No. 95920-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS MUSSIE BERHE,

Appellant.

BRIEF OF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON, AND LOREN MILLER BAR ASSOCIATION

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

Antoinette M. Davis, WSBA# 29821
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: 206-624-2184
tdavis@aclu-wa.org

ACLU FOUNDATION

Jeffery Robinson, WSBA #11950
Twyla Carter, WSBA #39405
125 Broad Street, 18th Fl.
New York, NY 10004
jrobinson@aclu.org
tcarter@aclu.org

MBE LAW GROUP PLLC

Margaret Pak Enslow, WSBA #38982
1001 Fourth Ave., Suite 3200
Seattle, Washington 98154
Tel (206) 400-7722 x 103
margaret@mbelg.com
ACLU-WA Cooperating Attorney

LOREN MILLER BAR ASSOCIATION

Erika J. Evans, WSBA #51159
P.O. Box 1873
Seattle, WA 98111
president@LMBA.net

Attorneys for *Amici Curiae*

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I. IDENTITY AND INTEREST OF AMICI

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization of over 80,000 members and supporters, dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws. It has long been dedicated to protecting the right to a fair trial by a jury, including advocating for procedures designed to keep the jury selection process and jury deliberations free from discrimination or bias. ACLU-WA has submitted amicus briefs in numerous cases where the right to a fair jury and the right to participate in a jury were at stake.

The American Civil Liberties Union Foundation ("ACLU") is a nationwide nonpartisan organization of over 1.6 million members dedicated to protecting constitutional rights, including the rights of all persons who face a criminal charge. The ACLU files amicus curiae briefs in state and federal courts across the country, and seeks to educate the public and contribute to the developing jurisprudence about the important subject addressed in this case, and served as one of several *amici* in *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 191 L.Ed.2d 107 (2017).

The South Asian Bar Association of Washington (SABAW) is a professional association of attorneys, law professors, judges and law students involved in issues impacting the South Asian community in

Washington state. Created in 2001, SABAW provides pro bono legal services to the community, engages in outreach and education efforts, and monitors the rights of its membership.

The Loren Miller Bar Association (LMBA) is an affiliate chapter of the National Bar Association. LMBA is a nonprofit organization dedicated to defending the civil rights and constitutional freedoms consistent with the principals of a free democratic society. LMBA's 500 current and past members are primarily African-American judges, attorneys, law professors, and law students.

ACLU-WA and the Loren Miller Bar Association were members of the GR 37 Workgroup, which advised the Court regarding GR 37 to provide additional protections against racial bias in jury selection.

Counsel for *amici* have reviewed the documents and pleadings in this case and are familiar with the issues and arguments raised by the parties.

II. INTRODUCTION

In *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), this Court recognized that the jury selection process has been imperiled by implicit racial bias, and in subsequent decisions and rule making, has taken strides to begin remedying race discrimination in jury selection. To continue encouraging jury diversity and deter racial bias in all parts of the

jury process, equally strong safeguards are necessary to ensure that jury deliberations—and the verdicts that flow therefrom—are race bias free.

In Petitioner's case, Juror # 6, a juror of color, experienced harassment and race-based bias while performing her civic duty, and the concerns about racial bias that she raised were dismissed without an evidentiary hearing. *Amici* urge the Court to hold that where a juror alleges bias or discrimination in deliberations, the prima facie showing of bias is satisfied, and an evidentiary hearing is required. Because of the time elapsed in Petitioner's case, however, the appropriate remedy here is a new trial.

III. STATEMENT OF THE CASE

Amici adopts Petitioner's statements of the case in the Petition for Review and Petitioner's Supplemental Brief.

IV. ARGUMENT

A. Robust procedural rules addressing juror misconduct are necessary to protect a criminal defendant's constitutional right to an unbiased and unprejudiced jury.

1. Claims of racial bias are especially pernicious to the jury system.

It is well established in Washington that a criminal defendant's right to a fair trial includes the right to a jury free of racial bias or prejudice. *State v. Jackson*, 75 Wn. App. 537, 544, 879 P.2d 307 (1994).

