NO. 100922-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAUL RIVERS,

Petitioner.

RESPONDENT'S REPLY TO AMICUS CURIAE

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A. ISSUE PRESENTED

Should this Court decline amici's invitation to abandon the test from Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)?

B. INTRODUCTION

There are limits, both legal and practical, to what any court can accomplish with the stroke of a pen. See United States v. State of N.Y., 475 F.Supp. 1103, 1106 (N.D.N.Y. 1979).[1] Minority underrepresentation on Washington venires is likely influenced by a broad range of factors, including policy, history, culture, economics, geography, and individual preferences. There is no "silver bullet" to solve this problem; in truth, we do not even know where to aim.

The Duren test has survived decades of challenges because it strikes a careful balance between the goal of a fair-

[1] "The application of constitutional…principles by a court cannot be expected to solve, even temporarily, all of the moral, social, and economic problems of a changing society."

cross section and the judiciary's means to achieve it. While some of amici's proposals are worth exploring, most will require legislative action. Where this Court does have the ability to affect change independently, it should do so through the deliberative rule-making process that already exists.[2]

Amici and this Court no doubt share an understandable desire to act. Adversarial litigation, however, can be a poor vehicle for sweeping policy reforms, and actions taken in haste may do more harm than good. This Court should reject amici's ad hoc approach in favor of a measured and collaborative process.

[2] It is worth noting that other efforts to increase jury diversity have gone through a formal rule-making process. GR 37; LGR 18. This makes sense, as rule-based reform is freed from the limitations inherent to litigation, such as the strength of the underlying record and the number of parties.

C. AMICI'S PROPOSED ALTERNATIVES TO DUREN ARE UNWORKABLE.

Rivers and amici share the same general goal of replacing the Duren test with a Washington specific standard. Most offensive to amici is Duren's requirement that challengers establish "systematic exclusion in the jury-selection process." 439 U.S. at 366. Amici have targeted this factor because it makes fair-cross section claims relatively more difficult to prove than if underrepresentation alone were sufficient. However, there are sound practical reasons to retain this aspect of the test.

A finding of "systematic exclusion" identifies the cause of the challenged demographic disparity. See Ford v. Seabold, 841 F.2d 677, 685 (6th Cir. 1988) ("Just as important, [Duren] also was able to establish when in the system the exclusion took place…"). Once a cause is discovered, it can be curtailed or eliminated by various means. A test based solely on

underrepresentation, by contrast, merely observes an effect without identifying its source.

Such a test will require lower courts to invalidate jury selection procedures regardless of whether better options are available. This will lead to a trial-and-error approach where judge and lawyers do not know in advance whether a particular method is constitutional. By claiming to possess a cure without first diagnosing the disease, amici are approaching the problem backwards. See United States v. Orange, 447 F.3d 792, 799 (10th Cir. 2006) ("A court's consideration of reasonable measures that may reduce disparity is primarily remedial and really does not address whether the disparity is a result of systematic exclusion…").

WACDL also asks this Court to modify the second Duren factor. Brief of WACDL, et al, at 12. Duren requires a defendant to show underrepresentation "in venires from which juries are selected." 439 U.S. at 364. Courts have construed the plural usage of "venires" to mean that a fair cross-section

violation "cannot be premised upon proof of underrepresentation in a single jury." United States v. Miller, 771 F.2d 1219, 1228 (9th Cir. 1985). Instead, a defendant must show that underrepresentation is "the general practice." United States v. Williams, 264 F.3d 561, 568 (5th Cir. 2001).

Under amici's proposed revision, trial courts would be required to strike any venire in which comparative disparity for a minority group exceeded 20 percent.[3] Brief of WACDL, et al, at 12. Essentially, amici are asking this Court to impose a racial quota. However, directly manipulating the racial composition of the venire is constitutionally dubious under the Equal

[3] Rivers identified only a single case in the nation finding the second Duren factor satisfied based on a comparative disparity of 20 percent or less. Brief of App. at 14; Smith v. Berghuis, 543 F.3d 326, 338 (2008) (reversed on other grounds by 559 U.S. 314, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010)). The defendant in Smith produced two data sets from different months showing an 18 percent and 34 percent comparative disparity respectively. Id. at 338. In subsequent decisions relying on Smith, however, the Sixth Circuit has cited only the 34 percent figure. Garcia-Dorantes v. Warren, 801 F.3d 584, 601 (6th Cir. 2015).

Protection Clause and would likely violate state law requiring that panels be assembled at random. See United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998);[4] RCW 2.36.065; RCW 2.36.080(1); CrR 6.3.

Presumably hoping to bypass these issues, amici support a *de facto* quota enforced by cycling through panels until an acceptable proportion is happened upon by chance. Brief of WACDL, et al, at 12. Such an approach would guarantee gridlock in our already overburdened trial courts. Amici cannot even establish whether this proposal would be possible, as there is no evidence regarding how many venires on average would satisfy the 20 percent standard. The impact on the court system

[4] Ovalle struck down a well-intentioned jury selection process where "in an effort to assure that African-Americans are fairly represented in the qualified jury wheel, *one in five non-African Americans were selected at random to be removed from the jury wheel simply because of their racial status*." 136 F.3d at 1095 (emphasis original). Rather than manipulating the composition of the venire, the court encouraged "alternative methods of broadening membership in the jury pool" such as diversifying the source list. Id. at 1106.

could be catastrophic, especially in rural counties that lack the ability to repeatedly summon large numbers of jurors.

