

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,	)	No. 100922-4
Respondent,	)	
	)	PETITIONER’S
v.	)	RESPONSE TO
	)	STATE’S STATEMENT
PAUL RIVERS	)	OF ADDITIONAL
Appellant.	)	AUTHORITIES
	)	(RAP 10.8(c))

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*State v. Fleeks*, \_\_ Wn. App. 2d \_\_, 523 P.3d 220 (2023), supports Mr. Rivers’s argument that to achieve diverse jury pools and meaningfully recognize the right to draw a jury from a fair cross section of the community, this Court should establish a different test than *Duren*<sup>1</sup> and a test that derives from Washington’s Constitution, not the Sixth Amendment.

Mr. Fleeks argued his venire with “only two Black people” violated his right to have a jury drawn from a fair cross section of the King County community. *Id.* at 231. The trial

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<sup>1</sup> *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

court agreed Mr. Fleeks’s venire “was clearly not proportionate with regard to representation of African Americans.” *Id.* It noted “the representation of this particular panel was low.” *Id.* But it nevertheless rejected Mr. Fleeks’s challenge. *Id.*

The Court of Appeals applied the Sixth Amendment’s *Duren* test and unsurprisingly rejected Mr. Fleeks’s challenge as well. *Id.* at 231-36. The court held Mr. Fleeks did not demonstrate an underrepresentation and, if he did, ruled he did not prove a systematic exclusion. *Id.* at 234-36.

Like the cases referenced in Mr. Rivers’s Supplemental Brief and accompanying appendix, *Fleeks* demonstrates that the *Duren* test cannot protect Washington’s inviolate right to an impartial jury drawn from a fair cross section of the community. *See Supp. Br.* at 10-11 & Appendix A. The opinion’s criticism of what it believed to be Mr. Fleeks’s lack of data also supports Mr. Rivers’s argument that this Court should establish a test that focuses on the panel appearing

before it and reject *Duren*'s requirement to prove a general underrepresentation over time. *See* Supp. Br. at 29-30.

The *Duren* test presents an insurmountable burden that denies accused persons their ability to enforce their fair cross section rights. This Court should recognize Washington's more protective fair cross section right and establish a new test to enforce it. To persist under a *Duren* analysis will only result in continued denials of the right, as occurred in *Fleeks*.

Counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by RAP 18.17, as 343 words.

DATED this 17th day of March, 2023.

Respectfully submitted,



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Date: March 17, 2023

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