).
[10] *See* Alschuler & Deiss, *supra*, at 884.
[11] Hoag, *supra*, at 62-63.

"esteemed in their community for their integrity, fair character, and sound judgment."[12] Federal law explicitly permitted lists of potential jurors to be hand-selected—in both state and federal courts—by white officials who invariably determined only other white people to meet those criteria.[13] This process for creating jury pools remained in place in federal courts until 1968, and in some state courts for longer than that.[14]

Other states required potential jurors to be selected from the voter rolls.[15] But voting in many states was limited to those who could pay a poll tax, pass a literacy test, and "demonstrate a reasonable understanding of the duties and obligations of

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[12] *Id.* at 63.

[13] *Id.* at 880, 893-94; Benno V. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 Tex. L. Rev. 1401, 1454-55 (1983).

[14] Alschuler & Deiss, *supra*, at 894; *see also Carter v. Jury Comm'n*, 396 U.S. 320, 336-37, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970) (upholding the constitutionality of jury venires hand-selected based on subjective, vague criteria, even when the procedure leads to extreme underrepresentation of Black jurors in majority-Black counties).

[15] Schmidt, *supra*, at 1462.

citizenship."[16] Invariably, these standards were enforced in a manner that wholly prohibited Black people from registering to vote, and consequently excluded them from jury service.[17]

The widespread exclusion of Black people from criminal juries served two primary purposes, both of which reinforced white supremacy. First, all-white juries permitted the perpetrators of anti-Black violence to confidently evade punishment.[18] Organizations like the Ku Klux Klan engaged in a campaign of violent terrorism against Black citizens to prevent them from exercising the rights granted to them under the Fourteenth and Fifteenth Amendments, including the right to participate in jury service.[19] The complete absence of Black people on juries meant that, even in the rare case in which a state filed criminal charges against the perpetrators of anti-

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[16] *Id.*
[17] *Id.*
[18] Hoag, *supra*, at 59-61; Forman, *supra*, at 916-21; *Race and the Jury*, *supra*, at 11.
[19] Hoag, *supra*, at 59-60.

Black violence, an all-white jury would invariably acquit them.[20] The campaign of terrorist violence and the exclusion of Black citizens from juries created a self-reinforcing cycle – anti-Black terror prevented Black people from exercising their rights, including the right to serve on a jury. And the absence of Black jurors permitted the racist violence to continue.[21]

Second, all-white juries allowed the criminal legal system to be weaponized against Black communities. Almost immediately after the end of the Civil War, Black people accused of crimes were more likely to be convicted and were sentenced more harshly than similarly situated white people.[22] These patterns continue to the present day, including in Washington State.[23]

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[20] *Id.* at 61; Forman, *supra*, at 921.
[21] Hoag, *supra*, at 61.
[22] Forman, *supra*, at 915.
[23] *See generally* Research Working Grp., Task Force 2.0, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court* 3-5 (2021), https://digitalcommons.law.seattleu.edu/korematsu_center/116.

b. Systematic exclusion of Black citizens from jury pools continued throughout the 20th century and Black people are still disproportionately underrepresented on jury venires through the country, including in Washington State.

The mechanisms for excluding Black jurors described above continued well into the 20th Century.[24] Despite the initial promise of a fair cross section articulated in *Duren v. Missouri*, 439 U.S. 357, 360, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), significant Black underrepresentation on jury venires persists.[25]

A 1994 study of continued disproportionate exclusion of Black potential jurors broke down jury selection from the total adult population into eight phases, demonstrated below:

