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STATE OF WASHINGTON
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NO. 95920-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS BERHE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

A deliberating juror contacted Tomas Berhe's attorney the day after the jury convicted Mr. Berhe, a black man. Juror 6 was the sole black person serving on the jury. Juror 6 was upset about racial stereotypes and hostility by other jurors during deliberations. The court barred the parties from contacting the jurors to investigate. Six jurors volunteered that they were unaware of racial bias during deliberations. The court conducted no further inquiry, denied Mr. Berhe's requests for an evidentiary hearing, and refused to order a new trial.

Does the report by the only black juror that racial discrimination affected the verdict against a black defendant require a full inquiry into whether the jury verdict was tainted by racial discrimination?

B. STATEMENT OF THE CASE.

Juror 6 filed a declaration explaining that other jurors "repeatedly" accused her of being "partial" toward Mr. Berhe "because I was the only African-American juror on the panel in a trial with an African-American defendant." CP 475. She said she was "disparaged," "mocked as 'stupid' and 'illogical'" and "personally ridiculed in a way the other dissenting jurors were not." CP 475.

The prosecution opposed the defense's investigation into juror misconduct, claiming their right to privacy superseded the defense's interest in investigation. CP 293-303. The court ordered the lawyers not to initiate contact with jurors. 3/10RP 23.

Instead, the court sent a letter to the jurors. CP 292. The letter thanked the jurors for their service and for spending "considerable time . . . reaching a unanimous decision." CP 292. It explained the court had barred the lawyers from contacting any jurors, but the jurors "can call" the lawyers if they desire to talk about the case. *Id.* The letter did not specify what the lawyers wanted to discuss.

Six jurors contacted the prosecutor after receiving the court's letter and responded in writing to two questions, (1) "Did you personally do anything to Juror# 6 which was motivated by racial bias?" and (2) "Did you observe any other juror do anything to Juror#6 which appeared to be motivated by racial bias during deliberations." CP 323-28. Each denied being motivated by racial bias toward Juror 6. *Id.*

There is no evidence the five others jurors who deliberated were questioned. An additional juror participated in the first day of deliberations but was replaced due to illness. 2/25RP 3355-56. There is no indication anyone spoke to that juror either.

The prosecution agreed Juror 6 “felt bias” against her. 4/6 RP 100. The judge likewise said, “I don’t think there’s any doubt” Juror 6 “felt attacked because she is black.” 4/6RP 109-110. But the court believed this juror was “the lone holdout” and that could have led to jurors disparaging her. 4/6RP 110. While Juror 6 “felt she was pressured because of her race,” the court contended no one expressly said they were treating her differently “because she was black.” 4/6RP 111. The court concluded “it’s equally likely” that her treatment resulted from her being a holdout. 4/6RP 111. The court did not further inquire into the juror’s claim of racial bias affecting deliberations. *Id.*

The Court of Appeals ruled the trial court was not obligated to conduct a testimonial hearing based on the juror’s perceptions of racial bias, even when crediting those perceptions, absent detailed evidence of purposeful discrimination. COA 75277-4-I, Slip op. at 32-33.

The case involved the State’s accusation that Tomas Berhe was the person who fired shots into a car parked in a dark alley that killed Everett Williams and superficially injured Mike Stukenberg. 2/2RP 1425-26.¹ People who heard shots but did not see the shooting gave

¹ All proceedings occurred in 2016.

wide ranging descriptions of the potential perpetrator. *See, e.g.*, 2/28RP 839-40 (white t-shirt), 979-80 (average height male in long-sleeved shirt and dark colored clothing); 2/22RP 3022-23 (6' tall white male in red coat); 2/22RP 3070 (light clothes). Mr. Berhe is 5'7" tall, black, and wore a dark t-shirt and denim shorts. 2/16RP 2473; Ex. 58, p. 10.

Mr. Williams was part of a large circle of young people who regularly gathered to drink and do drugs. 2/2RP 1368. Another suspect, Dominic Oliveri was present at the time of the shooting and "disappeared" afterward. 2/2RP 1331; 2/10RP 2095. He had accused Mr. Williams of stealing a bag of pills from him and Mr. Williams expressed concern that Mr. Oliveri would kill him. 2/2RP 1345; 2/3RP 1530-31; 2/10RP 2102; 2/22RP 3052-54.

