Supreme Court No. 102492-4
Court of Appeals No. 53826-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

ANGELIQUE S. LANTZ, as Personal Representative of the ESTATE OF JUSTINE M. ROWE,

Respondent,

v.

STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and CHILD STUDY AND TREATMENT CENTER,

Appellants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Justine Rowe was denied a fair trial because of juror misconduct. The trial court recognized this and, well within its discretion, granted a new trial. The Court of Appeals applied this Court's decisions and affirmed.

The State seeks review based on RAP 13.4(b)(1) and RAP 13.4(b)(4). But neither ground is satisfied as the Court of Appeals followed *Henderson v. Thompson*, 200 Wn.2d 417, 518 P.3d 1011 (2022), applying that precedent to the unique facts of this case. The decision below did not change Washington law. And review of the application of that law to the anomalous facts presented will provide little guidance to future litigants.

If, however, this Court accepts review, then it should also consider whether the test utilized by the Court of Appeals violates the Equal Protection and Due Process clauses of Fourteenth Amendment to the United States Constitution; whether the mandates of *Henderson* apply to members of other protected classes, including those with a disability, like Rowe; and whether the State violated *Henderson* at trial by appealing to

biases about Rowe's protected characteristics of race, gender, and disability.

II. IDENTITY OF RESPONDENT

Respondent Angelique Lantz was substituted as the personal representative of the estate of her daughter, Rowe.

III. STATEMENT OF ISSUES

Whether the State has failed to satisfy the requirements of RAP 13.4(b) when the decision below affirmed the discretionary grant of a new trial based on juror misconduct in this fact-driven situation.

Whether *Henderson's* "could" test, applied in the decision below, violates the Fourteenth Amendment to the United States Constitution.

Whether the test utilized by the Court of Appeals also applies to other protected classes, including those with disabilities, and whether the State violated *Henderson* at trial by appealing to biases about Rowe's protected characteristics of race, gender, and disability.

IV. STATEMENT OF THE CASE

Justine Rowe was an African American female[1] who suffered from both physical and mental health related medical disabilities. RP 398. At trial, the State's chief argument was that Rowe had manufactured her reports of sexual assault occurring while in the State's care because of her mental health disabilities. *Id.*

At age 16, Rowe was involuntarily committed to the Department of Social and Health Services' ("DSHS") Child Study and Treatment Center ("CSTC"), located on the grounds of Western State Hospital. Trial Exhibit 2. This hospitalization was a result of the last of seven suicide attempts. RP at 1196. Soon after arriving at CSTC, Rowe met Matthew Grundhoffer, one of the Agency-Affiliated counselors employed by CSTC. RP at 1182–95. Grundhoffer was part of the medical team, and he began grooming Rowe, leading to unlawful sexualized conduct. *Id.* Following Rowe's release from CSTC and for several years thereafter, Grundhoffer maintained a relationship with Rowe through electronic communications. Trial Exhibit 4. In these

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[1] SRP at 6. ("In this case, the plaintiff is biracial and identified as African American.").

communications Grundhoffer recounted sexual acts with Rowe from the time at CSTC when she was a minor. Trial Exhibit 51A.

Rowe filed suit against the State alleging various causes of action, including violations of the Washington Law Against Discrimination ("WLAD") for sexual assault occurring at a place of public accommodation. CP 589. On June 3, 2019, trial started in Pierce County Superior Court. CP 1823. At the outset of the case, the trial court disclosed the nature of the case to the prospective jurors and administered a juror questionnaire. RP 141–47; CP 122. Juror 4 completed the form. CP 122. Juror 4 was called in for individual questioning. RP 196. Based on his answers, no challenge for cause was made and no preemptory challenge was used on Juror 4. Juror 4 was seated for the trial.

Trial proceeded for several weeks, during which extensive evidence was introduced regarding Rowe's childhood trauma, abuse, and family contacts with law enforcement. *See, e.g.*, Trial Exhibits 1 and 102. Shortly before closing arguments, Rowe's counsel discovered documents showing that Juror 4 was not honest in voir dire and, in fact, this individual had experienced circumstances closely analogous to those at issue in the trial. CP

1741–55, 1765–81; RP 1854. Rowe moved at that time to dismiss Juror 4; there were two alternates available. *Id.* at 1854, 1862. The State opposed this request and argued that Rowe should have used a peremptory on Juror 4: "*plaintiff had an opportunity to use a preemptory on him; passed over him and decided not to do so.*" RP 1918 (emphasis added). The Court did not grant the motion to excuse Juror 4. RP 1923.

