NO. 100922-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAUL RIVERS,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The State primarily relies on the Brief of Respondent previously filed in this case, but respectfully submits additional argument on the following issues:

1. Is article I, section 21 of the Washington constitution inoperative in this case because the state law right to an impartial jury, from which the fair cross-section requirement derives, is explicitly protected by article I, section 22?

2. Has Rivers failed to show that dividing King County into two jury assignment areas constitutes systematic exclusion under Duren?[1]

3. Is the comparative disparity identified by Rivers constitutionally acceptable when Black citizens comprise a relatively small percentage of King County's overall population?

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[1] Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

B. STATEMENT OF THE CASE

The State relies on the facts presented in the Brief of Respondent.

C. ARGUMENT

1. THE RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE POPULATION DOES NOT DERIVE FROM ARTICLE I, SECTION 21.

Under federal precedent adopted by Washington, a defendant must demonstrate three factors to show a prima facie violation of the Sixth Amendment right to a fair cross-section:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren, 439 U.S. at 364; In re Yates, 177 Wn.2d 1, 19, 296 P.3d 872 (2013).

Rivers argues that the Washington constitution provides greater protection than the Sixth Amendment in part because article I, section 21, has no direct federal analogue. As a result,

Rivers believes Washington law allows this Court to find a fair cross-section violation without any showing of systematic exclusion. The Court of Appeals debated this proposition at oral argument, ultimately leading the panel to certify the issue to this Court. Order of Certification, State v. Rivers, No. 81216-5 (May 11, 2022); Oral Argument at 13:04, State v. Rivers, No. 81216-5 (2022).

Rivers is mistaken. The weight of this Court's precedent, along with that of other jurisdictions whose constitutions share a common origin, leads to the conclusion that article I, section 21 does not control this inquiry. Instead, this Court's constitutional analysis should focus on article I, section 22, where the right to an impartial jury, and thus to a fair cross-section, is explicitly preserved.

Article I, section 21, states in relevant part that "[t]he right of trial by jury shall remain inviolate." Sections 21 and 22 "generally offer[] broader protection of the jury trial right than does the federal constitution." State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). However, Rivers must show that section 21 is more protective *in this context* and explain why it "actually compel[s] a particular result." Madison v. State, 161 Wn.2d 85, 93-94, 163 P.3d 757 (2007); State v. Sum, __ Wn.2d __, No. 99730-6, 2022 WL 2071560 at *5 (Wash. Sup. Ct., June 9, 2022). To answer this question, the Court may consider "the intent of the framers, and the history of events and proceedings contemporaneous with [section 21's] adoption…" Yelle v. Bishop, 55 Wn.2d 286, 291-92, 347 P.2d 1081 (1959); Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004).

a. The Constitutions Of Oregon, California, And Nevada, From Which The Washington Framers Copied The Relevant Language In Section 21, Do Not Support Rivers' Argument.[2]

Section 21's statement that jury trials must "remain inviolate" was "borrowed" from the constitutions of Oregon, California, and Nevada – states the framers believed shared Washington's agrarian interests. Robert Utter and Hugh Spitzer, The Washington State Constitution: A Reference Guide, 15, 34, G. Alan Tarr, Series Editor (2002).

The Oregon constitution's analogue to section 21 does not apply to criminal matters at all, expressly stating that "[i]n all *civil cases* the right of Trial by Jury shall remain inviolate." OR CONST. Art. I, § 17 (emphasis added). As interpreted by the Oregon Supreme Court, section 17 "simply 'guarantees a jury

[2] This Court has previously looked to comparable provisions from other states when interpreting our own constitution. In State v. Lanciloti, for example, this Court considered the constitutions of Arkansas, Tennessee, Minnesota, and Wyoming, to inform its analysis of article I, section 22. 165 Wn.2d 661, 670-71, 201 P.3d 323 (2009).

trial in civil actions for which the common law provided a jury trial when the Oregon constitution was adopted in 1857.'" Jensen v. Whitlow, 334 Or. 412, 422, 51 P.3d 599 (2002). Oregon's right to a fair cross-section is instead protected by Article I, § 11, which largely coincides with Washington's section 22. State v. Johnson, 340 Or. 319, 353, 131 P.3d 173 (2006); see also State v. Compton, 333 Or. 274, 289, 39 P.3d 833 (2002) ("…because defendant has not suggested a different analysis under Article I, section 11, his fair cross-section argument also fails under the Oregon Constitution"); compare OR CONST. Art. I, § 11 with WA CONST. art. I, § 22.