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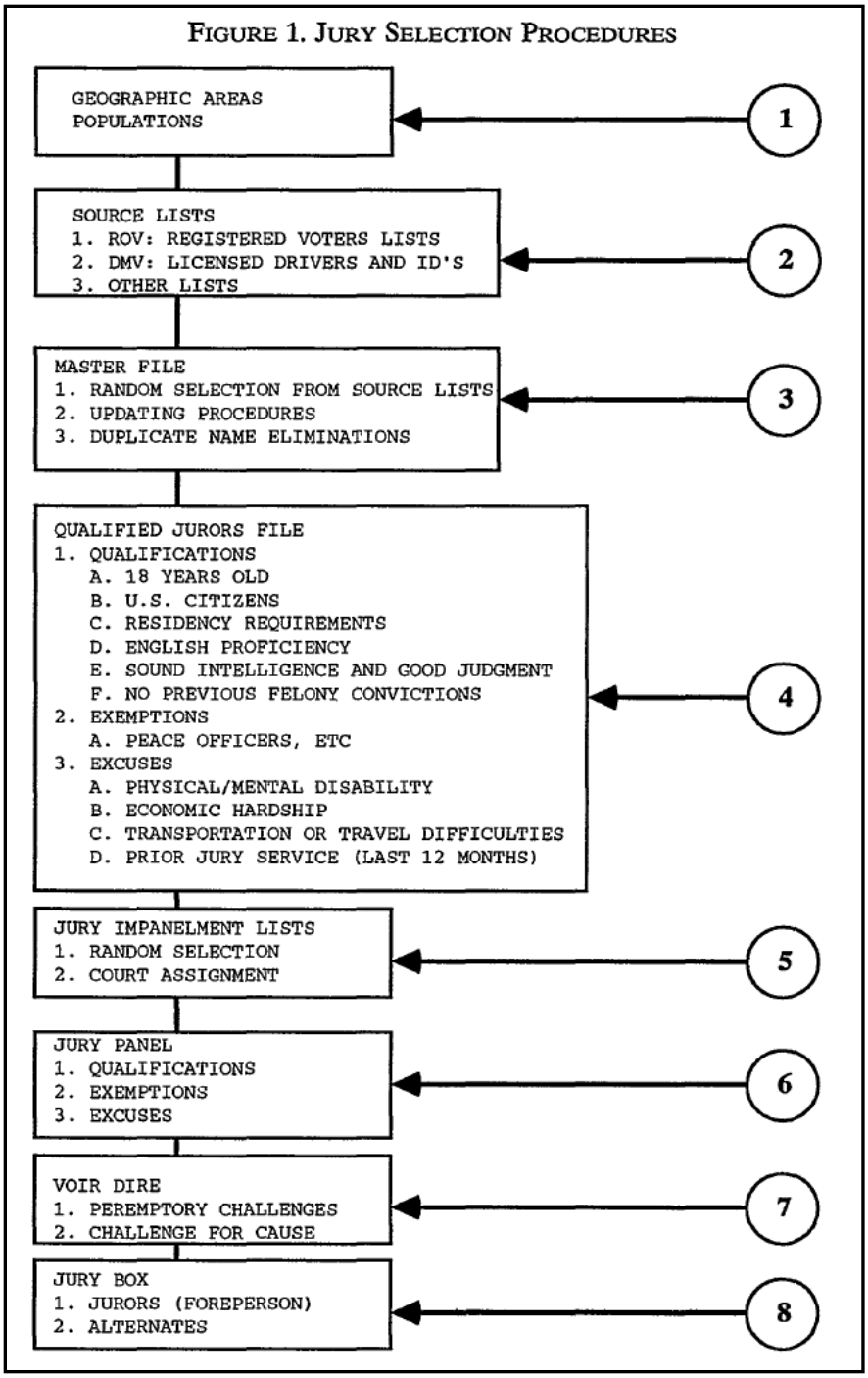
[24] Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf; Alschuler & Deiss, *supra*, at 896; *Race and the Jury*, *supra*, at 16-17.

[25] *See* Hoag, *supra*, at 68-75.



From Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial*

Disenfranchisement in the Jury and Jury Selection System, 13 UCLA Nat'l Black L.J. 238, 240 (1994).

At each phase in the model, Black potential jurors were disproportionately excluded, creating a cumulative effect in which Black people were significantly underrepresented on jury panels.[26] This filtering effect continues to operate throughout the country and "mimic[s] the same results as explicit attempts to exclude [B]lack jurors in the past."[27]

Research specific to Washington State demonstrates that the cumulative exclusion of Black jurors at each phase of the process leads to significant Black underrepresentation on jury pools here. Juror source lists, which are drawn from lists of

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[26] Fukurai & Butler, *supra*.

