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NO. 95920-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS MUSSIE BERHE,

Appellant.

RESPONDENT'S ANSWER TO AMICI CURIAE

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A. INTRODUCTION

The State and Amici share the goal of ensuring that jury trials and jury verdicts are free from racial bias and discrimination. Due process demands no less. The State and Amici also agree that where a party presents sufficient evidence that racial bias played a part in deliberations, a trial court must take appropriate steps to determine whether the verdict was reached free from racial bias and discrimination.

The petitioner has asked this Court to apply existing law, i.e., that where the moving party has made a *prima facie* showing that racial bias played a part of deliberations, the trial court should hold an evidentiary hearing. In contrast, Amici asks this Court to substantially broaden the existing rule to eliminate trial court discretion and require that where a juror in an affidavit “alleges bias or discrimination in deliberations,” a trial court must conduct a full evidentiary hearing. Amici further asserts that because Juror # 6 made such an allegation in an affidavit, the trial court’s failure to conduct a full evidentiary hearing was reversible error.

The State respectfully suggests that the current rule should be retained. That rule requires a *prima facie* showing of racial bias and most appropriately harmonizes the dual interests at stake; the

secrecy of the jury process – which encourages honest, robust and candid deliberations as well as stability and finality of verdicts -- on the one hand, with the need to protect jurors from racial harassment during deliberations, which ensures that verdicts are untainted by racial bias.

In the case at bar, the Honorable Mariane Spearman did not abuse her discretion in finding that while Juror # 6 may have subjectively believed implicit racial bias affected the jury's attitudes towards her, she did not allege conduct which, objectively viewed, established a *prima facie* case of racial discrimination that would warrant a full evidentiary hearing.

B. STATEMENT OF FACTS

Due in part to the arguments made by Amici, it is important to understand the factual details of the crime in order to understand the jurors' reactions to Juror # 6 during deliberations, and the trial court's assessment of Juror # 6's affidavit. Those facts are detailed in the Court of Appeals Brief of Respondent.

In short, a Black male was seen walking up to a white Lexus in the parking lot of the Eastlake Market and firing four shots

through the window of the Lexus.¹ Everett Williams, seated in the passenger seat, was struck four times and died at the scene; Mike Stukenberg, seated in the driver's seat, was struck once and survived.²

The shooter was observed walking away from the car and getting into a Chevy Impala that then sped away.³ Officers observed the Impala getting onto I-5 and stopped the car a short time later.⁴ Tomas Berhe and Elijah Washington were the two occupants.⁵ Also in the car was Berhe's .45 semiautomatic handgun, which ballistics showed was the murder weapon.⁶ An independent civilian witness positively identified Berhe as the man he saw get into the Impala and drive away.⁷ Berhe's fingerprints were found on the exterior of the white Lexus.⁸ Eastlake Market security video showed that Washington was inside the store at the time of the shooting.⁹

¹ 1/27RP 679-80, 683, 763-65.

² 1/27RP 709-10; 2/18RP 2977.

³ 1/27RP 794, 798, 800; 1/28RP 831, 950-56, 959, 984.

⁴ 2/1RP 1196-97, 1223-24.

⁵ 2/1RP 1102, 1235-36, 1251.

⁶ 2/2RP 1466-68; 2/4RP 1931-33; 2/10RP 1985-86; 2/17RP 2698.

⁷ 1/27RP 811-13; 1/28RP 853, 876, 878.

⁸ 2/18RP 2900-08.

⁹ 2/11RP 2222, 2235-38, 2252.

C. ARGUMENT

1. THE CURRENT RULE THAT ALLOWS FOR A VERDICT TO BE CHALLENGED FOR RACIAL BIAS IS PRACTICAL AND BASED ON SOUND JUDICIAL POLICY

One of the central foundations of our criminal justice system is the right to be tried by a jury of one's peers. Pena-Rodriguez v. Colorado, ___ U.S. ___, 137 S. Ct. 855, 860, 197 L. Ed. 2d 107 (2017). A paramount component of a jury trial is the requirement that deliberations be private. Id. at 865. Private deliberations, among other important considerations, "promote full and vigorous discussion" of the issues by the deliberating jurors. Id. A concomitant jury trial right is the right to an unbiased and unprejudiced jury. State v. Parnell, 77 Wn.2d 503, 507-08, 463 P.2d 134 (1969).

