6. Motion for a representative jury panel and also to ensure that any BIPOC**[[1]](#footnote-1)** jurors have a meaningful opportunity to be selected to serve.

Granted Denied Reserved

Defense recognizes that this motion may be premature and could be mooted depending on the composition of our venire. Still, Defense wishes to raise this issue in motions in limine because of the critical impact that race plays in Mr. CLIENT’s case. As noted above, and as the Court can see, Mr. CLIENT is a black man. The detectives in this case were white. None of the expert witnesses are black.

It is impossible to separate the risk of implicit bias that permeated this case. Studies have shown that law enforcement, by and large, have deep seeded implicit bias against African Americas. *See* Stark, J. *Addressing Implicit Bias in Policing*, Police Chief Online, <https://www.policechiefmagazine.org/addressing-implicit-bias-in-policing/> (2021) (last accessed 11/29/2022 at 11:50am) (“the overwhelming majority of the officers had either a slight bias against black individuals . . or a strong bias against black individuals.”; “However, the vast majority of the officer displayed implicit bias against African Americans as measured in the study.”)[[2]](#footnote-2)

The King County Auditor’s Office found that King County Sherriff’s Office, the agency involved in this investigation, “showed racial disparities in the number of arrests and uses of force.” King County Auditor’s Office, *Sheriff’s Office Data Shows Racial Disparities, Potential to Expand Alternative Policing*, (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kingcounty.gov/~/media/depts/auditor/new-web-docs/2022/calls-for-service-2022/cfs-2022.ashx?la=en), P. 1 (2022) (last accessed 11/29/2022 at 11:58am)[[3]](#footnote-3). This found that the Sheriff’s Office “reported Black people as suspects and officers arrested Black people at rates nearly four times higher than expected given their proportion of the county population.” *Id* at iii.

Seattle Children’s Hospital, whose SCAN doctors speculate about injuries that Mr. CLIENT may have caused to DECEDENT, has been noted to have issues with racism and bias. *See* *Seattle Children’s Failed To Address Racism, Investigation Finds*, Crosscut, <https://crosscut.com/news/2021/08/seattle-childrens-failed-address-racism-investigation-finds> (2021) (last accessed 11/29/2022 at 12:46pm)[[4]](#footnote-4).

Finally, nationally, medical examiners, much like Dr. DOCTOR, are found to employ cognitive bias in evaluating child deaths. *See Study Finds Cognitive Bias in How Medical Examiners Evaluate Child Deaths*, Washington Post, <https://www.washingtonpost.com/opinions/2021/02/20/study-finds-cognitive-bias-how-medical-examiners-evaluate-child-deaths/> (2021) (last accessed 11/29/2022 at 12:48pm)[[5]](#footnote-5). The Washington Post article discussed a study of Dr. Itiel Dror, a cognitive neuroscience researcher at University College London. In it, they looked at Nevada death certificates for children under the age of 6 over ten years and found that “medical examiners were about twice as likely to rule a Black child’s death to be a homicide as a White child.” Further, they provided a hypothetical of a “3-year-old who was taken to an emergency room with a skull fracture, brain hemorrhaging, and other injuries who later died”. Half of the participants were told that the child was Black and left in the care of the mother’s boyfriend (identical to the facts in this case), and the other half were told the child was White and left in the care of its grandmother. 133 medical examiners were asked, 78 said they could not determine and needed more information, 23 said it was an accident, 32 said it was a homicide. Startling, though, “the medical examiners who were given the fact pattern with a Black child were five times more likely to rule the death a homicide than an accident.” The converse was also true, in the White child example, medical examiners were twice as likely to rule the death an accident versus a homicide. This clear racial disparity and implicit bias cannot be overstated.

In order to combat the implicit bias that has likely permeated this case, and to also combat implicit biases that our venire will likely hold, this Court should do everything in its power to ensure that Black members of our community, people of the same race as Mr. CLIENT, make it on to our jury.

Mr. CLIENT has a constitutional right to a fair trial by a jury of his peers. General Rule 37 is designed to ensure that the jury selection process is free from discrimination and to promote diverse juries. Based on Mr. CLIENT’s due process right to a fair trial and a jury of his peers, Defense moves this Court to move any juror who identifies as Black to the front of the Zoom jury pool, as well as to the supplement the pool with additional jurors of Mr. CLIENT’s race. This request can be accomplished relatively easily and would assure a diverse jury without prejudicing the Government. Similarly, the parties could also agree ahead of time that any non-white juror should be exempt from being assigned as an alternate juror. Furthermore, such a decision would help protect Mr. CLIENT’s right to a jury of his peers and promote the fundamentally American idea that all citizens have a right to sit as jurors.