Article I, section 16 of the California constitution states that "[t]rial by jury is an inviolate right and shall be secured to all." The California Supreme Court has held that the right to a fair cross-section flows from this language. People v. Ramirez, 39 Cal. 4th 398, 444, 139 P.3d 64 (2006). However, it has also found section 16 coextensive with the Sixth Amendment in this context. People v. Bell, 49 Cal. 3d 502, 525, n.10, 778 P.2d 129

(1989); People v. De Rosans, 27 Cal.App.4th 611, 618, 32 Cal.Rptr.2d 680 (1994).

It is noteworthy that California's statement of rights in criminal cases provides only for "a speedy public trial," as opposed to "a speedy public trial by an *impartial jury*…" Compare CA CONST. Art. I, § 15 with WA CONST. art. I, § 22 (emphasis added). As noted in the Brief of Respondent, the right to a fair cross-section is a facet of the right to an impartial jury. Holland v. Illinois, 493 U.S. 474, 480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990).[3] California's reliance on section 16 was likely compelled by the absence of any language in section 15 regarding impartiality.

The Nevada constitution contains a provision that is functionally identical to Washington's section 21:

> The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be

[3] The Court has also found the right guaranteed by the equal protection clause of the Fourteenth Amendment. Smith v. Texas, 311 U.S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84 (1940).

> prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

NV CONST. Art. 1, § 3. However, Nevada courts have held that the rights guaranteed by section 3 are "coextensive with…the federal constitution." Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 628-29, 748 P.2d 494 (1987).

The Nevada Supreme Court has described the "inviolate" right in section 3 as "the right to have factual issues determined by a jury." Tam v. Eight Jud. Dist. Ct., 131 Nev. 792, 796, 358 P.3d 234 (2015). The petit jury is not referenced in the Nevada constitution's "[r]ights of the accused in criminal prosecution." NV CONST. Art. 1, § 3. Thus, Nevada's fair cross-section requirement appears to derive entirely from federal precedent. See Valentine v. State, 135 Nev. 463, 464, 454 P.3d 709 (2019) (relying only on the Sixth and Fourteenth Amendments to the U.S. Constitution to support the right to a fair cross-section);

see also Adler v. State, 95 Nev. 339, 347, 594 P.2d 725 (1979) (recognizing fair cross-section right based on U.S. Supreme Court precedent).

The phrasing in section 21 was heavily influenced by, if not copied from, similar provisions in other constitutions. It is therefore telling that only Oregon has found a more expansive State right from this language, and then only in civil matters. Nothing in the jurisprudence of these states suggests the Duren standard is inadequate to secure Rivers' right to a fair cross-section.

b. Washington's Constitutional History Demonstrates That Section 21 Is Not Relevant To A Fair Cross-Section Analysis.

Washington courts have "long interpreted article I, section 21 as guaranteeing those rights to a trial by jury that existed at the time of the constitution's adoption in 1889." Bird v. Best Plumbing Group, LLC, 175 Wn.2d 756, 768, 287 P.3d 551 (2012); Smith, 150 Wn.2d at 153; see also State ex rel.

Goodner v. Speed, 96 Wn.2d 838, 841, 640 P.2d 13 (1982) ("It is the old right, whatever it was…that must remain inviolable…") (quoting Byers v. Commonwealth, 42 PA. 89, 94 (1862)). Reviewing courts use this "historical standard to determine the scope of the right" protected by section 21. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711 (1989).