[27] Hoag, *supra*, at 57; *see also* Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, J. of Crime & Just. (2015); Ashish S. Joshi & Christina T. Kline, American Bar Association, *Lack of Jury Diversity: A National Problem with Individual Consequences* (2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/.

registered voters and driver's license/state identification card holders, exclude as many as one third of Black Washingtonians.[28] The manner in which juror summonses are sent out results in underrepresentation from areas with large Black populations.[29] Black people are disproportionately likely to never receive a jury summons because of transiency, unstable housing, and housing discrimination.[30] When a summons is returned as undeliverable, that person's name can be "purged"

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[28] Minority and Justice Commission, Washington State Supreme Court, *Annual Report 2017-18* 11, https://www.courts.wa.gov/committee/pdf/AnnualReportMJC2017-2018.pdf; Memorandum from Washington Appleseed to Washington State Supreme Court (Apr. 19, 2017), https://www.courts.wa.gov/subsite/mjc/docs/2017/Washington%20Appleseed%20Jury%20Diversity%20Memo.pdf

[29] Alexis Krell, *Juries Have a Diversity Problem. What's Being Done to Address it in Washington State?*, The News Tribune, April 17, 2021, https://www.courts.wa.gov/content/publicupload/eclips/2021%2004%2019%20Juries%20have%20a%20diversity%20problem%20Whats%20being%20done%20to%20address%20it%20in%20Washington%20state.pdf.

[30] Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 Criminology, Crim. Just., L. & Soc'y, 1, 36 (2021).

from the master list, which further exacerbates the underrepresentation.[31] And Black Washingtonians are disproportionately likely to be unable to serve on a jury because of socio-economic factors such as lack of childcare, lack of transportation, or inability to afford time off work.[32]

As a result of the "unbroken thread" of the exclusion of Black jurors since the founding of the county, a jury venire in a Washington criminal case is almost certain to include far fewer Black people than expected based on the population of the state, even before *voir dire* begins.[33]

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[31] *Id.*
[32] *Id.*
[33] *Id.*; Hoag, *supra*, at 55; Beckett, *supra*; Wash. State Ctr. for Court Rsch., *Juror Research Project: Report to the Washington State Legislature* (2008), https://www.courts.wa.gov/subsite/mjc/docs/2017/2008%20Juror%20Research%20Project%20-%20Washington%20State%20Center%20for%20Court%20Research.pdf.

c. Excluding Black people and other people of color from the venire not only harms the accused person, but the harms run to those excluded jurors and into their communities as well.

A central theme that has emerged in the "almost unbroken chain of decisions" over more than a century of "abolish[ing] race as a consideration for jury service," *Georgia v. McCollum*, 505 U.S. 42, 46, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), is the breadth and depth of the harm wrought when "identifiable segments playing major roles in the community" are not represented in jury service. *Peters v. Kiff*, 407 U.S. 493, 503, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972). Indeed, *Batson* itself declared unreservedly that the harm of race-based exclusion of jurors "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

This was not a novel concept even at the time *Batson* was decided. Nearly a century before *Batson*, the Court observed that "the exclusion of Negroes from jury service injures not

only defendants, but also other members of the excluded class: it denies the class of potential jurors the 'privilege of participating equally . . . in the administration of justice.'" *Peters*, 407 U.S. at 499 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L. Ed. 664 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)). Decades before that Alexis de Tocqueville recognized that "the institution of the jury raises the people itself…to the bench of judicial authority [and] invests the people… with the direction of society." *Powers v. Ohio*, 499 U.S. 400, 407, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (quoting Alexis de Tocqueville, 1 Democracy in America 334–337 (Schocken 1st ed. 1961)). Jury participation "is highly beneficial" to the juror, and "one of the most efficacious means for the education of the people which society can employ." *Id.* Exclusion from jury service in light of these benefits is thus a plain harm to BIPOC individuals. Compounding that harm, in more contemporary times the Supreme Court has recognized that those excluded

from jury service on the basis of race are often so marginalized that they "otherwise might not have the opportunity to contribute to our civic life" at all. *Id*. at 409.

