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No. 102534-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER GATES,

Petitioner.

MEMORANDUM OF AMICI CURIAE ACLU OF
WASHINGTON FOUNDATION AND FRED T.
KOREMATSU CENTER FOR LAW AND EQUALITY
IN SUPPORT OF REVIEW

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I. IDENTITIES AND INTERESTS OF *AMICI*

Per RAP 10.3(e), the identities and interests of Amici are found in the accompanying motion for leave.

II. STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

III. ARGUMENT

This Court should grant review of Mr. Gates' petition because the issues presented raise a significant question of constitutional law as well as matters of substantial public interest.

RAP 13.4(b)(3), (4).

A. This Court Should Grant Review Because a Significant Question of Constitutional Law and an Issue of Substantial Public Interest Are Raised by the Race-Based Prosecutorial Misconduct that Taints this Case.

At trial, after his attorney properly encouraged the jury to consider Mr. Gates' "life experiences in evaluating the reasonableness of his actions," and more specifically to "place" themselves in his "shoes," the prosecutor argued that Mr. Gates was seeking "different standards for different people." *State v.*

Gates, No. 83243-3-I, 2023 WL 6553863, at *4 (Wn. App. Oct. 9, 2023) (unpublished).

These words, “different standards for different people,” can be understood in different senses. Though they could be heard as simply rejecting a purely subjective test, an objective observer, “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State,” *State v. Zamora*, 199 Wn.2d 698, 718, 512 P.3d 512 (2022), could understand these words as racially coded language, words that could elicit implicit or unconscious bias in white jurors in a case involving a Black defendant, such as Mr. Gates. Similarly, when the prosecutor told the jury that Mr. Gates had argued “because of who *they* are, it’s okay to just shoot somebody for walking down the street out the back of a club,” *Gates*, 2023 WL 6553863, at *4 (emphasis added), the words, “different people” and “they” and “they’re different” used in different combinations, in a short period of

time, can work together to construct an “us versus them” dynamic that could be seen as eliciting bias in white jurors.

The fact that the court below dismissed the race-based prosecutorial misconduct summarily in a footnote indicates the need for further guidance to courts in applying the objective observer test. *Id.* at *19, n.20. Guidance is needed to safeguard a key constitutional protection in an area of special public concern: racism in Washington’s criminal legal system.

The analysis below demonstrates that the race-based prosecutorial misconduct committed at Mr. Gates’ trial raises a significant constitutional concern and an issue of substantial public interest, per RAP 13.4(b)(3) and (4).

1. Lower Courts Require Guidance to Meaningfully Apply Jurisprudence Which Safeguards Against the Injection of Improper Considerations of Race.

In *State v. Zamora*, the Court applied the race-based prosecutorial misconduct standard to a prosecutor’s voir dire questions. Heeding Amici’s recommendation for “clear guidance,” this Court clarified that lower courts applying

Monday's flagrant-or-apparently-intentional test must utilize the objective observer standard. *Zamora*, 199 Wn.2d at 717. As it infused the race-based prosecutorial misconduct test with the objective observer standard, this Court also cautioned lower courts to "be vigilant of conduct that appears to appeal to racial or ethnic bias even when not expressly referencing race or ethnicity." *Id.* at 714. *Zamora* also established that prosecutorial appeals to racial bias are prejudicial per se. *Id.* at 722.

After *Zamora*, the Court in *Bagby* provided the following framework:

[W]e consider (1) the content and subject of the questions and comments, (2) the frequency of the remarks, (3) the apparent purpose of the statements, and (4) whether the comments were based on evidence or reasonable inferences in the record.

State v. Bagby, 200 Wn.2d 777, 794, 522 P.3d 982 (2023) (citing *Zamora*, 199 Wn.2d at 718-19); (*State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011)). In *Bagby*, this Court clarified that an objective observer could find that an intentional and flagrant appeal to racial bias occurred when a prosecutor

repeatedly referenced a Black defendant's *nationality* in an effort to distinguish him based on his race. 200 Wn.2d at 801. Crucial to this reasoning was the idea that Bagby's prosecutor "primed the all-white jury to pay more attention" to Bagby's race using coded language, "thereby activating any anti-Black implicit biases they may hold." *Id.* at 795; *see id.* at 794-95 (discussing how the use of coded language can invoke implicit biases and impact juror decision making).

As mentioned above, the court below summarily applied *Zamora* and appeared to conclude, based on *Bagby*'s third and fourth factors, that the apparent purpose was as a response to the defense's argument. *Gates*, 2023 WL 6553863, at *19, n.20. However, the Court of Appeals did not discuss the frequency or the content of the comments other than the prosecutor's asserted reason on appeal. The court below did not consider how the language was racially coded.¹ In this instance, that the prosecutor

¹ Troublingly, the State's Answer to the Petition for Review, at 19-20 and 21, accuses Mr. Gates's appellate counsel of fabricating the record and "doubl[ing] down on the falsehoods"

used language that could be regarded by an objective observer as racially coded is precisely why courts need further instruction on identifying and assessing racially coded language. The timing of the prosecutor's statements in closing argument in this case is also important. *Cf. State v. Ellis*, 19 Wn. App. 2d 1006, 2021 WL 3910557, at *7 (2021) (unpublished) (“The prosecutor's statements here, while not as pervasive as those in *Monday* ..., are nevertheless significant because they came at a critical point in the proceeding: voir dire.”). Here, the prosecutor's remarks at closing occurred at a critical point, just before the jury went into deliberations.