Following closing arguments, the trial court instructed the jury, including on definitions for communications with a minor for immoral purposes. CP 1794–98. Following deliberations, the jury returned with a 10–2 defense verdict, where Juror 4 was one of the necessary 10 jurors finding against Rowe. RP 1976.

After the verdict, Rowe learned that Juror 4 misrepresented his background, including a substantial amount of highly analogous information demonstrating an undisclosed bias. CP 500–88, 1855–2116, 2306–27. This included false information regarding his involvement with lawsuits, physical abuse, sexual abuse, DSHS, and mental health patients. *Id.*

Rowe moved for a new trial. CP 1843. The State responded that the evidence submitted was insufficient to support the

requested relief, but it did not make any specific evidentiary objection to any of the material filed in support of Rowe's motion. CP 2119–30; RP 1991–2003. The State also did not request an evidentiary hearing. *Id*. The trial court ordered a new trial. RP 2004–06; CP 2391–96.

The State then filed a motion for an evidentiary hearing, limited to the question of whether Rowe's motion for a new trial was brought for racially discriminatory reasons. CP 2343–55. Critically, the State never requested an evidentiary hearing into the evidence supporting the motion for a new trial, instead seeking a hearing on Rowe's motives for seeking a new trial and whether they were racially discriminatory. CP 2370; SRP at 8. Ultimately, the trial court found that the State had failed to make a prima facie showing of racial bias, and that race was not a factor in the verdict. SRP at 15. The Court entered orders. CP 2391–96.

On September 18, 2019, the State filed a notice of appeal. CP 2397. On January 26, 2021, the State filed a motion to stay proceedings while *Henderson* was under consideration by this Court, which was granted. On November 22, 2022, after *Henderson* was decided, the Court of Appeals allowed the parties

to submit supplemental briefs addressing *Henderson*. Rowe's supplemental brief argues that the State's requested test would violate the Fourteenth Amendment to the United States Constitution, and that the State's own conduct related to Rowe's race, gender, and disability provided an additional basis for a new trial.

Rowe died on February 16, 2023, and her mother was substituted as Personal Representative.

The case was argued on May 1, 2023. On September 19, 2023, the Court of Appeals issued its decision affirming the trial court. The Court of Appeals reasoned that there was significant evidence of juror misconduct and that an independent review of the records showed that a reasonable observer could not conclude that race was a factor in the decision to grant a new trial. *Lantz v. State*, ___ Wn. App. 3d. ___, 535 P.3d 501, 514 (2023) ("Reviewing the record de novo, we conclude that an objective observer could not view race as a factor in the decision to grant a new trial, because there was an objectively valid reason for challenging Juror 4."). The Court of Appeals explained, in part:

> A dubious history of excluding people of color from juries cannot be ignored, and when practiced, brings into question whether a fair trial has occurred. At the same time, it cannot seriously be argued that prohibiting disqualification of jurors of color based on race, is the same as prohibiting disqualification of a juror of color who is disqualified due to his bias.

Id. at 515 n.9.

The State now seeks discretionary review from this Court.

V. ARGUMENT

A. RAP 13.4(b)(1) is not met because the Court of Appeals decision does not conflict with this Court's decisions.

This Court's decision in *Henderson* did not modify longstanding law establishing that a new trial is the proper remedy when a juror misrepresents or fails to disclose information during voir dire that would support a challenge for cause. *See Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 776 (1989); *Matter of Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835, *decision clarified sub nom. In re Pers. Restraint Petition of Lord*, 123 Wn.2d 737, 870 P.2d 964 (1994). At the trial court, the State did not make any specific evidentiary objection to the evidence relied upon by the trial court. *See* Brief of Respondent at 42–43. Based on the extensive evidence and

highly unique fact pattern, Rowe established her right to a new trial under Civil Rules 59(a)(1), 59(a)(2) and 59(a)(9). The trial court granted the motion and the Court of Appeals independently agreed. In reaching its decision, the Court of Appeals did not modify, criticize, or deviate from *Henderson*; *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019); or *State v. Sum*, 199 Wn.2d 627, 511 P.3d 92 (2002), as wrongly claimed by the State. *See* Petition at 19. Instead, the Court of Appeals applied these authorities to the unique facts of this case:

> Reviewing the record de novo, we conclude that an objective observer could not view race as a factor in the decision to grant a new trial, because there was an objectively valid reason for challenging Juror 4. The litigant raising the issue of racial bias must make a showing sufficient to draw an inference of racial bias. *Henderson*, 200 Wn.2d at 435, 518 P.3d 1011. Here, Defendants merely assert that because Juror 4 was the only juror of color, implicit bias could have played a role in the challenge. But, as discussed above, there was a valid basis for a challenge for cause due to the significant information Juror 4 failed to disclose during voir dire. J.R. has shown that Juror 4 would have been dismissed for cause had he answered the juror questionnaire and the voir dire questions honestly. Therefore, an objective observer could not view race as a factor in the decision to challenge Juror 4, and Defendants have not met their burden.

