SUPREME COURT NO. 95920-0
COURT OF APPEALS NO. 75277-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS MUSSIE BERHE,

Appellant.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Rules and Regulations

Washington State:

A. PROCEDURAL SUMMARY AND ISSUES RAISED

A jury convicted the defendant of first-degree murder and first-degree assault for the execution style slaying of Everett Williams and shooting of Mike Stukenberg. The Court of Appeals affirmed the defendant's conviction whereupon the defendant filed a petition for review. To help determine whether to accept review, this Court directed the State to file an answer addressing two issues (1) Whether the trial court properly investigated a claim of racial bias during deliberations and (2) Whether the admission into evidence of a few sentences uttered by the defendant during custodial interrogation, but after he invoked his right to remain silent, was prejudicial.

RAP 13.4(b) governs the type of cases that will be accepted for review. Here, the Court of Appeals decision does not conflict with any legal precedent, and there is no significant dispute as to the law. The defendant's arguments rest primarily on his disagreement with how the trial court and the Court of Appeals handled the facts of his case. Because such a disagreement does not fit within the criteria set forth in RAP 13.4(b), the defendant's petition should be denied.

B. SUMMARY OF RELEVANT TRIAL FACTS

In the early hours of July 22, 2013, a man walked up to a white Lexus parked in the alley behind the Eastlake Market and fired four shots

through the front passenger window. 1/27RP 679-80, 683, 763-65. All four bullets struck Williams who was seated in the front passenger seat. 2/18RP 2977-98. One bullet passed through Williams' face and hit Stukenberg, who was in the driver's seat. 1/27RP 709-10, 2/3RP 1693, 2/17RP 2799-800.

From his balcony above the alley James Brighton heard the shots and saw the flash of the gun. 1/28RP 947-56, 977-84. Immediately looking down, Brighton saw a Black male standing next to the passenger door of the Lexus with his arm extended holding a gun. Id. His description of the shooter matched the defendant. 1/28RP 954-55, 979-80; Exh. 58 Photos 10-20; Exh. 93 Photos 9-12. Brighton watched as the Black male walked across the parking lot towards a dark sedan that was driving down the alley. 1/28RP 956-59. Brighton heard the car door open and then saw the sedan speed away. 1/28RP 958-59. Two other bystanders, Matthew Bellando and Lucas Alvarez, heard the gunshots and saw a Black male walk from the area of the Lexus to a dark Chevy Impala that then sped away. 1/27RP 743, 755-58, 768, 789, 794, 798, 800.

Within minutes police observed a dark Impala enter onto I-5 about a mile from the shooting and drive erratically southbound. 2/1RP 1196-97, 1222-24. The front passenger matched the description of the shooter. 1/28RP 1005. The vehicle was stopped after it exited onto James Street.

1/28RP 1009-10. The front passenger was the defendant, the driver, his friend, Elijah Washington. 2/1RP 1235-36, 1251. A show-up was conducted with Bellando positively identifying both the defendant and the car. 1/27RP 811; 1/28RP 853, 876-78.

A Springfield .45 semiautomatic was recovered from under the Impala's front seat. 2/4RP 1931-33. The defendant had been observed with the gun on multiple occasions. 2/2RP 1466-68. The defendant was also the owner of the Impala. 2/10RP 1985-86. There were only two bullets remaining in the gun – one was in the chamber. 2/4RP 1938.

There were four spent bullets and four shell casings recovered at the scene. 2/3RP 1683-84, 1692-93, 1722; 2/11RP 2266-67; 2/17RP 2807. The spent bullets and bullets in the gun were all .45 caliber hollow-points. 2/3RP 1699-1700; 2/17RP 2699-2700. All the shell casings from the scene and from the gun were identical -- brass with a nickel primer and with a "RP .45" headstamp (Remington Peters). Id. The gun was test-fired five times with ballistics showing that the spent bullets and shell casings recovered from the scene were fired from the gun found in the defendant's car. 2/17RP 2687, 2698-704. The defendant's fingerprints were found on the exterior of the Lexus. 2/18RP 2900-08.

The driver of the getaway car, Elijah Washington, would later testify that he and the defendant had been drinking most of the day and

that at one point the defendant told him that Williams was responsible for the killing of his "little cousin" during a drug deal and that he was going to "take care" of him. 2/10RP 1988, 1993-96. Washington claimed that when he and the defendant were at the Eastlake Market, he did not know the defendant was going to shoot Williams. 210RP 2012-13. He said he heard the shots while he was inside the market and that he ran out, got into the defendant's car and drove down the alley looking for him. 2/10RP 2013-14, 2022. He said the defendant waved him down, climbed into the car, and ordered him to get on the freeway. 2/10RP 2023-25. Surveillance video confirmed that Washington was inside the market when the shooting occurred.[1] 2/11RP 2235-38, 2252.