This Court also imposed the objective observer standard to enhance Article I, section 7's protection against

because appellate counsel interpolated “Black” to explain what the facially race-neutral yet nevertheless racially coded language indicates. Raising what is unstated when racially coded language is used is not fabrication. If this allegation of fabrication were to be accepted, racially coded language might never be called out. Disagreement over whether language is racially coded is expected from litigants; alleging fabrication in this context is unwarranted.

unconstitutional seizures. *State v. Sum*, 199 Wn.2d 627, 631, 511 P.3d 92 (2022). Since *Sum*, lower courts assessing whether a seizure occurred must take race into account. The *Sum* objective observer knows that racism has “resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color in Washington.” *Id.* Accordingly, *Sum* imbued the “objective” seizure inquiry with an assessment of how one’s race or ethnicity influences whether that person feels free to leave, refuse, or terminate a police encounter. *Id.* at 653.²

The objective lens in General Rule 37, *Sum*, and *Zamora*, as well as *Babgy*’s scrutiny of coded language, represent a developing jurisprudence that provides safeguards against the explicit or implicit injection of improper considerations of race. It is not surprising that lower courts need additional guidance in applying this emerging body of law.

² *See also id.* at 652-4 (discussing the perspective of a “reasonable person” and GR 37’s objective observer).

Another example of lower courts' need for guidance comes from the civil context. In *Henderson v. Thompson*, this Court noted that when a trial judge views "the facts from her own perspective" the objective observer standard is not meaningfully applied. *Henderson v. Thompson*, 200 Wn.2d 417, 438, 518 P.3d 1011 (2022). Aptly, this Court recognized that "[c]ode 'dog whistle' language impermissibly allows the speaker to appeal to racial bias and then excuse that behavior by arguing they did not intend to say anything racist." *Id.* at 432-3. The reference to Henderson as "combative" and "confrontational" was deduced as racism that affected the verdict because "arguments advanced by defense counsel suggested Henderson and her witnesses were not credible because of their race." *Id.* at 439.

As it did in *Sum*, *Zamora*, *Henderson*, and *Bagby*, review of Mr. Gates' petition will provide lower courts the guidance needed to ensure that this Court's jurisprudence is meaningfully and consistently applied.

2. Mr. Gates' Petition Merits Review per RAP 13.4(b)(3) and (4).

“[A] verdict affected by racism violates fundamental concepts of fairness and equal justice under law...” *Id.* at 421. Racism infects Washington’s legal system.³ Petitions challenging permutations of racism that continue to plague Washington carry the highest public importance because their resolution advances “our shared cause of dismantling systematic racism.”⁴ Mr. Gates’ petition carries the utmost public interest because the pervasiveness of racism in our legal system threatens its very legitimacy.⁵

³ See e.g., *id.* (racism is endemic in both criminal and civil law); *State v. Hawkins*, 200 Wn.2d 477, 492, 519 P.3d 182 (2022) (“[W]e certainly agree that racial bias affects judicial decision-making.”). See also *State v. McKenzie*, 21 Wn. App. 2d 722, 733, 508 P.3d 205 (2022) (collecting cases) (“[T]his appears not to be the first time the prosecutor in Mr. McKenzie's case has utilized inflammatory stereotyping, leading to reversal of a conviction.”).

⁴ Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty., 2 (June 4, 2020), [<https://perma.cc/QNT4-H5P7>].

⁵ See e.g., *State v. Horntvedt*, No. 38928-6-III, 2023 WL 8592780, at *5 (Wn. App. Dec. 12, 2023) (unpublished) (“Appeals to bias not only cause personal harm and undermine the integrity of the judicial system, they distort the deliberative process.”).

Additionally, as explained in III.A.1., resolution of the prosecutorial question raised by Mr. Gates will shape how lower courts apply the objective observer standard. The appellate decision affirming Mr. Gates' conviction demonstrates that courts remain reluctant to call out implicit racial bias. This was true in *Bagby*,⁶ in *Zamora*,⁷ and during Mr. Gates' appeal. Without additional guidance from this Court, the trend will persist.

B. This Court Should Grant Review Because an Issue of Substantial Public Interest Is Raised by the Lyft Recording in this Case.

Mr. Gates sought to suppress a recording that was produced from a Lyft vehicle. *Gates*, 2023 WL 6553863, at *2. While the driver was ferrying a passenger, a conversation was captured in a single recording, which overlaid both dashcam footage and audio of the two speaking. *Id.* Denying the defense's suppression motion, the trial court reasoned that the passenger

⁶ *Bagby*, 17 Wn. App. 2d 1023.