Several miles from the shooting, police stopped Mr. Berhe in a dark sedan. 1/28RP 1096. Elijah Washington was driving. 2/1RP 1251. The police found a gun under Mr. Washington's seat. 2/4RP 1931. A forensic scientist concluded this firearm fired the bullets used in the shooting. 2/17RP 2698, 2704. The prosecution gave Mr. Washington immunity even though he admitted to lying to police and giving various accounts of the incident. 2/10RP 2059, 2061, 2063, 2073, 2075, 2079,

2090. Mr. Washington claimed the gun was Mr. Berhe's and Mr. Berhe told him he was the shooter. 2/10RP 2013, 2035.

The trial lasted five weeks and the jury deliberated for several days. 3/1RP 3366-67. The jury convicted Mr. Berhe of first degree murder and first degree assault while armed with a firearm. CP 474-78. The trial evidence is further discussed in Appellant's Opening Brief.

C. ARGUMENT.

Convicting a black person of serious crimes when the jurors' deliberations are tainted by racism violates the constitutional guarantees of due process, equal protection, and an impartial, unanimous jury and undermines public faith in a fair criminal justice system.

1. The right to a fair trial by impartial, unanimous jury is a cornerstone of the criminal justice system.

It is an "unmistakable principle" that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017), quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979).

The constitutional guarantee of an impartial jury in all criminal trials is a necessary component of a fair and functioning justice system. *Turner v. Louisiana*, 379 U.S. 466, 471-72, 85 S. Ct. 546, 13 L. Ed. 2d

424 (1965); U.S. Const. amends. 6, 14; Const. art. I, §§ 21, 22. This Court has long held that “[t]he right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitution[al] trial.” *Alexson v. Pierce Cty.*, 186 Wash. 188, 193, 57 P.2d 318 (1936).

To preserve the jury’s impartiality, courts require that a verdict must be based on the “evidence developed at the trial.” *Turner*, 379 U.S. at 472. In *Turner v. Louisiana*, jurors were guarded by two men who were also witnesses for the State. There was no evidence the guards talked to any jurors about the case, but the Court ruled there is “extreme prejudice inherent in this continual association” between the jurors and key witnesses. *Id.* at 473. This association “undermined the basic guarantees of trial by jury.” *Id.* at 474.

The basic guarantees of trial by jury also prohibit a prosecutor from implicitly appealing to jurors’ potential racial bias, such as using racially charged images in closing argument, mocking a black witness’s accent in speaking of “po-leese,” or arguing “black folk don’t testify against black folk” to explain why witnesses were reluctant to testify. *State v. Walker*, 182 Wn.2d 463, 488, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring); *State v. Monday*, 171 Wn.2d 667, 676, 257

P.3d 551 (2011). Appeals to racial prejudice need not be blatant to undermine the fairness of a trial. *Monday*, 171 Wn.2d at 678. Subtle appeals to racial prejudice are “[p]erhaps more effective Like wolves in sheep’s clothing, a careful word here and there can trigger racial bias” that affects the verdict. *Id.*

Jurors also “have the right to participate in jury service free from racial discrimination.” *State v. Jefferson*, _ Wn.2d _, 429 P.3d 467, 470 (2018). When racial discrimination arises in selecting jurors, this bias “harms not only the accused,” but also “shamefully belittles minority jurors,” and “undermines public confidence in the fairness of our system of justice.” *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017) (citing *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

The persistence of “racial and ethnic disproportionality in [Washington’s] criminal justice system is indisputable.” *Saintcalle*, 178 Wn.2d at 54, quoting Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington’s Criminal Justice System 1 (2011). Based on statistical evidence showing jurors were significantly more likely to impose the death penalty on black

defendants than similarly situated white defendants, this Court recently invalidated the death penalty. *State v. Gregory*, __ Wn.2d __, 427 P.3d 621, 630 (2018). It offends “society’s standards of decency” and “fundamental fairness” to permit this punishment when racial bias plays a role in who receives the death penalty. *Id.* at 635-36.

If racial prejudice among jurors plays a role in convicting a person, it undermines the core constitutional belief that the jury trial is a bulwark of liberty. *Pena-Rodriguez*, 137 S. Ct. at 867. It is the court’s “duty” to confront racial animus in the justice system, including during deliberations. *Id.*

2. *Evidence tending to show racial bias among deliberating jurors undermines the validity of a verdict and requires a court’s meaningful inquiry.*

In most instances, the content of jury deliberations are secret and courts may not inquire into what motivated a jury’s verdict. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 817, 425 P.3d 807 (2018). But this rule does not apply when evidence arises about racial discrimination among deliberating jurors. *Pena-Rodriguez*, 137 S. Ct. at 868; *State v. Jackson*, 75 Wn.App. 537, 542, 879 P.2d 307 (1994).

