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IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

AMANUEL TESFASILASYE,
Petitioner.

BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF REVIEW

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I. INTRODUCTION

Thurgood Marshall warned that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Batson v. Kentucky*, 476 U.S. 79, 108, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (Marshall, J. concurring). In 2013, the Court recognized that "the use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, . . . [and] results in less effective juries[.]" *State v. Saintcalle*, 178 Wn.2d 34, 69, 309 P.3d 326 (2013) (Gonzalez, J. concurring). After acknowledging the limitations of *Batson*'s ability to protect our legal system from the discriminatory use of peremptory strikes, the Court adopted General Rule 37. General Rule 37 is a strong remedy for the persistent and pervasive issue of the racially discriminatory use of peremptory strikes in Washington's legal system. However, like all remedies, General Rule 37 is only as strong, effective and protective as it is applied and interpreted. To ensure that General

Rule 37's protections are as robust as intended the Court must consistently remind courts not to backslide into their longstanding *Batson* analysis by providing guidance regarding the scope of General Rule 37's additional protections. Here, the Court should accept review because the trial court and the Court of Appeals relied upon statements and beliefs from potential jurors of color that are expressly forbidden by General Rule 37 and *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020). Additionally, accepting review to protect Washington's legal system—and its juries—from racial discrimination is in the public interest.

II. INTEREST OF AMICI

The identity and interest of Amici Curiae are set forth in the accompanying Motion for Leave to File an Amicus Curiae Brief.

III. STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case.

IV. ARGUMENT

A. Review Should Be Granted Because the Court of Appeals Decision Is in Conflict with the Court's Holding in *State v. Pierce* and General Rule 37

In *Pierce*, the Court reaffirmed its commitment to ensuring that "[j]ury selection [is] done in a fair way that does not exclude qualified jurors on inappropriate grounds, including race. *Pierce*, 195 Wn.2d at 231–32 (citing *City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017); *Batson*, *supra*; GR 37). In order to ensure that jury selection is not tainted by race discrimination, the Court was asked whether the State's use of a peremptory strike to exclude a Black prospective juror violated General Rule 37. *Id.*

In *Pierce*, the prosecutor used a peremptory challenge to strike a Black prospective juror. *Pierce*, 195 Wn.2d at 243-44. The prosecutor justified the strike on the basis that the "juror had a brother who was convicted of attempted murder and that the process of conviction and sentence 'left a bad taste in her mouth.'" *Id.* The prosecutor also noted that the prospective Black juror "'had strong opinions' that 'the system, or at least parts of the system, did

not treat her brother fairly.'" *Id.* at 654. The Court held that both of these "reasons for dismissal [were] presumptively invalid under GR 37(h)(i)-(iii)." *Id.* This makes sense as General Rule 37 explicitly identifies prior contact with law enforcement, distrust of law enforcement, and having close relationships with people who have been involved in the criminal legal system as presumptively invalid bases for peremptory challenges. *See* GR 37(h)(i)-(iii).

Precluding the use of peremptories on these bases is necessary because it is well settled that the criminal legal system disproportionately targets people and communities of color. Allowing potential jurors to be stricken based on involvement—or proximity to those involved—in the criminal legal system further disenfranchises Washingtonians of color. *See* Supreme Court Ltr. to the Legal Community (Jun. 4, 2020) (acknowledging that "the injustices faced by [B]lack Americans are not relics of the past" and the "racialized policing and the overrepresentation of [B]lack Americans in every stage of our criminal and juvenile systems"). *See also Illegal Racial Discrimination in Jury Selection*: A

Continuing Legacy, Equal Justice Initiative (Aug. 2010) at 28-34. To ensure that prospective jurors of color are protected from bias in jury selection the *Pierce* Court hewed close to the plain language of General Rule 37 and rejected peremptories that were based on distrust of a legal system that targets people of color and/or on having close relationships with people who have been involved in the criminal legal system. *Pierce*, 195 Wn.2d at 243-44.

