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**IN THE SUPREME COURT FOR THE STATE OF  
WASHINGTON**

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**In the Matter of the Personal Restraint of  
THEODORE R. RHONE,**

*Petitioner.*

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**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL  
LIBERTIES UNION OF WASHINGTON FOUNDATION,  
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE,  
AND WASHINGTON DEFENDER ASSOCIATION**

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## **I. IDENTITY AND INTEREST OF AMICI**

The identity and interest of Amici are set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

## **II. INTRODUCTION**

Diverse juries are imperative to ensure defendants and the public that the criminal legal system is impartial and fair. The Sixth Amendment of the U.S. Constitution guarantees to all defendants the right to a speedy and public trial by an impartial jury. As considerable power is vested in the group of people serving on a jury, it is of paramount importance that jurors reflect the myriad of race, gender, and socioeconomic statuses. These vastly different lived experiences, opinions, and attitudes allow for deliberations from varying perspectives and helps to combat the biases and prejudices that pervade the criminal legal system.

Racially diverse juries make decisions in a different way than homogenous juries. Studies have consistently demonstrated that “[d]iverse juries have longer deliberations, discuss more



case facts, make fewer inaccurate statements, and members are more likely to correct inaccurate statements. In short, jury and jury pool diversity impact the equity and justice of jury verdicts.” Wash. Sup. Ct. Gender & Justice Comm’n, 2021: How Gender and Race Affect Justice Now: Final Report 131 (Sept. 2021) (2021 Gender Justice Study).

The constitutional right to an impartial jury is one of the long-standing central “principles upon which this nation is founded.” *State v. Evans*, 154 Wn.2d 438, 445, 114 P.3d 627 (2005). Voir dire, the process by which a jury is selected, invokes other fundamental constitutional rights, such as due process and equal protection. For the last nearly forty years, discriminatory jury selection has been violative of “a defendant’s [constitutional] right to equal protection because it denies the protection that a trial by jury is intended to secure.” *Batson v. Kentucky*, 476 U.S. 79, at 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Over the last decade, this Court has made significant strides in combating discriminatory jury selection and jury

deliberation. As “the protections under *Batson* were not robust enough to effectively combat racial discrimination during jury selection”, *State v. Jefferson*<sup>1</sup>, *City of Seattle v. Erickson*<sup>2</sup>, and General Rule 37 (GR 37) have served as safeguards to defendants, as well as jurors of color, to ensure that juries, criminal trials, and verdicts are free from race-based discrimination. *State v. Tesfasilasye*, No. 100166-5, 2022 WL 5237738, at \*6 (Wash. Oct. 6, 2022) (quoting *Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017)).

### III. STATEMENT OF THE CASE

At his trial in 2005, Mr. Rhone objected to the State’s exclusion of the sole Black potential juror.<sup>3</sup> The trial court denied his objection based on its application of the *Batson* framework.

Mr. Rhone raised the issue in his timely direct appeal, seeking a brightline rule that excluding the last or only juror of a

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<sup>1</sup> 192 Wn.2d 225, 429 P.3d 467 (2018).

<sup>2</sup> 188 Wn.2d 721, 398 P.3d 1124 (2017).

<sup>3</sup> Before the trial began, Mr. Rhone, “acting pro se,” objected to the jury selection process on the ground that the State had used a peremptory strike to remove the only remaining Black juror from the venire. *State v. Rhone*, 137 Wn. App. 1046, 2007 WL 831725, at \*3 (2007).

cognizable racial class constitutes prima facie discrimination requiring a race-neutral explanation. The Supreme Court denied his appeal, 5-4.

Almost a decade later, in *Seattle v. Erickson*, this Court adopted the precise rule Mr. Rhone sought from the time of his trial. Indeed, the *Erickson* court referred to the brightline rule as the “*Rhone* rule.” (“To ensure a robust equal protection guaranty, we now limit [the trial court’s] discretion and adopt the bright-line *Rhone* rule.”) *Erickson*, 188 Wn.2d at 734.

Remarkably, Mr. Rhone has never received relief for the rule which bears his name. As the Court of Appeals recognized in their decision transferring the matter to this Court, Mr. Rhone is entitled to such relief.

Amici additionally adopt Petitioner’s statement of the case.

#### IV. ARGUMENT

##### A. Racially Diverse Venires Improve the Reliability of Jury Outcomes and Afford Defendants a Fairer Trial in the Criminal Legal System.