"Actual bias" is the existence of a state of mind on the part of a juror wherein that juror cannot try a case impartially and without prejudice to the substantial rights of one of the parties. State v. Jackson, 75 Wn. App. 537, 542-43, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995); RCW 4.44.170(2).

"Implicit bias" is "the set of automatic preferences deep in our brains that instantaneously influence our decisions and how we

perceive people and situations without our conscious awareness.”¹⁰

“Implicit bias” is “something we all have simply because we’re human.”¹¹

Implicit biases “encompass both favorable and unfavorable assessments, and are activated involuntarily and without an individual’s awareness or intentional control.”¹² “Everyone possesses them, even people with avowed commitments to impartiality, such as judges.”¹³ There is no reason to assume jurors are any different. Assuming these things to be true, it is unlikely that implicit bias can be totally eliminated from the jury system. Rather, through awareness and education of practitioners, judges, and jurors, the potential effects of implicit bias can be minimized.

Along these lines, in recent years there has been an added emphasis placed on drawing jurors from varied backgrounds as a means to counter-balance unconscious biases, and on educating jurors on how to recognize and address their own unconscious biases. For example, the list of citizens eligible for jury service has expanded from registered voters age 21 and older, to persons 18

¹⁰ Attorney Jeffery Robinson, (jury video at 1:25-2:35)
www.wawd.uscourts.gov/jury/unconscious-bias.

¹¹ Id.

¹² kirwaninstitute.osu.edu/research/understanding-implicit-bias.

¹³ Id.

years or older who possess a Washington ID card or driver's license. State v. Cienfuegos, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001); RCW 2.36.070. General Rule 37 was adopted to address the shortcomings of the three-part Batson test¹⁴ used to determine whether a peremptory strike was impermissibly racially motivated. See State v. Jefferson, 192 Wn.2d 225, 243-44, 429 P.3d 467 (2018). And jurors are now educated about their own unconscious biases. For example, all prospective jurors in King County are now shown an educational video aimed at reducing the impact implicit bias may have in trial.¹⁵

Once trial begins, but before testimony is taken, and again at the conclusion of the case, jurors are specifically instructed that they must decide the case in an unbiased manner.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

¹⁴ Referring to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

¹⁵ See Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response, 86 Fordham L. Rev. 3091, 3110 (2018) (citing Unconscious Bias, U.S. District Ct., W. District Wash., www.wawd.uscourts.gov/jury/unconscious-bias).

WPIC 1.01; WPIC 1.02. In addition, trial courts now routinely provide jury instructions on implied bias, like the following:

Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions. To reach a fair decision, it's important to put aside our automatic assumptions, called stereotypes or biases. Sometimes to do this, we all have to look at our thinking to be sure we are not unknowingly reacting to stereotypes or jumping to conclusions. Social scientists and neuroscientists studying the way our brains work have shown that, for all of us, our judgments are influenced by our backgrounds, experience, and stereotypes we've learned. Our first responses are like reflexes, and just like our knee reflexes, they are quick and automatic. Often, without our conscious awareness, these quick responses may mean that hidden biases influence how we judge people and even how we remember evidence or make judgments.

It is not enough to tell ourselves or the lawyers and judge during jury selection that we are open-minded. To reach a decision in this case it's important to be more reflective. Social science research has taught us some ways to be more careful in our thinking about individuals and evidence:

- Take all the time you need to test what might be reflexive unconscious responses and to think carefully and consciously about the evidence.
- Focus on individual facts, don't jump to conclusions, which may often be biased by stereotypes.
- Try putting yourself in the other person's place.
- Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people presenting looked different, if they belonged to a different group? You must each decide this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different

backgrounds. Working together, a fair result can be achieved.