When the defendant's car was stopped, he was ordered out, taken into custody and advised of his Miranda rights by Officer Brian Hunt. 2/1RP 1106. Officer Hunt told the defendant that the Impala and he fit the description from an "incident" up north. The defendant lied and said that he was coming from Lake City. 2/1RP 1106. The defendant also got very confrontational and began yelling and cursing at Officer Hunt. 2/1RP 1107, 1112. When a second officer came up and told the defendant that

[1] The defendant states that Washington repeatedly lied about what happened and that he was granted immunity for his testimony. This is somewhat misleading. Washington was granted immunity but only for a single crime -- rendering criminal assistance. 2/10RP 2031-33, 2138; Exh. 50 & 53. Per agreement, if the facts proved he was directly involved in Williams' death, he could be charged with murder. 2/10RP 2138, 2168-69, 2177.

the Impala had been seen leaving the scene of a shooting, the defendant began swearing at the officer, stated that he had not been at the scene and demanded to know who said that he was. 2/1RP 1253-56. When asked who owned the car, the defendant responded, "It doesn't fucking matter." 2/1RP 1256. Consistent with best practices, the entire arrest and statements by the defendant were recorded on the officers' dash cams. 1/20RP 233, 255, 307-08; CP 385. None of these statements were challenged on appeal.

The defendant was then transported to the homicide unit where he was interviewed by Detectives Alan Cruise and Russ Weklych. 1/19RP 182-89. The entire conversation was audio and video recorded. 1/19RP 189; CP 386. Prior to questioning, Detective Weklych read the defendant his Miranda rights. 1/19RP 187, 189. The trial court found, and the defendant has never disputed, that he waived his Miranda rights by engaging the detectives in a conversation. 1/19RP 189-92; CP 387-88.

The nature of the interview was not your typical question and answer interrogation. Rather, the defendant repeatedly asked questions of the detectives and was at times evasive, hostile and argumentative. 1/19RP 189-90. For example, when asked his name, the defendant responded "[i]t's not like you guys don't recognize me, right...[s]o let's not play no bullshit games again man." CP 145. When asked if he knew

the name of the person driving his Impala, the defendant responded, "No, why?" CP 147. When asked who the Impala belonged to, the defendant lied and said "[i]t belongs to somebody else." CP 147. When asked where he had been coming from, the defendant claimed that "[i]t doesn't matter where I was. Am I in trouble? ... because nobody told me shit, they just brought me here." CP 149. He said this despite the fact that the dash cam video shows the defendant was informed why he was stopped.

At one point during the interview, Detective Weklych asked, "[t]hat's all I'm asking you, what you were doing." CP 153. The defendant responded, "[w]hat do you mean, what I – I don't even want to talk to you, dog. I don't even want to talk to you. I don't want to talk to you or you." CP 153 (page 11, lines 7-9). This is the point that the defendant claimed he unequivocally invoked his right to remain silent. However, the trial court ruled that the "clear point" when the defendant invoked occurred a few lines further on page 11 at lines 22-24. 1/20RP 344. The difference between where the court found the defendant invoked and where the defendant claims he invoked resulted in the following few statements being heard by the jury:

> Weklych: Why are you so ticked off?
>
> Defendant: Because I don't like that fucking smirk you got on your face looking at me like that. I know you're up to some fucking fucked-up ass game [redaction]. So it

> doesn't matter. And I know that shit right there is recording, I don't care.
>
> Weklych: Okay.
>
> Defendant: I don't care. You're not telling me what the fuck I'm here for. Those officers didn't tell me what the fuck I'm here for. But you're just going to come in here and question me and try to role play me along.
>
> Weklych: What would you like me to do?
>
> Defendant: I would like you not to talk to me about shit and tell me what the fuck I'm here for. All you're telling me is, oh, I'm investigating an incident. What incident?

Trial Exh. 63; CP 153 (page 11, lines 10-24).[2]

On appeal, the State did not challenge the defendant's position as to when he invoked, and the Court of Appeals agreed with the defendant as to when he invoked. Still, the State argued, and Court of Appeals held, that the error in the jury hearing the few extra utterances was harmless, especially when considering the same antagonistic behavior was shown in the dash cam videos that were admitted without challenge.

