No. 100922-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAUL RIVERS,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

In this Court's open letter to the legal community, it acknowledged the shameful role the legal system plays in devaluing and degrading Black lives and perpetuating injustices. The Court recognized "the overrepresentation of black Americans in every stage of our criminal" legal system.[1] But, while Black Americans are overrepresented among the people policed, prosecuted, and sentenced, they are drastically *underrepresented* at one crucial stage: jury selection.

This was true for Paul Rivers, a Black man charged with assaulting his white girlfriend, who was forced to select a jury from a panel with no Black potential jurors. The federal test does not protect Washington's inviolate right to impartial juries drawn from a fair cross section of the community. This Court should adopt a standard that renders the fair cross section right a reality rather than a myth.

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[1] Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (2020).

B. ISSUES PRESENTED[2]

1. Do article I, sections 21 and 22 of Washington's Constitution afford greater protection of the right to a jury drawn from a fair cross section of the community than the Sixth Amendment?

2. Should this Court abandon the unworkable Sixth Amendment *Duren* test and establish a test capable of safeguarding this crucial right?

2. Did the court deprive Mr. Rivers of his inviolate right to an impartial jury drawn from a fair cross section of the community when it denied his motion and drew his jury from a venire with no Black venirepersons?

C. STATEMENT OF THE CASE

The prosecution charged Paul Rivers, a Black man in Seattle, with assaulting his white girlfriend. CP 1-2. Mr.

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[2] This Court transferred the entire case from Division One. Mr. Rivers focuses on his challenge under Washington's Constitution and relies on his opening and reply briefs for his Sixth Amendment challenge, the court's inadequate response to jury notes, and the improper "expert" testimony.

Rivers moved the court to draw his jury from a fair cross section of the community. CP 66-161; RP 171-78.

Mr. Rivers demonstrated venires in King County consistently underrepresent Black potential jurors. He identified data collected for one year in 2015 demonstrating the county undersamples zip codes with higher percentages of Black residents and oversamples zip codes with higher percentages of white residents. CP 80-86, 141-53.

Mr. Rivers also relied on Professor Katherine Beckett's report demonstrating Black venirepersons are underrepresented by a 35.5% comparative disparity in King County generally and an even higher disparity in Seattle's jury assignment area.[3] CP 115, 105-20. Although King County's 2015 jury-eligible population was 5.6% Black, only 3.61% of King County jury pools contained Black members. CP 113-15. Although 4.14% of Seattle's jury assignment area population was Black, only

[3] King County divides its source list into Seattle and Kent jury assignment areas. RCW 2.36.055; LGR 18.

2.29% of Seattle jury pools contained Black potential jurors. CP 113-15. Professor Beckett concluded, "[B]lack adult citizens residing in King County are under-represented among those appearing in King County courts in response to a jury summons" throughout the county and in Seattle's assignment area. CP 113.

In addition to showing underrepresentation of Black venirepersons generally, Mr. Rivers noted that his panel did not include a single person who appeared to be Black. RP 275-76. Neither the prosecution nor the court challenged his assertion. RP 275-76.

The court acknowledged "courts in this County, and I think across the whole state" were aware of potential underrepresentation of Black venirepersons. RP 177. It nonetheless found Mr. Rivers did not show underrepresentation. RP 177. It also ruled systematic exclusion requires "blatantly different treatment of under-represented groups, and I think there is simply no evidence of that." RP 178. The court

ignored Mr. Rivers's argument that Washington's Constitution is more protective of the fair cross section right and disregarded his *Gunwall* analysis. CP 92-94.

The court denied the motion and forced Mr. Rivers to select a jury from a panel with no Black members. RP 176-78, 275-78. That jury convicted him as charged. CP 30-32.

D. ARGUMENT

1. Juries drawn from a fair cross section of the community play a crucial role in ensuring fair and impartial deliberations.

In a legal system that disproportionately targets Black, Indigenous, and People of Color (BIPOC), racial and ethnic diversity of venires and petit juries plays a critical role in reducing the harmful bias inherent in that system. "[J]ury and jury pool diversity impact the equity of jury verdicts." Wash. Courts Gender & Just. Comm'n, Final Report, *How Gender and Race Affect Justice Now* 131 (2021). Studies confirm not only that "more diverse *juries* result in fairer trials," but also that more diverse *jury pools* result in fairer trials. *State v.*

Saintcalle, 178 Wn.2d 34, 50, 309 P.3d 326 (2013) (Wiggins, J., lead opinion) (emphasis added). "The positive impact of racial and ethnic diversity occur[s] even when the jury *pools*, from which jurors are selected, [are] diverse, regardless of the diversity of the seated jury." Final Report, *supra*, at 134. "Adding black potential jurors to the pool can also affect trial outcomes even when these jurors are not ultimately seated on the jury." Shamena Anwar, et al, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. Econ. 1017, 1020 (2012).