Washington has recognized the racial bias exception to the rule against jury impeachment long before the U.S. Supreme Court did so in *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 191 L.Ed.2d 107 (2017) ("*Peña-Rodriguez")*. *See, e.g., State v. Jackson*, 75 Wn. App. at 543 (reversible error to deny motion for new trial after post-verdict showing of racial bias without evidentiary hearing); *Turner v. Stime*, 153 Wn. App. 581, 590, 222 P.3d 1243 (2009) ("misconduct does not inhere in the verdict where the juror makes racially based statements that are factual in character"). As the U.S. Supreme Court recognized in *Peña-Rodriguez*, bias or prejudice based on race is especially pernicious in the jury system because it "damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Peña-Rodriguez*, 137 S.Ct. at 868. Racial bias is significantly different from other types of improper conduct because it implicates unique historical, constitutional and institutional concerns. *Id.* "[T]here is a sound basis to treat racial basis with added precaution." *Id*. at 869.

2. The trial judge has responsibility to ensure jury deliberations are free of racial bias, and make further inquiry if racial bias is implicated.

A trial judge may grant a new trial due to juror misconduct when it "affirmatively appears that a substantial right of a defendant was materially affected." CrR 7.5. Courts also have the inherent power to

order a new trial on its own motion for juror misconduct. *State v. Hawkins*, 72 Wn.2d 565, 569, 434 P.2d 584 (1967). Even where affidavits of defendants requesting new trial is insufficient to "invoke the jurisdiction of the trial court," the trial court may on its own initiative obtain the evidence necessary to determine whether prejudicial misconduct occurred. *Id.* Indeed, the trial court has an obligation to combat any lingering doubt that the trial was unfair. *State v. Jackson*, 75 Wn. App. 537, 545, 879 P.2d 307 (1994) (dissenting opinion) (noting that defendant did not assign error, raise issue on appeal and objected to an evidentiary hearing at trial). This inherent power exists in the jury selection process too. *State v. Evans*, 100 Wn. App. 757, 767, 998 P.2d 373 (2000) (trial court may raise, *sua sponte*, *Batson* challenges). "Failure to act in such a situation runs the substantial risk of casting doubt on the fairness of the judicial process." *Id*.

Affidavits alone may be sufficient to establish bias and prejudice. Where juror bias is raised post-verdict, the trial court has significant discretion to determine that the challenging party's right to a fair trial was prejudiced. *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009). In *Turner v. Stime*, for example, a juror contacted counsel for plaintiff, post-verdict, to report racial bias influencing the defense verdict. The juror reported jury members using pejorative nicknames for plaintiff's

counsel, who was Japanese-American. *Id.* at 584. The court reviewed affidavits of several jurors, including eight jurors who stated that they did not observe any evidence suggesting racial bias. *Id*. at 586. The court granted plaintiff's motion for a new trial, rendered written findings of fact and conclusions of law, and concluded that juror misconduct in the form of racial bias toward plaintiff's counsel had been established. *Id.* at 587. The court then concluded as a matter of law that it was "reasonably likely that the improper conduct affected the juror's objective analysis of the material issues." *Id*. Reviewing for abuse of discretion, the Court of Appeals affirmed the trial court's factual findings and conclusions of law.

However, relying on affidavits alone should not be sufficient to *deny* a motion for new trial where there is an "inference" of racial bias in juror conduct. This would violate due process because "there should be no lingering doubt" that the criminal defendant received a fair trial. *State v. Jackson*, 75 Wn. App. at 543 (statements of juror revealing aversion and prejudices against African-Americans created a clear inference of racial bias). In *State v. Jackson*, the Div. 1 Court of Appeals reversed a defense verdict because the trial court failed to conduct an evidentiary hearing on juror bias before ruling on the motion for new trial. The court offered guidance on how to conduct an evidentiary hearing, including an examination of the jurors and determination of their credibility and

demeanor in determining whether a particular juror, in fact, had a racial bias so that he or she could not decide the case fairly. "An evidentiary hearing was the only appropriate course of action given Jackson's prima facie showing of racial bias."[1] *Id*. at 544.

