NO. 100060-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SABELITA LAVAUGHN HAWKINS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Sabelita Hawkins has petitioned for review of the Court of Appeals' decision on direct appeal from the trial court's denial of Hawkins' motion to vacate her felony convictions. State v. Hawkins, No. 81259-9-I, slip op. (June 7, 2021). The State files this answer to the petition at the Court's request. In short, review should be denied because Hawkins' shifting arguments are not supported by the record, identify no conflicts among appellate decisions, fail to establish racial bias, and fail to establish even the *risk* of racial bias over and above the risk that exists as to *any* statute that permits judges to exercise discretion.

Hawkins raised only two issues in the Court of Appeals: (1) whether the trial court necessarily abused its discretion by considering "unproven allegations" in the certifications for determination of probable cause—the factual basis for the original charges—when ruling on her motion; and (2) whether RCW 9.94A.640(1)'s provision stating that a court "may" grant

or deny a motion to vacate unless certain disqualifying circumstances are present should be read to require that a court *must* grant a motion to vacate unless disqualifying circumstances are present, in order to eliminate the possibility that the exercise of discretion might result in racially disproportionate outcomes. Brief of Appellant at 2-3. Applying its prior holdings in State v. Kopp, 15 Wn. App. 2d 281, 287, 475 P.3d 517 (2020), the Court of Appeals rejected both of those arguments. Slip op. at 3-5.

In her petition for review, Hawkins seeks review of the denial of her motion to vacate, but she does so on issues either not litigated in the Court of Appeals or litigated on different grounds than Hawkins now argues.

First, Hawkins seeks review of the Court of Appeals' ruling that a trial court may properly consider information in a certification for determination of probable cause, which the defendant stipulated constituted "real and material facts" for purposes of sentencing, when ruling on a motion to vacate.

Petition for Review at 2. Hawkins argues for the first time in her petition that this interpretation is required to remove the risk that implicit bias will infect the trial court's decision.[1] Petition at 2.

Second, Hawkins seeks review of what she describes as the Court of Appeals' decision to "subject[] Ms. Hawkins' claim . . . to RAP 2.5(a) review and require[] evidence" of racial discrimination "before considering the issue" of whether Courts can consider information stipulated to for purposes of sentencing.[2] Petition at 2-3 (internal quotation marks omitted). The parties never addressed RAP 2.5 in their briefing below,

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[1] In Hawkins' Brief of Appellant and Reply, she raised arguments about implicit racial bias only in arguing that RCW 9.94A.640 should be read to require, rather than merely permit, the vacation of statutorily eligible convictions. Br. of Appellant at 13-29, Reply at 1-8.

[2] Although Hawkins does not explicitly specify "the issue" to which she refers, the Court of Appeals discussed RAP 2.5(a) only in the context of noting that Hawkins "did not argue below that reliance on the probable cause certification to evaluate her motion to vacate perpetuated racial bias in the criminal justice system." Petition at 3; slip op. at 6.

and although the Court of Appeals noted Hawkins' failure to properly preserve the issue in passing, it rejected her argument on its merits rather than declining to consider it under RAP 2.5(a).

Hawkins' petition appropriately concedes that "RCW 9.94A.640 gives a judge discretion to deny a motion to vacate a person's conviction," and does not seek review of the Court of Appeals' holding on that point. Petition at 2.

The State respectfully requests that this Court deny the petition for review because the bases on which Hawkins seeks review are not properly before this Court and because the issues raised do not meet the criteria for acceptance of review.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question

of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

A full statement of the facts of Hawkins' offenses was set forth by the Court of Appeals and in the State's Brief of Respondent below. Those facts can be summarized as follows.

In 2011, the State charged petitioner Sabelita Hawkins with one count of assault in the first degree with a domestic violence designation and a deadly weapon enhancement for an incident in December 2011 in which Hawkins stabbed her mother multiple times in the face, shoulder, and upper back with a knife, penetrating her mother's cheek, tongue, and lung, until she was tackled and restrained by a family member. CP 1-2, 5. An additional count of assault in the third degree was added for an incident in October 2011 in which Hawkins threatened and charged at a fellow nurse at the Veterans

Administration hospital where they both worked, damaging a copier that she attempted to throw at her coworker. CP 11-13, 28. Hawkins was in the midst of a mental health crisis at the time of these incidents. RP 23.