Rivers' reliance on section 21 is incorrect unless Washington law in 1889 required a demographically representative jury pool even in the absence of any "systematic exclusion." See State v. Haq, 166 Wn. App. 221, 253, 268 P.3d 997 (2012).[4] Such a showing is unlikely since the Court at that time accepted expressly exclusionary policies. See State v. Smith, 74 Wn.2d 744, 751-52, 446 P.2d 571 (1968) (upholding automatic jury exemptions for women, persons over 60, and several professions) (vacated in part on unrelated grounds by

[4] "Thus, we examine relevant authorities to determine whether the jury trial right in 1889 included a requirement that the State prove beyond a reasonable doubt that an accused was sane."

Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972);[5] see also State v. McDowell, 61 Wash. 398, 400, 112 P. 521 (1911) (requirement that jurors be taxpayers did not violate section 21).

Washington practice in 1889 diverged from federal law in at least three relevant respects. First, federal precedent at the time did not require unanimous criminal verdicts. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Ramos v. Louisiana, -- U.S. --, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020). Second, federal law has never required jury trials for "petty offenses," whereas Washington considered "no offense…so petty as to warrant denying a jury if it constitutes a crime."[6] City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618

[5] The policy described in Smith would plainly be unconstitutional under Duren, *supra*, which was decided a decade later. However, Smith suggests there was no independent state constitutional bar to these statutes.

[6] This was the issue that most concerned the drafters of the California constitution. Mitchell v. Superior Court, 49 Cal.3d 1230, 1243, 783 P.2d 731 (1989).

(1982); United States v. Nachtigal, 507 U.S. 1, 113 S. Ct. 1072, 122 L. Ed. 2d 374 (1993). Finally, the federal constitution does not require civil jury trials in state courts, while Washington has always guaranteed this right in some circumstances. Sofie, 112 Wn.2d at 644;[7] see State v. Doherty, 16 Wash. 382, 384-85, 47 P. 958 (1897).[8]

Civil litigation appeared to be foremost on the drafters' minds when proposing section 21, as "the right to a jury in criminal cases is more specifically addressed in Article I, Section 22." The Washington State Constitution: A Reference Guide, *supra*, at 34. Debate surrounding section 21 at the

[7] The Seventh Amendment to the U.S. Constitution preserves the right to civil jury trials in federal court but "does not apply through the Fourteenth Amendment to the states in civil trials." Sofie, 112 Wn.2d at 644.

[8] "The effect of [article I, section 21] is to provide that right of trial by jury as it existed in the territory at the time when the constitution was adopted…the Code of 1881, in force at the date of the adoption of the present constitution, was as follows: 'Either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury.'" Doherty, 16 Wash. at 384-85 (internal citations omitted).

constitutional convention centered on whether civil juries should be permitted to deliver nonunanimous verdicts. Id.

The drafters nevertheless chose not to limit section 21 to civil matters as Oregon did. However, in State v. Ellis, 22 Wash. 129, 131, 60 P. 136 (1900) (overruled in part on other grounds by State v. Lane, 40 Wn.2d 734, 246 P.2d 474 (1952)), this Court stated that section 21, "was simply intended as a limitation of the right of the legislature to take away the right of trial by jury." The Court later clarified that section 21 "does not prohibit modification of the details of administration which does not affect enjoyment of the right…" State v. Furth, 5 Wn.2d 1, 19, 104 P.3d 925 (1940) (overruled on other grounds by Smith, 150 Wn.2d at 146).

Accordingly, cases interpreting section 21 have tended to limit affirmative State action that threatened to degrade the availability or primacy of trial by jury. This Court has stated, for example, that the State may not create unreasonable procedural hurdles or limit the jury's fact-finding mission.

Brandon v. Webb, 23 Wn.2d 155, 158-59, 160 P.2d 529 (1945); Geschwind v. Flanagan, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).

At oral argument, the Court of Appeals questioned whether State v. Saintcalle, 178 Wn.2d 34, 49, 309 P.3d 326 (2013),[9] provided greater protection when it stated that "our Batson analysis should reflect…the jury trial protections contained in article 1, section 21…"

This language appears in the lead opinion, which was signed by only two justices. State v. Saintcalle, No. 86257-5, slip. op. at 28.[10] Only one other member of the court, Justice Stephens, mentioned section 21, and then only to express skepticism towards the lead opinion's statement. Saintcalle, 178 Wn.2d at 66-67 (J. Stephens, concurring). "A plurality has little

[9] Abrogated on unrelated grounds by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017).