⁷ *Zamora*, 17 Wn. App. 2d 1073.

had no expectation of privacy in the vehicle and that conversation between the passenger and Lyft driver was not a private conversation per RCW 9.73.030(1)(b). *Id.*

Division I affirmed, finding that the recording did not contain a private conversation, *id.* at *8, and that the passenger “had no reasonable expectation of privacy within the rideshare vehicle[,]” *id.* at *9.⁸

The analysis below demonstrates that the admission of a nonconsensual Lyft vehicle recording raises an issue of substantial public importance, per RAP 13.4(b)(4).

1. The Public Interest in this Case Is Substantial Because Car-Hailing Is a Ubiquitous Mode of Transportation.

In Washington there are more than 30,000 Uber and Lyft drivers.⁹ Car-hailing, as an increasingly preferable mode of

⁸ Division I described Voorhis’ car as a “rideshare vehicle,” *id.*, but in reference to Lyft and Uber this Court utilized the terms “car-hailing” and “transportation network companies (TNCs),” *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 773, 418 P.3d 102 (2018). Amici adopt this Court’s terms.

⁹ James Parrott and Michael Reich, *A Minimum Compensation Standard for Seattle TNC Drivers*, 4 (July 2020), [<https://www.seattle.gov/documents/Departments/LaborStandar>

transportation, has significantly impacted Washington.¹⁰ The ubiquitous nature of car-hailing is inferred from the companies' own reporting. Data reported to Seattle showed that, in the city-area alone, Lyft and Uber provided "more than 91,00 rides on an average day...", and "more than 31 million trips" in 2018.¹¹

Because Mr. Gates' petition raises a question regarding the application of the Privacy Act in the context of car-hailing vehicles, a new, ubiquitous mode of transportation, it merits review per RAP 13.4(b)(4).

Division I's logic presumes a private conversation between a Lyft driver and a passenger is impossible because such

ds/Parrott-Reich-Seattle-Report_July-2020%280%29.pdf]. Cf. David Kroman, *Seattle-area demand for Uber, Lyft still not back up to speed, an outlier in the U.S.*, SEATTLE TIMES (June 6, 2022) (King County issued 90,000 ride-hailing permits to drivers in 2019). Five years ago, this Court noted that Uber had at least "14,000 drivers in Seattle." *Lyft, Inc.* 190 Wn.2d at 774.

¹⁰ Lauren Girgis, *As taxi business wanes at Sea-Tac, drivers want a say in their future*, SEATTLE TIMES (February 13, 2023); Gene Balk, *Uber, Lyft used by 3.5 times more people than taxis in Seattle, new data show*, SEATTLE TIMES (April 26, 2018).

¹¹ David Gutman, *How popular are Uber and Lyft in Seattle? Ridership numbers kept secret until recently give us a clue*, SEATTLE TIMES (November 5, 2018).

conversation occurs in the context of a business transaction. *Gates*, 2023 WL 6553863, at *9-10.

Division I reasoned: if an “ordinary person does not reasonably expect privacy in a stranger’s car [...] [s]uch expectation is less reasonable still in a rideshare vehicle, in which the service of transporting persons for compensation is provided.” *Id.* (quoting *State v. Clark*, 129 Wn.2d 211, 230, 916 P.2d 384 (1996)). The danger lies in the effect the appellate court gave to the transactional nature of the driver-passenger relationship. In *Clark*, the Court held that audio recordings of conversations on public streets between police informants and drug dealers were not private. Division I relied on an analogy to *Clark* that matched Lyft drivers with informants buying drugs and passengers with dealers.

The *Clark* court feared such application of its ruling: “We are not suggesting or deciding that a conversation is not private solely because it takes place on a street or solely because it relates to a commercial or illegal transaction.” *Clark*, 129 Wn.2d at 231–

32. The Court noted that in a privacy analysis the transactional nature of an interaction is not dispositive: “there are many commercial and/or illegal transactions that may involve private conversations. These conversations may involve relationships and transactions wholly unlike [...] anonymous and spontaneous street-level transactions.” *Id.*

In addition, Division I neglected to consider this Court’s Article I, section 7 jurisprudence, which has “[f]rom the earliest days of the automobile in this state [...] acknowledged the privacy interest of individuals and objects in automobiles.” *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988). Division I similarly ignored that “vehicle passengers hold an independent [...] privacy interest [that is] not diminished merely upon stepping into an automobile with others.” *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). These are imperative considerations when applying the Washington Privacy Act to the new context that is car-hailing.

The appellate holding below must be corrected because its reasoning threatens to eliminate privacy from conversations occurring between people who are merely engaged in a business transaction.

IV. CONCLUSION

For the reasons stated above, Amici ask this Court to grant Christopher Gates' petition for review.

This document contains 2,461 words per RAP 18.17(c)(9), excluding the parts of the document exempted from the word count by RAP 18.17(c).

RESPECTFULLY SUBMITTED January 16, 2024.

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CERTIFICATE OF SERVICE

I Certify that on this 16th day of January, 2024, I caused a true and correct copy of this document to be served on all parties by electronically filing this document through the Washington State Appellate Courts Secure Portal.

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