These harms fall not only upon individuals and excluded groups, but instead infect the entire criminal legal system, and ultimately the entire community. "[E]xcluding identifiable segments playing major roles in the community [from jury service] cannot be squared with the constitutional concept of jury trial" and undermines "public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 530.This is not merely an academic concern. A 2019 Pew research study revealed that 65% of respondents (and nearly *ninety* percent of Black respondents) agreed that Black people are treated less fairly "[b]y the criminal justice system."[34]

[34] Juliana Menasce Horowitz et al., Pew Rsch. Ctr., *Race in America* (2019), https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/#majorities-of-black-and-white-adults-say-blacks-are-treated-less-fairly-than-whites-in-dealing-with-police-and-by-the-criminal-justice-system.

In light of these harms, the United States Supreme Court declared eighty years ago that "[t]endencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial[.]" *Glasser v. United States*, 315 U.S. 60, 86, 62 S. Ct. 457, 86 L. Ed. 680 (1942). As this Court did in updating the *Batson* standard when it failed to achieve its goals, this Court should recognize that the Sixth Amendment's "systemic exclusion" requirement fails to adequately protect against the multifaceted harms at which it is aimed.

II. Adopting a more protective cross section test under article I, sections 21 and 22 is consistent with this Court's anti-discrimination jurisprudence.

Adopting Mr. Rivers's proposed test under article I, sections 21 and 22 is consistent with this Court's anti-discrimination jurisprudence, which explicitly accounts for the operation of systemic race bias in the criminal legal system. The proposed test would ameliorate a multipronged harm—

harm to the accused, harm to those BIPOC individuals currently underrepresented in Washington's jury venires, harm to the perceived fairness of the criminal legal system, and harm to the community.

Following the murder of George Floyd, this Court's letter to the legal community named its responsibility to confront the racial injustices plaguing our country.[35] The Court committed to correcting the judicial system's incorrect, harmful, and shameful practices, irrespective of tradition or precedent.[36]

This Court has worked diligently to acknowledge and correct its mistakes of the past. *See, e.g.*, *Garfield Cty. Transp. Auth. v. State of Washington*, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020) (noting that the decision in *Price v. Evergreen Cemetery Co. of Seattle*, 57 Wn.2d 352, 357 P.2d 702 (1960), which invalidated a 1953 statute that made a cemetery's refusal

[35] Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. at 2 (June 4, 2020).
[36] *Id.*

of burial on the basis of race unlawful, was "an example of the unfortunate role we have played in devaluing [B]lack lives."); *State v. Towessnute*, 197 Wn.2d 574, 578, 486 P.3d 111, 112 (2021) (repudiating the decision and racist language in *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), where this Court had required Mr. Towessnute to be prosecuted for fishing in the Yakama's usual and accustomed places, as it reflected racism against the Yakama Tribe and a fundamental misunderstanding of the nature of treaty rights); *Matter of That Portion of Lots 1 & 2, Block 1, Comstock Park Second Addition, According to Plat Recorded in Volume 2 of Plats, Page 84, Situate in City & Cnty. of Spokane*, 199 Wn.2d 389, 402, 506 P.3d 1230 (2022) (although discriminatory restrictive covenants are morally repugnant, they are a part of a documented history of disenfranchisement that must be preserved in the public record).

In addition to confronting its racist past, this Court is committed to addressing the ways in which our criminal legal system disproportionately harms Black people and other people

of color, and to creating new rules that explicitly account for the operation of institutional and systemic racism. In *State v. Blake*, the Court acknowledged that the drug possession statute disproportionately impacted young men of color and found that the strict liability nature of the statute, which exercised substantial penalties for innocent, passive conduct, exceeded the legislature's police power. 197 Wn.2d 170, 181, 192, 481 P.3d 521 (2021); *see also State v. Thomason*, No. 99865-5, 2022 WL 2517212, at *6-7 (Wash. July 7, 2022) (González, C.J., concurring) (expressing concern over the Court's unchallenged precedents, Justice González highlighted the SRA's failed attempts to constrain race discrimination in the criminal sentencing).

The Court has also expanded application of the "objective observer" standard, first adopted by this Court in GR 37 to combat race discrimination in jury selection, into other areas of the criminal law. That standard now informs how courts must account for implicit bias and systemic racism when

analyzing the constitutionality of civilian interactions with law enforcement, and curbs race-based prosecutorial misconduct. *State v. Sum*, ___ Wn.2d __, 511 P.3d 92, 97 (2022) (an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington); *State v. Zamora*, No. 99959-7, 2022 WL 2348703 (June 30, 2022) (a prosecutor's flagrant or apparently intentional appeals to racial or ethnic biases, as viewed through the lens of the objective observer, require reversal).