Where a juror alleges harassment and discrimination based on implicit bias, it is all the more important to conduct a thorough evidentiary hearing. As we are often not aware of our own implicit biases, and because it is that very implicit bias that might make it harder to recognize implicit or explicit biases of others, a careful examination by the trial judge is required.

B. After Petitioner raised a prima facie showing of juror misconduct, the trial judge erred in denying the motion for new trial without further inquiry.

The trial judge, prosecuting attorney and the Court of Appeals characterized Juror #6's declaration as subjective opinion, even though she

[1] Another example of useful guidance comes from the Connecticut Supreme Court which stated in *State v. Santiago* that the evidentiary hearing should include "at a minimum an extensive inquiry of the person reporting the conduct, to include the context of the remarks, an interview with any persons likely to have been a witness to the alleged conduct, and the juror alleged to have made the remarks." *State v. Santiago*, 245 Conn. 301, 341, 715 A.2d 1 (1998). *See also* Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Pena-Rodriguez Exception Beyond Race*, 118 COLUMBIA LAW REVIEW 6 (2018) (discussing Delaware and Georgia's approaches to ensuring impartial jury free of improper racial implications on basis of due process and equal protection).

set forth sufficient evidence to support an inference of racial bias. *See State v. Berhe*, No. 75277-4-I, 2018 WL 704724, *14-15 (Div. 1, Feb. 5, 2018). Juror #6, the sole African-American juror, stated that non-African American jurors who dissented were not harassed. For example, when Juror #6 raised doubts on how Petitioner came into possession of the gun, she was "personally ridiculed in a way the other dissenting jurors were not." CP 475. The Court of Appeals concluded that there was only a "subjective perception" even though Juror #6's declaration clearly contained objective statements regarding how she was unfairly treated because of race compared to other non-African-American dissenting jurors.[2]

The six jurors who contacted only the prosecuting attorney, while predictably denying being racially biased, corroborated factual allegations that Juror #6 was treated differently. Juror #13 stated, "I felt that a lot of the jurors were frustrated with Juror #6 because she seemed very closed minded about all the evidence being presented." CP 325. Juror #11 stated that though she was not frustrated with Juror #6, she was "uncomfortable by the frustration expressed by a few" due to the "perception" and "sense"

[2] In civil matters, where discrimination is vetted out regularly, disparate treatment is an acceptable way to state a prima facie case of discrimination. *See Johnson v. Dep't of Social and Health Services*, 80 Wn. App. 212, 226-27, 907 P.2d 1223 (1996).

that Juror #6 was basing her position on sentiment rather than facts and reasoning. CP 326. The presiding juror, Juror #14, stated "Juror #6 was challenged many times" and that Juror #6 "could not support her position with any of the evidence." CP 328. Juror #6 was harassed and singled out for dissenting even though other non-African-American jurors expressed dissenting views. Yet, the trial court did no further inquiry.

Finally, the trial judge said that it was "equally likely" that Juror #6 was treated differently because she was the hold out juror. At the hearing on Petitioner's motion for new trial, the trial judge stated:

> There was nothing in her declaration where she said, where anybody said, anything to her or about Mr. Berhe about their race. She felt it. She felt she was pressured because of her race. But we have to look at what she said objectively. There's nothing in there, in her declaration, whatsoever where any juror said anything to her that she was -- her opinions were being discounted because she was black or that Mr. Berhe should be found guilty because he was black. I mean, we can -- I understand about implicit bias.
>
> But we can't just assume. I think it's equally likely that she felt pressured because she was the lone holdout as she did because of any other reason. And I don't believe the State -- the defense has made a prima facie showing of bias. There's nothing objectively in her declaration where I could come to that conclusion.