Ultimately, the State allowed Hawkins to plead guilty in superior court to reduced charges of felony harassment with a domestic violence designation and second-degree malicious mischief. CP 17-29. Pursuant to the plea agreement, Hawkins also pled guilty in district court to fourth degree assault and opted into King County's Regional Veterans Court program, through which she would receive oversight, treatment, and services. CP 39, 43; RP 24.

At the felony sentencing hearing, the prosecutor noted her extensive work with cases involving mental illness and substance abuse and stated, "This case has been one of the most difficult to digest of my career." RP 23. The prosecutor acknowledged that although the charges arose from a "very, very serious incident[,]" there were "significant mitigating

circumstances" and a need for treatment "so that Ms. Hawkins can transition safely into the community." RP 23-24. The court followed the agreed recommendation of the parties and imposed a First Time Offender Waiver involving 90 days in jail, which Hawkins had already served, and one year of community custody. CP 47; RP 26.

In September 2019, Hawkins moved to vacate her felony convictions. CP 71. Contrary to the Court of Appeals' characterization of the record, the State did not "agree with the proposed order to vacate." Slip op. at 2. The State signed off on Hawkins' motion for the limited purpose of signaling its agreement that Hawkins was "eligible [for vacation] per statute," but did not take a position on whether the convictions should be vacated. CP 77.

The Chief Judge at King County's Maleng Regional Justice Center considered Hawkins' motion without a hearing. CP 54-55. After "carefully review[ing] the record," including the certifications for determination of probable cause and

Hawkins' plea statement, the trial court denied the motion. CP 54-55. The court explained:

> These documents detail the underlying events during which Hawkins made death threats and chased and stabbed her mother with an eight-inch knife and, on another occasion, became hostile and caused damage at a healthcare facility.[3] Exercising its discretion under RCW 9.94A.640(1), and based on the particular facts of this specific case, the Court finds that it is not reasonable or appropriate to allow Hawkins to withdraw her guilty plea or vacate her conviction.

CP 54-55.

In January 2020, Hawkins moved again to vacate her felony convictions. CP 56. In a second written ruling, the court confirmed that it had carefully reviewed Hawkins' motion and all attachments. CP 56-57. Citing the "particular facts of this

[3] The trial court did not, as Hawkins contends in her petition, find that the information in the probable cause certification showed that Hawkins was a "'hostile' and violent" person. Petition at 18. The trial court never used the word "violent," and used the word "hostile" only in describing Hawkins' demeanor at the time she attacked a coworker at the Veterans Administration, not in describing her as a person at the time of the motion to vacate. CP 54-55. The record does not support Hawkins' suggestion that the trial court's ruling constitutes evidence of implicit bias. Petition at 16 n.3.

specific case," the court found it was "not reasonable or appropriate" to vacate her convictions for the same reasons articulated in the court's September 2019 ruling. CP 56-57.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE THE ISSUES PROPERLY BEFORE THIS COURT DO NOT MEET THE CRITERIA FOR REVIEW

1. ARGUMENTS ABOUT REMOVING JUDICIAL DISCRETION TO ELIMINATE THE RISK OF IMPLICIT BIAS MUST BE ADDRESSED TO THE LEGISLATURE; THIS COURT LACKS THE AUTHORITY TO REWRITE THE VACATION STATUTE BASED ON HAWKINS' DISAGREEMENT WITH THE LEGISLATURE'S CHOICES.

At their core, the arguments of Hawkins and amici curiae amount to a request that this Court rewrite a statute and create conditions for the exercise of discretion simply because discretion can, conceivably, be exercised with bias. Hawkins and amici do not argue that the vacation statute is unconstitutional; they simply disagree with the legislature's decision not to eliminate the possibility of bias or restrict judicial discretion in the way Hawkins thinks would be best.

Critically, they do not explain how, in the absence of a constitutional defect, this Court may disregard the separation of powers between the judiciary and the legislature and re-write the vacation statute.