III. Ensuring a diverse venire champions fair trial rights, as empirical evidence demonstrates that diverse juries engage in a fairer deliberative process.

A diverse jury drawn from a representative venire is necessary for a jury to make a decision based on the facts and

the law, rather than on bias.[37] Empirical literature on this topic underscores the very real dangers of an unrepresentative venire, as well as the intrinsic value of jury diversity.

Empirical literature suggests that white jurors have decreased ability to empathize with a defendant who is not a member of their demographic in-group. In-group favoritism and out-group derogation influence how jurors understand and explain a defendant's actions.[38] "[P]eople are especially likely to empathize with those who share a group identity, while withholding empathic understanding for members of out-groups."[39] Without the empathy extended to in-group members,

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[37] For implicit bias, see generally Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 Soc. Just. Rev. 145-45 (2004); Scott Plous, *The Psychology of Prejudice, Stereotyping and Discrimination: An Overview*, in *Understanding Prejudice and Discrimination* 13-14 (2003).

[38] Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 877, 877 (2015); Dasgupta, *supra*, at 146.

[39] Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 L. & Soc. Inquiry 377, 383 (2015).

jurors struggle to humanize the defendant and instead fall back on stereotypes.[40]

Though Washington no longer allows the death penalty, the robust empirical literature in the capital context on empathic deficits can help understand more generally how race can influence jurors' engagement with the evidence, whether for purposes of conviction or for sentencing.[41] The "empathic divide" that separates jurors from the defendant is much greater when their racial identities differ and is extremely difficult to overcome due to racial biases.[42]

Mock capital jurors were more likely to empathize with defendants who shared their same or similar race and were less

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[40] "Among whites, especially white males, racial stereotypes and mistrust are linked to punitiveness." William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 179 (2001).
[41] *See* Lynch & Haney, *supra*, at 382-83 (concluding that the race of the defendant had a significant effect on a jury's sentencing choice).
[42] *Id.* at 383.

likely to apply empathy to defendants outside of their racial group.[43] Jurors would build off those emotions to find other jurors who shared the same sentencing preference and would often form empathic narratives with one another, and then use those narratives to persuade other jurors to their preferred sentencing choice.[44] White male jurors were generally the most successful in implementing this strategy, because they held a great degree of influence over other participants by asserting their own emotional authority through personal emotional responses and by policing the emotional expressions of the other jurors.[45] White male jurors would often exercise their authority differentially based off the defendant's race and were the primary drivers of racial bias, both overtly and subversively.[46] In the white defendant, black victim scenarios, white men were more likely to become authoritative advocates

[43] *Id.* at 385.
[44] *Id.* at 387.
[45] *Id.* at 394.
[46] *Id.* at 394.

for life sentences and confidently assert empathetic narratives on the defendant's behalf. Conversely, in the black defendant, white victim scenarios, white men became leaders in quashing empathetic responses from other jurors and countered their emotional responses with claimed expertise and redirected empathetic mitigating narratives to the apparent facts of the case.[47] Sympathetic life stories were therefore given less mitigating significance when offered on behalf of a black defendant versus a white defendant.[48]

A literature review[49] on the role of race in juror behavior in interracial trials also suggests that white jurors' racial bias is activated when the racial context of a crime is not provided (or made "salient") in the case, versus a race-neutral presentation of

[47] *Id.* at 394.
[48] *Id.* at 402.
[49] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries—A Review of Social Science Theory and Research*, 78 Chi-Kent L. Rev. 997, 1010-11 (2003).

the facts.[50] White mock jurors were significantly more likely to vote to convict a Black defendant than a white defendant when the racial context was not provided, but fact patterns were otherwise identical.[51] This allows jurors' implicit biases to operate unchecked, and is consistent with the evolution of racism in America, shifting from overt, explicit demonstrations of racism to more subtle means, such as opposition to social

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[50] In the studies examined, the racial context (or "race salience") was created for the mock jurors via case descriptions that included racially charged statements by the defendant at the time of the incident, or via witness testimony addressing racial tension that existed when the incident occurred. *Id.* at 1014-16.