This standard would be a radical departure from the universally accepted principle that "[d]efendants are not entitled to a jury of any particular composition." Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Cienfuegos, 144 Wn.2d 222, 231, 25 P.3d 1011 (2001); United States v. Raszkiewicz, 169 F.3d 459, 462 (7th Cir. 1999); Davis v. Davis, 361 F.2d 770, 773 (1966). It would also shift the fundamental nature of the fair-cross section analysis, which has generally been defined by both case law and statute in relation to the master jury list rather than the selection of the petit jury. State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987); State v. Meza, __ Wn. App. 2d __, 512 P.3d 608, 620 (2022); RCW 2.36.080.

WACDL has also proposed an "interim test" requiring that "**all** reasonable steps" be taken "to address systematic exclusion" before a demographically disproportionate venire

can be accepted. Brief of WACDL, et al, at 13 (emphasis added). But this veneer of reasonableness is merely a euphemism for what is actually an exorbitantly maximalist standard. It establishes no meaningful guidance for trial courts and would simply become a poison pill ensuring reversal if the trial court failed to correctly guess what steps were "reasonable" in any particular case.

If one assumes that WACDL considers their own proposals "reasonable," amici's test would render an unsatisfactory venire defective unless the State first: (1) expanded the jury source list, (2) staggered juror reporting times, (3) increased the frequency of address updates, (4) funded unspecified community outreach programs, (5) increased juror pay, (6) allowed remote voir dire, (7) provided or reimbursed childcare, and (8) employed whatever other means a given trial judge might consider "reasonable." This is totally unrealistic as an immediately applicable "interim" standard.

WACDL's suggested policy changes are not individually "unreasonable" on their face, but they also cannot be implemented without supporting budgetary and bureaucratic action. Brief of WACDL, et al, at 20-28. Amici's test would transform this Court into a *de facto* legislative body. Since courts cannot levy taxes, judges would have to gauge the effectiveness of various programs and decide whether to require that finite funds be reallocated from legislative priorities to judicial ones.

The effectiveness of amici's proposals is also largely theoretical. Amici concede, for example, that past experiments with increased juror pay had little effect. Brief of WACDL, et al, at 27. The variety of potential "community outreach programs" is vast, and it is unclear exactly which ones amici believe should "reasonably" be required. Id. at 20. Finally, this Court's own commission concluded that "it is impossible to tell…exactly how [different source lists] will change Washington's juror diversity if enacted." Minority and Justice

Commission Jury Diversity Task Force, Interim Report at 3 (2019).[5]

Amici's comparison to this Court's recent voir dire reforms is unpersuasive. This Court "has plenary authority over trial procedures" such as peremptory challenges. State v. Saintcalle, 178 Wn.2d 34, 110, 309 P.3d 326 (2013) (Gonzalez, J., concurring) (abrogated on unrelated grounds by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017)). Because voir dire involves the conduct of individual attorneys, judicial review is relatively straightforward. The demographic composition of any given venire, by contrast, is shaped by a range of socio-economic factors and competing policy considerations, making effective judicial review incredibly difficult, if not impossible.

[5]Available at: https://www.courts.wa.gov/subsite/mjc/docs/Jury%20Diversity%20Task%20Force%20Interim%20Report%202019.pdf

None of this is meant to disparage amici's goal of achieving greater diversity. The State agrees that more diverse juries function better, and some of amici's proposals may ultimately prove meritorious. But "there is a difference between the optimal results which particularly well-administered jury plans…can achieve, and the minimum which the Constitution requires." Anaya v. Hansen, 781 F.2d 1, 7 (1st Cir. 1986). Amici's test would place courts in the impossible position of requiring reforms without either firm evidence of their effectiveness or a political mechanism to implement them.

"Foisting [a] rule upon courts and parties by judicial fiat [can] lead to unforeseen consequences." In re Pers. Restraint of Carlstad, 150 Wn.2d 583, 592, n.4, 80 P.3d 587 (2003). Abandoning the Duren standard would disconnect cause and effect, forcing courts to pursue ad hoc solutions in hopes of stumbling upon something that works. The Washington constitution does not require this result. As it has in the past, this Court should pursue a collaborative approach and resist the

temptation to impose hasty reforms in an adversarial setting. Saintcalle, 178 Wn.2d at 55 (Gonzalez, J., concurring) ("As urgent as the need for a new framework may be, we cannot create one in this case").

D. CONCLUSION

The State respectfully requests this Court reject amici's proposals for sweeping yet ineffective judicial action and affirm the superior court.

This document contains 1,805 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 25 day of August, 2022.

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August 25, 2022 - 11:40 AM

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