The elimination of racial discrimination from the criminal justice system is a critical goal and an issue of substantial public interest. However, it is the legislature's prerogative to "defin[e] crimes and set[] the parameters for punishment." State v. McFarland, 18 Wn. App. 2d 528, 492 P.3d 829 (2021). When the legislature enacted a statute permitting the vacation of criminal convictions as part of the Sentencing Reform Act of 1981 ("SRA"), it set out a list of circumstances under which a conviction may not be vacated, and stated that, if none of those disqualifying circumstances applies, "the court may clear the record of conviction." Former RCW 9.94A.230(1) (1981) (recodified as current RCW 9.94A.640(1)). As this Court and others have previously held, and as Hawkins now concedes, the use of the word "may"

confers discretion on trial judges to grant or deny motions to vacate convictions so long as they are not statutorily ineligible for vacation. In re Carrier, 173 Wn.2d 791, 804, 272 P.3d 209 (2012); Hawkins, slip op. at 3-4 (citing State v. Kopp, 15 Wn. App. 2d 281, 287, 475 P.3d 517 (2020)); Petition at 2 (". . . RCW 9.94A.640 gives a judge discretion to deny a motion to vacate a person's conviction . . . ."). When the legislature passed the New Hope Act in 2019, narrowing the category of offenses that are ineligible for vacation, it chose to make no changes to that grant of discretion on the ultimate decision, unfettered by anything beyond the purposes the SRA. LAWS OF 2019, ch. 331, § 3.

Hawkins argues that the vacation statute's grant of discretion should "not be unfettered," but provides no authority, absent a constitutional defect, for this Court to eliminate or severely restrict judges' discretion where the legislature saw fit to impose no such limitations. Instead, Hawkins and amici focus on cases where this Court has struck down a statute as

unconstitutional based on evidence of racially biased application or where this Court has cited the need to root out bias as a basis for exercising its discretion to reach issues not properly preserved in the trial court. E.g., Petition at 17 (citing State v. Gregory, 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (holding WA death penalty statute unconstitutional due to evidence of racial bias in its application); State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) (choosing to reach unpreserved claim based on part on "[n]ational and local cries for reform of broken LFO systems")). Hawkins and amici have identified no case, and the State is aware of none, in which this Court has held that the possibility of bias in the exercise of judicial discretion permits a court to re-write a constitutionally valid statute to eliminate such discretion.

Hawkins' and amici's concerns about potential bias in the exercise of a trial court's discretion to grant or deny a motion to vacate are commendable, but in the absence of evidence of bias in this particular case or biased application of

the vacation statute generally, the issue is one of policy choices that must be made by the legislature, not the courts. The legislature can properly decide whether the benefits of eliminating the possibility of bias in vacation decisions are worth the disadvantages of vacating all convictions that are not statutorily ineligible, no matter how severe the underlying facts, how deliberate and cruel a defendant's conduct, or how thin the evidence of rehabilitation may be. Similarly, the legislature can properly decide whether the goal of reducing bias in the legal system would be served, or instead hindered, by prohibiting judges from considering the same circumstances of an offense that were considered at sentencing when exercising their statutory discretion to grant or deny a petition to vacate a conviction.

Any statutory grant of judicial discretion inherently creates the possibility that explicit or implicit bias could infect the process. But whether and how best to constrain courts' discretion within a constitutionally valid statutory scheme to

reduce the risk of bias is a question for the legislature. Because this Court would have to violate the separation of powers to reach the result Hawkins seeks, and for the additional reasons discussed below, the petition for review should be denied.

2. WHETHER COURTS MAY CONSIDER THE SAME FACTS AT A MOTION TO VACATE THAT COULD BE CONSIDERED AT SENTENCING IS NOT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Hawkins argued in the Court of Appeals that consideration of the probable cause certification was an abuse of discretion because she stipulated to their use only for sentencing, and because "unproven allegations are unrelated to rehabilitation and the statutory criteria of eligibility." Br. of Appellant at 2-3. She now asks this Court to grant review of this issue because preventing trial courts from considering probable cause certifications that were stipulated to for purposes of sentencing is necessary, she argues, to "ensure courts do not perpetuate historic forms of racial exclusion." Petition at 15. Hawkins made no such argument below. Br. of

Appellant at 16-20 (arguing only that consideration of the probable cause certification was improper because Hawkins did not stipulate to it for purposes beyond sentencing). As such, that argument is not properly before this Court and review on that issue should be denied. State v. Halstien, 122 Wn.2d 109, 129-30, 857 P.2d 270 (1993).