The defendant did not testify. One of the defense's trial theories was that a person named Dominic Oliveri murdered Williams because Williams allegedly stole drugs from him. 2/2RP 1484-89. Oliveri did not

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[2] Trial Exhibit 63 is the DVD played for the jury. The DVD was redacted to take out various statements ruled inadmissible on evidentiary grounds. The redaction in the quoted text is the single sentence "and I already have a fucking history with you." Compare Trial Exhibit 63 and CP 153. The transcript was not provided to the jury.

testify at trial. Oliveri -- tall, skinny and Caucasian, did not match anyone's description of the shooting. 2/10RP 2178.

C. SUMMARY OF POST-VERDICT FACTS

Closing arguments occurred on February 24, 2016. The jury returned guilty verdicts on March 1, 2016. During this time period, the record contains no evidence of any disharmony amongst the jurors.

In accepting the verdicts, the Honorable Judge Mariane Spearman polled each juror, asking if the verdicts were the verdicts of the entire jury, and if the verdicts were each juror's individual verdicts. 3/1RP 3363-66. Each juror answered affirmatively. Id. In speaking with the jurors post-verdict, Judge Spearman did not detect any disharmony. 3/10RP 11.

Two plus weeks later, the parties appeared before the court. Judge Spearman informed the parties that juror 6 had come into court emotionally upset and that she had been referred to a counselor. 3/10RP 6. Judge Spearman also informed the parties that another juror had contacted the court quite upset at being contacted by the defense. Id. at 7, 11. The defense admitted that they had been in contact with juror 6 and that they felt juror misconduct had occurred because juror 6 had told them that she had "acquiesced" in the verdicts. Id. at 6. It happened to be that

juror 6 was the lone Black member of the jury.[3] Id. The defense admitted having spoken with four other jurors but the defense did not disclose the substance of the conversations. Id. at 7. The defense asked for additional time to obtain affidavits and to investigate the matter. Id. at 6.

Judge Spearman agreed to give the defense more time. 3/10RP 12. She also authored a letter that was sent to each juror informing them that counsel wished to speak with them. 3/10RP 11; CP 292. The letter included contact information for the State and defense. Id.

The defense worked with juror 6 and crafted an affidavit for her to sign. CP 474-78. The defense filed a motion for a new trial based on the affidavit.[4] CP 452-87.

Per her affidavit, juror 6 stated that she did not agree with the jury's verdict. CP 474. She said she "felt personally attacked and belittled during the deliberation process." CP 475. She stated she "felt these attacks carried an implicit racial bias." Id. She said she felt this way because other jurors were dismissive of her and accused her of being close-minded. CP 475. She claims that's why she voted guilty. CP 476.

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[3] The jury consisted of a mix of men and women, with one Native American juror, one Black juror and at least two jurors of "Asian heritage." CP 334.

[4] The defense never disclosed how many jurors they contacted or the information they obtained from the other jurors.

The State filed affidavits from six jurors, all of whom stated that they did not witness anything that appeared to be racially motivated. CP 322-28. Some jurors stated that juror 6 was challenged because she insisted that the defendant was not guilty, but she would not support her position with a discussion of the evidence and did not seem very open-minded. Id. Jurors added that juror 6 expressed difficulty because she believed that a friend of her son was falsely accused of murder. Id.

On April 6, 2016, Judge Spearman held a hearing to determine whether the defense had made a *prima facie* showing of juror misconduct necessitating further investigation. In finding that the defense had not made a *prima facie* showing warranting further action, Judge Spearman noted that juror 6 was clearly emotionally distressed and felt attacked by the other jurors but that there was no support for the proposition that the other jurors did so based on racism or implicit bias. 4/6RP 109-10; CP 405-10. Judge Spearman noted that in her experience, lone holdouts often feel pressured and that many times persons who feel they have been treated disrespectfully by persons of another race will presume that the disrespect was due to the person's race. Id.

The Court of Appeals reviewed the case law as provided by the parties – the cases are cited herein. The Court held that Judge Spearman's decision was "tenable and consistent" with the applicable case law.

D. WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) governs when a case will be accepted for review. The rule provides that review will be accepted "only" if (1) the court of appeals' decision conflicts with either a decision of the Supreme Court or another decision of the Court of Appeals, there is a significant question of constitutional law, or the case involves an issue of substantial public interest. The issues raised herein do not meet any of these criteria.

1. THE DEFENDANT'S RIGHT TO REMAIN SILENT – THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF LAW

The defendant made various statements to the police on two occasions – upon his arrest after his car stopped and to detectives after he was transported to the homicide unit. On both occasions he was read his Miranda warnings and waived his right to remain silent. On appeal, the defendant did not challenge the statements he made to the responding officers (the dash cam video was played for the jury). In regards to the statements he made to the detectives, he argued to the trial court and to the Court of Appeals, that he invoked his right to remain silent at a specific point during the interrogation. The Court of Appeals ruled in the defendant's favor and the State agrees the Court's decision was correct.