This could be because white potential jurors who anticipate participating in a diverse jury are "motivat[ed] to avoid prejudice," which not only affects their "information-processing style but also [leads] to a significant shift in how they interpret[] and weigh[] the evidence." 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, 601, 607 (2006).

Drawing a jury from a fair cross section of the community preserves "public confidence in the fairness of the criminal justice system" through shared "civic responsibility." *Holland v. Illinois*, 493 U.S. 474, 495, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990) (Marshall, J., dissenting) (internal quotations omitted). "[I]nclusion and diversity should be considered extremely important goals of the jury system at a systemic level. … [I]nclusion and diversity is highly beneficial, advanc[es] fairness and the appearance of fairness, and promot[es] more effective and reflective juries." *Saintcalle*, 178 Wn.2d at 101 (González, J., concurring).

Conversely, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972) (Marshall, J.). Such exclusion "deprives the jury of a perspective on human events

that may have unsuspected importance in any case that may be presented." *Id.* at 503-04.

In short, "there is constitutional value in having diverse juries." *Saintcalle*, 178 Wn.2d at 49. However, courts cannot achieve diverse juries without a diverse jury pool drawn from a fair cross section of the community.

2. The Sixth Amendment test under *Duren* fails to protect Washingtonians' inviolate right to an impartial jury drawn from a fair cross section of the community.

To establish a prima facie violation of the fair cross section right under the Sixth Amendment, defendants must prove: (1) the group allegedly excluded is "distinctive;" (2) the group's representation in venires is "not fair and reasonable" in relation to the community; and (3) this underrepresentation is "due to systematic exclusion" "in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 569 (1979). The person must demonstrate systematic exclusion causes underrepresentation both "generally and on his venire." *Id.* at 366. Systematic exclusion is "inherent in the

particular jury-selection process utilized." *Id.* The exclusion need not be intentional or deliberate.[4] *Id.* at 368 n.26.

If the accused proves all three prongs, the prosecution can defeat a claim by showing the practice that led to the exclusion "manifestly and primarily" advances "a significant state interest." *Id.* at 367.

The Supreme Court does not endorse any particular measurement of underrepresentation. *Berghuis v. Smith*, 559 U.S. 314, 329-30, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010). Most courts applying *Duren* measure underrepresentation using absolute or comparative disparities. Nat'l Ctr. for State Cts., *Jury Managers' Toolbox: A Primer on Fair Cross Section Jurisprudence*, 3-4 (2010). Absolute disparity subtracts the percentage of the distinctive group in the pool from the

[4] The court's ruling Mr. Rivers must demonstrate "blatantly different treatment" was erroneous. RP 178; Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 Hastings L.J. 141 (2012).

percentage of the distinctive group in the jury-eligible population. Comparative disparity divides the absolute disparity by the distinctive group's representation in the jury-eligible population. *Berghuis*, 559 U.S. at 323; CP 108-09.

The Supreme Court has not identified a concrete threshold disparity must reach, but most cases applying *Duren* require values of "10% to 12% absolute disparity" or "40% to 50%" comparative disparity. NCSC, *Primer, supra,* at 4. Finally, the Supreme Court recognized, "The fair-cross section principle must have much leeway in application" and afforded "broad discretion in the States in this respect," though few states have exercised this discretion. *Taylor v. Louisiana*, 419 U.S. 522, 537-38, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

The vast majority of cases applying *Duren* find the challenger did not prove sufficient underrepresentation or systematic cause. Chernoff, *Wrong, supra*, at 166-84 (examining 167 cases between 2000 and 2011, all denying challenges); Paula Hannaford-Agor, *Systematic Negligence in*

Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 763 (2011).

The undersigned reviewed 20 cases in which Washington appellate courts considered fair cross section claims under *Duren* or its progeny. Not a single case found a violation under the Sixth Amendment test. Appendix A.