Here, the Court of Appeals failed to apply the plain language protections of General Rule 37 and affirmed peremptory strikes that are in direct conflict with the Court's holding in *Pierce*. The Court of Appeals upheld a peremptory strike against Juror 25, an Asian-American woman, based on her "involvement in her son's prosecution and her personal beliefs about the justice of his conviction and sentence." *State v. Tesfasilasye*, 2021 WL 3287706 at *4 (Aug. 2021) (unpublished). In upholding the strike, the Court of Appeals relied on Juror 25's "belief that her son had not committed the alleged sexual assault . . . and was unduly punished for it, [and] that the victim's version of events was significantly

different than her son's story[.]" *Id.* Striking a juror because they watched their loved one struggle with the criminal legal system and doubted whether they were treated fairly is presumptively invalid under General Rule 34(h)(i)-(iii) and *Pierce*. *See Pierce*, 195 Wn.2d at 243-44. The Court of Appeals' reliance on a person of color's frustration at how someone close to them was treated by the criminal legal system must be reversed or it will encourage courts to allow prospective jurors of color to be struck for having an emotional response to being targeted and harmed by the racial disproportionalities in the criminal legal system.

The Court of Appeals also erred when it upheld the peremptory strike of Juror 3, a Latino man, in part on the basis that the potential juror stated that "I know that in many people's eyes [I'm] already guilty." *Tesfasilasye*, 2021 WL 3287706 at *5. Juror 3 simply stated a belief—rooted in fact—that people of color are often thought of as criminals. *See Race and Washington's Criminal Justice System*: 2021 Report to the Washington Supreme Court, Research Working Group (2021) (finding that "although racial

groups were subject to traffic stops at equitable rates, minorities were more likely to be subjected to searches" even though "seizures [were] lower for minorities" and finding "[d]efendants of color were significantly less likely . . . to receive sentences that fell below the standard range").

Further, a person of color's belief that they are subject to racialized targeting is a presumptively invalid reason for a peremptory. *See* GR 37(h)(ii) (finding invalid peremptories based on a "distrust of law enforcement"). Affirming such a basis for a strike also runs afoul of *Pierce*, which held that having "strong opinions" that "the system, or at least parts of the system" do not treat people fairly is invalid under General Rule 37. *Pierce*, 195 Wn.2d at 243. The Court of Appeals' reliance—and indeed one of its first basis for upholding the peremptory strike—on a person of color's acknowledgement that the criminal legal system has racist underpinnings must be reversed or it will encourage courts to allow prospective jurors of color to be struck for having an understandable emotional response to being subjected to—and part

of communities that are subjected to—the harsh impacts of the racial disproportionalities of the criminal legal system.

The Court should grant review to again affirm *Pierce* and remind courts that General Rule 37 must be interpreted and applied in a liberal manner to protect prospective jurors of color from discrimination—and our legal system as a whole from the taint of such discrimination.

B. Review Should Be Granted Because to Ensure that General Rule 37 Is Interpreted and Applied Liberally to Protect Jury Selection from Race Based Discrimination Is an Issue of Substantial Public Interest

"The state and federal constitutions protect the right of the criminally accused to a fair and impartial jury." *State v. Lahman*, 17 Wn. App. 2d 925, 931–32, 488 P.3d 881, 883–84 (2021) (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22). "Standards for juror qualification and the ability to strike jurors for cause enable the court and parties to ensure a biased juror does not sit in judgment on a particular case." *Id.* "In addition to enforcing juror qualification standards and challenges for cause, parties may use 'peremptory challenges' to strike a limited number of otherwise

qualified jurors from the venire for no stated reason." *Id.* "The justification for peremptory strikes is that trial attorneys have instincts about which jurors will be best for their case." *Id.* "Not surprisingly, the use of instincts to render judgment about other people's thought processes and beliefs has historically opened the door to implicit and explicit bias." *Id.* "Judges have been assigned an important role in protecting these rights and ensuring peremptory challenges are not used in a discriminatory manner." *Id.* Historically, the standard for determining whether a peremptory strike was unlawfully based on racial bias required the objecting party to prove purposeful discrimination. *See Batson*, 476 U.S. at 79. However, making a showing of purposeful discrimination under *Batson* is notoriously difficult. *State v. Saintcalle*, *supra* (noting that "[a] requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge") (citing *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 11 (1997)).