In *Pena-Rodriguez*, the Supreme Court acknowledged that racial bias among deliberating jurors is an “evil that, if left unaddressed,

would risk systemic injury to the administration of justice.” 137 S. Ct. at 868. Pragmatically, racial bias is “less likely caught” by other safeguards because deliberations are not public, and the stigma attached to bigotry makes people less likely to openly admit its existence. *Id.* It is “necessary” to root out this racial bias to protect the central premise of the Sixth Amendment’s right to trial by jury. *Id.* at 689.

In *Pena-Rodriguez*, several jurors complained post-verdict that one juror “expressed anti-Hispanic bias” during deliberations. *Id.* at 861. The trial court acknowledged the juror’s apparent bias but said it was bound by Colorado’s “no-impeachment rule” that prohibited courts from questioning the jurors’ decision-making process. *Id.* at 862.

The Supreme Court noted that unlike Colorado, many other states have long treated allegations of racial discrimination as an exception to the rule barring inquiry into the jury’s motivation or decision-making process. 137 S. Ct. at 865, 886 (citing *inter alia Jackson*, 70 Wn. App. at 738). It agreed with these states that “racial bias is different from other juror misconduct.” *Id.* at 868. It adopted a “constitutional rule that racial bias in the jury system must be addressed” by the courts, including jury deliberations. *Id.* at 868-69.

The Court ruled that if a juror “relied on racial stereotypes or animus,” a court must make “further judicial inquiry.” *Id.* at 869. While “every offhand comment” may not constitute impermissible bias, the Sixth Amendment does not permit a verdict to stand when a juror makes statements that “tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.” *Id.*

Pena-Rodriguez left it to the states to implement standards and determine the evidentiary threshold needed to ensure racial discrimination does not improperly taint jury verdicts. *Id.* at 870. Under existing Washington law, when there is some evidence that racial discrimination played a role in the jury’s verdict, this allegation undermines the fairness of the trial and the perception of impartiality that is critical to the criminal justice system. *Jackson*, 75 Wn. App. at 542; *Turner v. Stine*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009).

In *Jackson*, after convicting a black defendant, a juror told defense counsel she overheard another juror speak derisively about “coloreds” he encountered on a recent trip home and with whom he did not like to socialize. 75 Wn. App. at 539-40. The juror made these remarks in a side conversation with another juror, not during deliberations. *Id.* The trial judge noted the term “colored” was no

longer acceptable but it is not inherently derogatory and uttering it does not show the juror was prejudiced. *Id.* at 541. The judge refused to inquire further without direct evidence of racial prejudice affecting deliberations. *Id.* at 541-42.

But the Court of Appeals ruled the juror's comments indicated the juror's "predisposition" toward making negative generalizations about African-Americans. *Id.* at 543-44. "Presumptively" the juror's discriminatory views "could affect his ability to decide Jackson's case fairly and impartially." *Id.* at 543. The defendant was African-American and the outcome turned on the jurors' assessment of witnesses' credibility, including African-American witnesses. *Id.* The juror's negative remarks about African-Americans constituted prima facie evidence of racial bias. *Id.* at 543-44. The trial court never questioned the jurors the issue. The Court of Appeals ordered a new trial because too much time had passed to meaningfully inquire into the potential effect of racially biased views held by a juror. *Id.* at 544.

Similarly, in *Turner*, after the jury returned a verdict against the plaintiff in a civil case, two jurors reported that some jurors made fun of the plaintiff's lawyer's Japanese surname. 153 Wn. App. at 584. One juror also made a reference to December 7, implicitly invoking the

anniversary of Pearl Harbor. *Id.* There was no direct evidence that anti-Japanese bias affected a juror's vote. But the Court of Appeals ruled these words revealed racial bias. Because seemingly racially derogatory words were uttered in the context of reaching a verdict against the attorney's position, it was "reasonably likely" racial bias "affected the jurors' objective analysis of the material issues in the case." *Id.* at 587.

As *Jackson* and *Turner* demonstrate, when evidence indicates a juror harbors a racial bias, it is not permissible to presume this bias had no effect on the verdict. A juror who expresses less tolerance for people of the defendant's race is "reasonably likely" to be affected by it. 153 Wn. App. at 587. At the least, the court must meaningfully inquire into the evidence that a juror harbored some amount of racial bias that could affect juror's decision-making process. *Jackson*, 75 Wn. App. at 544.