As a result of the trial court's error, two statements and only two statements were heard by the jury that would not otherwise have been

admitted. See CP 153 (page 11, lines 10-24). Based on the relatively benign and limited nature of those two statements, and the fact that the statements were merely cumulative of what the jury already knew, the Court of Appeals found that the error was harmless.

In making its determination, the Court recognized that the erroneous admission of custodial statements in violation of a person's right to remain silent is an error of constitutional magnitude. State v. Berhe, 2018 WL 704724 at 7. Thus, the Court stated, in order to find the error harmless, the Court had to be "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result, despite the error." Id. (quoting State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995)).

The defendant argues the Court of Appeals erred in a couple of ways. First, he asserts that the Court did not "presume the error harmful" and thus the Court applied the wrong legal standard. Pet. at 16. The problem with this argument is that the very test for harmless constitutional error subsumes this presumption. Thus, the "test for harmless error is whether the state has overcome the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt." State v. Clark, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001). There

can be no dispute that the Court of Appeals applied the correct harmless error standard regardless of whether or not the Court used the phrase "presumption of prejudice."

Next, the defendant asserts that the Court found the error harmless by improperly relying on other statements wherein he was exercising his right to remain silent. The defendant cites to cases holding that a suspect's denial of having committed a crime is "irrelevant" or "inherently ambiguous" and that a suspect's lack of cooperation during custodial interrogation should not be used as evidence of guilt. There are problems with the defendant's attempt to garner review based on this argument.

First, neither the State nor the Court of Appeals disagrees with the holdings of the cases cited. But the defendant did not merely deny involvement or fail to cooperate. Rather, he lied repeatedly and feigned indignation and ignorance of the reason why he was pulled over, even though the evidence clearly showed he was informed why.

When patrol officers told him why he was stopped, the defendant lied and said he was coming from Lake City (officers in fact observed him enter the freeway miles from Lake City but near the murder scene). 2/1RP 1106, 1197-202. When he was told his car was seen leaving the scene of a shooting, he swore at the officers, denied being at the scene and demanded to know who told them his car had been there. 2/1RP 1253-56. He lied

again and told the police that he did not know the name of the person who was driving his Impala, even though evidence showed the driver was his longtime friend. CP 147. In contrast to the evidence, he even claimed the Impala was not his. CP 147. He also feigned indignation and ignorance about why he was stopped, even though the evidence showed he had just fled from the scene of a murder (whether he committed the murder or not) and was told why he was stopped by patrol officers. CP 147. He told detectives that he had been cooperative with the patrol officers but they treated him "like shit," even though the dash cam video showed he had not been mistreated despite his antagonistic behavior. CP 148.

Lying to police is evidence of consciousness of guilt. State v. Huff, 64 Wn. App. 641, 647, 826 P.2d 698, rev. denied, 119 Wn.2d 1007 (1992). Providing improbable explanations can be as well. State v. Goodman, 42 Wn. App. 331, 711 P.2d 1057 (1985), rev. denied, 105 Wn.2d 1012 (1986). Evasive behavior may show the same. State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996). Even nervous behavior is sometimes indicative of a consciousness of guilt. Illinois v. Wardlow, 528 U.S. 119, 124-25, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

In short, while the defendant cites cases wherein a person merely denies involvement in a crime, the cases are inapplicable to the facts herein. In conjunction therewith, these are evidentiary issues and the

defendant did not raise these objections in the trial court. And besides generalities, he also fails to identify which specific statement(s) should have been suppressed or not relied on by the Court of Appeals. Where a defendant fails to raise an evidentiary objection, review is barred. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985). Where a defendant makes a specific objection, review is limited to the specific ground raised at trial. Id.

The Court of Appeals' application of law does not conflict with any decision of this Court or any other court. There is no significant question of constitutional law and no issue of substantial public interest. Rather, the defendant merely disagrees with the trial court and Court of Appeals' weighing of the facts. This Court does not determine credibility or resolve disputed facts. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

2. THE TRIAL COURT PROPERLY ADDRESSED THE DEFENDANT'S CLAIM OF RACIAL BIAS DURING DELIBERATIONS

Last year, the United States Supreme Court issued an opinion that provided guidance to trial courts in dealing with claims of racial bias during deliberations and that balance that must be struck with the "no impeachment rule." Pena-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct. 855, 861, 197 L. Ed. 2d 107 (2017). The Court began by recognizing that

despite our jury system's flaws, "fair and impartial verdicts can be reached if a jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense." Id., 37 S. Ct. at 861. To protect the integrity of this system, at common law and in every jurisdiction, there exists a "no impeachment rule." Id. at 863. The purpose of the rule is to "give substantial protection to verdict finality and to assure jurors that once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations."[5] Id. at 861.

