

FILED
SUPREME COURT
STATE OF WASHINGTON
4/15/2019 2:42 PM
BY SUSAN L. CARLSON
CLERK

NO. 96344-4
CONSOLIDATED W/ NO. 96345-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner/Cross-Respondent,
v.

KARL PIERCE and MICHAEL BIENHOFF,
Respondents/Cross-Petitioners.

MOTION OF FRED T. KOREMATSU CENTER, AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON, WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND
WASHINGTON DEFENDER ASSOCIATION FOR LEAVE TO FILE
AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Robert S. Chang, WSBA #44083
Jessica Levin, WSBA #40837
Shreya Ahluwalia, Rule 9 #9871792
Ryan Mathisen, Rule 9 #9866106

RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4009
changro@seattleu.edu
levinje@seattleu.edu

Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Additional Counsel Listed on Next Page

Nancy Talner, WSBA # 11196
Antoinette Davis, WSBA # 29821
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: (206) 624.2184
talner@aclu-wa.org
tdavis@aclu-wa.org

Counsel for Amicus Curiae
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Rita Griffith, WSBA # 14360
1511 Third Ave, Ste 503
Seattle, WA 98101
Tel: (206) 623-1302
griff1984@comcast.net

Counsel for Amicus Curiae
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Hillary Behrman, WSBA #22675
110 Prefontaine Pl S Ste 610
Seattle, WA 98104
Tel: (206) 623-4321
hillary@defensenet.org

Counsel for Amicus Curiae
WASHINGTON DEFENDER ASSOCIATION

I. MOTION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE.

1. Identity of Moving Parties

a. Fred T. Korematsu Center for Law and Equality (Korematsu Center)

The Korematsu Center is based at Seattle University School of Law and advances justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice and has a special interest in working to eradicate improper discrimination in jury selection. To this end, the Korematsu Center submitted a comment to proposed General Rule (GR) 37 – Jury Selection and participated in the GR 37 workgroup, joining several organizations in an individual comment following the workgroup. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

b. American Civil Liberties Union of Washington (ACLU-WA)

ACLU-WA is a statewide, nonpartisan, nonprofit organization with over 135,000 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 advocated for procedures designed to keep the jury selection process free from discrimination or bias and has worked toward reducing discrimination in the exercise of peremptory challenges through litigation, education, and rule-drafting, as well as by submitting amicus briefs in numerous cases where the right to participate in a jury was at stake.

c. Washington Association of Criminal Defense Lawyers (WACDL)

WACDL, a non-profit organization formed in 1987, is dedicated to improving the quality and administration of justice. WACDL has over 800 members consisting of private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL holds seminars throughout the year to educate lawyers, paralegals and investigators on pertinent issues related to the defense of Washington citizens accused of all crimes, from capital cases to misdemeanors and infractions. WACDL has previously been granted amicus status in numerous Washington appellate cases and has been, on occasion in the past, invited by the Supreme Court to file amicus briefing.

d. Washington Defender Association (WDA)

WDA is a non-profit association of over 1,500 public defenders,

criminal defense attorneys, investigators, social workers and civil attorneys representing individuals in mental health, dependency and youth related matters throughout the state of Washington. WDA and its members are committed to supporting and improving indigent defense and the lives of indigent defendants and their families. A primary purpose of WDA is to improve the administration of justice and stimulate efforts to remedy inadequacies in substantive and procedural law that contribute to injustice. WDA and its members have previously been granted leave to file amicus briefs on many issues related to criminal defense and the representation of the indigent clients in a wide array of criminal and civil proceedings.

2. Statement of Relief Sought

Amici curiae, pursuant to RAP 10.6(a), seek leave to file an amicus curiae brief on the basis that it will assist the Court by providing further explanation and analysis on the application of the objective observer standard set out in *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018). Now that the purposeful discrimination requirement has been replaced by the objective observer standard in the third step of the *Batson* framework, clarification is necessary on how this new standard applies to certain seemingly “race-neutral” justifications for peremptory strikes. Amici file this motion for leave to participate as amici curiae to provide analysis regarding the permissibility of these reasons under the new

objective observer standard.