American Bar Association Draft Instruction.¹⁶ Jurors are presumed to follow instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). All of the above rules and procedures are in place to ensure that jury deliberations are as free of racial bias as possible. See Pena-Rodriguez, 137 S. Ct. at 871.

In the issue at bar, the focus must necessarily be retrospective. Following State v. Jackson, and Pena-Rodriguez, a moving party may attack a jury verdict based on a claim of racial bias where the moving party makes a *prima facie* showing that racial bias was a motivating factor in a juror's vote to convict. Pena-Rodriguez, 137 S. Ct. at 869; State v. Jackson, 75 Wn. App. at 543. This standard provides the proper balance between protecting the secrecy and integrity of the jury system, and the right to a just and unbiased deliberation process.

One part of the rule recognizes that the private deliberative process is critical to a jury trial in that it encourages "deliberations that are honest, candid, robust and based on common sense."

¹⁶ Criminal Justice Section of the American Bar Association, Panel Presentation, American Bar Association Annual Meeting, August 9, 2013, www.americanbar.org/content/dam/aba/events/criminal_justice/annual2013/Implicit_Bias_aijpanel.doc.

Pena-Rodriguez, 137 S. Ct. at 861. “Probing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise.” Id. at 871. Thus, to protect the integrity of the deliberative process, and enhance free and open discussion by the jurors, there exists the “no impeachment rule” whereby evidence from a juror may not be used to impeach the jury’s verdict. Id. at 861, 863. The rule is intended to ensure “stability and finality to verdicts” 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.” Id. at 861, 865. The rule also serves the purpose of protecting jurors from being “harassed or annoyed by litigants seeking to challenge [an unfavorable] verdict” once the jurors have returned to their daily affairs. Id. at 865, 869.

Because courts are wary of the evil consequences likely to result from post-verdict inquiries—subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts—such inquiries are not undertaken in the absence of reasonable grounds.

United States v. Baker, 899 F.3d 123, 131 (2d Cir.), cert. denied, 139 S. Ct. 577 (2018) (internal quotation and citations omitted).

The requirement that the moving party present a *prima facie* case of racial bias, and allowing for trial court discretion in determining whether this standard has been met and what steps should be taken, strikes the proper balance between addressing specific claims of racial bias in deliberations and protecting the deliberative process from vague claims of improper motive. This standard achieves this balance while not impeding the moving party's ability to challenge a verdict where there are legitimate grounds to do so. See e.g. State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994) (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"); Cienfuegos, 144 Wn.2d at 232 ("bare allegation" the jury pool was not a fair representation of the community was insufficient "to bring this issue into play"). Once a specific claim of bias is raised, "a trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct." Turner v. Stime, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009).

The standard proposed by Amici, however, would undermine juror secrecy without substantially increasing the chances of

detecting racial bias. The standard also could encourage some lawyers to obtain statements former jurors post-verdict via manipulation or intimidation.

Jurors are ordinary citizens asked to appear at a courthouse to perform their civic duty. At the end of their service, they are told that they have fulfilled their civic duty. Jurors do not expect to be pursued by an investigator or lawyer making an unannounced evening visit to their home. They do not expect to be cross-examined by skilled trial attorneys.

This case illustrates some of the problems that can arise under Amici's proposed standard. Here, the court became aware that defense counsel was contacting jurors because a juror called the court and complained about the unwanted contact. 3/10RP 7, 11. Jurors are not trial witnesses. When information comes to light suggesting the possibility of juror misconduct, the court should immediately be notified so a determination can be made by the court how to proceed.

United States v. Baker, *supra*, provides a good example. A juror left a message with defense counsel suggesting juror misconduct may have tainted the verdict. Defense counsel then notified the court and sought "further guidance from the court on

how to proceed.” Id. at 128-29. After all, if the goal really is to accurately and justly assess whether racial bias played a part in deliberations, then jurors should not be subjected to private questioning by persuasive and skilled advocates. Rather, the juror should be asked to appear in court, or the juror should be interviewed at a meeting with both parties that is witnessed or recorded.

