Supreme Court No. 104100-4

COA No. 86840-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

AIDEN FETTERS,
Petitioner.

AMENDED BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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I. IDENTITY AND INTEREST OF AMICUS

The identity and interest of amici are set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

II. INTRODUCTION

The Washington Supreme Court has long recognized the virtue of correcting its mistakes as an exception to the doctrine of *stare decisis*:

> "[J]ustice requires us to admit our mistakes when we make them and to overrule precedent that is demonstrably incorrect and harmful."

Cockrum v. C.H. Murphy/Clark-Ullman, Inc., ___ P.3d ___, 102881-4, 2025 WL 1523125, at *1 (2025). This stands in contrast to the court's obligation to conform its precedent to that of United States Supreme Court. See *State v. Hall-Haught*, ___ P.3d ____,102405-3, 2025 WL 1523492, at *5 (2025), *as amended* (May 30, 2025). While Petitioner argues simply that this Court's holding in *State v. Brunson*, 128 Wn.2d 98, 905 P.2d 346 (1995) is inconsistent with binding precedent established by *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), Amicus Washington Association of

Criminal Defense Lawyers (hereinafter "WACDL") seeks to persuade this Court that it should accept review and more broadly overrule its precedent allowing trial courts to instruct juries on permissive inferences. In addition to offending due process as explained in Fetters's petition for review, permissive inference instructions invade the province of the jury in violation of Article IV, section 16, and have the harmful effect of exacerbating disparities in the criminal legal system based on race, class and other intersectional characteristics that shape jurors' experience of the world and the assumptions they rely upon to draw inferences about the state of mind of defendants.

III. ARGUMENT

A. The holding in *Brunson* is incorrect because it failed to account for material differences between WPIC 60.05 and the instruction given in the precedential federal case therein relied upon.

The Due Process Clause of the federal Constitution requires that 'permissive inference' instructions "not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Cnty. Court of Ulster Cnty., N. Y. v. Allen*,

442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979), citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). In *Ulster County* the court held that the permissive instruction in question did not offend the due process clause. *Id*.

Sixteen years later, this Court in *Brunson* relied heavily on *Ulster County* to resolve the same question with respect to WPIC 60.05. *State v. Brunson*, 128 Wn.2d 98, 105, 905 P.2d 346, 349 (1995). In *Ulster County*, the trial court instructed the jury to "consider all circumstances tending to support or contradict such inference, and to decide the matter for itself." *Ulster County*, 442 U.S. at 140. In explaining why this particular instruction did not undermine the aforementioned responsibility of the fact finder at trial, the court held:

> In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference that all four occupants of the car had possession of the two loaded handguns and to decide the matter for itself[.]

Id. at 162. Although this instruction did not explicitly tell jurors the inference itself was insufficient alone to support the finding of criminal intent, this conclusion is implicit because the

instruction makes clear that, upon a finding of unlawful entry, further consideration of all the evidence was mandatory before finding criminal intent.

By contrast, WPIC 60.05 permits the jury to find criminal intent solely on the inference. The issue with WPIC 60.05 is not that it suggests the jury may disregard other evidence, but that it suggests the jury could weigh the inference of criminal intent flowing from unlawful entry *so heavily* as to alone overcome the presumption of innocence even were the jury to give other evidence of criminal intent no weight at all.

B. *Deal* is incorrect in its holding that WPIC 60.05 does not violate Article IV, section 16 of the Washington Constitution.

The sacrosanct role of jurors – rather than judges – in determining what is rational and reasonable with respect to the facts of cases is enshrined in our state Constitution: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Article IV, section 16, Washington State Constitution. Despite this imperative, permissive inference instructions appear designed to protect the State from irrational deliberations by suggesting to juries the

possible factual inferences that may be drawn from the evidence.[1]

Yet, absent any further explanation, this Court in 1996 concluded it was "satisfied" that just such a suggestion as to a legally acceptable *factual* determination "did not amount to a comment on the evidence." *State v. Deal*, 128 Wn.2d 693, 704, 911 P.2d 996, 1002 (1996). The challenged instruction therein was identical in relevant portion to WPIC 60.05. Id. at 697. In being so satisfied, the *Deal* Court ignored long-standing precedent interpreting Article IV, section 16 as an attempt to "prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, *or sufficiency* of the evidence." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982, 986 (2007)(emphasis added). It further ignored the question

