

Raising Race

ZAMORA AND MORE





“The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation’s founding.”

Supreme Court Open Letter, 6/4/20



“The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will.”

Supreme Court Open Letter, 6/4/20



Editor · Aug 13, 2020 · 1 min read



SCJA Denounces Structural Racism



The Superior Court Judges Association joins with the Supreme Court, professional partners, and others across the justice system who have come forward to forcefully denounce structural racism embedded our society. The attached letter from Association President Judge Judith H. Ramseyer details out the initial steps the SCJA is taking to confront this important topic.

Supreme Court has addressed systemic racism by:

- Extending GR 37 standard to other contexts
- Endorsing the use of data in decision-making

General Rule 37

If “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge.” **GR 37(e)**.

General Rule 37

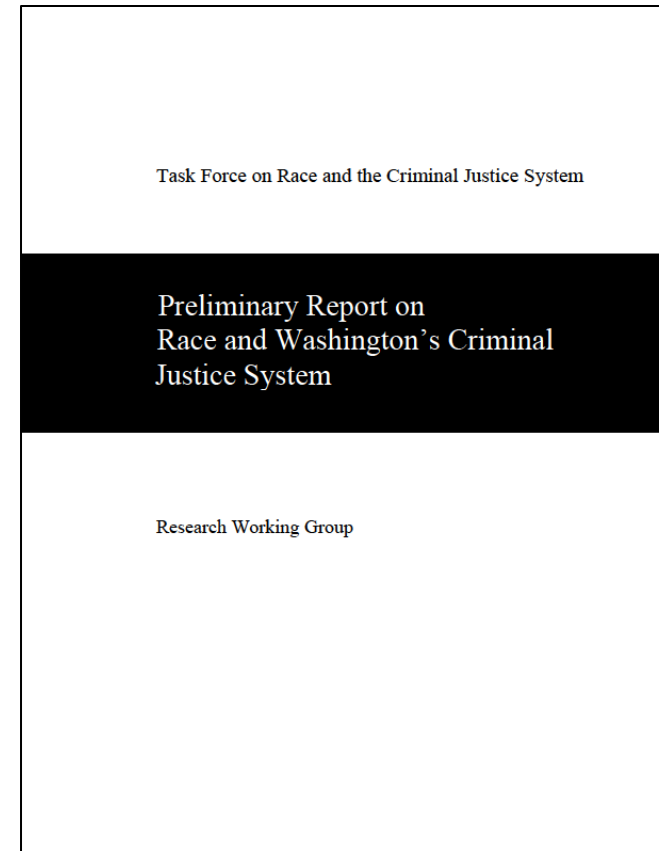
“For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.” **GR 37(f).**

General Rule 37

- The presumptively invalid justifications: those historically used to discriminate in jury selection:
 - **GR 37(h)**: having been stopped by police, distrusting police, having a relative or friend in prison, etc.
 - **GR 37(i)**: demeanor-based justifications, e.g. bad attitude, inattentive, unintelligent, etc.

Task Force Report

“Racial bias permeates Washington’s criminal justice system.”



Applying GR 37 outside of jury selection

- *State v. Berhe* (juror misconduct)
- *State v. Sum* (search and seizure)
- *In re K.W.* (dependency placement)
- *State v. Zamora* (prosecutorial misconduct)
- *Henderson v. Thompson* (civil cases)

Applying GR 37 outside of jury selection

State v. Berhe, 193 Wn.2d 647 (2019)

- Post-verdict, sole Black juror disclosed she voted to convict against her wishes due to other jurors' racist comments.
- Other jurors denied being racist, so court denied evidentiary hearing.
- Supreme Court: "Are you kidding?"



Applying GR 37 outside of jury selection

State v. Berhe, 193 Wn.2d 647 (2019)

- Investigation must be overseen by court.
- Prima facie showing of racial bias -> evidentiary hearing.
- Adopts GR 37-like standard to determine whether there is a prima facie showing of racial bias.



Applying GR 37 outside of jury selection

State v. Berhe, 193 Wn.2d 647 (2019)

- “The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict.”
- If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.



Applying GR 37 outside of jury selection

State v. Sum, 199 Wn.2d 627 (2022)

- Race is relevant to question of whether person was seized for purposes of article I, section 7.
- “a person is seized for purposes of article I, section 7 if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter ...”