While the Court might have some reservations about taking proactive steps to promote a diverse jury in most circumstances, this case presents a unique situation. Ordinarily, a randomized selection of jurors may be suitable. To state the obvious, a randomized process has the benefit of being random. However, the drawback is that its net effect can have the substantive and unintended effect of appearing and feeling decidedly unfair. In a community that readily acknowledges the need for more impartial minority jurors, it seems only reasonable to consider a method of selecting jurors that maximizes the likelihood of the fair and impartial minority potential jurors being selected to be on the actual jury to deliberate, which is the right of every citizen. In this case, before any evidence has been offered to the jury, the Court has been presented with an easy means of increasing the diversity of the jury without prejudicing either party.

It is well-established that, for various reasons, jury pools in Kent tend to be less diverse than those in other parts of King County; by extension, juries tend to be less diverse. The concern surrounding a lack of diversity in jurors is at its apex in criminal cases involving Black defendants charged with crimes. The concept that the accused had a right to be tried by a jury of his or her peers seems like an empty promise when a predominantly white jury sits in judgement of a black defendant.

In addition, having a less diverse jury pool is incredibly dangerous in creating unfair outcomes. For instance, research conducted in Florida found that all-white juries convicted black defendants 81% of the time, whereas white defendants were only convicted 66% of the time. See “The Impact of Jury Race in Criminal Trials, by Shemena Anwar, Patrick Bayer, Randi Hjalmarsson The Quarterly Journal of Economics, Volume 127, Issue 2, May 2012, Pages 1017–1055, <https://academic.oup.com/qje/article/127/2/1017/1826107>[[6]](#footnote-6), (last accessed 11/29/2022 at 12:59pm) This shows that a lack of diversity contributes to black defendants getting convicted 1.25 times more than white defendants. However, juries with at least one black juror resulted in a 76% conviction rate for black defendants and a 77% conviction rate for white defendants. A diverse jury is not a luxury but is a right for minority defendants to have a fair trial among a jury of their similar race and gender peers.

Here, Mr. CLIENT, a Black man, is charged with murdering his young son. It is within the Court’s broad powers to determine the jury pool in a manner that ensures that fair and impartial black jurors are on the jury. The Court has broad discretion in the context of the jury selection process. Criminal rules 6.1 thought 6.5 outline the jury selection process.

While granting Defense’s motions would be relatively simple and not prejudicial to the State, denying Defense’s motion would deprive Mr. CLIENT of a jury composed of people of his race. Historically, black citizens have been systematically eliminated from juries.

“It would be naïve to assume Washington is somehow immune from this nationwide problem. Our Race and Equal Justice Task Force concluded that “[t]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable.” Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System 1 2011 (hereinafter Task Force Report).”

*State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326, 334 (2013), abrogated by *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). *Erickson* established a bright-line rule that striking the sole member of particular race is a per se prima facie showing of discrimination. In establishing this new precedent, the Court noted that “such a rule would not only lead to greater protection from racial discrimination, but would help effectuate Washington’s elevated right to a fair trial.” *Erickson*, 188 Wn. 2d. at 731. In *Erickson*, the Washington Supreme Court essentially adopted the bright-line rule recommended in the dissent of *State v Rhone*, 168 Wn.2d 645 (2010). In support of its argument for a bright-line rule, the *Rhone* dissent stated:

“[o]ne of the strongest reasons to adopt such a bright line rule is that the benefits of such a rule far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge during venire. As the lead opinion notes, some of these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venires, and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial.”

*State v. Rhone*, 168 Wn.2d 645, 661, 229 P.3d 752, 759–60 (2010) (dissenting), abrogated by *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). New General Rule 37 recognizes the unfair exclusion of minority jurors in Washington State and essentially codifies the Court’s holding in *Erickson*.