“This [C]ourt has stated, unequivocally, that [it] owe[s] a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice.”<sup>4</sup> “If racial bias is a factor in the decision of a judge or jury, that decision does not achieve substantial justice, and it must be reversed.” *Henderson v. Thompson*, No. 97672-4, 2022 WL 11469892, at \*1 (Wash. Oct. 20, 2022) (citing *State v. Zamora*, 199 Wn.2d 698, 722, 512 P.3d 512 (2022)). Empirical evidence and literature have consistently demonstrated how unrepresentative venires threaten the very notion of justice that our legal system is founded upon.<sup>5</sup>

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<sup>4</sup> Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020); <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

<sup>5</sup> 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, 605-06 (2006)[hereinafter *Group Decision Making*]; see also Neil Vidmar & Valerie P. Hans, *American Juries: The*

Research shows that “compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.” *Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> at 14 (Aug. 2010). Empirical evidence has consistently demonstrated that all-white juries convict at higher rates, generally, and convict Black people, specifically, at higher rates than other defendants.<sup>6</sup> As recently as 2021, our state’s Gender and Justice Commission determined that “juries with

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*Verdict* 74 (2007); see also Sarah E. Gaither et al., *Mere Membership in Racially Diverse Groups Reduces Conformity*, 9 Soc. Psychol. & Pers. Sci. 402, 403 (2017).

<sup>6</sup> See Anwar, S., Bayer, P., & Hjalmarsson, R., *Impact of Jury Race in Criminal Trials*, Quarterly Journal of Economics, Vol. 127, Issue 2 (May 2012) (finding that “[w]hen there are no potential black jurors in the pool, black defendants are significantly more likely than whites to be convicted of at least one crime” and affirming that “there is a significant gap in conviction rates for black versus white defendants when there are no black [jurors] in the jury pool”). See also Kang, J. & Carbado, D., *Implicit Bias in the Courtroom*, 59 UCLA L. R. 1124 (2012) (detailing jury composition research confirming that white juries convict Blacks and people of color at higher rates than racially diverse juries). See also Flanagan, F., *Race, Gender, and Juries: Evidence from North Carolina*, Journal of Law & Economics, 61 JLECON 189 (2018) (affirming an increase in the proportion of the jury pool that is black results in a decrease in the conviction rate for both black and white defendants).

jurors of color were less punitive against Black and Latinx defendants than all-white juries.” 2021 Gender Justice Study 134.

What is viewed as the most consequential and heavily cited study assessing the role of race in a mock jury determined that racially diverse panels resulted in more reliable verdicts than that of homogenous panels, as there were fewer inaccurate statements made and a more robust exchange of information and consideration of the facts.<sup>7</sup> As “jurors tend to rely on their lived experiences when participating in jury deliberations, ... having greater perspectives can yield a discussion that is more well-balanced.” Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 *Criminology, Crim. Just., L. & Soc’y* no. 1, 2021, at 6.

Racially diverse panels also had a dramatic impact even before the deliberation stage. White jurors included in the diverse

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<sup>7</sup> *Group Decision Making, supra*, at 599.

juries were nearly 10% less likely to presume the defendant's guilt than members of all-white juries.<sup>8</sup> This study further found that white jurors more thoroughly processed information regarding or expressed by Black individuals, as they were more mindful of evaluating evidence in such a way that could trigger their own racial biases.<sup>9</sup> This finding was particularly evident when the defendant is Black.<sup>10</sup>

Ensuring that a diverse jury is drawn from a venire that is representative assures that the decision rendered is based on the law and the facts, rather than on bias. Mr. Rhone's unsuccessful challenge to the last remaining Black juror being struck from his venire directly resulted in him facing a jury that was undoubtedly less likely to debate and consider uncomfortable issues related to race and acknowledge and mitigate implicit biases than that of a diverse jury. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove

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<sup>8</sup> *Id.* at 607.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.” *Peters v. Kiff*, 407 U.S. 493, 503, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972). As the United States Supreme Court has recognized, “[D]iscriminatory selection procedures make ‘juries ready weapons for officials to oppress those accused individuals’” who are members of underrepresented populations. *Batson*, 476 U.S. at 86-87 (quoting *Akins v. Texas*, 325 U.S. 398, 408, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945) (Murphy, J., dissenting)). In contrast, juries whose diverse members are not excluded serve as a check on government power, improve faith in the judicial system, and most importantly, provide for more accurate verdicts. *Matter of Rhone*, 516 P.3d 401, 409 (Wash. Ct. App. 2022). Had Mr. Rhone’s jury been truly representative, the empirical evidence suggests that the jury deliberation process in his case would have been substantively better.