[10] The State has cited to the slip opinion because it is difficult to tell from the official reporter which justices signed the lead opinion.

precedential value and is not binding." State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012).

Furthermore, the lead opinion in Saintcalle did not conduct a Gunwall analysis, nor did it substantively discuss section 21's historical background. Id. Constitutional interpretation is highly context dependent. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 937 P.2d 154 (1997). Saintcalle suggested the Batson[11] test was inadequate under the Washington constitution. Saintcalle, 178 Wn.2d at 49. But this observation was made within the context of peremptory challenges by individual attorneys. It does not follow that King County's method of populating its jury rolls is unconstitutional, or that the Duren standard is facially deficient.

Saintcalle's discussion of section 21 was also plainly dicta. "A statement is dicta when it is not necessary to the court's decision in a case." Protect the Peninsula's Future v.

[11] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013). Saintcalle ultimately affirmed the defendant's conviction under Batson. Saintcalle, 178 Wn.2d at 55-56. While it suggested the need for future action to improve *voir dire* practices, the limited discussion of section 21 was by no means necessary to the outcome. Id. at 49.

The drafters plainly did not envision the role for section 21 sought by Rivers. Rather, the provision was understood to protect the right to have a jury of sufficient size make material determinations of fact. Schuck v. Beck, 19 Wn. App. 2d 465, 519, 497 P.3d 395 (2021). Approximately 20 years after admission to the Union, this Court stated:

> The guaranty…means "that the right of trial by jury shall be and remain as ample and complete as it was at the time when the constitution was adopted." In Vaughn v. Scade…it was held that the guaranty means a jury of 12 men, but that "the nonessentials of that institution such as concerns the qualifications of jurors, **the mode of summoning them**, and many other such matters," are left to the wisdom of the lawmaking body…
>
> …
>
> We entertain no doubt that the standard of qualification for jury service might be so raised as to be

> subversive of the right of trial by jury. We think that the logic of the cases is that the right to a jury trial shall remain inviolate where the right existed when the Constitution was adopted; that the term "jury" signifies a body of 12 impartial men, peers of the parties; and that the guaranty is that these essential features cannot be taken away by the lawmaking power. This, we think, has been the construction from the beginning. The legislature, in harmony with this view, has from time to time changed the qualifications of jurors, but has always preserved the essential and fundamental features of the jury system as we had it when the constitution was adopted. This, we think, satisfies the guaranty.

State v. McDowell, 61 Wash. 398, 400-02, 112 P. 521 (1911) (internal citations omitted and emphasis added).

The question here is not whether the Court has the power to address issues of racial equity within the jury system, but *where* that power is derived from. As noted, *supra*, the fair cross-section requirement is a component of the right to an impartial jury, which is expressly protected by section 22. Because the right asserted by Rivers is not governed by

section 21, this Court should restrict its substantive analysis to section 22.[12]

2. THE DIVISION OF KING COUNTY INTO TWO JUDICIAL DISTRICTS DOES NOT CONSTITUTE SYSTEMATIC EXCLUSION UNDER DUREN.

Rivers argues that dividing King County into two jury districts constitutes "systematic exclusion" because: (1) the Kent jury assignment area contains "[t]wice as many jury-eligible Black people per capita" than Seattle, and (2) this disparity can be traced to past racist housing policies that were once abetted by the courts. Brief of App. at 21. But the jury assignment division was designed to *increase* racial diversity and consolidation would likely *lower* overall Black participation.

This Court previously described the data underlying the decision to split the county into two jury assignment areas:

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[12] The Court is referred to the Brief of Respondent for the State's Gunwall analysis regarding article I, section 22.

> Working with the Seattle-King County Department of Public Health, Judge Fox and court staff pulled together detailed demographic information about the county. They compared this data with juror response rates. Indeed, the data generally showed an inverse relationship between the distance from the summoning courthouse and the likelihood of appearing in response to a jury summons. The data also showed that "lower income and racial minority citizens were less likely than higher income and non-minority citizens to report to a court house more distance from their home." This…meant a poor response rate from lower income and minority populations.