3. Facts Relevant to Motion

The amicus curiae brief was prepared by lawyers authorized to practice law in Washington, as required by RAP 10.6(a). The brief likewise satisfies the requirements of RAP 10.6(b):

(i) Amici's Interest in this Case

Amici curiae's interest in this case is detailed in the identity of the parties section above.

(ii) Familiarity with Issues and Argument

Attorneys for amici are familiar with the scope of the arguments presented by the parties and will not unduly repeat arguments raised by any of the parties.

(iii) Issues to Which Amicus Curiae Brief Will Be Directed

The amicus curiae brief will address whether an objective observer could view race as a factor in a peremptory strike when (1) the strike is justified by the juror's momentary pause in response to a question, despite other jurors engaging in similar pauses without being stricken, and (2) the challenge is justified by the juror's link to the criminal justice system.

This brief will argue that the objective observer, equipped with extensive knowledge about the existence of explicit and implicit bias, could view race as a factor in the prosecution's exercise of a peremptory

strike against Juror 6, a black juror whose demeanor—her pausing—was treated differently than other jurors.

This brief will also argue that an objective observer, aware of how explicit and implicit bias has contributed to racial disproportionality in the criminal justice system, could view race as a factor in the peremptory strike of Juror 6 when the prosecutor offered her familial connection to the criminal justice system and her feelings about her brother being assaulted by the police as reasons to support the strike.

(iv) Belief that Additional Argument Is Necessary on These Issues

Amici curiae believe that additional argument is necessary to provide a full analysis of the objective observer standard as it relates to the two reasons that were offered for the peremptory challenge exercised against Juror 6, a black juror: (1) the presence of pauses and (2) links to and opinions of the criminal justice system. This more full analysis directs the focus on the standard recently set forth in *State v. Jefferson*, 192 Wn.2d, 225, 249-50, 429 P.3d 467 (2018): whether an objective observer *could* view race as *a factor* in the use of the peremptory challenge.

4. Grounds for Relief and Argument

Amici curiae request that the Court allow the filing of the amicus brief on the ground that the brief meets all of the requirements contained in RAP 10.6(b) for submission of an amicus curiae brief.

II. TIMELINESS

Under RAP 10.2(f)(2), the attached amicus curiae brief will be due on or before April 15, 2019, which is 45 days before oral argument, which is docketed on May 30, 2019.

III. CONCLUSION

Amici curiae respectfully request that the Court grant the motion for leave and permit it to participate in the case as amici curiae.

RESPECTFULLY SUBMITTED this 15th day of April, 2019.

s/ Robert S. Chang

Robert S. Chang, WSBA #44083

Jessica Levin, WSBA #40837

Shreya Ahluwalia, Rule 9 #9871792

Ryan Mathisen, Rule 9 #9866106

Counsel for Amicus Curiae

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Nancy Talner, WSBA #11196

Antionette Davis, WSBA #29821

Counsel for Amicus Curiae

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Rita Griffith, WSBA #14360

Counsel for Amicus Curiae

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Hillary Behrman, WSBA #22675

Counsel for Amicus Curiae

WASHINGTON DEFENDER ASSOCIATION

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 15, 2019, the forgoing document was electronically filed with the Washington State Supreme Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, this 15th day of April, 2019.

/s/ Jessica Levin

Jessica Levin
Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

KOREMATSU CENTER FOR LAW AND EQUALITY

April 15, 2019 - 2:42 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96344-4
Appellate Court Case Title: State of Washington v. Karl Emerson Pierce, et al.
Superior Court Case Number: 12-1-04437-2

The following documents have been uploaded:

- 963444_Briefs_20190415143624SC032652_5395.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Amicus Brief - Pierce - final for filing.pdf
- 963444_Motion_20190415143624SC032652_0153.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion for Leave to File Amicus - Pierce - final for filing.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- ann.summers@kingcounty.gov
- gibsonc@nwattorney.net
- gverhoef@spokanecounty.org
- levinje@seattleu.edu
- marla@marlazink.com
- paoappellateunitmail@kingcounty.gov
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Jessica Levin - Email: levinje@seattleu.edu

Filing on Behalf of: Robert S Chang - Email: changro@seattleu.edu (Alternate Email:)

Address:
901 12TH AVE
KOREMATSU CENTER FOR LAW & EQUALITY
SEATTLE, WA, 98122-4411
Phone: 206-398-4167

Note: The Filing Id is 20190415143624SC032652