Even if Hawkins had argued below that the possibility of racial bias requires disallowing consideration of the information that was available at sentencing, Hawkins does not explain how so restricting the information available to judges would actually reduce the opportunity for implicit bias to infect the vacation process. Indeed, reducing the amount of information a court can consider when deciding whether to grant or deny a motion to vacate might just as easily increase the risk that implicit bias would have an effect. If limited only to the sparse facts admitted to in the Statement of Defendant on Plea of Guilty, trial courts' rulings would likely become more arbitrary, with little way to distinguish cases where vacation is more

appropriate from those where it is less so. There is no reason to believe that the legislature, having granted trial courts the discretion to vacate a criminal conviction, intended trial courts to make that decision with less information than was available to the court at sentencing.

More importantly, Hawkins fails to establish that the narrow issue raised below—whether judges can consider a probable cause certification that was properly before the court at sentencing when ruling on a motion to vacate—meets the criteria for acceptance of review. This issue is purely a statutory, not constitutional question, no appellate decisions conflict, logic and principals of statutory interpretation support the Court of Appeals' holding, and whether courts must turn a blind eye to sentencing facts when deciding a motion to vacate is a very narrow question affecting very few people.

Hawkins' plea agreement required her to stipulate that the probable cause certification could be considered at sentencing because the SRA prevents a trial court, when

imposing a standard range sentence, from considering any information other than what "is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537." RCW 9.94A.530(2). Hawkins' stipulation that the information in the probable cause certification constituted "real and material facts for purposes of . . . sentencing" turned the certification into "information . . . admitted [or] acknowledged . . . at the time of sentencing," allowing it to be considered at sentencing when it otherwise could not have been. CP 39; RCW 9.94A.530(2). However, neither RCW 9.94A.530 nor any other part of the SRA places similar restrictions on the information a court may consider when ruling on a motion to vacate a conviction. It is thus an open question whether a stipulation for purposes of sentencing is even necessary before a court can consider a probable cause certification at a motion to vacate. RCW 9.94A.640.

Regardless, as the Court of Appeals held in this case and in Kopp, if a defendant "agreed that the sentencing court could rely on the facts in the probable cause certification when determining the appropriate sentence," there is logically "no abuse of discretion in relying on those same facts when deciding whether to vacate that conviction." Slip op. at 5 (quoting Kopp, 15 Wn. App. at 288). Hawkins has not demonstrated that the general public has any awareness of, let alone substantial interest in, this question.

Additionally, contrary to Hawkins' argument in her petition, the use of a probable cause certification to which the defendant stipulated for purposes of sentencing has little in common with the impermissible use of such a probable cause certification in a comparability analysis. Petition at 14. Consideration of unadmitted or unproved allegations in a comparability analysis is barred because comparability analysis asks, in essence, what crime the defendant committed, with additional judicial factfinding barred by the constitutional right

to a jury trial. State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006). The same considerations do not apply when ruling on a motion to vacate, which, like crafting a sentence within the standard range, calls for evaluating the circumstances surrounding the crime and not just the legal elements of the offense. A defendant has no less incentive to dispute false allegations in a probable cause certification that will be used to craft her sentence than in one that will be used at a motion to vacate her conviction.

Furthermore, the record in this case is clear that the reduction in Hawkins' charges did not result from any dispute about the veracity of the information in the certification for determination of probable cause. Although she pled guilty only to threatening her mother and damaging Veterans Administration property, Hawkins expressed deep remorse at sentencing for the physical harm she caused her mother and gratitude that the result of the attack had not been even worse. RP 40-43. Hawkins thus fails to establish that the Court of

Appeals erred in upholding the use of the probable cause certification at the motion to vacate, let alone establish that the criteria for review are met.

Whether a trial court ruling on a motion to vacate can consider a probable cause certification to which the defendant stipulated for purposes of sentencing is a narrow nonconstitutional issue on which there is no dispute among Washington appellate courts and little public interest. The State therefore respectfully asks this Court to deny review of this issue.

