NO. 96344-4
CONSOLIDATED W/ NO. 96345-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner/Cross-Respondent,
v.

KARL PIERCE and MICHAEL BIENHOFF,
Respondents/Cross-Petitioners.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The statement of identity and interest of amici are set forth in the Motion for Leave to File that accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized the need to improve the *Batson* framework and has taken steps to better enable the *Batson* test to root out discrimination in jury selection, most recently by adopting the objective observer standard in *State v. Jefferson*, 192 Wn.2d 226, 249, 429 P.3d 467 (2018). An objective observer, for purposes of determining whether race could have been a factor in the exercise of a peremptory strike, is one who is knowledgeable about the existence and extent of explicit and implicit bias as well as how these biases have contributed to racial disproportionality in the criminal justice system.

The objective observer is aware that race can affect perception and behavior in stark ways, as exemplified in an episode of ABC's hidden camera show, *What Would You Do?*, which captured people's candid reactions to actors trying to steal a bike in a public park.[1] Three similarly dressed actors, a white man, a black man, and a white woman, individually

[1] At least one federal judge shows this to jurors to educate them about implicit bias. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1182 n.250 (2012).

made obvious attempts to steal the bike in broad daylight as people passed by.[2] For the most part, the white man was left alone; the black man was repeatedly confronted and challenged; the white woman was either left alone or was assisted in stealing the bike.[3] Though later interviews of those observing the three actors typically included claims that race was irrelevant to their decisions to act or not act, an objective observer could conclude that race was a factor that shaped their perceptions and behavior.

In the present case, as detailed below, one prospective juror's pauses were perceived as thoughtful; another prospective juror's pauses caused concern. The first, Juror 4,[4] was likely white; the second, Juror 6, African American. The first juror was struck for cause, though not because of the pauses. The second juror's pauses were offered as a reason to justify a peremptory strike. Additional reasons offered against the second juror were her familial connection to the criminal justice system and her feelings about her brother being assaulted by police. Reasons such as these disproportionately impact minority jurors because, as detailed *infra* Part II, minorities are more likely to have connections to the criminal justice

[2] *What Would You Do?* (ABC television broadcast May 7, 2010), https://www.youtube.com/watch?v=ge7i60GuNRg.

[3] If the actor was confronted, at the close of the particular interaction, the scene was reset to test new individuals and groups with the setting. *Id.*

[4] Juror numbers refer to their respective numbers in the venire.

system and are more likely to have negative views of the system. An objective observer, aware of explicit and implicit bias and the historical and contemporary experience of racial minorities in the United States and in Washington, could view race as a factor in the exercise of the peremptory strike.

ARGUMENT

I. The Objective Observer Recognizes and Seeks to Address the Existence and Impact of Implicit Bias and to Overcome the Difficulties in Uncovering Covert Conscious Bias in Jury Selection.

A legal standard that requires a showing of purposeful discrimination cannot redress disparate outcomes that result from implicit or unconscious biases. That same purposeful discrimination standard does not provide an effective way to identify and redress covert conscious bias. This Court recognized as much in *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013) (even after *Batson*, "peremptory challenges have become a cloak for race discrimination" (citing Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (Aug. 2010))).

After *Saintcalle*, this Court has taken meaningful steps to ameliorate the harms caused by the deficiencies of *Batson*. In *City of Seattle v. Erickson*, this Court adopted a bright-line rule for the first step, holding that the peremptory strike of a juror who is the sole member of a

racially cognizable group constitutes a prima facie showing of racial discrimination. 188 Wn.2d 721, 734, 398 P.3d 1124 (2017). In *Jefferson*, this Court addressed the third step and changed the "purposeful discrimination" inquiry to "whether an objective observer could view race or ethnicity as a factor in this use of the peremptory strike." 192 Wn.2d at 249-50. The objective observer knows that racial discrimination has a long and pernicious history, both nationally and locally, and implicit bias is part of the problem. *Id.* In this case, an objective observer, equipped with this knowledge, would be well aware that bias can be masked by subtle reasons based on juror conduct and demeanor, "which are easily alleged but often extremely difficult to scrutinize." *Saintcalle,* 178 Wn.2d at 93 (González, J., concurring) (internal citations omitted).

A. An Objective Observer Could See Race as a Factor in the Strike Because Juror 6's Pauses Were Treated Differently from the Pauses of Other Jurors.