This Court's observation that "Washington appellate courts have *never* reversed a conviction" under *Batson* spurred it to adopt a new standard for peremptory challenges. *Saintcalle*, 178 Wn.2d at 45-46. Likewise, that appellate courts have *never* reversed a conviction under *Duren* weighs in favor of a new standard for assessing fair cross section violations. Like *Batson*, *Duren* "created a 'crippling burden,'" making it "very difficult" for people to prove a violation of the right "even where it almost certainly exists." *Id.* at 46.

Mr. Rivers's case exemplifies how *Duren*'s crippling burden denies Washingtonians their fair cross section right.

Mr. Rivers provided the court with data demonstrating a disparity of Black venirepersons "generally and on his venire." *Duren*, 439 U.S. at 366. First, he showed "his venire" had no Black venirepersons. RP 275-76. Second, he showed venires "generally" underrepresented Black venirepersons. CP 105-20. Professor Beckett analyzed 4,669 responses from surveys administered on 20 days over three months in King County in 2015. CP 112-13. The report concluded that across King County generally, Black venirepersons were underrepresented by 35.5% comparative disparity. CP 115. In Seattle's assignment area, where Mr. Rivers was tried, disparity reached 44.7%. CP 115. Kent's assignment area reflected 34.4% comparative disparity. CP 115.

Mr. Rivers also demonstrated higher rates of undeliverable and nonresponse summonses in zip codes correlating to communities of color. CP 80-86, 141-53. He explained King County's response to undeliverable summonses undersampled zip codes with higher rates of Black residents

because the county sends new summonses countywide, not to the same zip code from which they were returned, diluting summonses to zip codes with higher percentages of Black residents. CP 80-86, 141-53; *see also* Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?* 52 U. Mich. J.L. Reform 1, 37-46 (2018).

Additional data collected at the direction of this Court's Minority & Justice and Gender & Justice Commissions show similar underrepresentation. In a 2016-2017 yearlong survey of 33 courts across the state, all but one "reported non-White populations as underrepresented" in jury pools. Peter A. Collins & Brooke Miller Gialopsos, A*nswering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 Criminology, Crim. Just., L. & Soc'y 2, 9 (2021). This was true of both King County jury assignment areas. *Id.* at 10. The survey demonstrated BIPOC generally "are underrepresented in nearly all Washington jury pools." *Id.* at 10-11. BIPOC women are underrepresented at even higher rates. *Id.* at 11-13.

A four-month survey across King, Pierce, and Snohomish counties in early 2021 shows this underrepresentation of potential jurors of color continues to increase.[5] 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). "White respondents were overrepresented (+9.0%) in King County during the study period (survey 78.8% White and CVAP[6] baseline 69.8% White), marking an increase from the previous jury survey and a total difference of +6.1%." *Id.* at 4.

In sum, all the available data demonstrate consistent underrepresentation of BIPOC generally and Black people in particular in venires in Seattle, King County, and most of Washington. Rather than a process that selects jurors from panels drawn from a fair cross section of the community, "It

[5] The surveys collected data based on people's self-identified race and ethnicity according to census categories but grouped conclusions as "White" and "non-White."

[6] Citizen Voting Age Population

appears as though our justice system has a jury selection process for some and a jury non-selection process for others." Collins & Gialopsos, *Answering*, *supra*, at 3.

Yet despite this demonstrated underrepresentation of Black venirepersons in King County generally, Seattle's assignment area generally, and Mr. Rivers's particular venire, the trial court held Mr. Rivers did not demonstrate a violation of the fair cross section right under *Duren*. RP 174-78.

The requirements of proving underrepresentation not only in the particular venire but also generally and of proving systematic exclusion create "a high bar that often renders the fair cross section guarantee illusory." David M. Coriell, *An (Un)fair Cross Section: How the Application of Duren Undermines the Jury*, 100 Cornell L. Rev. 463, 465 (2015). The insurmountable *Duren* test makes the fair cross section right unenforceable. "A proclaimed constitutional right—a fair cross-section in a jury venire—without a practical remedy to

vindicate that right is no right at all." *State v. Williams*, 972 N.W.2d 720, 727 (Iowa 2022) (Appel, J., concurring).

3. Washington's Constitution affords greater protection of the inviolate right to an impartial jury drawn from a fair cross section of the community.

"The right of trial by jury shall remain inviolate." Const. art. I, § 21. Article I, section 22 describes the guarantees of that inviolate right: "In criminal prosecutions the accused shall have the right to … a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The federal constitution similarly guarantees "an impartial jury" but contains no parallel to section 21's mandate that the jury right remain "inviolate." U.S. Const. amend. VI.