3. THIS COURT SHOULD DECLINE REVIEW OF WHAT HAWKINS CHARACTERIZES AS A DECISION TO SUBJECT THE ABOVE CLAIM TO RAP 2.5(a) REVIEW; THE COURT OF APPEALS DID NOT APPLY RAP 2.5(a) TO BAR CONSIDERATION OF HAWKINS' CLAIM.

Hawkins contends that "the Court of Appeals subjected Ms. Hawkins's claim that unlimited judicial discretion risks perpetuating racist outcomes to RAP 2.5(a) review and required 'evidence' that 'Hawkins's race played a role in her

prosecution, sentence, or the denial of a motion to vacate her convictions,' before considering the issue." Petition at 2-3. Hawkins asks this Court to review that alleged decision on the grounds that it contradicts "this Court's caselaw that takes judicial notice of unconscious racial bias." Petition at 2. This Court should decline to grant review of this issue because the decision Hawkins wishes this Court to review did not actually occur and because the criteria for review are not met. Contrary to Hawkins' assertions, the Court of Appeals did not apply RAP 2.5(a) to bar review of any of Hawkins' claims—it resolved her claims on their merits. Moreover, the Court of Appeals did not deny the possibility of bias. It simply refused to assume actual racial bias absent evidence thereof. Requiring evidence to support one's claims is standard within our legal system, whether the claim relates to racial bias or election fraud.

As in Kopp, the Court of Appeals held in this case that "'RCW 9.94A.640(1), by its plain language, vests the sentencing court with the discretion to grant or deny a motion to

vacate the offender's record of conviction'" and that if a defendant "'agreed that the sentencing court could rely on the facts in the probable cause certification when determining the appropriate sentence, we can see no abuse of discretion in relying on those same facts when deciding whether to vacate that conviction.'" Slip op. at 3-4 (quoting Kopp, 15 Wn. App. 2d at 287), 5 (quoting Kopp, 15 Wn. App. 2d at 288). This was a rejection of Hawkins' claims on their merits.

RAP 2.5(a) came up only when the Court of Appeals subsequently explained why it was declining to depart from Kopp's holding that it was not an abuse of discretion to consider a probable cause certification that had been stipulated to for purposes of sentencing. The Court noted that Hawkins argued for distinguishing Kopp on the grounds that "Kopp did not address whether a judge should have unfettered discretion to deprive a Black person of her civil rights in light of the criminal justice system's role in perpetuating legalized forms of racial discrimination. [Hawkins] argues that such unfettered

discretion risks the arbitrary and racially biased application of the vacation statute, citing our Supreme Court's recognition of the implicit and overt racial bias against black defendants in this state, in State v. Gregory, 192 Wn.2d 1, 22, 427 P.3d 621 (2018)."[4] Slip op. at 6 (internal quotation marks omitted). The Court of Appeals "note[d] that Hawkins raise[d] this issue for the first time on appeal in contravention of RAP 2.5(a)" because "[s]he did not argue below that reliance on the probable cause certification to evaluate her motion to vacate perpetuated racial bias in the criminal justice system." Slip op. at 6. But the Court of Appeals did not dispose of the argument on that basis. Instead, it went on to address its substance:

> We acknowledge that the criminal justice system has perpetuated legalized forms of racial discrimination against Black defendants and that

[4] Hawkins made this argument for distinguishing Kopp solely as a basis for reading "may vacate" to mean "must vacate" in RCW 9.94A.640. Reply at 4-8. For reasons that are not clear, the Court of Appeals analyzed the argument as if it had also been made as a basis for prohibiting trial courts from considering probable cause certifications to which defendants stipulated for purposes of sentencing. Slip op. at 6.

> the judiciary has played a role in this discrimination. We will not tolerate racial bias, whether implicit or overt, in any discretionary decision a trial court may make.
>
> But without evidence, we cannot reach the conclusion that Hawkins's race played a role in her prosecution, sentence, or the denial of a motion to vacate her convictions. The record here establishes that Hawkins assaulted a co-worker at the VA and two months later, assaulted her mother with a knife. Her mother "sustained lacerations/stab wounds to her face, left shoulder, and upper back." Hawkins's mother faced multiple surgeries to repair the damage from this assault because "the knife penetrated all the way through her cheek, and cut her tongue, which required surgery to repair, while another stab wound was deep enough to puncture her lung." Hawkins was originally charged with assault in the first degree for the attack on her mother and assault in the third degree for the assault of her co-worker.