3. *The court curtailed any inquiry into a juror's claim that racial hostility impacted the verdict.*

The day after the jury reported its verdict, Juror 6 contacted defense counsel and reported racial animus during deliberations. 4/6RP 105. Before defense counsel further investigated, the prosecution moved to bar the defense from communicating with jurors, citing juror privacy. CP 296-97. The court agreed and prohibited the parties from

contacting jurors. 3/10RP 23. Instead, the court sent the jurors a letter thanking them for “reaching a unanimous decision” and telling them, “if you want to talk to the lawyers . . . you can call them.” CP 292.

Juror 6 explained in a declaration that other jurors “repeatedly” accused her of favoring Mr. Berhe “because I was the only African-American juror on the panel in a trial with an African-American defendant.” CP 475. She described being “disparaged,” “mocked as ‘stupid’ and ‘illogical’” and “personally ridiculed in a way the other dissenting jurors were not.” CP 475. In one instance, she was “loudly mocked” by several jurors who assumed her discussion of Mr. Berhe’s compliance with the arresting officers was a “comment on police misconduct towards African- Americans.” CP 476.

Six jurors voluntarily contacted the prosecutor and denied being motivated by racial bias or observing racially biased motives toward Juror 6. CP 323-28. Five other jurors did not respond. This inquiry was not designed to produce a meaningful assessment of the existence racial bias in the jury room.

It is well-documented that people are reluctant to admit their own bias. *See, e.g., McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (Brennan, J.,

concurring) (observing that the bias of a juror will rarely be admitted by the juror himself and the juror “may be unaware of” own bias); *Williams v. Pennsylvania*, _U.S. _, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) (bias is “difficult to discern in oneself”). The questions the prosecution posed to some jurors do not substitute for a judicial hearing on whether racial bias affected any jurors.

One juror admitted they consulted Juror 6 for the “norm in hip hop culture of baggy pants without a belt and the need to hold them up with one’s hands.” CP 326. “Hip hop culture” may be a proxy for negative stereotypes of young, black men. *See, e.g.*, Jeffrey A. Williams, *Flagrant Foul: Racism in “The Ron Artest Fight,”* 13 *UCLA Ent. L. Rev.* 55, 58 & n.18 (2005) (quoting Rush Limbaugh equating “gang culture” with “hip hop culture” and violence by African American men). Jurors also assumed Juror 6 was accusing the police misconduct toward black people even when she had not made that claim, and they “loudly mocked” her in response. CP 476.

These examples underscore Juror 6’s perception that she was subjected to racial stereotypes and not treated as an impartial participant by jurors. They show the jury was keenly aware of Mr. Berhe’s race, even though the identity of the shooter rested on varying descriptions of

clothes, not race. Jurors' generalization that Juror 6 favored Mr. Berhe due to their shared race is evidence of jurors who are predisposed to making generalizations drawn from racial stereotypes. *Jackson*, 75 Wn. App. at 544.

The defense expected the court would conduct an evidentiary hearing under *Jackson*. 4/6RP 93; CP 456, 459. The prosecutor agreed the court should hold a hearing and "actually call in the jurors" if there was a prima facie showing of racial bias. 4/6RP 100. Neither the prosecutor nor the judge doubted that Juror 6 "felt" she was treated hostilely due to racial bias. 4/6RP 101, 109-10.

But the court decided Juror 6's perception of bias was not evidence of it. 4/6RP 109-10, 111. The court surmised that it was "equally likely" she was mistreated because she was a "holdout" for a long time, although it is unclear how the court discerned this lengthy lone "holdout" status. 4/6RP 111. The court never questioned the jurors and did not let the parties contact jurors to investigate.

Under *Jackson*, a testimonial evidentiary hearing is "always the preferred course of action" when prima facie evidence indicates racial bias during jury deliberations. 75 Wn. App. at 543-44. A hearing allows for questioning of Juror 6 so the court may make "a determination

based on its assessment of the juror's response, credibility, and demeanor." *Id.* at 544. It allows the parties to examine jurors "about whether race played a role in their deliberations." *Id.*

Juror 6's declaration did not name the jurors who berated her, and the court had no idea if the six jurors who denied being motivated by racial bias in writing were the jurors who mocked, ridiculed, or accused her of favoring Mr. Berhe because of her race. The court's truncated inquiry barred the parties from seeking full information about the context and content of Juror 6's complaints, despite agreeing that Juror 6 honestly believed racial discrimination affected the verdict.