As this Court has already recognized, the unique text of Washington's jury guarantee shows the right is more extensive than the Sixth Amendment's jury trial right. *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982).

The Court has also recognized Washington's greater protection of the jury trial right in the context of the jury

selection process specifically. *See City of Bothell v. Barnhart*, 172 Wn.2d 223, 231-33, 257 P.3d 648 (2011) (federal law "inapplicable" to challenge under Washington's Constitution); *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) (recognizing "increased protection of jury trials" under Washington's Constitution). A *Gunwall*[7] analysis confirms the conclusion that article I, sections 21 and 22 provide broader protections of the right to a jury drawn from a fair cross section of the community than the Sixth Amendment.

Differences in the texts of the constitutions support independent interpretation. As noted, the federal constitution has no analog to Washington's declaration the right to a jury trial is "inviolate." Const. art. I, § 21; *Mace*, 98 Wn.2d at 97. The provision cementing Washington's jury trial right as

[7] Nonexclusive factors include: (1) textual language, (2) differences between the texts, (3) constitutional and common law history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

"inviolate" demonstrates the great importance of Washington's right. *State v. Williams-Walker*, 167 Wn.2d 889, 895-96, 225 P.3d 913 (2010).

The "inviolate" nature of Washington's right means "it must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fireboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). The enshrinement of the jury trial right in two separate provisions signifies double protection, "indicates the general importance of the right," and supports the conclusion that Washington "offers broader protection of the jury trial right than does the federal constitution." *State v. Smith*, 150 Wn.2d 135, 151, 156, 75 P.3d 934 (2003).

Structural differences favor an independent analysis, as they do in every case. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018).

The factors of preexisting state law, constitutional and common law history, and Washington's particular interest in

eradicating race-based inequity and discrimination from the jury selection process all sanction independent interpretation. Though history is one factor this Court considers, it also must consider the evolution of its jurisprudence. *See State v. Sum*, __Wn.2d__, 511 P.3d 92, 101 (2022) ("[H]istory is not a static factor in our analysis … we are 'constantly striving for better.'" (quoting Letter, *supra*)); *Bassett*, 192 Wn.2d at 80-81 (disregarding 1932 case as "not a guiding light").

Our legislature recognizes the history of racism and inequity in Washington. Laws of 2021, ch. 295, § 1. It prohibits race-based exclusion from jury service and prioritizes service as an "opportunity" and "obligation" for all qualified citizens. RCW 2.36.080.

Like Washington's legislature, this Court acknowledges the shameful role the legal system plays in perpetuating ongoing injustices through systemic oppression and inequalities. Letter, *supra*. It urged the legal community to recognize current and historical racism and to address these

injustices even when it means disregarding "tradition and the way things have 'always' been." *Id.*

This Court has begun the work of addressing systemic racism. It struck down the death penalty because it was administered "in an arbitrary and racially biased manner." *State v. Gregory*, 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018). It ordered the removal of "morally repugnant" racist covenants from property titles while retaining the public record. *In re Portion of Lots 1 & 2 v. Spokane Co.*, 199 Wn.2d 389, 391-92, 401-02, 506 P.3d 1230 (2022).

Most recently, the Court held, "[As] a matter of independent state law that race and ethnicity are relevant to the question of whether a person was seized by law enforcement." *Sum*, 511 P.3d at 103. It established a new standard of automatic reversal for prosecutorial race-based misconduct to "safeguard[]" the "right to an impartial jury." *State v. Zamora*, __Wn.2d__, 2022 WL 2348703, at *7 (2022).

This Court readily deviates from federal law "to accommodate unique jury selection processes" and protect Washington's interests in diverse juries free from discrimination. *State v. Jefferson*, 192 Wn.2d 225, 242, 429 P.3d 467 (2018). *State v. Berhe* limited courts' discretion to ignore evidence of racial bias in deliberations and required evidentiary hearings if an objective observer who is aware of implicit, institutional, and unconscious bias could view race as a factor in the verdict. 193 Wn.2d 647, 665, 444 P.3d 1172 (2019). In *State v. Pierce*, the Court abandoned the prohibition against informing jurors a case did not involve the death penalty because that rule disproportionately eliminated BIPOC. 195 Wn.2d 230, 242-43, 455 P.3d 647 (2020) (González, J., lead opinion).