To remedy *Batson*'s failing, "Washington courts recently departed from the *Batson* formulation in favor of a new test." *State v. Listoe*, 15 Wn. App. 2d 308, 319, 475 P.3d 534, 540 (2020). The *Batson* formulation is considered deficient because it requires a party contesting a peremptory challenge to demonstrate purposeful discrimination, which is difficult to prove "even where it almost certainly exists." *State v. Jefferson*, 192 Wn.2d 225, 242, 429 P.3d 467 (2018) (quoting *City of Seattle v. Erickson*, 188 Wn.2d at 735). In addition, this formulation failed to take into account the realities of implicit or unconscious racial bias. *Id*. "GR 37 was created with the specific objective of addressing *Batson's* deficiencies." *Jefferson*, 192 Wn.2d at 243.

General Rule 37 provides that, "[a]fter an objection [to the use of a peremptory strike] has been raised, the party exercising a peremptory challenge is required to articulate its reasons for doing so." GR 37(d). "The trial court then evaluates the reasons for exercising the challenge under the totality of the circumstances." GR 37(e). If "an objective observer could view race or ethnicity as

a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." GR 37(e). GR 37(f) defines "objective observer" as one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington." The result is that by enacting General Rule 37, the Court discarded the incredibly difficult and illusive purposeful discrimination standard. GR 37(e).

Unfortunately, "[t]he pervasive nature of racial basis in the criminal [legal] system, coupled with lawyers' preference to continue long-standing yet questionable legal tradition, often makes changes to the legal process . . . slow[.]" Annie Sloan, *What to Do About Batson?*: Using a Court Rule to Address Implicit Bias in Jury Selection, 108 CAL. L. REV. 233, 236 (Feb. 2020). Because General Rule 37—and the protections it affords potential jurors of color—is still new and is a major departure from longstanding practice under *Batson*, the Court should take review of this matter to again affirm the principle that General Rule 37 must be

interpreted and applied in a manner most protective to prospective jurors of color. Such an interpretation will give effect to the plain language protections of General Rule 37—*i.e.* disallowing peremptories based on prior experiences with the criminal legal system and the attendant feelings that often accompany racialized targeting of individuals and communities.

C. Requiring Courts to Give Full Effect to General Rule 37's Protections Will Result in More Diverse Juries and a Less Unjust Criminal Legal System

In a legal system rife with bias and a criminal legal system that disproportionately targets people of color, the racial and ethnic diversity of juries is critical to reducing the harm of that system. 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* at 14. On the other hand, racially diverse juries spend more time deliberating, discussing a wider range of case facts and personal perspectives, and make fewer factual errors. *Saintcalle*, *supra* (citing Sommers, Samuel R., *On Racial Diversity and Group*

Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608 (2006)).

Research also shows that all-white juries convict at higher rates, generally, and convict Black people, specifically, at higher rates than other defendants. *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"), https://ideas.repec.org/a/oup/qjecon/v127y2012i2p1017-1055.html. *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); Anwar, S., Bayer, P., & Hjalmarsson, R., *Impact of Jury Race in Criminal Trials*, QUARTERLY JOURNAL OF ECONOMICS (affirming

that "there is a significant gap in conviction rates for black versus white defendants when there are no blacks in the jury pool"). *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).

Further, racial diversity improves the reliability of jury outcomes in the criminal legal system and affords defendants a fairer trial. This is because when the jury selection process excludes a distinct group of the population:

> the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable . . . [The group's] exclusion deprives the jury of a perspective on human events that may have unsuspected importance[.]

Peters v. Kiff, 407 U.S. 493, 503-04, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

V. CONCLUSION

For the foregoing reasons the court should accept review of this matter.

VI. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 2,474.

RESPECTFULLY SUBMITTED this 1st day of November 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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