The State relied in part on two pauses by Juror 6 to support its peremptory challenge. RP 1017, 1018. The first pause referenced by the State occurred on the first day of voir dire, RP 497; the second, occurred on the third day, RP 881. Though there was a colloquy with Juror 6 over the first pause, there was not over the second. The second preceded her affirmation where she stated, "I am very hesitant about making a decision that would weigh that heavily upon somebody's life, but I feel that I am

capable of making a fair and impartial decision." RP 878:7-10. As detailed below, these pauses are imperfectly reflected in the record, inaccurately remembered, difficult to scrutinize, and disparately treated.

The first pause is reflected by the prosecutor confronting hesitation by Juror 6, manifested in the record by the word "Um." RP 497:1-3. Much like the suspicion the black actor was subjected to in the episode of *What Would You Do?*, the increased suspicion Juror 6 was subjected to is discernable by how the prosecutor pressed Juror 6. After asking and ascertaining that Juror 6 agreed that defendants deserve a fair trial and that jurors are to treat them "fairly and make sure that they have a fair trial," the prosecutor asked if she agrees that "prosecutors should have a fair trial as well." RP 496:6-497:2.

> A. Um, yes.
> Q. You seem to have hesitated. And again, I don't know if it comes out in the typing, but you paused, and your voice kind of reflected some hesitation. Why?
> A. I guess -- I guess it's fair both ways. I mean, it's the responsibility of each side to present their case, so I think that -- I think it's -- I think each side deserves fairness.
> Q. I don't mean to pick on you. I just want to ask you, why did you pause when I asked you that question?
> A. I guess sometimes -- I think that maybe sometimes when -- when people are, like, of certain groups sometimes may not get necessarily as fair trials as others sometimes. So I guess that's where my hesitation was coming from.
> Q. Is that the experience you had with your brother?
> A. No, not necessarily. I think just in general, like just kind

> of a culture of -- like Black Lives Matter and some of the racial tensions that are kind of being brought to light is kind of the reality of a lot of people sometimes.
> Q. Absolutely. Well, do you feel -- I will just put it on you. Do you feel like you would be able to give us a fair trial in this case?
> A. I think I would.

RP 497:3-498:3 (Mr. Yip questioning, Juror 6 answering, no pause in Juror 6's last response).

The second pause that occurred two days later is reflected by em-dashes offsetting the words "-- I don't --." RP 881:19-22. Though there was a colloquy between the prosecutor and the juror regarding the first pause, the second pause was not contemporaneously corroborated in the record by the judge or the other parties. Also, the context necessary to properly evaluate both pauses, such as duration, tone of voice, and demeanor is entirely absent.

Even without this lack of context, the record makes it clear that Juror 6's pauses were treated differently than the pauses of other jurors. For example, Juror 4 paused multiple times just prior to Juror 6's "Um" pause. Yet Juror 4's pauses were seen by the prosecutor to be evidence of thoughtfulness while Juror 6's pauses were viewed with suspicion. *Compare* RP 480-85, 489:7-23, *with* RP 496:17-497:3, *and* RP 880:9-881:24.

Pauses by Juror 4[5]	**"Um" Pause by Juror 6[6]**
Though race and ethnicity was not specified, by inference, likely white[7]	African American[8]
Not questioned by the prosecution	Questioned by the prosecution and twice asked about why she paused
Expressed hesitation and concern as to the felony murder rule	Expressed hesitation and concern as to whether all people always receive fair trials, citing Black Lives Matter as an example
Prosecution viewed the juror's pauses as evidence of thoughtfulness	Prosecution viewed the juror's pause with suspicion
Prosecution noted the pause for the record and asked the Judge for an independent assessment of the juror's demeanor	Prosecution noted the pause for the record by confronting Juror 6 *without* asking the Judge for an independent assessment of the juror's demeanor

There are additional disparities in the treatment of Juror 6 that could cause an objective observer to conclude that race or ethnicity was a factor. One such disparity is that the prosecutor appears to have misremembered when the "Um" pause occurred. The prosecutor

[5] RP 480-485 (pausing at least four times as indicated by em-dashes).

[6] RP 496-498 (pause as indicated by the use of the term "Um").

[7] The inference is supported by the fact that the defense argued that the for cause challenges asserted against both Juror 4 and Juror 6 should be denied, but only raised the potential for a *Batson* challenge and specified the race for Juror 6. *Compare* RP 485-488, *with* RP 854:20-855:7.