See 4/6 RP at 109-111. Where there is an equal chance that the juror's conduct was impermissibly motivated by racial bias, due process requires at the very least an evidentiary hearing. *State v. Jackson*, 75 Wn. App.

537, 544, 879 P.2d 307 (1994). Here, Petitioner's constitutional right to a jury free from prejudice and bias was violated, and "nothing short of a new trial can insure that the defendant will be treated fairly." *See State v. Pete*, 125 Wn.2d 546, 552, 98 P.3d 803 (2004).

C. Racial bias in jury deliberations threatens to nullify other protections aimed at racial bias in the jury process, such as those relating to peremptory challenges under GR 37.

GR 37 was adopted because the protections of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and its progeny failed to address "unintentional, institution or unconscious" race bias and limited challenges to peremptory strikes to "purposeful discrimination." *Jefferson*, 192 Wn.2d at 240. Similar protections are needed to protect jury deliberations from racial bias.

As part of the process for explaining why GR 37 was needed, numerous stakeholders, including *amici*, provided comments, research and proposed language addressing the harm resulting from juror discrimination at the jury selection stage. *See* GR 37—Jury Selection Workgroup FINAL REPORT, p. 3 ("FINAL REPORT"), *available at* https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf ; *State v. Jefferson*, 129 Wn.2d. at 477 (describing ACLU's proposed rule and subsequent

workgroup). Apart from the intrinsically harmful nature of race discrimination, it also means that the benefits of a diverse jury with respect to the robustness and accuracy of the deliberative process are not going to be realized on most juries.

GR 37 was in significant part informed by this Court's Minority and Justice Commission 2017 Symposium, Jury Diversity in Washington: A Hollow Promise or Hopeful Future? *See* Supreme Court Symposium, WASH S. MINORITY & JUSTICE COMM'N website, *available at* https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2. Speakers presented research regarding the impact of jury diversity in criminal trials and in jury decision making. *Id.; see, e.g.*, Shamena Anwar, *et al*., *The Impact of Jury Race in Criminal Trials*, 127 THE QUARTERLY JOURNAL OF ECONOMICS 1017 (2012); Samuel Sommers, *Race and the decision making of juries*, 12 LEGAL AND CRIMINAL PSYCHOLOGY 171 (2007). Studies like these show that racial diversity within a jury improves the quality of decisions through the process of information exchange and the individual jurors' heightened awareness of their membership in a heterogeneous group. *Id*.; *see also State v. Saintcalle*, 178 Wn.2d at 50 (referencing studies that "confirm what seems obvious from reflection: more diverse juries result in fairer trials").

For example, the Sommers (2006) study found that racially diverse groups made decisions more reliable and grounded in fact than did homogenous groups because diverse groups discussed more facts, deliberated longer, and made fewer inaccurate statements. *See* 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 (2006) ("*On Racial Diversity and Group Decision Making*"). "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." Neil Vidmar & Valerie P. Hans, AMERICAN JURIES: THE VERDICT 74 (2007). Another study found that jury diversity can improve the quality of communication and participation in the decision-making group even before discussion begins. *See* Sarah E. Gaither, *et al*., *Mere Membership in Racially Diverse Groups Reduces Conformity*, 9 SOC. PSYCH & PERS. SCIENCE 402, 403 (2017). For example, a jury's racial composition may trigger normative pressures by activating jurors' motivations to avoid racial prejudice. 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,

1024 (2003). In addition to arguments of increased perceived and actual legitimacy, constitutional requirements, and morality, the research pointed to jury diversity as an "ingredient for superior performance" and therefore higher reliability in the verdict. *On Racial Diversity and Group Decision Making*, at 608.

The Court's consideration of GR 37 brought to light that the values and benefits of jury diversity can only be sustained if implicit racial bias is confronted. To that extent, this Court rejected the "purposeful discrimination" standard established by *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), because it failed to acknowledge and remedy discrimination caused by implicit bias. FINAL REPORT at p. 3. To address implicit bias, the Court approved GR 37's use of an objective observer standard in the peremptory challenge part of *voir dire*, with an "objective observer" being defined as one who is aware of "implicit, institutional, unconscious biases" and "purposeful discrimination". GR 37(f). The Court also required the trial judge to evaluate reasons given to justify a peremptory challenge and determine if an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. GR 37(g).