In *Saintcalle*, the Court recognized the changing nature of racism made *Batson*'s purposeful discrimination requirement an inadequate test to guard against race-based peremptory challenges. 178 Wn.2d at 46-49. It relied on article I, section

21's inviolate jury trial right to honor the "constitutional value in having diverse juries" even when that value could not be protected by the Fourteenth Amendment's *Batson* test. *Id.* at 49. The Court invoked its independent state authority to address a process that allowed "the systematic removal of minority jurors" because that process "create[d] a badge of inferiority, cheapening the value of the jury verdict." *Id.* at 50. Therefore, the Court relied on its "authority under federal law to pioneer new procedures within existing Fourteenth Amendment frameworks." *Id.* at 51.

Perhaps most relevant is the Court's adoption of GR 37. The Court abandoned *Batson*'s unworkable purposeful discrimination requirement in favor of this new standard. GR 37 prohibits peremptory challenges when "an objective observer could view race or ethnicity as a factor" in the challenge where that observer "is aware that implicit, institutional, and unconscious biases, in addition to purposeful

discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(e)-(f).

Washington leads the nation in establishing rules that strive to eliminate racial bias and inequity during voir dire and at trials. But these rules can address only those jurors who are summoned and appear and cannot address the inequity and bias from the underrepresentation of Black community members in venires. Where a fair cross section of the community is not summoned, and where Black venirepersons do not appear, our efforts "to eliminate the unfair exclusion of potential jurors based on race or ethnicity" cannot achieve that goal. GR 37(a).

4. This Court should establish a new test to recognize Washington's stronger protection of this essential right.

This Court should hold that in Washington, a person is entitled to a new panel if they show impermissible underrepresentation in their own venire, without also having to prove general underrepresentation over time. The Court should further hold that underrepresentation reaches constitutionally

impermissible levels above 20% comparative disparity. This one-step standard would best protect defendants' rights to a fair cross section and would be easy for courts to administer.

Alternatively, if this Court also requires general underrepresentation over time, it should jettison the requirement of a direct systematic cause. Numerous past and present government actions and inactions combine to produce underrepresentative venires. This Court should take judicial notice of the cumulative effects of procedural choices and entrenched practices contributing to the problem of systemic underrepresentation, and not require a showing in every individual case.

a. <u>This Court should hold a defendant is entitled to a new panel if they demonstrate impermissible levels of underrepresentation in their venire.</u>

The Court should focus on underrepresentation in the panel in the case before it and abandon the requirement of underrepresentation "generally." *Duren*, 439 U.S. at 366 (requiring underrepresentation "generally and on his venire").

Where a person shows impermissible underrepresentation in the panel appearing for their trial, they should be entitled to a new panel. The Court should set the threshold for impermissible underrepresentation at 20% comparative disparity.

Several courts recognize comparative disparity as an appropriate metric because absolute disparity and other measures cannot account for underrepresentation at low percentages. *E.g., Garcia-Dorantes v. Warren*, 801 F.3d 584, 600-02 (6th Cir. 2015); *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1161-65 (9th Cir. 2014); *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008), *rev'd on other grounds,* 559 U.S. 314 (2010); *United States v. Orange*, 447 F.3d 792, 799 (10th Cir. 2006); *Mosley v. Dretke*, 370 F.3d 467, 479 n.5 (5th Cir. 2004); *United States v. Rogers,* 73 F.3d 774, 776-77 (8th Cir. 1996); *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3d Cir. 1992); *United States v. Osorio,* 801 F. Supp. 966, 978-79 (D. Conn. 1992).

The vast majority of Washington residents report their race as white.[8] The individual race and ethnic groups traditionally considered "distinctive groups" for fair cross section purposes appear in comparatively low percentages. This creates problems with properly assessing underrepresentation. If Washington's fair cross section right means anything, it must account for the low percentages of individual communities of color across the state.

Any method of measuring underrepresentation presents problems and may produce specific instances of under- or over-inclusion. *Berghuis*, 559 U.S. at 329. However, comparative disparity offers an appropriate measure when distinctive groups constitute small percentages of the jury-eligible population. Hannaford-Agor, *supra*, at 768; David Kairys et al, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 793-97 (1977).

