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Division III  
State of Washington  
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NO. 37253-7-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

DALE A. TENINTY,

Appellant.

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REPLY BRIEF OF APPELLANT,  
DALE A. TENINTY

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY  
THE HONORABLE RAYMOND F. CLARY, JUDGE

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## I. ARGUMENT IN REPLY

The trial court in this case excluded Juror 34 because he was friends with someone accused of a crime. In a state that disproportionately polices and charges people of color, this factor has a racially disproportionate impact on selecting jurors.

The state attempts to minimize these facts. The state points to only acquittals as the relevant metric and only *Batson* as the relevant caselaw. Respondent's Brief at 14-16. In short, the state presents a narrow argument, refutes this argument, and asks this Court to affirm. This Court should reject the state's distortion and reverse. The trial court's actions violated Washington precedent, *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020), by basing jury selection on a racially disproportionate factor.

### A. The Trial Court Excluded Juror 34 Based on a Racially Disproportionate Factor.

The state argues that "the foundational premise" of Mr. Teninty's argument is "that minorities are more likely to be among those who are acquitted of a crime, and therefore, the excusal of a juror based on association with one exonerated of a crime disproportionately affects minority jurors." Respondent's Brief at 16. The state's argument is misplaced because it minimizes the trial court's actions.

Juror 34 was excluded because his friend was charged with a somewhat-similar crime. RP 265. In this specific situation, the friend was acquitted. However, the trial court’s ruling was not based primarily on this acquittal. The trial court found it “significant” that Juror 34 “was a character witness” and “thought [that] his friend was wrongfully charged.” RP 265. The court believed that his experience “could affect his thinking in this case.” *Id.* Ultimately, the court concluded that Juror 34 was “predisposed” and removed him for cause. *Id.*

In other words, the court excluded Juror 34 because his friend was charged with a crime, Juror 34 believed his friend, and he testified at his friend’s trial. The exact same reasoning applies whether the friend was acquitted or convicted.<sup>1</sup> When the trial court excludes a juror because they are acquainted with someone accused of a crime, that metric has a racially disproportionate impact on the jury pool. This impact does not evaporate because that acquaintance happened to be acquitted.

The state points out that the constitutional violation in this case does not fall into the narrow category articulated in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Respondent’s Brief at 14-15.

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<sup>1</sup> The trial court’s reasoning was even more flawed because the friend actually was “wrongfully charged,” but the constitutional violation is the same regardless.

The state's argument fails because it ignores a recent Washington Supreme Court case, *State v. Pierce*, 195 Wn.2d 230.

The *Pierce* Court reversed a rule about voir dire because it disproportionately excluded people of color from juries. 195 Wn.2d at 242. The Court concluded that “[h]ewing to a rule that has a disproportional effect of eliminating people of color undermines our commitment to fostering juries that reflect our society.” *Id.* at 243. In other words, removing jurors in ways that “disproportionally exclude people of color” violates due process. *Pierce*, 195 Wn.2d at 242-43. This is precisely what the trial court did in this case, requiring reversal.

**B. This Error was Manifest, Structural, and Not Harmless.**

Mr. Teninty objected at trial to excluding Juror 34. RP 264. The state argues that this error was not preserved because Mr. Teninty did not specifically say that the trial court's actions had a racially disproportionate impact. *See* Respondent's Brief at 18. The state's argument fails because theory behind Mr. Teninty's objection remains the same: the trial court erred by dismissing a juror because his acquaintance was accused of a crime. RP 264.

This Court should also reverse to correct a manifest error affecting a constitutional right. RAP 2.3(a)(3). An error is manifest if it “had practical and identifiable consequences in the trial of the case.” *State v.*

*O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (internal quotations omitted). It requires only “a plausible showing that the error resulted in actual prejudice” to the accused. *State v. A.M.*, 194 Wn.2d 33, 39, 448 P.3d 35 (2019). Here, Mr. Teninty was prejudiced because the trial court’s practices violated “the appearance of fairness,” which is an “underlying goal of the jury selection process.” *State v. Saintcalle*, 178 Wn.2d 34, 76, 309 P.3d 326 (2013) (González, J., concurring), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017).

Finally, reversal is required because this error was structural. The state argues that the error was harmless because Juror 34 likely would not have served on this jury regardless. Respondent’s Brief at 20. The state’s argument fails because selecting jurors based on a racially disproportionate factor is a structural error not subject to harmless error analysis.

Jury selection on the basis of race “strikes at the fundamental values of our judicial system and our society as a whole,” violating a defendant’s constitutional rights. *Vasquez v. Hillery*, 474 U.S. 254, 262, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979)). This error is structural because it harms the “integrity of the criminal tribunal itself,” and is thus “not amenable to harmless-error review.” *Id.* at 263-64.

*Vasquez* concerned overt race-based discrimination. However, these same principles apply to practices that disproportionately exclude persons of color from juries. See *Pierce*, 195 Wn.2d at 242-43 (reversing the rule from *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), because it “disproportionally exclude[s] people of color”). The Washington Supreme Court has recognized that “[r]acism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes.” *Saintcalle*, 178 Wn.2d at 46 (plurality opinion). To combat racism in our institutions, Washington Courts must disapprove of not only overtly race-based voir dire but also racially disproportionate practices.

## II. CONCLUSION

Mr. Teninty respectfully requests that this Court reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 25th day of September, 2020.



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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On September 25, 2020, I electronically filed a true and correct copy of the Reply Brief of Appellant, Dale A. Teninty, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

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SIGNED in Tacoma, Washington, this 25th day of September, 2020.



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