If jurors of color are unable to fully participate in juror deliberations due to explicit or implicit bias against them, this Court's

recent advances in remedying racial bias in jury selection have diminished reach. "[G]iven historical discrimination against nonwhite, nonmale and poor citizens in jury selection, it is important to consider whether similar processes are at work in the context of jury deliberations." Alix S. Winter and Matthew Clair, *Jurors' Subjective Experiences of Deliberations in Criminal Cases*, 43 LAW & SOCIAL INQUIRY 1458 (2018), *available at https://scholar.harvard.edu/files/winter_clair_2018.pdf.* In a 2017 study of 3,000 real-world juror surveys, researchers found that "Blacks and Hispanics with lower levels of education are less likely than their white peers to feel as positively that they had enough time to express themselves during jury deliberations." *Id*. at 23. While these researchers did not focus on the impact of jury deliberations on verdict outcomes, they noted that further study may explain why there is not a stronger link between juries' racial compositions and their verdicts. In other words, looking at objective participation rates alone and ignoring the subjective experiences of diverse jurors undermine the benefits of jury diversity that are well established in social science research. *See id.* at 24.

D. The subjective experience of jurors of color should not be ignored because it affects the integrity and fairness of jury trial proceedings.

Perhaps the most powerful part of this Court's 2017 Symposium on Jury Diversity in Washington was the testimony of Ausha B., the

African-American juror who described her personal experience of being immediately stricken from a jury pool after she was personally asked a question by the prosecutor about trusting the police. She said that she answered the question about trusting the police truthfully, but "I really wish that I would have gotten the same respect back from the Court and no one ever asked me why I didn't trust the police."[3] *See* Washington State Supreme Court, Minority & Justice Commission Symposium (May 24, 2017), TVW video at 2:9:42-2:16:36. As Ausha B. personified, race discrimination "shamefully belittles minority jurors who report to serve their civic duty only to be turned away on account of their race." *State v. Saintcalle*, 178 Wn.2d at 41, *citing Batson v. Kentucky*, 476 U.S. 79, 87, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).

After voting, jury service is recognized as a citizen's "most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407, 111 S.Ct. 1364, 1369, 113 L.Ed.2d 411 (1991); *see also* Christina S. Carbone and Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837, 843 (2014) (hereinafter referred to as "*Diversity and the Civil Jury*") (summarizing research on

[3] The final GR 37 rule states that a peremptory challenge based on a distrust of law enforcement is presumptively invalid. *See* GR 37(h)(ii).

jury diversity).[4] Jury service can give voice to local communities, stimulate psychological and behavioral benefits for participants, and increase civic pride and engagement, particularly among minority groups who have been historically marginalized in the legal system. *Diversity and the Civil Jury* at p. 845-46. A national study of jurors showed that those serving on criminal juries were more likely to vote in later elections if they were infrequent voters prior to service. *Id*. at 846-47. Conversely, being allowed to serve on a jury only to be treated like a "second class" citizen could have profound, lasting negative psychological impact. *See, e.g., Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494–95, 74 S. Ct. 686, 691–92, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

In light of the historical context of racially diverse jurors being excluded from jury service, it is wholly appropriate for a court to rely on a juror's sworn statement that she has been precluded from meaningful participation in jury service due to implicit racial bias. "[S]pecial efforts should be made to increase the participation in jury service by sectors of

[4] *Available at* https://scholarship.law.wm.edu/wmlr/vol55/iss3/6. The author notes that most research on jury participation and civic participation is not broken down by race/ethnicity and encourages future research to do so. *Id*. at 847-48.

society that traditionally *have not participated fully*, particularly young people and minority communities. WASHINGTON STATE JURY COMM'N, Report to the Board for Judicial Administration, p. 3 (July 2000), *available at* http://www.courts.wa.gov/committee/pdf/jury_commission_report.pdf (emphasis added); *see also State v. Saintcalle*, 178 Wn.2d at 100, citing to same report.