[8] 77.5% "White alone;" 4.5% "Black or African American alone." https://www.census.gov/quickfacts/WA

Twenty percent is an appropriate threshold because it accounts for the relatively low percentages of distinctive groups across Washington while not requiring perfect representation. While the determination of any threshold is always somewhat arbitrary, a test prohibiting underrepresentation of distinctive groups by more than 20% comparative disparity places "a high value on representativeness while allowing leeway for administrative feasibility." Kairys, *supra*, *at* 799 n.124. Academics addressing underrepresentation in small populations suggest thresholds ranging from 15% to 20%. *Id.* at 779; 1 Jurywork Systematic Techniques § 5:32 (database updated Nov. 2021); CP 115-17.

This chart exemplifies when the proposed test would recognize a violation in a panel of 100 venirepersons where the distinctive group is Black potential jurors and the hypothetical county's jury-eligible population is 5.0% Black.

# of Black potential jurors out of panel of 100	% distinctive group on panel	comparative disparity*
10	10%	-100%
9	9%	-80%
8	8%	-60%
7	7%	-40%
6	6%	-20%
5	5%	0%
4	4%	20%
3**	3%	40%
2	2%	60%
1	1%	80%
0	0%	100%

* comparative disparity = [(group % in jury-eligible population) – (group % in panel)] / group % in jury eligible population

**In a 100 person panel with 3 Black potential jurors, the percentage of Black jurors on the panel is 3% (3/100 = .03 ~ 3%). The comparative disparity of Black potential jurors on the panel is 40% (5%-3% = 2%; 2%/5% = 40%).

The proposed test is appropriate for several reasons. First, a test focused on the panel appearing for a particular case, without requiring general underrepresentation over time, will help courts more easily assess claims. It will not require experts or involve complicated interpretation of data across

ongoing time ranges. Instead, the court can rule based on the specific panel before it.

Second, a test focusing on particular venires will eliminate the unfair burden on defendants to present data that courts do not consistently collect or disseminate. Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719 (2016). "[S]tatistical data are inherently limited by the manner and means in which they are collected." *Sum*, 511 P.3d at 104 (rejecting statistical requirement that "would artificially raise [defendant's] burden").

Across Washington, "there are significant gaps in demographic data about potential jurors and jurors at each stage of the jury selection process." Final Report, *supra*, at 137. Courts do not consistently collect or disseminate race, ethnicity, or other demographic data of summoned jurors, despite this Court's steadfast recommendations. *Id.* at 873-85; Jury Diversity Task Force, Minority & Just. Comm'n, *Interim*

Report 6-7 (2019); Wash. State Supreme Ct. Minority & Just. Comm'n, *Annual Report* 5 (2017-2018).

The recent appropriation for courts to administer electronic surveys collecting "data on each juror's race, ethnicity, age, sex, employment status, educational attainment, and income" may alleviate the absence of data. Engrossed Substitute S.B. 5092, 67th Leg., Reg. Sess. (Wash. 2021). However, this *invites*, not mandates, courts to collect data. *Id.*; Final Report, *supra*, at 138. Whether counties accept that invitation, and whether funds to collect data continue beyond 2023, remains to be seen.

Third, focusing on the venire in front of the court ensures every defendant enjoys the right to draw their jury from a fair cross section of the community. A Black defendant who views a sea of 100 white faces will take little comfort in assurances that jury pools *generally* reflect the county's diversity. Each defendant should have the right to demand a new panel if their

venire is so disproportionate it underrepresents a distinctive group by more than 20% comparative disparity.

b. If this Court requires general underrepresentation over time, it should not require direct systematic exclusion within the meaning of *Duren*.

If the Court retains underrepresentation requirements both "generally and on [their] venire," it should not require proof of systematic exclusion. Instead, this Court should take judicial notice of the systemic problem of underrepresentation and the numerous past and present practices contributing to it. Individual defendants should not have to trace underrepresentation of BIPOC to a single, specific government action in every case.

Duren's requirement of "systematic exclusion" forecloses remedies even when structural and procedural choices combine to create underrepresentation. Just as the "purposeful discrimination" requirement made *Batson* an all but impossible standard, so does the "systematic exclusion" requirement make *Duren* insurmountable. This Court should

recognize that indisputable structural racism results in systematic exclusion of prospective jurors of color in Washington.