Applying GR 37 outside of jury selection

State v. Sum, 199 Wn.2d 627 (2022)

- “an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington.”



Applying GR 37 outside of jury selection

State v. Zamora, 199 Wn.2d 698 (2022)



Applying GR 37 outside of jury selection

State v. Zamora, 199 Wn.2d 698 (2022)

- Following 911 call, officers stopped Zamora for walking while Latino (“vehicle prowl”).
- Escalated to “extreme acts of violence”



Applying GR 37 outside of jury selection

State v. Zamora, 199 Wn.2d 698 (2022)

- Following 911 call, officers stopped Zamora for walking while Latino (“vehicle prowl”).
- Escalated to “extreme acts of violence”
- An officer “sustained an injury to his hand from punching Zamora in the back of the head multiple times.”
- Zamora charged with assault 3.



Applying GR 37 outside of jury selection

State v. Zamora, 199 Wn.2d 698 (2022)

- During voir dire, prosecutor discusses border security, illegal immigration, and crimes allegedly committed by undocumented immigrants.
- At a break, trial judge says WTF?
- Zamora's public defender said he didn't object because he didn't think the questions would benefit the prosecution.



Applying GR 37 outside of jury selection

State v. Zamora, 199 Wn.2d 698 (2022)

- Supreme Court: prosecutor committed race-based misconduct.
- Applies GR 37 standard: “we ask whether an objective observer **could** view the prosecutor’s questions and comments during voir dire as an appeal to the jury panel’s potential prejudice, bias, or stereotypes about Latinxs.”



Applying GR 37 outside of jury selection

State v. Zamora, 199 Wn.2d 698 (2022)

- “The objective observer is a person who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination.”
- Race-based misconduct = automatic reversal.



Other contexts???

“[A]n objective observer in Washington ‘is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in’ many injustices against BIPOC, particularly in the criminal justice system.” *Sum*, 199 Wn.2d at 642-43.

Other legal hooks for raising race

State Constitution

- Article I, section 7 (privacy)
- Article I, section 22 (trial, appear, defend, testify, appeal)
- Article I, section 14 (cruel punishment)
- Article I, section 9 (silence)

Other contexts for extending GR 37??

- Challenges for cause – GR 37(h)
- Custodial interrogation
- Conclusory / coded testimony
- Use of criminal history in sentencing
- ER 609
- CrR 8.3(b)

Other contexts – Example: 8.3(b)

State v. Toliver

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1. MOTION

13

Through counsel Cathy Gormley and Juanita Holmes, William Toliver moves this court

14

for an evidentiary hearing to decide any disputed issues of fact and determine whether the

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prosecutor's media statements following his release hearing included implicit appeals to racial

16

bias. This motion is brought under the authority of *State v. Zamora*, 199 Wn.2d 698 (2022),

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Wash. Const. art. 1, § 22, and the additional authorities cited below.

Raising Race, Presenting Data

- Hire an expert
- Use existing reports and tools
- Build your own report using existing data



Raising Race, Presenting Data

Examples: Hire an expert

- *Gregory* study on race and the death penalty
- *Quijas* study on juvenile decline

