

FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 95920-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS MUSSIE BERHE,

Appellant.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION

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The American Civil Liberties Union of Washington, American Civil Liberties Union Foundation, the Loren Miller Bar Association and the South Asian Bar Association of Washington respectfully move, pursuant to RAP 10.1(e) and 10.6, to file a brief as *amici curiae* in the above-captioned case.

I. IDENTITY AND INTEREST OF AMICUS

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, 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 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.

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.

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.

II. FAMILIARITY WITH ISSUES

Amici have obtained copies of, and are familiar with, the briefing submitted by the parties to this Court, as well as other relevant portions of

the record. *Amici* are familiar with the scope of arguments presented by the parties and will not unduly repeat those arguments.

III. ISSUES TO BE ADDRESSED BY AMICUS

Whether the trial court failed to adequately investigate a complaint of juror race-based bias made by the sole African American juror who asserted after the verdict that she did not believe the Black defendant was guilty, that she was subject to race-based discrimination and harassment during deliberations by other jurors because of that belief, and that her treatment by other jurors was the result of implicit racial bias.

IV. WHY AMICI BRIEFING WILL ASSIST THE COURT

Amici believe that diverse juries are essential to a defendant's right to a fair trial, the public legitimacy of the courts, and diverse jurors' right to fully participate in their civic duties. In this case, where an African-American juror submitted a sworn declaration that she was harassed and belittled because of implicit bias against her, this Court has an opportunity to recognize that diverse jurors must be able to fully participate in jury deliberations free of racial bias. *Amici* urge the Court to hold that where a juror alleges racial bias or discrimination in deliberations, the prima facie showing of bias is satisfied, and an evidentiary hearing is required.

As members of the GR 37 workgroup, *Amici* is familiar with the legal arguments and social science research regarding the benefits of jury

diversity. All the benefits of and protections for having a diverse jury, however, are lost if diverse jurors do not fully participate in juror deliberations due to explicit or implicit bias against them. Looking at objective participation rates alone and ignoring the subjective experiences of diverse jurors may not lead to the benefits of jury diversity such as robustness and accuracy of the deliberative process.

The additional argument provided by *Amici* will be helpful to this Court because we supplement Petitioner's legal argument with social science research supporting GR 37 and jury diversity in general. We connect the protections of GR 37 to jury deliberations. And we directly address the issue of whether Juror #6's complaints of racial bias were too "subjective" to merit further inquiry by this Court.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant them leave to file the attached amici brief.

RESPECTFULLY SUBMITTED this 1st day of February, 2019.

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