4. The court applied the wrong standard for assessing accusations of racial bias during deliberations.

The entire jury need not be racially biased to violate the right to a fair trial and impartial jury. "[T]he Sixth Amendment is violated by "the bias or prejudice of even a single juror. One racist juror would be enough." *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (internal citation omitted).

It is a "straightforward racial stereotype and generalization" to assume a black juror will favor the defendant due to their shared race. *Saintcalle*, 178 Wn.2d at 85 (Gonzalez, J. concurring); see *Sassen Van*

Elsloo, 191 Wn.2d at 840 (impermissible to assume juror’s “tribal affiliation would influence her view of tribal affiliate’s testimony”).

It is also impermissible discrimination to act on “an antiquated belief” that a black person is less qualified to serve as a juror “due to insufficient integrity, intelligence, or judgment.” *Id.* at 85; *see also Batson*, 476 U.S. at 104-05 (Marshall, J., concurring) (“crude, inaccurate racial stereotype” to deem black juror more sympathetic to black defendant or that black jurors lack sufficient “intelligence, experience, or moral integrity”).

If a lawyer struck a juror because the juror’s race aligned the juror with the defendant, this conduct would qualify as purposeful discrimination. *Batson*, 476 U.S. at 97. Here, jurors “repeatedly” accused Juror 6 of aligning herself with Mr. Berhe solely because both were black, and also accused her of being stupid and having less integrity than the rest of the jurors. CP 475-76. These remarks are evidence of racial discrimination.

Discrimination is not “any less pernicious” if it is not documented by outright racial slurs. *Saintcalle*, 178 Wn.2d at 48-49. It undermines the efforts this Court has undertaken to prohibit race-based

jury selection when, once selected, a black juror is marginalized or mistreated due to her race. *See* GR 37.

“Trial courts should do all within their means to ensure that verdicts have not been compromised by jurors who harbor prejudice towards any minority.” *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (reversing conviction where juror called key witness “cheap Jew” and used derogatory tone).

It jeopardizes the “very integrity of the courts” when racial discrimination calls into doubt “the jury’s neutrality and undermines public confidence in” an adjudication. *Miller-El v. Dretke*, 545 U.S. 231, 238, 125 S. Ct. 2317, 162 L. Ed.2d 196 (2005).

The racial hostility Juror 6 described was rooted in the racial stereotype that a black juror could not fairly assess evidence against a black man and that her doubts about the evidence reflected stupidity, unlike other dissenting jurors. CP 475. Juror 6’s complaints merited a meaningful inquiry based on the reasonable likelihood that racial sentiments affected deliberations. The court’s failure to inquire further casts serious doubt on the fairness and impartiality of the jurors and undermines confidence in the verdict.

5. *The remedy is a new trial.*

A new trial is the appropriate remedy when it is no longer possible to conduct a meaningful evidentiary hearing into racial discrimination of trial participants due to the passage of time. *Erickson*, 188 Wn.2d at 735; *Jackson*, 75 Wn. App. at 544.

The jury returned its verdict three years ago. 3/1RP 3363. The trial judge has retired.² Juror 6 promptly explained that palpable racial hostility impacted deliberations. CP 475-76. It is no longer possible to accurately ascertain the content and context of comments made during deliberations. Yet it remains reasonably likely racial stereotypes affected the verdict. The case depended on assessing the credibility and behavior of black acquaintances (Mr. Berhe, Mr. Washington, and Mr. Williams) and Caucasian observers or accusers who were witnesses for the prosecution. Ex. 20 (pictures of central witnesses). Other suspects had motive and opportunity to commit the crime or lie about what happened. Opening Brief at 7-10, 59-60. The potential that racial bias affected the jury's deliberations, and the impossibility of meaningfully

² See Inslee makes two appointments to the King County Superior Court (March 6, 2018), available at: <https://www.governor.wa.gov/news-media/inslee-makes-two-appointments-king-county-superior-court> (last viewed Jan. 11, 2019).

assessing allegations of overt and implicit racism due to the passage of time, make a new trial the appropriate remedy. *Jackson*, 75 Wn. App. at 544; *Erickson*, 188 Wn.2d at 735.

D. CONCLUSION.

Tomas Berhe respectfully requests this Court reverse his convictions and remand his case for further proceedings.

DATED this 14th day of January 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written in a cursive style.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
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)
 v.) NO. 95920-0
)
 TOMAS BERHE,)
)
 Petitioner.)

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