**B. Protecting the Constitutional Right to an Impartial Jury and Ensuring a Diverse Venire by Expansively Interpreting and Applying GR 37 is Consistent with this Court’s Anti-Discrimination Jurisprudence.**

“This case represents the struggle to defend our equal protection guaranties and to continue fighting against racial discrimination in the jury selection process.” *Erickson*, 188 Wn.2d at 726. This Court has continually reaffirmed its commitment to “eliminat[ing] the unfair exclusion of potential jurors based on race or ethnicity.” GR 37(a). GR 37 was adopted to bring increased clarity, consistency, and justice to jury selection, an area of law where all three qualities have long proved elusive. *State v. Sum*, 199 Wn.2d 627, 649, 511 P.3d 92, 106 (2022). The adoption of this rule served to remedy the clear failings of the *Batson* test, which “has done very little to make juries more diverse or to prevent prosecutors from exercising race-based challenges.” *Id.* at 649 (citing *Jefferson*, 192 Wn.2d at 240, 429 P.3d 467 (2018)). Although this Court has been at the national forefront of explicitly repudiating and reckoning with

the institutionalized racism present in our criminal legal system through the development and implementation of GR 37 and cases such as *Erickson* (relating to when the sole member of a racially cognizable group has been struck from the jury), *Jefferson* (ensuring that jurors of color are not improperly excluded based on race), and *Berhe* (providing a remedy for race-based juror misconduct, once empaneled), there still exists a dire need to expansively interpret and apply these protections.<sup>11</sup>

“[This Court’s] commitment to substantial justice rings hollow if [it] fail[s] to recognize that racial bias often interferes with achieving justice in our courts.” *Henderson*, No. 97672-4, 2022 WL 11469892, at \*5 (Wash. Oct. 20, 2022). By liberally interpreting and applying the protections contained in GR 37 and *Erickson*, *Jefferson*, and their progeny, the Court can further reduce the historical and continuing exclusion of Black jurors from jury service and ensure that defendants have the ability to

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<sup>11</sup> *State v. Berhe*, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019).

effectively challenge the underrepresentation of cognizable racial groups in jury venires.

“Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice.” *Id.* at \*1. Protecting potential jurors of color from race-based discrimination in the jury selection process increases the likelihood that a diverse jury is empaneled on any given case, leading to a substantially fairer deliberative process and ensuring public confidence in our criminal legal system. “Courts take a step toward achieving greater justice when the people who comprise them comprehend the legacy of injustices built into our legal systems, actively work to prevent racism before it occurs, and also recognize how our participation in these systems may rectify them.” *Id.* at \*12.

## **V. CONCLUSION**

“Our constitutions require a fair and impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The parties and the jurors themselves have the right to a trial process free from

discrimination.” *Tesfasilasye*, No. 100166-5, 2022 WL 5237738, at \*6 (Wash. Oct. 6, 2022) (citing *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000)). It is well-established fact that jury diversity directly impacts jury verdicts. “Recognizing that a verdict affected by racism violates fundamental concepts of fairness and equal justice under law”, ensuring a diverse venire through the further development of jurisprudence, the present rule of which was borne of Mr. Rhone, himself, and the liberal interpretation and application of GR 37 will “not only lead to greater protection from racial discrimination, but [will] help effectuate Washington’s elevated right to a fair jury trial.” *Henderson*, No. 97672-4, 2022 WL 11469892, at \*1 (Wash. Oct. 20, 2022), *Erickson*, 188 Wn.2d at 731 (citing *State v. Rhone*, 168 Wn.2d at 648-50, 229 P.3d 752 (2010)). For the foregoing reasons, the Court should grant Mr. Rhone’s personal restraint petition.

### **RAP 18.17 Certification**

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 1,917 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 2,500 words for amicus briefs as required by RAP 18.17(c)(6).

Respectfully submitted this 28th day of October, 2022.

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## **CERTIFICATE OF SERVICE**

I certify that on the 28<sup>th</sup> day of October, 2022, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 28<sup>th</sup> day of October, 2022 at Seattle, WA.

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