Here, Juror # 6 came into the court post-trial in emotional distress. 3/10RP 6. The court referred her to a counselor. 3/10RP 6. There is no indication Juror # 6 said anything about racial bias during deliberations. The defense then had contact with Juror # 6. It was nine days after the verdict, through a series of emails, that the prosecutor became aware that the defense was seeking a continuance of sentencing to pursue a claim of jury misconduct. CP 536-37. The defense did not disclose they were pursuing a claim of racial bias. Id. Concerned that the defense had failed to present a factual basis to support their continuance motion and contacts with jurors, the State set a hearing. CP 536; 3/10RP 2.

In their brief to the court, the defense failed to mention that they had contacted Juror # 6 or that they were pursuing a claim of racial bias. CP 532-33, see also CP 177B (State’s response noting

the “vaguely explained” need to investigate). At the hearing, the defense obtained their continuance, but again said nothing about pursuing a racial bias claim.¹⁷ 3/10RP 2-25.

When the defense-prepared affidavit of Juror # 6 was finally submitted to the court, the defense did not disclose the circumstances under which the juror was questioned or how the issue of racial bias was first brought up. Further, defense counsel either did not record their interview of Juror # 6, or the interview was recorded but not provided to the court. When the parties next appeared in court, instead of having Juror # 6 appear and present evidence to the court, the defense relied solely on the affidavit they prepared and had Juror # 6 sign. Thus, it was this single affidavit that the defense asked the court to find established a *prima facie* case of racial bias. Under the circumstances here, it did not.

¹⁷ Berhe asserts that at the State’s behest the court prevented the defense from investigating their claim of racial bias by barring counsel from contacting jurors directly. This is incorrect. The court sent a letter to each juror indicating that the attorneys sought to speak with them. CP 292. Because neither the court nor the State was notified that the defense was pursuing a claim of racial bias, there was no basis at that point to apply the exception to the no impeachment rule.

2. JUDGE SPEARMAN DID NOT ABUSE HER DISCRETION IN FINDING THAT THE AFFIDAVIT DID NOT ESTABLISH A *PRIMA FACIE* CASE OF RACIAL BIAS

Amici asserts that Juror # 6 was treated differently than other jurors who initially did not vote to convict, and that from this disparate treatment this Court should “infer” that implicit racial bias played a part in the deliberations. This assertion fails because the evidence and affidavits show that there were sound reasons for other jurors to fault Juror # 6’s positions in deliberations.

An “inference” is “the act of passing from one or more propositions, statements, or judgments considered as true to another the truth of which is believed to follow from that of the former.” Webster’s Third New International Dictionary 1158 (1993). To draw the inference that jurors’ conduct towards Juror # 6 was based on implicit racial bias, rather than an honest disagreement about the evidence, there must exist a showing that jurors similarly situated to Juror # 6 were treated differently. The inference Amici asks this Court to draw – that Juror # 6 was treated badly based on implicit racial bias, might be reasonable if the other dissenting jurors had taken similar positions as Juror # 6 regarding the facts of

the case, but were treated differently than Juror # 6. But that is not what the record reflects.

For example, Juror # 6 states that she was concerned because the “State’s case rested on wholly circumstantial evidence” and that when she “tried to discuss the lack of concrete evidence,” other jurors were “outright dismissive.” CP 475. But there was substantial direct evidence. An independent civilian witness, James Brighton, witnessed the shooting from his balcony and watched the shooter walk across the parking lot whereupon he heard a car door slam and then saw a dark sedan drive away.¹⁸ Brighton’s description of the shooter matched Berhe.¹⁹ A second civilian witness, Matthew Bellando, heard the shots and saw a Black male walking where Brighton said he saw the shooter walking, and then get into a dark Chevy Impala and speed away.²⁰ Shortly thereafter, the Impala was pulled over fleeing from the scene, with Berhe and the murder weapon inside.²¹ Bellando positively identified the car and Berhe.²² Berhe’s fingerprints were

¹⁸ 1/28RP 950, 953-56, 959, 984.