Lantz, 535 P.3d at 514–15.

Because the decision below is not in conflict with the precedent of this Court, review is not appropriate.

B. RAP 13.4(b)(4) is not satisfied because the application of established law to these unique facts does not create an issue of substantial public importance.

The decision below also does not modify this Court's decision in *Henderson*. Instead, the decision below merely applies existing law against the highly unusual facts presented by this case, where a juror with extensive experiences with the same parties and issues from the case withheld this information during voir dire. The Court of Appeals decision is a correct application of existing law to the facts of this case and the requirements of RAP 13.4(b)(4) are not met.

C. If review is granted, then this Court should evaluate whether the "could" test used by the Court of Appeals violates the Fourteenth Amendment to the United States Constitution.

If review is accepted, then the Court must, as a threshold issue, determine whether the test applied by the Court of Appeals

violates the Fourteenth Amendment to the United States Constitution. RAP 13.4(b)(3); RAP 2.5(a)(3).[2]

Here, as urged by the State, the Court of Appeals held that the trial court made a legal error by assessing whether a reasonable observer "would" consider race a factor. *Lantz*, 535 P.3d at 514. Instead, the Court of Appeals implemented the holding from *Henderson* and asked whether a reasonable observer "could" conclude that race was a factor in the decision making. *Id.* This speculative test is unconstitutional.

Under federal law, all state court systems are subject to the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303, 310, 25 L. Ed. 664 (1880). The United States Supreme Court has

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[2] The trial court applied a "would" test to the issues presented by the State that did not raise the same constitutionality concerns. After the State urged a "could" test based on the recent *Henderson* decision, Rowe argued in supplemental briefing that the standard is unconstitutional in violation of the Fourteenth Amendment. At oral argument at the Court of Appeals, the State claimed that these constitutional challenges were not preserved. But this argument is incorrect because (a) the Court of Appeals applied a different test than that of the trial court; (b) *Henderson* was not decided until well after Rowe's motion for new trial; and (c) Rowe presents an issue that constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

"consistently and repeatedly . . . reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 44, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). Moreover, state judicial procedures must comport with due process. *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Regarding equal protection, even benign racial distinctions are unconstitutional unless there is a strong basis in evidence of specific racial discrimination to correct in a narrowly tailored fashion. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). It is true that "[a] State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Shaw v. Hunt*, 517 U.S. 899, 909, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996). However, to satisfy the requirement of a "compelling state interest," the State "must satisfy two conditions." *Id.* First, the State must identify the discrimination with "some specificity" for which it seeks to "use

race-conscious relief." *Id.* Regarding this requirement, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909–10. Second, the State must have sufficient evidence to determine that remedial action was necessary in the particular situation. *Id.* at 910; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510, 109 S. Ct. 706, 730–31, 102 L. Ed. 2d 854 (1989). These exacting requirements are necessary because "[r]acial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" *Shaw*, 517 U.S. at 907 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964)). Indeed, two Supreme Court Justices observed that the test from *Henderson* is "on a collision course with the Equal Protection Clause, as our recent opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181, 143 S. Ct. 2141, 216 L. Ed. 2d 857[ ] (2023) (*SFFA*), demonstrates." *Thompson v. Henderson*, 143 S. Ct. 2412, 2413 (2023) (statement of Alito & Thomas, JJ. respecting denial of certiorari).

Moreover, the Fourteenth Amendment's Due Process Clause requires that the procedures by which laws are applied are evenhanded to avoid the arbitrary exercise of government power. *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401 (holding that due process requires effective assistance of counsel on first appeal as of right). State judicial proceedings are unconstitutional if they are decided "in a way that [is] arbitrary with respect to the issues involved." *Id.* at 404. Moreover, "a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the

Fourteenth Amendment." *Heiner v. Donnan*, 285 U.S. 312, 329, 52 S. Ct. 358, 76 L. Ed. 772 (1932). Again, though certiorari was denied in *Henderson*, two Justices casted doubt regarding the constitutionality of the decision, describing the test as "an evidentiary hearing at which racism will be presumed and the attorney will bear the burden of somehow proving his or her innocence." *Henderson*, 143 S. Ct. at 2413.