[8] RP 1015:22.

represented that Juror 6 paused when she was asked whether she would be fair, RP 1018:20-23, yet the "Um" pause actually occurred earlier when she was asked the abstract question of whether the State *should* have a fair trial generally. RP 497:1-3. The echoes of this potential memory lapse appear to extend even to the prosecution's most recent supplemental brief. Supplemental Br. of Pet'r/Cross Resp't at 13 (State's brief) (citing one of the reasons proffered by the State for the peremptory challenge as "she 'paused for a very long time' before being able to answer that she could give the State a fair trial" without noting the discrepancy between the record and the reason offered). When Juror 6 was ultimately asked about whether she *would* be fair, she said "I think I would," with no evidence in the record of a pause. RP 497:24-498:2.

Further, Juror 6 was the only juror that the prosecution confronted about a pause, *see* RP 497:1-5, and no other juror was asked the abstract question of whether the State "should have a fair trial," the question that sparked the pause.[9] A juror being asked "different and more" questions is relevant to the determination as to whether an objective observer could view race or ethnicity as a factor. *See Jefferson*, 192 Wn.2d at 234-35.

[9] *Compare* RP 496:17-497:3, *with* RP 553:15-554:24, 662:8-20, 770:7-775:11, 785:24-786:14, 837:12-17, 922:23-923:3, 979:25-981:5 (questioning of jurors by prosecutor relating to whether a juror could be fair).

A white juror, whose pause is attributed to his concern about the felony murder doctrine, is considered thoughtful by the prosecutor and by the judge; a black juror, who explains that she paused because of her concern that certain groups are not always treated fairly in the criminal justice system, is regarded with suspicion.

Ultimately, this Court does not need to conclude that an objective observer could conclude that race was *the* reason for the peremptory challenge, as is suggested by the State in its supplemental briefing. *See* Supplemental Br. of Pet'r/Cross-Resp't at 16.[10] Instead, as stated in *Jefferson*, the question is "whether an objective observer *could* view race or ethnicity *as a factor* in the use of the peremptory strike." *Jefferson*, 192 Wn.2d at 230 (emphasis added). Given that Juror 6's pauses were treated differently than those of other jurors, the assertion of the pauses to support the peremptory challenge is sufficient evidence that an objective observer could view Juror 6's race or ethnicity as a factor in the use of the peremptory strike against her.

[10] Though the State initially provides the correct rule statement from *Jefferson*, that the objective observer need only conclude that race or ethnicity could have been a factor, Supplemental Br. of Pet'r/Cross-Resp't at 10, it distorts the rule when it states that "[n]o objective observer could view Juror 6's race as **the** reason for the State's challenge," *id*. at 11 (emphasis added), and that "the totality of the circumstances could not lead an objective observer to conclude that the peremptory challenge to Juror 6 was **because of** her race," *id*. at 16 (emphasis added).

B. Reasons Based on Juror Conduct that Are Not Supported by the Record Should Receive Greater Scrutiny.

In addition to adopting the objective observer standard, *Jefferson* adopted de novo review for *Batson* challenges. 192 Wn.2d at 249. Under a de novo review, an objective observer could conclude that race was a factor if a reason given for a peremptory challenge is not well supported by the record. *Cf. id.* at 251 ("Without a more specific record about why the prosecutor did not 'bond' with a juror, this vague assertion cannot serve as a valid, race-neutral justification for a peremptory strike.").

Reasons based on juror conduct should be supported by evidence beyond a mere assertion by one party that the conduct occurred. Even prior to *Jefferson*, reasons offered to support a peremptory challenge were viewed with increased scrutiny if they lacked support in the record. *Cf. Ali v. Hickman*, 571 F.3d 902, 910 (9th Cir. 2009) (reasoning that, under *Batson*, a reason proffered for a peremptory challenge was pretextual, in part, because it was unsupported by the record). If a reason offered is not supported by the record, an objective observer could find that race was a factor in the peremptory challenge if the juror received differential treatment. *See Jefferson*, 192 Wn.2d at 250-51 (noting that, under the objective observer standard, the proffered reasons for a strike "seem[ed] to lack support in the record" and reflected differential treatment, thus the

reasons offered could support an inference of implicit bias).