"A structurally racist system can be understood best as a system in which a society and its institutions are embedded, and from which racial disparity results." *Task Force 2.0: Race and Washington's Criminal Justice System: Report to the Washington Supreme Court* xii (2021). If the Court is aware that "implicit, institutional, and unconscious biases" and "purposeful discrimination" "have resulted in the unfair exclusion of potential jurors," there can be no question that racial disparities reflected in the underrepresentation of Black venirepersons results at least in part from the current summons and selection processes. GR 37(f).

Experts and empirical evidence identify barriers to service at every stage of the selection process. Collins & Gialopsos, *Answering*, *supra*, at 3-6; Collins & Gialopsos, *Barriers*, at 15, 28-30; *Final Report, supra*, at 138-53. The

government's action in maintaining current systems that preserve underrepresentation and inaction in addressing known barriers *is* a systemic cause. *See Rocha v. King Co.*, 195 Wn.2d 412, 434-36, 460 P.3d 624 (2020) (Yu, J., Madsen, J., concurring and dissenting) (recognizing low pay creates systematic exclusion); *id.* at 437-41 (González, J., dissenting) (same); Hannaford-Agor, *supra*, at 790 (recognizing failure to mitigate underrepresentation is systematic exclusion). Until the government and courts address known barriers to service, this Court should take judicial notice of cumulative systemic contributing factors. *Cf. Gregory*, 192 Wn.2d at 22 (judicial notice of racial bias in Washington's criminal legal system); Coriell, *supra*, at 488-90 (courts should presume causation where there is historical underrepresentation).

Barriers contributing to underrepresentation include the failures to be included in source lists, receive summons, and appear when summoned. Collins & Gialopsos*, Barriers*, *supra,* at 7.

The first two categories of barriers are within court control. For example, the source list draws from only three sources, is under-inclusive, and requires updating only annually. RCW 2.36.054-.055. Follow-up summonses are not required. RCW 2.36.095. Summonses returned as undeliverable are not resent to the same zip codes, resulting in undersampling of zip codes correlated with higher percentages of Black residents. CP 80-86, 141-53. King County's division into two assignment areas replicates racial segregation caused by exclusionary housing practices like redlining, restrictive covenants, and discriminatory lending. Opening Br. at 15-21; Reply Br. at 5-8.

To address these barriers, courts could draw from additional lists, update lists more frequently, and send follow-up notices. Collins & Gialopsos, *Answering*, *supra*, at 14-16; Nat'l Ctr. for State Cts., *Jury Managers' Toolbox: Best Practices to Decrease Undeliverable Rates*, 1-5 (2009). Courts could address undeliverable summonses by sending new notices

to the same zip code. Abramson, *supra*, at 43-45. King County could eliminate the county division or permit defendants to move for pools drawn "from the entire county." Former LGR 18(e)(2) (2007).

In addition to procedural barriers, courts must address known barriers to service like work, inadequate compensation, and family care, which all contribute to people's inability to respond to summonses and disproportionately impact BIPOC. Collins & Gialopsos, *Answering*, *supra*, at 16-18; Collins & Gialopsos, *Barriers*, at 28-36; *see Rocha*, 195 Wn.2d at 431 & n.9 ("embarrassingly low" compensation contributes to poor response rates). Possible solutions abound, but scholars and potential jurors themselves agree solutions include increasing compensation, employer compensation, reimbursing for costs, child care options, and community education and outreach. Collins & Gialopsos*, Answering*, *supra*, at 14-18; Collins & Gialopsos, *Barriers*, *supra*, 31-37; *Final Report*, *supra*, at 152-53; *Interim Report, supra,* at 3-7.

Washington's procedures for summonsing jurors and failure to address barriers collectively contribute to the underrepresentation of Black potential jurors. *Cf. State v. Lilly*, 930 N.W.2d 293, 307 (Iowa 2019) (under Iowa Const. art. I, § 10 "run-of-the-mill jury management practices" can be systematic exclusion). The underrepresentation of Black venirepersons is a systemic problem, even if individual litigants cannot prove it is caused by a single systematic exclusion. This Court should recognize the failure to mitigate collective causes of underrepresentation and eliminate the systematic exclusion requirement.

5. The trial court violated Mr. Rivers's right to a jury drawn from a fair cross section of the King County community when it forced him to draw a jury from a panel with no Black members.

Under either proposal, the court violated Mr. Rivers's right when it denied his motion to draw a jury from a fair cross section of the community and instead permitted his trial by a jury selected from a panel devoid of any Black venirepersons.