¹⁹ 1/28RP 877, 887, 954-55.

²⁰ 1/27RP 786, 789, 794, 798, 800; 1/28RP 831.

²¹ 2/1RP 1102, 1196-97, 1223-24, 1235-36, 1251.

²² 1/27RP 811-13; 1/28RP 853, 876, 878.

found on the exterior of the victim's car, and ballistics showed that the gun in Berhe's car – a gun witnesses had seen Berhe with in the past -- was the murder weapon.²³

Certainly a juror could question Brighton and Bellando's observations, but just as certainly jurors could vigorously disagree that the case depended solely on "circumstantial evidence." Importantly, there is no claim that any juror other than Juror # 6 espoused the position that the State's case was purely circumstantial.

Similarly, Juror # 6 states that when she argued that Berhe could have taken the gun from the real shooter, she was "mocked as stupid and illogical." CP 475. There were only two people in Berhe's Impala stopped fleeing the scene – Berhe and Elijah Washington.²⁴ Washington could not have been the shooter because security video showed he was inside the market when the shots were fired.²⁵ No evidence was presented that anyone had contact with the shooter from the time the shots were fired into the victim's car and the shooter walked over to Berhe's Impala. Thus,

²³ 2/2RP 1466-68; 2/17RP 2699-2704; 2/18RP 2900-08.

²⁴ 2/1RP 1235-36, 1251; 2/4RP 1931-33; 2/10RP 1985-86; 2/17RP 2699-2704.

²⁵ 2/10RP 2013-14; 2/11RP 2222, 2235-38, 2252.

jurors could fairly criticize the suggestion that Washington or another person -- unseen by any witness -- was the real shooter and that Berhe willingly took the gun from the shooter and fled the scene. Again, there is no claim that any other juror espoused Juror # 6's position that Berhe, inexplicably and for no apparent reason, took the gun from the real shooter.

Moreover, Juror # 6 primarily expressed her subjective beliefs about deliberations, stating that "I *felt* personally attacked and belittled during the deliberation process." CP 475 (emphasis added). Such feelings are common to hold-out jurors, as Judge Spearman observed. Juror # 6, however, drew a different conclusion. "I *felt* these attacks carried an implicit racial bias." CP 475 (emphasis added). The other jurors saw it differently and explained their reasoning, as did Judge Spearman.

Juror # 13 described that "jurors were frustrated with Juror # 6 because she seemed very closed minded about all the evidence being presented." CP 335. Juror # 14 stated that "Juror # 6 was challenged many times because of her opinion and for that reason alone." CP 338. "The other jurors" she added, disagreed with her and often she could not support her position with any of the evidence." CP 338. Juror # 6 would proclaim that "I just don't feel

like he's guilty,' which would cause the other jurors to challenge her." CP 338.

In addition, Juror # 6 never identified any particular juror as exhibiting racial bias. Juror # 6 also never identified any particular statement as showing racial bias. This, despite the fact that seasoned trial attorneys, who knew the showing of racial bias they had to make, questioned Juror # 6 and prepared her affidavit.

The evidence supports Judge Spearman's finding that while Juror # 6 may have subjectively believed the criticism of her or her position during deliberations was based on racial bias, the evidence did not show such bias actually existed.

One must also ask what purpose a hearing would have served. It would not have been to confirm or disaffirm whether any particular statement had been made because none had been identified. Would it be to probe the jurors' implicit bias? And if so, how? If the mere suggestion of implicit racial bias can impeach a verdict, then no verdict will be immune from impeachment. The jury system can work to combat implicit biases, but it cannot eliminate them. After all, all people have implicit or unconscious biases.

D. CONCLUSION

For the reasons cited above, this Court should reject Amici's request to create a broad new rule that would require an evidentiary hearing into any allegation of racial bias during deliberations. Such a rule is practically unworkable and unnecessary.

DATED this 6th day of March, 2019.

Respectfully submitted,

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