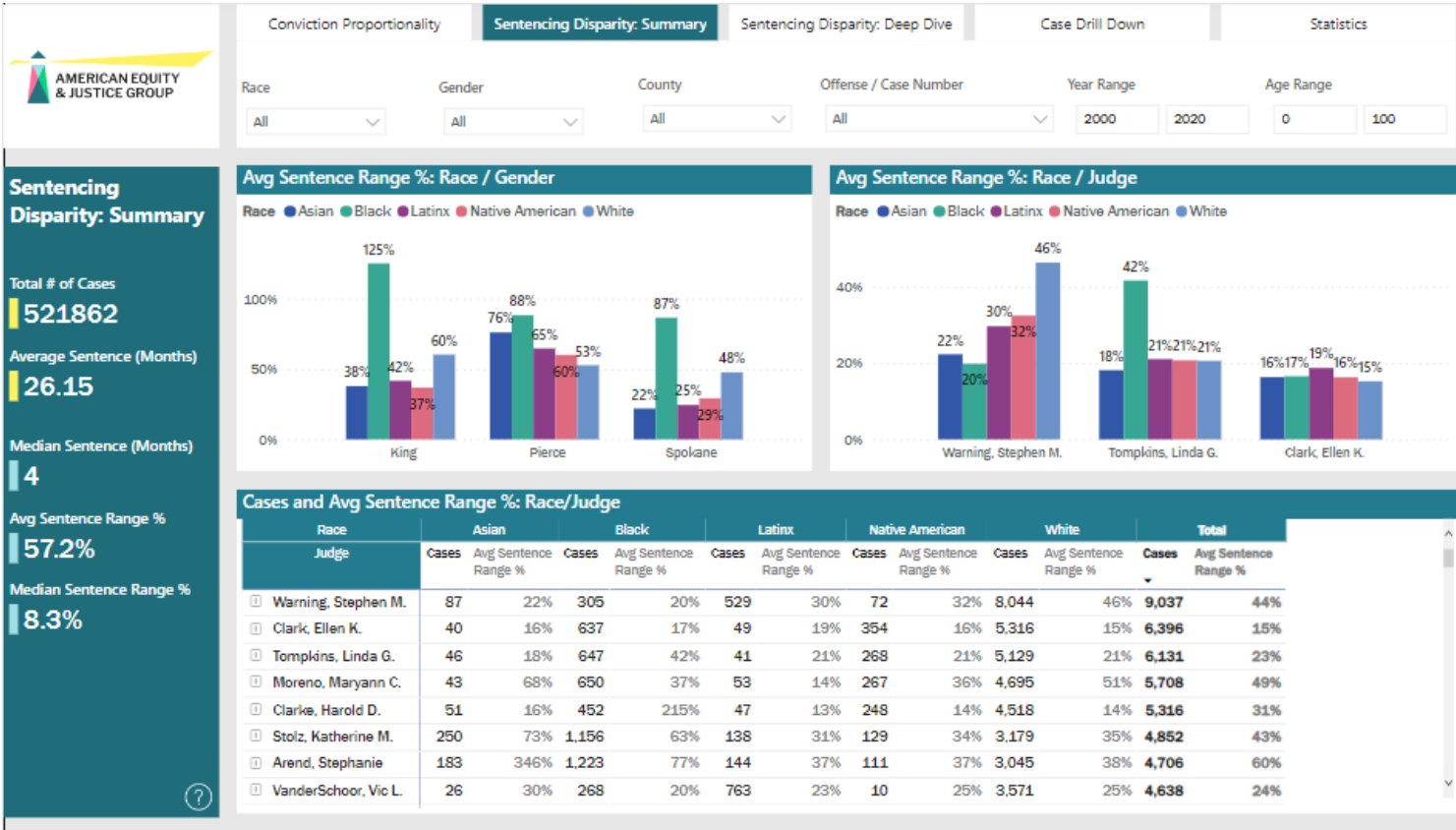


Raising Race, Presenting Data

But don't always need an expert.

- “[W]e decline to require indisputably true social science to prove that our death penalty is impermissibly imposed based on race.” *Gregory*, 192 Wn.2d at 21.
- Court took “judicial notice of implicit and overt racial bias against black defendants in this state.” *Id.* at 22.

Raising Race, Presenting Data



AEJG has data sharing agreements that prohibit the release of raw data and the identifying information they contain. If you would like to download a dashboard page or reference the data, please consider using the following citation: Dashboard, American Equity & Justice Group. (2022). American Equity & Justice Group Dashboard Tool (Data Release: 1.1.1). Retrieved from <https://www.americanequity.org> on date. Please note that such use of the dashboard is an express agreement to comply with the terms of use.

Raising Race, Presenting Data

Use existing reports, e.g.