Lanciloti, 165 Wn.2d at 664 (internal citation omitted).

As an initial matter, it is worth noting that having multiple jury districts is a routine administrative practice throughout the country. United States v. Gottfried, 165 F.2d 360, 364 (2d Cir. 1948). Courts "have had the power since the first Judiciary Act of 1789 to divide a district territorially in the interest…of lessening the burden of attendance." Id.; see also Williams v. Superior Court, 49 Cal.3d 736, 742, 781 P.2d 537 (1989) ("…the judicial district [as opposed to the county] best serves the constitutional…considerations at issue…as well as the practical problems posed by a far-flung megapolis"). Such

divisions have been repeatedly upheld in all but the most unusual circumstances. See Zicarelli v. Dietz, 633 F.2d 312, 317 (3rd Cir. 1980) ("We begin with the well-established principle that a defendant does not have a right…to have jurors drawn from the entire district").

Federal courts have suggested that divisions might be unconstitutional if geography becomes "a proxy for…[a] distinct group." United States v. Traficant, 209 F.Supp.2d 764, 782 (N.D. Ohio 2002). But this principle is not implicated merely by demographic imbalance; rather, it applies when the State effectively excises a culturally distinct area from the primary jury district. Id.

Alvarado v. State, 486 P.2d 891 (Alaska 1971), was discussed by both Zicarelli and Traficant as an example of unconstitutional jury districting. 209 F.Supp.2d at 782; 633 F.2d at 317. Alvarado was accused of rape in his remote Native Alaskan village that lacked roads, television, and running water. Alvarado, 486 P.2d at 894. His trial, however, occurred in

Anchorage with a jury venire summoned exclusively from the immediate urban area. Id. This resulted in the exclusion of "virtually all residents of Native villages." Id. at 903.

The Alvarado Court examined the vast racial and cultural divide that separated relatively cosmopolitan Anchorage from Native frontier villages. Id. at 899. But most important to the court's analysis was that no jurors were drawn from the area where Alvarado lived and where the alleged crime had been committed. Id. at 904. Thus, potential jurors that would better understand the way of life in these austere places were never even afforded an opportunity to appear. Id. at 902-04.

The Native villages in Alvarado were so concentrated that the defendant was effectively tried in a foreign jurisdiction; Native Alaskans constituted almost 30% of the countryside, but only 3.5% of the population in Anchorage. Alvarado, 486 P.2d at 895. The demographic variance asserted here is relatively modest. Black citizens comprise 8.11% of the Kent jury assignment area compared to 4.14% in Seattle. CP 115.

The Kent and Seattle jury assignment areas do not have proportionally identical racial populations. But "as long as a division is not 'gerrymandered,' demographic difference in terms of racial or socioeconomic composition…will withstand constitutional scrutiny." Bolden v. United States, 171 F.Supp.3d 891, 910 (E.D. Missouri 2016) (citing United States v. Cannady, 54 F.3d 544, 547 (9th Cir. 1995)). Unlike in Alvarado, there is no evidence that Black citizens were unfairly deprived of an opportunity to be jurors, and jurors were summoned from the area where Rivers both lived and committed the alleged offense.

The State does not deny or downplay the shameful history of housing discrimination in Washington. Washington State Minority and Justice Commission Symposium, Prof. Quintard Taylor, 2:00 (June 1, 2022).[13] However, it is reasonable to question whether such practices actually created

[13] Available at: https://tvw.org/video/washington-state-minority-and-justice-commission-symposium-2022061002/.

the existing geographic disparities. After all, redlining and similar racist practices applied county-wide, meaning they would not necessarily drive people of color to the area now constituting the Kent jury district. To the extent historical practices tended to concentrate Black homeowners in Seattle's Central District, it would also not be responsible for the current variance identified by Rivers.