[51] *Id*. at 1014-16 (citing Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions,* 26 Personality & Soc. Psychol. Bull. 1367, 1372 (2000); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Racial Prejudice against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201 (2001)). For an important explanation of these studies and the concept of "race salience," including how Sommers and Ellsworth have continued to refine their language describing these studies, see Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 Behav. Sci. Law 599, 599-603 (2009).

policies for racial equality.[52] Conversely, white jurors are less influenced by defendant race in interracial trials and are motivated to avoid racial biases when concerns about racism are emphasized.[53]

A more protective cross section test would increase the likelihood of jury diversity, which the literature suggests may increase the chances that jurors will engage with the racial context of the case. Empirical evidence suggests that heterogenous groups deliberate longer and consider a more comprehensive range of information than homogeneous groups, meaning information exchange within diverse juries is more robust than in all-white juries.

The most powerful and widely cited study evaluating the role of race in the mock jury found that diverse groups made more reliable decisions than did homogenous groups, because diverse groups discussed more facts and made fewer inaccurate

[52] *Id*. at 1011.
[53] *Id*. at 1013.

statements.[54] Motivations to avoid prejudice led white jurors to more systematically and thoroughly process information conveyed by or about Black individuals.[55] A jury's racial composition also led to a significant shift in how the jurors interpret and weigh the evidence—particularly when a defendant is Black.[56] Jurors, viewing the same evidence, were also less likely to believe the defendant was guilty when they were in a diverse group.[57]

Racially diverse juries are also effective in counteracting the biases of white jurors even before deliberations begin, by

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[54] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations,* 90 J. Pers. & Soc. Psychol. 597, 605-06 (2006) [hereinafter *Group Decision Making*]; *see also* Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 74 (2007) ("A jury of people with a wide range of backgrounds, life experiences, and world knowledge will promote accurate fact-finding" because "a diverse group is likely to hold varying perspectives on the evidence, encouraging more thorough debate over what the evidence proves.").
[55] *Group Decision Making*, *supra*, at 599.
[56] *Id* at 607.
[57] *Id.* at 607.

virtue of white jurors' heightened awareness of their membership in a heterogeneous group.[58] Predeliberation ratings were collected privately before the mock jurors interacted, and across the entire sample, 41.0% of participants voted guilty before deliberations began; however, 30.7% of participants in diverse groups voted guilty compared with 50.5% of participants in all-white groups.[59] The predeliberation effect of a diverse venire was also stark among white jurors: whites in diverse groups gave significantly lower guilt estimates than whites in all-white groups.[60]

Mr. Rivers moved the superior court to draw his jury from a fair cross section of the community, but the existing fair cross section jurisprudence under the Sixth Amendment has made the promise of a diverse jury illusory. The superior court

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[58] *Id.* at 603; *see also* Sarah E. Gaither et al., *Mere Membership in Racially Diverse Groups Reduces Conformity*, 9 Soc. Psychol. & Pers. Sci. 402, 403 (2017).
[59] *Group Decision Making*, *supra*, at 603.
[60] *Id.*

denied Mr. Rivers's motion, after which he faced a jury that was less likely to discuss race, consider racism, or mitigate individual racial biases as compared to a diverse jury. Had his jury been drawn from a truly representative cross section of the community, the empirical evidence suggests that the deliberative process in his case would have been materially better.

CONCLUSION

Our state constitution requires that there be an effective remedial approach to address fair cross section claims. Ensuring that a defendant can effectively challenge underrepresentation of distinct groups in jury venires will help counteract the historical and continuing exclusion of Black people from jury service. Ensuring a more protective fair cross section standard is also consistent with this Court's antidiscrimination jurisprudence, and will increase the likelihood that a diverse jury is empaneled on any particular case, promising a more thorough deliberative process that ensures greater fairness.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 4,985 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 5,000 words for amicus briefs as required by RAP 18.17(c)(6).

DATED this 29th day of July, 2022.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on July 29, 2022, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 29th day of July, 2022.

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