- Task Force Report
- Gender and Justice Commission Report
- WSIPP reports
- SGC reports
- *About Time*
- Many others



Raising Race, Presenting Data

Build your own report using existing data. Examples:

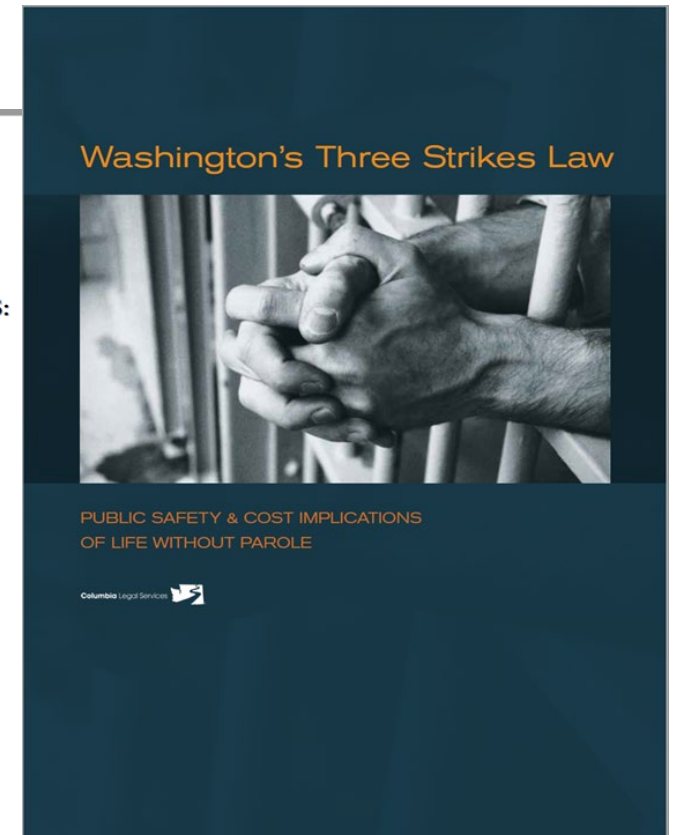
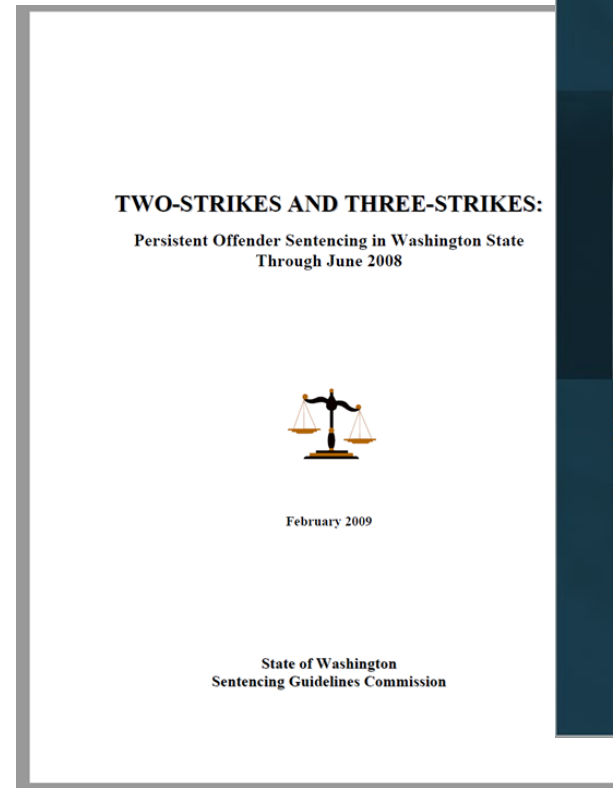
- First phase of *Quijas* litigation on juvenile decline
- Three Strikes challenge in *State v. Brown*



Raising Race, Presenting Data

Example: Three Strikes challenge
in *Brown*

- Existing reports showed significant racial disproportionality
- But these reports were old (2009)



Raising Race, Presenting Data



**WASHINGTON STATE
CASELOAD FORECAST COUNCIL**

- Home
- Human Services
- Medical Services
- Education
- Criminal Justice
- Data Warehouse
- Publications
- Meetings

Criminal Justice Publications

Adult Felony Sentencing Manual

Statistical Summary of Adult Felony Sentencing

2021

2020	2019	2018	2017	2016	2015	2014	2013
2012	2011	2010	2009	2008	2007	2006	2005
2004	2003	2002	2001	2000	1999		

Link Map:

- Sentencing Guidelines Commission |
- Access Washington |
- Office of Financial Management |
- Health Care Authority |
- Department of Corrections |
- Department of Social and Health Services |
- Washington State Legislature |
- Department of Children, Youth & Families |
- Superintendent of Public Instruction |
- Economic and Revenue Forecast Council |
- Washington Institute for Public Policy |
- Legislative Evaluation & Accountability
Program Committee |
- TVW |

Raising Race, Presenting Data

**Table 14B. Details in Persistent Offenders' Sentences
Under the Persistent Offender Statue RCW 9.94A.030 (38)(a)(b)**

Fiscal Year 2021

CAUSE	VERDICT	SENTENCING DATE	OFFENSE	SEX	RACE	DOB	AGE at SENTENCE
King							
17-1-04714-3	Jury Trial	11/20/2020	MURDER 1 (7/1/90-7/24/99) [Life] w/ Sexual Motivation	Male	African American	10/11/1962	58
2020110816	FY 2021	King					
		Prior offense	RAPE 2 (PRE 7/90)				
		Prior offense	ROBBERY 1				
		Prior offense	RAPE 2 (PRE 7/90) [Attempt]				
17-1-04489-6	Jury Trial	1/29/2021	MURDER 2 (POST 7/24/99) [Life] Non-Firearm DW	Male	African American	4/21/1979	41
2021010804	FY 2021	King					
		Prior offense	ROBBERY 2				
		Prior offense	ROBBERY 2				
		Prior offense	ROBBERY 2				
		Prior offense	ROBBERY 2				
		Prior offense	ROBBERY 2				
		Prior offense	ROBBERY 1 [Attempt]				

Raising Race, Presenting Data

POAA Prisoners TWO - Excel Lila Silverstein

File Home Insert Page Layout Formulas Data Review View Help ACROBAT Tell me what you want to do Share