Misidentifying the cause of this shift and building constitutional mandates on insufficiently nuanced historical analysis might actually worsen the problem. While Rivers' brief does not propose any potential alternatives to LGR 18, there are only two logical options – either reconsolidate a unitary jury district or redraft the two districts to make them more racially proportional. Either course of action would face difficult realities. First:

> …it would be impossible in practice to administer [the judicial districts] if it were a condition that the divisions made must be so homogenous that they showed an equal percentage of all possible groups. There are probably no districts in the Union [] which can be

> divided without disclosing in the sections different racial, religious, political, social, or economic percentages. To demand that they shall not, would be a fantastic pedantry which would serve no purpose and would put an end to the statute.

Gottfried, 165 F.2d at 364.

Second, there is no reason to suspect that the fundamental premise underlying LGR 18 – that minority jurors are significantly less likely to appear for service farther from their home – has changed. Even if, *arguendo*, a unitary jury system summonsed more Black jurors from South King County to the Seattle courthouse, racial diversity will not increase if those jurors never show up.

Rivers asked the Court of Appeals to ignore the rationale behind LGR 18, noting that systematic exclusion need not be intentional. Brief of App. at 6. But the State is not asking this Court to reject Rivers' argument merely because the proponents of LGR 18 had good intentions. The State's point is that, in the absence of any evidence-based proposals, there is a very real chance that changing the jury assignment areas might *reduce*

racial diversity. This would almost certainly produce another fair cross-section claim, thus potentially placing the Court on a constitutional see-saw.

That Rivers' position could be harmful is suggested by the experience of trial judges during the COVID-19 pandemic. Because of public health concerns, the King County Superior Court transitioned to a remote *voir dire* process using videoconferencing technology. Comment on Proposed GR 41 by King County Superior Court (December 29, 2021) (https://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=5838). King County judges subsequently reported that "since start[ing] video voir dire…our juries are more diverse than ever before…" Id. While this evidence is admittedly anecdotal, it suggests a link between jury diversity and ease of appearance.

Any alteration to the summonsing process should be undertaken cautiously, in consultation with affected shareholders, and with full consideration of the potential

consequences. This Court should reject Rivers' *ad hoc* approach.

3. COMPARATIVE DISPARITY IS LIKELY TO BE INACCURATE GIVEN THE SMALL BLACK POPULATION OF KING COUNTY.

The Brief of Respondent discusses at length the well-documented problems with using comparative disparity to analyze a relatively small segment of the population. Brief of Respondent at 12-25. The recent case of United States v. Smith, 457 F.Supp.3d 734 (D. Alaska 2020), provides additional persuasive argument on this point.

Using comparative disparity, Smith asserted that Black and Native American citizens were underrepresented on his grand jury by 52.15% and 57.27%, respectively. Id. at 741-42. The court affirmed, observing that seemingly high disparities are produced by "shortcomings" inherent to the methodology:

> The Court finds that, as applied here, the comparative disparity rates ranging from 29.14% to 57.27% fall within the level of comparative disparity that other circuit courts have held to be permissible, even as those courts recognize the shortcomings of the

> comparative disparity methodology. For example, comparative disparities of 54.49%, 58.39%, and 59.84% have been found permissible by other circuits. Moreover, the Ninth Circuit, in dicta, has permitted a comparative disparity of 52.9%. Mr. Smith points to no court that has dismissed an indictment because a distinctive group in the grand jury had a comparative disparity in this range. Here, where the distinctive groups in question make up a small portion of the district's population, comparative disparities in the high-50% range are acceptable.

Id. at 742-43.

The Black population of the district in Smith was 3.37%, similar to the Seattle Jury Assignment area at 4.14%. Id. at 739; Brief of App. at 13. While the comparative disparity presented in the Beckett report might seem excessive at first glance, this is, whether by accident or design, a predictable consequence of the analytical approach. This Court should follow the great weight of precedent finding similar comparative disparities acceptable when the measured demographic is small.

D. CONCLUSION

The State respectfully requests that this Court affirm Rivers' convictions.

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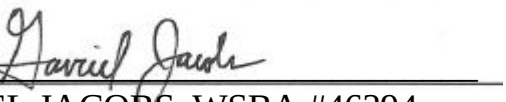
DATED this 15th day of June, 2022.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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