There is a 2021 study from the Washington Court that discusses responses to jury summons and questionnaires. See “An Exploration of Barriers to Responding to Jury Summons Technical Report to Washington State Administrative Office of the Courts, June 24, 2021 (Revised), by Peter Collins, PhD. and Brooke Gialopsos, PhD. [https://www.courts.wa.gov/subsite/mjc/docs/2021\_Jury\_Study\_Final\_Report.pdf](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.courts.wa.gov%2Fsubsite%2Fmjc%2Fdocs%2F2021_Jury_Study_Final_Report.pdf&data=05%7C01%7CAHeyman%40kingcounty.gov%7C9765f2f3e74947e9498608da9bf44b9a%7Cbae5059a76f049d7999672dfe95d69c7%7C0%7C0%7C637993770796684009%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=MflLzNMYzMiR6zDli8Cnd7bwqwkUctY5CcoVI9hjVQI%3D&reserved=0)[[7]](#footnote-7), (last accessed 11/29/2022 at 1:01 pm). In it, it indicates white people are disproportionately summonsed in King County (P. 21, 22). We know this is a chronic problem. The Court in this report further cited an article highlighting the diversity problems plaguing Washington juries: “Juries have a diversity problem. What’s being done to address it in Washington state, by Alexis Krell, The News Tribune, April 21, 2021: (<https://www.courts.wa.gov/content/publicupload/eclips/2021%2004%2019%20Juries%20have%20a%20diversity%20problem%20Whats%20being%20done%20to%20address%20it%20in%20Washington%20state.pdf>)[[8]](#footnote-8).  In addition, the GR 37 working group notes that we have issues of excluding people of color from serving on a jury. See “Proposed New GR 37—Jury Selection Working Group, Final Report” ([https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.courts.wa.gov%2Fcontent%2FpublicUpload%2FSupreme%2520Court%2520Orders%2FOrderNo25700-A-1221Workgroup.pdf&data=05%7C01%7CAHeyman%40kingcounty.gov%7C9765f2f3e74947e9498608da9bf44b9a%7Cbae5059a76f049d7999672dfe95d69c7%7C0%7C0%7C637993770796684009%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=om74yo0T0SJ0XwIxD7jr2K7yBwVCRBkt7EhGjIg5W7A%3D&reserved=0))[[9]](#footnote-9). There was clear consensus, as is evidenced in the rule, and on p. 4 of the Report, that people of color have been systemically excluded from jury service.

In *State v. Saintcalle*, 178 Wn.2d 34, 35, 309 P.3d 326 (2013), the Court notes that “Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection.”   As the Court astutely observed in *Saintcalle*, there is constitutional value to having a diverse jury:

“We should also recognize that there is constitutional value in having diverse juries, quite apart from the values enshrined in the Fourteenth Amendment. Article I, section 21 of our state constitution declares, “The right of trial by jury shall remain inviolate.

We have juries for many reasons, not the least of which is that it is a ground level exercise of democratic values. The government does not get to decide who goes to the lockup or even the gallows. Ordinary citizens exercise that right as a matter of democracy. In England, the jury developed into juries of one's peers, coming from one's community. This is the grand heritage of the jury system.

But equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less.”

*Saintcalle*, 178 Wn. 2d at 50 abrogated by*. Erickson*, 188 Wn.2d at 721. Very rarely is there such an easy mechanism through which we can achieve a fair and diverse jury.

Furthermore, it would be naïve to assume Washington is somehow immune from this nationwide problem. Our Race and Equal Justice Task Force concluded that “[t]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable.” Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System 2011 (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2076&context=sulr) (last accessed 11/29/2022 at 1:02 pm).[[10]](#footnote-10)

Given the pervasive specter of implicit bias haunting every agency involved in this case, it is imperative that this Court do everything in its power to end that risk proactively. A jury that includes members who share Mr. CLIENT’s race will, at the very least, go a long way to showcase the efforts this Court is taking to ensure that, while the investigation and prosecution may have been based on implicit bias, this trial will not be.

1. Black, Indigenous, People of Color [↑](#footnote-ref-1)
2. Appendix O. [↑](#footnote-ref-2)
3. Appendix P. [↑](#footnote-ref-3)
4. Appendix Q. [↑](#footnote-ref-4)
5. Appendix R. [↑](#footnote-ref-5)
6. Appendix S. [↑](#footnote-ref-6)
7. Appendix T. [↑](#footnote-ref-7)
8. Appendix U. [↑](#footnote-ref-8)
9. Appendix V. [↑](#footnote-ref-9)
10. Appendix W. [↑](#footnote-ref-10)