First, Mr. Rivers established 100% comparative disparity of Black venirepersons in his panel. RP 275-76. This grossly exceeds the 20% comparative disparity threshold Mr. Rivers proposes.

Second, Mr. Rivers demonstrated underrepresentation reoccurring in King County pools generally over time. The 2015 yearlong zip code data, 2015 Beckett report analyzing King County surveys over three months, 2016-2017 yearlong surveys across 33 courts, and 2021 four month surveys in three counties, including King, all demonstrate consistent underrepresentation of Black venirepersons in King County jury pools. Thus, Mr. Rivers established an underrepresentation "generally and on his venire."

The trial court denied Mr. Rivers his inviolate right to a jury drawn from a fair cross section of the community.

E. CONCLUSION

This Court should recognize Washington's more protective fair cross section right, establish a new test, and reverse and remand for Mr. Rivers to receive a new trial by an impartial jury drawn from a fair cross section of his community.

This brief complies with RAP 18.17 and contains approximately 5,575 words (word count by Microsoft Word).

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Appendix A

Washington cases in which appellate courts considered and rejected fair cross section challenges under a *Duren* analysis

1. *State v. Meza*, __ Wn. App. 2d __, 2022 WL 2301478, at *7 (Wash. Ct. App. June 27, 2022)
2. *In re Pers. Restraint of Cox*, No. 79040-4-I, 2022 WL 2209433, at *3-*5 (Wash. Ct. App. June 21, 2022) (unpub.) (motion for discretionary review pending)
3. *State v. Lay*, No. 82428-7-I, 2022 WL 2230456, at *5-*8 (Wash. Ct. App. Jun. 21, 2022) (unpub.)
4. *State v. Severns*, No. 81668-3-I, 2021 WL 5768988, at *1-*3 (Wash. Ct. App. Dec. 6, 2021) (unpub.)
5. *State v. Abbott*, No. 79734-4-I, 2020 WL 6561541, at *2-*3 (Wash. Ct. App. Nov. 9, 2020) (unpub.)
6. *Johnson v. Seattle Pub. Utils.*, No. 76065-3-I, 2018 WL 2203321, at *2-*3 (Wash. Ct. App. May 14, 2018) (unpub.)
7. *State v. Lopez-Ramirez*, No. 75546-3-I, 2018 WL 827172, at *4-*6 (Wash. Ct. App. Feb. 12, 2018) (unpub.)
8. *State v. Lazcano*, No. 32228-9-III, 2017 WL 1030735, at *13-*15 (Mar. 16, 2017) (unpub.)
9. *City of Camas v. Gruntkovskiy*, No. 44184-5-I, 2014 WL 2547690, at *2-*4 (Wash. Ct. App. June 3, 2014) (unpub.)
10. *In re Pers. Restraint Petition of Yates*, 177 Wn.2d 1, 18-23, 296 P.3d 872 (2013)
11. *State v. Clark*, 167 Wn. App. 667, 673-76, 274 P.3d 1058 (2012), *affirmed on other grounds*, 178 Wn.2d 19, 308 P.3d 590 (2013)

12. *State v. Lanciloti*, 165 Wn.2d 661, 671-72, 201 P.3d 323 (2009)[1]
13. *State v. Suarez*, No. 23972-1-III, 2008 WL 501927, at *1-*3 (Wash. Ct. App. Feb. 26, 2008) (unpub.)
14. *State v. Palomares*, No. 24658-2-III, 2007 WL 1649904, at *3-*4 (June 7, 2007) (unpub.)
15. *State v. Carter*, No. 23246-8-III, 2005 WL 2672772, at *9 (Wash. Ct. App. Oct. 20, 2005) (unpub.)
16. *State v. Cienfuegos*, 144 Wn.2d 222, 230-32, 25 P.3d 1011 (2001)
17. *State v. Rupe*, 108 Wn.2d 734, 746-48, 743 P.2d 210 (1987)
18. *State v. Sellers*, 39 Wn. App. 799, 801-02, 695 P.2d 1014 (1985)
19. *State v. Gladstone*, 29 Wn. App. 426, 428-29, 628 P.2d 849 (1981)
20. *State v. Hilliard*, 89 Wn.2d 430, 440-43, 573 P.2d 22 (1977)[2]

[1] Additional cases not included in this list reject fair cross section challenges by citing to *Lanciloti* without performing a separate analysis under *Duren*.

[2] Rejecting fair cross section challenge under *Duren*'s predecessor, *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

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