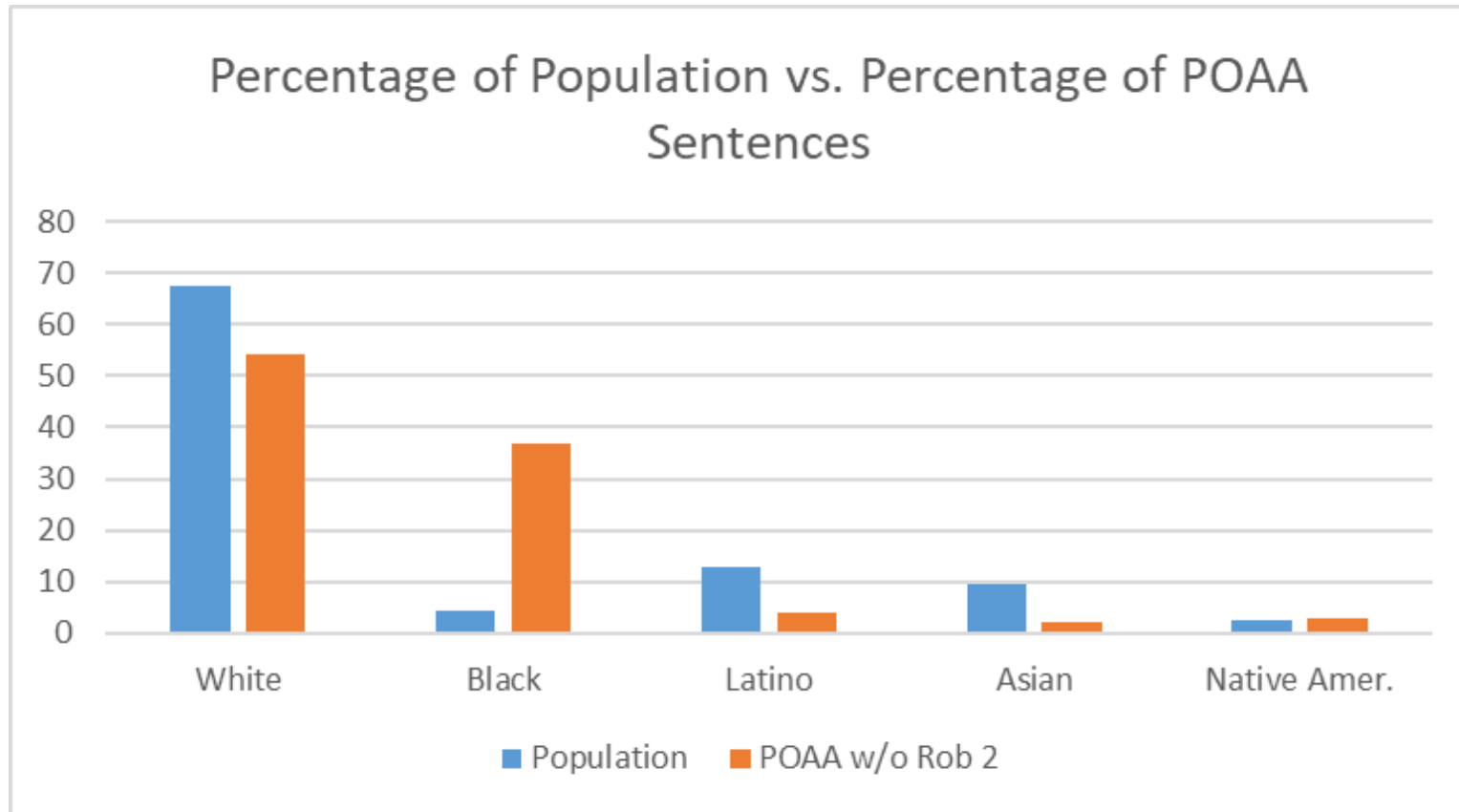
I452

	A	B	C	D	E	F	G	H	I	J
1	CaseNum	CauseNum	Sent Date	County	Race	Offenses	Rob 2?	Assault 2?	Assault 2 w/o DW?	Comment
427	2017060704	14-1-04486-1	6/22/2017	Spokane	White	Rob 1 x2, rob 2	Y	N		
428	2017090561	17-1-00032-1	9/15/2017	Grays Hbr	White	Child mol 1 x4	N	N		
429	2017081694	16-1-04833-8	8/18/2017	King	Black	Assault 2 x4, rob 2	Y	Y	Y	
430	2017101650	15-1-02193-8	10/13/2017	King	Black	Rob 1 x 11, assault 2 SM	N	N		
431	2017121390	16-1-04911-3	12/1/2017	King	White	Murder 2, assault 2, assault 1	N	Y	Y	
432	2018011781	16-1-03560-6	1/5/2018	Pierce	Black	murder 2, man 1, rob 2	Y	N		
433	2017121156	17-1-00830-8	12/28/2017	Snohomish	White	res burg, assault 2 x2	N	Y	Y	
434	2018120523	18-1-00017-3	12/17/2018	Ferry	Black	assault 2, rob 1, burg 1, rob 2	Y	Y	Y	
435	2018071543	17-1-02754-1	7/13/2018	King	Black	rob 2 x 7	Y	N		
436	2018081279	15-1-03905-5	8/30/2018	King	White	murder 1, assault 2 x2	N	Y	Y	
437	2018110184	16-1-01563-6	11/2/2018	Kitsap	Black	rob 1, rob 2, assault 2	Y	Y	Y	
438	2018070916	15-1-02459-1	7/12/2018	Spokane	Black	Murder 1, rob 1 consp., rob 1, burg 1, assault 2	N	N		said "no" to assault 2 b/c other offenses independently authorize the sentence.

Notes All Cases Omit Rob 2s Race All Cases Race Omit Rob : ...

Ready Accessibility: Investigate 100%

Raising Race, Presenting Data



Raising Race, Presenting Data

Brown Example, continued

- Argued three strikes law violates article I, section 14 because it is imposed in an unconstitutionally racially disproportionate manner
- Argued three strikes law violates article I, section 14 as applied to assault 2 strikes

Raising Race, Presenting Data

Brown Example, continued

- State offered to settle case. Pled to reduced charges. Sentence: 48 months. Client is out.
- Others have copied argument and appendix. Issue pending in trial and appellate courts. Feel free to copy for your cases (in your materials).
- Seattle U will create “official” report from this data soon. Use in lieu of my appendix once it’s out.

Raising Race, Summary

Silence = Complicity. Object to racial bias!

- Argue for application of GR 37 standard, and/or
- Cite state constitution, and/or
- Present data

Go, Fight, Win!



Thank you for your work.

Questions? lila@washapp.org