Here, applying a standard of "could" to presumptively deny Rowe a new trial, considering the extensive objective evidence of juror misconduct, violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

D. If review is granted, then this Court should evaluate whether *Henderson* applies to other protected classes, and whether the State violated *Henderson* by appealing to biases about Rowe's protected characteristics.

As briefed previously to the Court of Appeals, *Henderson* provides an independent basis to conclude that a new trial was required because the *State* impermissibly relied on Rowe's protected characteristics—race, gender, and disability—to argue that the jury should rule against her.

As "the party seeking to preserve the verdict," the State "bears the burden to prove that race was not a factor." *Henderson*, 200 Wn.2d at 423. Per *Henderson*, a defendant's suggestion that a Black female plaintiff is "untrustworthy and motivated by the desire to acquire an unearned financial windfall" constitutes an "appeal[] to negative and false stereotypes about Black women being untrustworthy, lazy, deceptive, and greedy." *Id.* at 437. The State engaged in precisely the type of argument that this Court has found improper. *Compare id.* (defense counsel's argument that "it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars" was an "appeal to racial bias"), *with* RP 1964 (defense counsel's argument that Rowe "has seven million reasons in order to make you believe. . . .").

While *Henderson* spoke in terms of race based on the facts of that case, there is no reason why the decision should not extend to other forms of discrimination. Rowe's race, *as well as* her gender and status as a person with disabilities are all protected characteristics under Washington law. "The right to be free from

discrimination because of race . . . sex . . . or the presence of any sensory, mental, or physical disability . . . is recognized as and declared to be a civil right." RCW 49.60.030(1). The trial court instructed the jury on this legal requirement at the outset of the trial: "It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, *gender* or *disability of any party*, any witness and the lawyers *should play no part in the exercise of your judgement throughout the trial*." RP 143 (emphasis added).

In a case holding that the WLAD's religious nonprofit exemption was unconstitutional as applied to a disabled employee, Justice Stephens' opinion recognizes that all citizens have the "fundamental right" to nondiscrimination based on protected characteristics, including disability: "the WLAD recognizes that freedom from discrimination is a civil right, not merely a statutory promise." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 794–97, 317 P.3d 1009 (2014) (Stephens, J., dissenting); *see id.* at 806 (Wiggins, J., concurring in part in dissent).

Here, the State's cross-examination of Rowe in this discrimination case emphasized that Rowe's childhood was plagued with traumatic experiences; her family's interactions with law enforcement, including her family's arrest history; domestic violence; prior gender-based sexual abuse; suicide attempts; and diabetes—all causing mental health disabilities. RP 1196–98. The State then used Rowe's protected characteristics to insist that the jury disregard, as not worthy of credibility, her testimony about the rape occurring at its facility. RP 1961–65 ("Rowe is the only person providing testimony in regards to the events. What we know are that her mental health conditions impaired her . . . ."). The trial court found that "Rowe was expressly challenged by the defense based on her history as a mental health patient." CP 2395. The dangerous suggestion that sexual assault allegations by patients in the State's mental health institutions should not be believed *because* the patients are disabled is both discriminatory and contrary to *Henderson*.

Just as Rowe is protected from discrimination based on her race, she should also be protected from discrimination based on her gender and status as a "person with a disability." RCW

49.60.030(1). If review is accepted, and the Court reaches the issue, it should consider whether *Henderson* applies to other protected classes beyond race, RAP 13.4(b)(4), and whether the State violated *Henderson* by trading on biases about Rowe's protected characteristics.

VI. CONCLUSION

This Court should deny review of the decision below. If review is granted, then this Court should consider the constitutional challenge, assess whether the *Henderson* standard also applies to other protected classes, including individuals with disabilities, and address whether the State violated *Henderson* by appealing to biases about Rowe's protected characteristics.

Respectfully submitted November 20, 2023.

I certify that this document contains 4,377 words per RAP 18.17.

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Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on November 20, 2023, I e-filed a copy of the foregoing Answer to Petition for Review with the Supreme Court and delivered the same by email to the following:

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November 20, 2023 - 3:53 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Angelique S. Lantz v. State of Washington, et al.
Superior Court Case Number:	18-2-08700-2

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