While GR 37 is not applicable to this case, its treatment of reasons based on juror conduct and demeanor is instructive. A "pause" is not explicitly provided for in subsection (i), but it is similar to the giving of an "unintelligent or confused answer." GR 37(i). If there is no corroboration of the conduct in the record "by the judge or opposing counsel verifying the behavior," the reason is invalidated. *Id.*

Without a rule that requires independent corroboration, reasons based on juror conduct and demeanor could be used by individuals seeking to intentionally discriminate in jury selection, effectively masking their true intentions.[11] If such unsupported reasons are allowed to pass the scrutiny of an objective observer, those seeking to intentionally discriminate on the basis of race will have at their disposal a tool well-suited to covertly discriminate in jury selection. Even in the case of unconscious and implicit bias, allowing such reasons to stand without independent corroboration allows individuals to rationalize decisions reached on the basis of unconscious and implicit biases without giving

[11] Amici are not suggesting that this is what occurred in this case. However, as was required prior to *Jefferson*, requiring a finding that reasons offered were pretextual required a court to find, essentially, that the striking party acted in a racist manner, precisely as the prosecutor hinted, "I appreciate the fact that Mr. McGuire has phrased . . . [the Batson challenge] the way he has and not blatantly called me a racist, but still, I mean, that's really what it comes down to." RP 1015:17-20.

courts the ability to scrutinize the rationale to uncover hidden bias. De novo review based on a properly informed objective observer provides an important and needed remedy.

II. The Objective Observer Is Aware that Discrimination Has Led Some Individuals to Have a Disproportionate Connection with the Criminal Justice System, Which Is then Offered as a Race-Neutral Reason to Justify Peremptory Strikes.

An objective observer, for purposes of determining whether race could have been a factor in the exercise of a peremptory strike, is one who is knowledgeable about the existence and extent of explicit and implicit bias. *See Jefferson*, 192 Wn.2d at 249-50 ("objective inquiry based on the average reasonable person – defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated ways").

This Court has taken "judicial notice of implicit and overt racial bias against black defendants in this state," referring specifically to this state's "case law and history of racial discrimination." *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018). The following case law and history, recited by the *Gregory* Court, included not just the treatment of black defendants, but also black members of the jury venire and witnesses, as well as the treatment of other minorities:

Citation	Parenthetical
City of Seattle v. Erickson, 188 Wn.2d 721, 734, 398 P.3d 1124 (2017)	(peremptory challenge used to strike the only African-American on a jury panel)
State v. Walker, 182 Wn.2d 463, 488, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring)	(describing prosecutor's use of inflammatory, racially charged images "highlighting the defendant's race—his blackness—in a case where that had absolutely no relevance")
In re Pers. Restraint of Gentry, 179 Wn.2d 614, 632, 316 P.3d 1020 (2014)	(prosecutor heckled black defense attorney in a death-penalty trial, asking, "'Where did you learn your ethics? In Harlem?'")
State v. Saintcalle, 178 Wn.2d 34, 45, 309 P.3d 326 (2013) (plurality opinion) (second alteration in original) (quoting TASK FORCE ON RACE & CRIMINAL JUSTICE SYS., PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 1 (2011) . . . [https://perma.cc/6BV4-RBB8])	("'[T]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable.'")
State v. Monday, 171 Wn.2d 667, 676-79, 257 P.3d 551 (2011)	(reversing a case in which the prosecutor argued to the jury that "'black folk don't testify against black folk'" and referred to the police as "'po-leese'" in the examination of black witness)
State v. Rhone, 168 Wn.2d 645, 648, 229 P.3d 752 (2010) (plurality opinion)	(peremptory challenge used to strike the "only African-American venire member in a trial of an African-American defendant")
State v. Dhaliwal, 150 Wn.2d 559, 582, 79 P.3d 432 (2003) (Chambers, J., concurring)	(the prosecution's theory of the case relied on "impermissible stereotypes of the Sikh religious community")

Turner v. Stime, 153 Wn. App. 581, 594, 222 P.3d 1243 (2009)	(requiring new trial based on jurors' racist remarks regarding Japanese American attorney)
OFFICE OF ATTY. GEN. OF WASH. STATE, CONSOLIDATING TRAFFIC-BASED FINANCIAL OBLIGATIONS IN WASHINGTON STATE 9 (Dec. 1, 2017) . . . [https://perma.cc/TB4K-KAEF]	[no parenthetical supplied but report concludes "that minority racial and ethnic groups remain disproportionately represented in Washington's court and criminal justice system."]
Amici Curiae Br. of 56 Former & Retired Wash. State Judges et al. at 8-13, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)	[no parenthetical supplied but referenced pages review Washington case law and various reports discussing racial bias in various aspects of the criminal justice system, including racial bias in jury selection]

Id. at 22-23.