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[1] *See* Mueller, Christopher B. and Kirkpatrick, Laird C. and Richter, Liesa, §3.14 Inferences in Criminal Cases (2018). C. Mueller, L. Kirkpatrick, & L. Richter, Evidence §3.14 (6th ed. Wolters Kluwer 2018), GWU Law School Public Law Research Paper No. 2018-54, GWU Legal Studies Research Paper No. 2018-54, Available at SSRN: https://ssrn.com/abstract=3275019. "These instructions serve an important purpose. In effect, they urge the jury to consider the implications of circumstantial evidence and assure the jury that it may draw important conclusions from such evidence."

altogether of whether such an instruction amounted to charging the jury with respect to a matter of fact; "[I]t is for the jury alone to determine the weight of the evidence submitted to them, without interference *or suggestion* on the part of the court." *Patten v. Town of Auburn*, 41 Wn. 644, 649, 84 P. 594, 595–96 (1906)(emphasis added). *Black's* defines a "suggestion" as "the indirect presentation of an idea." SUGGESTION, *Black's Law Dictionary* (12th ed. 2024).

Division I of the Washington Court of Appeals recently dismissed a challenge to a permissive inference instruction because it "did no more than accurately state the law." *State v. Yaffee*, 21 Wn. App. 2d 1011 (2022). By employing the circular logic that legislative proclamations as to evidentiary considerations are acceptable because they are legislative, the Court of Appeals dodged the question of whether such instructions charge juries with factual issues or comment on thereon. Yet, when read in conjunction with edict of Article I, section 21 – the right to trial by jury shall remain inviolate – the Framers' intent is manifest: only jurors should arbitrate matters of fact, and obligation of the former should be carried out

without interference or influence from any outside source, including the legislature. As such, this court should find that its holding in *Deal* was incorrect.

C. The application of *Brunson* and *Deal* is harmful

1. Permissive inference instructions promote conscious and implicit bias

Permissive inference statutes logically flow from the drafter's opinion about the likely state of mind of a generic, rational person under certain circumstances; a person who enters unlawfully probably intends to commit a crime, a person aware of certain predicate facts is probably aware of the ultimate fact, or a person who willfully disregards the property rights of another probably has malice in mind. Each of these examples is akin to a reasonable person standard because the inferences rely on the belief as to the mind of a supposed "generic" person. Legal scholars, however, have long recognized the problematic nature of the generic or reasonable person. See Hochman Bloom, Aliza, Objective Enough: Race is Relevant to the Reasonable Person in Criminal Procedure, 19 Stan. J. C.R. & C.L. 1 (2023). Specifically, a "reasonable" viewpoint of certain situations may differ widely based on the

race or other characteristics of a "reasonable person." This Court has recognized this incongruity in *State v. Sum*, 199 Wn.2d 627, 511 P.3d 92 (2022).

This Court has also recognized the subtlety of racial bias and the often unconscious impact of it in the presentation of evidence and argument of legal theories. *Henderson v. Thompson*, 200 Wn.2d 417, 432, 518 P.3d 1011, 1022 (2022); see also *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). Not only may members of majority groups on juries fail to adequately consider the impact of systematic marginalization in determining how a reasonable person would think or feel, many trial judges and attorneys are ill equipped to adequately police subtle demagoguery. As such, this Court should strongly disfavor instructions that have the practical effect of minimizing consideration of such factors, particularly in criminal trials.

Finally, the danger of enshrining bias in permissive inference instructions extends beyond race. In the prosecution of a defendant suffering from mental illness, a jury could rely on the permissive inference in unfair disregard for the defendant's altered, subjective mental state. In a prosecution of

an unhoused person for burglary, the jury could unfairly rely on the permissive inference to disregard the subjective motivation of an unhoused person to seek shelter by unlawfully entering a building. While the role of lawyers is to bring these considerations to light in evidence and argument, *Henderson* rebuts any presumption that this reliance is well founded.