Against this backdrop, the Court created an exception to the rule where there is a claim of racial bias. The Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant...the no-impeachment rule [must] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Id. at 869.

In Pena-Rodriguez, two jurors disclosed that another juror had expressed anti-Hispanic bias. A sexual assault case, the comments included the juror stating that "I think he did it because he's Mexican and

[5] In Washington, courts will generally not inquire into the internal process by which the jury reaches its verdict. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003). Thus, the individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach the verdict. Id.

Mexican men take whatever they want," and "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Id. at 862. In holding that the trial court erred in not considering the juror's statements, the Court cautioned "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Id. at 869.

"For the inquiry to proceed," the Court stated, "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." Id. "To qualify," the Court added, "the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." Id.

In a Washington case, State v. Jackson, the Court similarly held that when a claim of racial bias during deliberations is "raised post-verdict, and the moving party has made a *prima facie* showing of bias, an evidentiary hearing is always the preferred course of action." 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995). Jackson submitted an affidavit of a juror who stated she had heard another juror talking about a reunion the juror had attended. The juror made comments such as: "[t]here are a lot more coloreds now [at home] then [*sic*] there ever used to be," "[t]he worst part of the reunion was that I had

to socialize with the coloreds," and "[y]ou know how those coloreds are." Id. at 540. The Court of Appeals held that with this "clear inference of racial bias," the trial court should have conducted a full hearing. Id.

Whether a defendant meets this threshold is committed to the sound discretion of the trial court in light of all the circumstances, "including the content and timing of the alleged statements and the reliability of the proffered evidence." Id.; Breckenridge, at 203. To prevail on appeal, a defendant must show that the trial court abused its discretion, i.e., that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

As another example, the following is from an affidavit used as evidence in an attempt by a criminal defendant to obtain a new trial:

> I am of the opinion that James A. Jackson did not receive a fair deliberation on the verdict that was returned by the jury. There was little discussion of the evidence, nor did the discussions follow the framework of the Court's instructions; more specifically, reasonable doubt or presumption of innocence were not discussed. The jury, without exception, appeared to be of the opinion that the defendant was guilty.
>
> I also heard some discussion of the Watts incident in California during which the statement was made that we did

> not want a similar incident to happen in our city. In my opinion, the verdict was reached as a racial determination rather than on the evidence presented, and with bias. In other similar cases in which I was a member of a jury, evidence was discussed and a verdict reached after the jurors discussed the matter. This was not so in the Jackson case.

City of Seattle v. Jackson, 70 Wn.2d 733, 737, 425 P.2d 385 (1967).

> This Court was in accord with Jackson's legal premise:
>
> We agree that the right to trial by jury includes the right to an unbiased and unprejudiced jury. A trial by a jury, one or more of whose members are biased or prejudiced, is not a constitutional trial. Nor do those matters inhere in the verdict or impeach it.

Id. at 738 (internal quotations omitted). Nonetheless, this Court rejected Jackson's claim, finding that the affidavit was filled with opinion and lacking in facts. This Court noted that only one sentence was "factual in character;" the sentence that referred to the Watts Riots. Id. at 739. However the Court noted that defense counsel had brought up the Watts Riots in closing and the affidavit lacked facts showing racial bias simply because jurors discussed the issue.

> There is absolutely no elucidation as to what specifically was said, who said it, when it was said, or in what context. The factual assertion in the affidavit is altogether too general upon which to predicate error.

Id. In regards to the rest of the affidavit, this Court found that it contained nothing but opinion. Absent were facts necessary for a court to determine whether a due process violation had occurred.

> Of course the opinions that juror Poff expressed in the affidavit cannot be considered as raising issues to be determined by this court. Affidavits used to impeach juries ***must state facts not mere opinions***.

Id. at 740 (emphasis added).

Here, the trial court found, and the Court of Appeals agreed, that the defense had not made a *prima facie* case of racial bias during deliberations despite the defense having interviewed juror 6 and crafting her affidavit. Neither courts' application of law conflicts with decisions of this Court or any other court. While a claim of racial bias during deliberations raises a constitutional issue and can be concerning, the defendant's argument is factual, not legal, and does not fit within the criteria of RAP 13.4(b) as the type of case appropriate for review.

E. CONCLUSION

Review of this case should be denied because the issues do not meet the criteria of RAP 13.4(b).

DATED this 1 day of October, 2018.

Respectfully submitted,

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