Slip op. at 6-7. The court set out a detailed summary of the parties' work to negotiate a favorable resolution that took Hawkins' mental illness into account and ensured that she would receive treatment and support in the community, as well as the sentencing court's observations of "the degree of thought that had gone into finding an appropriate resolution for

Hawkins" and belief that the negotiated resolution was, in the sentencing court's opinion, "a gift" in light of the possible five-year mandatory minimum sentence Hawkins could have faced on the original charges. Slip op. at 7-8. The Court of Appeals held that "the record does not support the allegation that Hawkins's race, either implicitly or overtly, played a role in this particular case." Slip op. at 8. The Court concluded that, although another judge could reasonably have made a different choice about whether to vacate Hawkins' convictions based on the same information, "[t]he sentencing court's decision not to vacate her convictions was not outside the range of acceptable choices and we therefore can find no abuse of discretion." Slip op. at 8.

This detailed analysis of the record in search of evidence of possible racial bias was not, as Hawkins contends, an application of RAP 2.5(a) to bar consideration of Hawkins' claim—it was a consideration of the merits of Hawkins' claim that the possibility of racial bias required departure from Kopp.

Moreover, the Court of Appeals' search for evidence that implicit bias infected the denial of Hawkins' motion for vacation was entirely consistent with this Court's precedent.

As this Court noted in State v. Berhe, "implicit racial bias can be particularly difficult to identify and address" because "[i]mplicit racial bias can . . . influence our decisions without our being aware of it." 193 Wn.2d 647, 663, 444 P.3d 1172 (2019). This does not mean, however, that the *effects* of implicit racial bias are invisible or that the Court of Appeals erred in denying Hawkins' request to overturn the trial court's decision based on the mere risk of implicit bias, in the absence of any evidence that bias played a role in the decision, as Hawkins contends. Petition at 18. Instead, this Court has "rise[n] to meet" the challenges of detecting the effects of implicit bias by adopting standards, such as the standard for making a prima facie showing of racial bias in jury selection or a jury's verdict, that do not require a finding of conscious discrimination. Berhe, 193 Wn.2d at 664-65. But this Court

has never held, as Hawkins would have it do in this case, that appellate courts should reverse trial court decisions based on the mere possibility that implicit bias could have infected the proceeding without any evidence that such infection actually occurred. Petition at 18.

In fact, Hawkins asks this Court to go one step further, as she argues that the possibility of racial bias requires not just a reversal in her case, but a new interpretation of the vacation statute to prohibit all trial courts from considering a probable cause certification that was stipulated to for purposes of sentencing when ruling on a subsequent motion to vacate. Hawkins identifies no case in which this Court has ever modified or invalidated a statutory scheme on racial bias grounds without actual evidence of bias in the statute's application. Although Hawkins attempts to paint the Court of Appeals decision as in conflict with cases like State v. Gregory, 192 Wn.2d 1, 18, 427 P.3d 621 (2018), Gregory does not support the proposition that the risk of implicit bias requires

this Court to restrict the evidence that trial courts can consider when ruling on motions to vacate without any evidence that consideration of the same facts that were available at sentencing leads to racially biased outcomes. Petition at 19. To the contrary, in Gregory, this Court found Washington's death penalty statute unconstitutional *based on statistical evidence* that the penalty was being "imposed in an arbitrary and racially biased manner." Gregory, 192 Wn.2d at 18. No similar evidence exists suggesting that trial courts' consideration of probable cause certifications stipulated to for purposes of sentencing leads to racial bias in grant or denial of motions to vacate.

Thus, the Court of Appeals' decision not to reverse the trial court based on the mere possibility of racial bias in discretionary judicial decision-making, in a case where the Court of Appeals examined the record carefully and found no sign that bias infected the proceedings, is not in conflict with any decision of this court. Because the criteria for acceptance

of review are not met, this Court should decline to review this issue.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 4970 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of November, 2021.

Respectfully submitted,

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