2. Permissive inferences as an appeal to the passions and prejudices.

No case better illustrates the harm in this context of permissive inferences than that of *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015). *Allen* involved the notorious slaying of four white police officers[2] by Maurice Clemmons, a black man. Id. The murders received an avalanche of media attention.[3] At issue in the case was whether another black man[4], Darcus Allen, was an accomplice to the murders. *Id*. At trial, the State produced evidence that Allen was an employee of

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2 https://special.seattletimes.com/o/flatpages/specialreports/lakewoodslayings.html

3 See https://en.wikipedia.org/wiki/2009_Lakewood_shooting

4 https://www.king5.com/article/news/crime/hung-jury-retrial-darcus-allen-lakewood-getaway-driver/281-f765730a-633e-4e51-bc5f-a378fd5a15de

Clemmons and had been present during a dinner in which Clemmons had "expressed animosity toward the police[,] announced that if the police arrived to look for him, he would kill them and […] brandished a handgun while he described these acts." *Id*. at 370. In his closing argument, the prosecuting attorney reduced the requirement of knowledge to that of, essentially, negligence, i.e. "[Allen] should have known" Clemmons intended to commit the crime of murder. *Id*. at 371.

This Court unanimously reversed the conviction on the ground of prosecutorial misconduct. *Id*. at 387. However, in so doing, the Court tiptoed to the precipice of direct criticism of WPIC 10.02's permissive inference instruction:

> Although subtle, the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant "should have known" is critical. We have recognized that a juror could understandably misinterpret Washington's culpability statute to allow a finding of knowledge "if an ordinary person in the defendant's situation would have known" the fact in question, or in other words, if the defendant "should have known." However, such an interpretation subjects a defendant to accomplice liability under a theory of constructive knowledge and is unconstitutional.

Id. at 374 (internal citations omitted). This was also not the first time this Court has acknowledged the danger of the inferential language contained in WPIC 10.02:

> [This] interpretation redefines knowledge with an objective standard which is the equivalent of negligent ignorance. If the defendant is ignorant in a situation where the ordinary man would have knowledge, then the defendant would be deemed to have "knowledge" under the law. Such a redefinition is inconsistent with the statutory scheme which creates a hierarchy of mental states for crimes of increasing culpability.

State v. Shipp, 93 Wn.2d 510, 515, 610 P.2d 1322, 1325 (1980)

Yet, despite the *Allen* court's focus on "should have known," its rationale makes clear that the actual sin was not necessarily those three words, but the ultimate thrust of the argument that actual knowledge was not required, as betrayed by the prosecutor's explicit statement of such. In fact, this Court acknowledged in the above quotation that "should have known" meant the same thing as "a reasonable person in the defendant's situation would know," the latter of which can be similarly found in the permissive portion of WPIC 10.02:

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

This highlights the danger of the permissive inference instruction in WPIC 10.02; had the prosecutor simply removed his explicit misstatement of the law regarding actual knowledge, his argument would have been defensible as an accurate statement of law relying on the permissive inference. Yet, the substantive argument would have remained exactly the same: convict him solely because "a reasonable person" would have known.

Whether couched in terms of the jury's instructions or not, the dogwhistle[5] was unmistakable: an almost certainly mostly white jury[6] was considering whether to impute knowledge of four heinous murders to a black man largely based upon his having heard a fellow black man make statements about wanting to kill police officers. One of the factual issues the jury had to evaluate was how seriously Allen

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[5] See *Henderson v. Thompson*, 200 Wn.2d 417, 432–33, 518 P.3d 1011, 1022 (2022).

[6] According to census data, 72% of the population in Pierce County identifies as white, while only 8% of the population identifies as black. https://www.census.gov/quickfacts/fact/table/piercecountywashington/RHI125223

would have taken Clemmons's statements about killing police officers. The racial appeal by the prosecution was subtle, but multifaceted: minimize the racial context that might lead Allen to subjectively chalk up Clemmons's threats as idle talk by substituting an "ordinary, reasonable" listener in place of Allen while simultaneously highlighting the racialized passions of white jurors aroused by Clemmons's threats against law enforcement as the passions of "the reasonable person."[7] Finally, and relevant to the problem of permissive inferences more broadly than racial bias, the prosecution likely calculated that there would be jurors who, while wanting to convict Allen because of his association with a heinous crime, would be unwilling to intentionally and overtly disregard the law to do so. Thus, by reducing the standard to that of essentially negligence, such jurors might feel they could convict in accordance with the law even if they thought the evidence of Allen's subjective knowledge was scant.

IV. CONCLUSION

[7] This Court has recognized the discrimination suffered by black people in the legal system for negative views of police through its promulgation of GR 37.

So long as prior caselaw regarding permissive inference instructions remain enshrined in our State's jurisprudence, the issue raised in Mr. Fetters' trial is likely to recur regularly statewide. This Court should grant review and overrule the incorrect, harmful precedents established in *Brunson* and *Deal*.

This document contains 2,495 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 24th Day of June, 2025.

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