In this case, Juror #6 was fulfilling an important service to the government by serving as a juror. It is a serious and harmful form of discrimination for the law to allow her to be racially harassed by other jurors as part of that service. Juror #6 submitted a sworn statement that she "was repeatedly accused of being 'partial' because I was the only African-American juror on the panel in a trial with an African-American defendant." She was emotionally exhausted from the race-based ridicule and derision while performing her civic duty of jury service. The questions raised by these allegations necessitated further inquiry.

Moreover, Juror #6 had the courage to confront her fellow jurors about their implicit bias, and report the inappropriate conduct to the trial court judge. "The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal

experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot." *See Peña-Rodriguez*, 137 S.Ct. at 868.

The negative consequences of dismissing reports of racial bias without further inquiry are personally devastating to jurors who report and also detrimental to jury diversity efforts. African-American jurors will be deterred from serving on juries where the criminal defendant is also African-American for risk of being accused or ridiculed for being "partial" to them. The benefits of diverse juries on decision making are lost when African-American jurors are not allowed to freely share their opinions or dissent from the majority just because the criminal defendant is also African-American.

The subjective experience of jurors of color cannot be ignored because it ultimately goes back to the defendant's right to a fair jury trial. "Not only should there be a fair trial, but there should be no lingering doubt about it." *State v. Jackson*, 75 Wn. App. 537, 544, 879 P.32d 307, *quoting State v. Parnell*, 77 Wn.2d 503, 508, 463 P.3d 134 (1969). Here, Juror #6 submitted a declaration stating that she did not believe Petitioner was guilty, and her loss of trust in the justice system as fair and impartial was compounded when the trial court made no further inquiry to her complaints of racial bias.

V. CONCLUSION

The Court should rule that the trial court failed to perform a meaningful inquiry into Juror 6's complaints of racial bias affecting the jury's guilty verdict. The U.S. Supreme Court acknowledged various jurisdictions have recognized a racial bias exception to the no-impeachment rule, and left it to the states to determine the procedures of the evidentiary hearing and the standard of evidence sufficient to set aside the verdict. *Peña-Rodriguez*, 137 S.Ct. at 870-7. *Amici* urge the Court to hold that when jurors come forward and alleges bias or discrimination against them during deliberations, a prima facie case of juror misconduct has been satisfied, triggering the requirement for an evidentiary hearing. This procedure will both empower jurors to reveal implicit racial bias in deliberations and to safeguard a defendant's right to an impartial jury.

Respectfully submitted this 1st day of February, 2019.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By: */s/Antoinette M. Davis*
Antoinette M. Davis, WSBA# 29821
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: 206-624-2184
tdavis@aclu-wa.org
Attorney for Amici Curiae ACLU of Washington and SABAW

MBE LAW GROUP PLLC

Margaret Pak Enslow, WSBA #38982
1001 Fourth Ave., Suite 3200
Seattle, Washington 98154
Tel (206) 400-7722 x 103
Fax (206) 400-7742
margaret@mbelg.com
ACLU-WA Cooperating Attorney

ACLU FOUNDATION

By: */s/Jeffery Robinson*
Jeffery Robinson, WSBA #11950
Twyla Carter, WSBA #39405
125 Broad Street, 18th Fl.
New York, NY 10004
jrobinson@aclu.org
tcarter@aclu.org
Attorneys for Amicus Curiae ACLU Foundation

LOREN MILLER BAR ASSOCIATION

By:*/s/Erika J. Evans*
Erika J. Evans, WSBA #51159
P.O. Box 1873
Seattle, WA 98111
president@LMBA.net
Attorney for Amicus Curiae Loren Miller Bar Association

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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- tdavis@aclu-wa.org
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