With this knowledge, an objective observer will be aware that certain race-neutral reasons offered to justify peremptory challenges have historically been associated with improper discrimination in jury selection.[12]

In the present case, Juror 6 was questioned extensively about her familial link to the criminal justice system, to suggest that such a connection negatively affected her impartiality. The questioning began

[12] Though GR 37 is not applicable here, the Court recognized in GR 37 that certain reasons for strikes are presumptively invalid "[b]ecause historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State." GR 37(h).

with uncovering details about a specific bad experience with law enforcement but eventually covered Juror 6's views on the fairness of law enforcement in general:

> Q: Juror Number 6, bad experience?
> A: Yeah. I had a brother who was assaulted by the police and sued the police.
> Q: I think they can't hear you.
> A: and he had a lawsuit, sued them, won because of the assault when we were younger.
> Q: Does that, I guess, shape your view of police in general as a whole?
> A: Not -- no, not necessarily.
> . . .
> Q: Did it leave any - - any bad taste in your mouth, I guess, that whole experience and having that happen to your brother?
> A: Yeah. It was unsettling. It still is. But it happens.

RP 659:19-660:19 (Mr. Yip questioning, Juror 6 answering).

> Q: Did you feel that your family member was treated fairly by the system? And let me break that down. Do you feel he was treated fairly by the police?
> A: No.
> Q: And if you feel comfortable, how do you feel he wasn't treated fairly?
> A: He was assaulted by the police. But he's had various cases and issues, and there have been varying degrees of fairness or - -
> . . .
> A: And there's been varying degrees of fair treatment.
> . . .

RP 712:22-713:12 (Mr. Doyle questioning, Juror 6 answering).

In addition to being aware of the historical discrimination against minority jurors, an objective observer will also be aware that using peremptory challenges to strike potential jurors because of their

ambivalence, skepticism, or even distrust towards law enforcement officers or the criminal justice system broadly, has had the discriminatory impact of removing a disproportionate number of minorities from jury panels.

As a result of the systemic inequalities in our criminal justice system, black individuals are subject to disproportionate rates for arrests, convictions, and sentencing lengths. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW 180 (2012) ("More African American adults are under correctional control today – in prison or jail, on probation or parole – than were enslaved in 1850, a decade before the Civil War began.").

This observation also holds true in Washington State. *See generally* Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System (2011).[13] As incarceration levels have risen in the black community, so have the rates of "other African Americans who are connected through filial and social networks." Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury*

[13] https://digitalcommons.law.seattleu.edu/sulr/vol35/iss3/3/, *reprinted in* 47 GONZ. L. REV. 251 (2011), 35 SEATTLE U. L. REV. 623 (2012), 87 WASH. L. REV. 1 (2012) (published by flagship law reviews of all three law schools in Washington State).

Selection, 15 MICH. J. RACE & L. 57, 90 (2009). The objective observer will be aware of this and could consider race to have been a factor in the exercise of a peremptory strike against Juror 6.

Finally, it would be contradictory to allow a peremptory strike to be used against a prospective juror who expresses concerns because they are aware of the history and existence of racial disparities in the criminal justice system, when that is the very knowledge the objective observer is expected to bring to this inquiry. *Cf. Jefferson*, 192 Wn.2d at 249-50. Allowing a link to the criminal justice system to be a valid race-neutral reason for a peremptory challenge will transform the *Batson* hearing into a mere ritual that "perpetuates a veneer of racial inclusion that is substantively false." Price, *supra*, at 61. Broadly using a link to the criminal justice system as a race-neutral reason to justify a peremptory challenge should be rejected.

CONCLUSION

The adoption of the objective observer standard in *State v. Jefferson* cemented this Court's efforts to recognize the role that implicit bias plays in jury selection. Under this standard, an objective observer could view the bases for peremptory challenges that have been historically associated with improper discrimination in jury selection as invalid due to the disparate impact on potential minority jurors. Using personal, filial, or

social connections to the justice system or a distrust of law enforcement officers to justify a peremptory strike could be viewed by an objective observer as using race or ethnicity as a factor in the use of the peremptory challenge. Similarly, an objective observer could reach the same conclusion when juror conduct and demeanor is used without support in the record or was the subject of disparate treatment. The objective observer standard is a crucial safeguard to preserve the fairness of trials in Washington State.

RESPECTFULLY SUBMITTED this 15th day of April, 2019.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 15, 2019, the forgoing document was electronically filed with the Washington State Supreme Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, this 15th day of April, 2019.

/s *Jessica Levin*
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KOREMATSU CENTER FOR LAW AND EQUALITY

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