COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12549

COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

v.

QUINTON WILLIAMS,

DEFENDANT-APPELLANT

ON APPEAL FROM CONVICTION IN THE BROCKTON DISTRICT COURT

BRIEF OF AMICI CURIAE THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, THE NEW ENGLAND INNOCENCE PROJECT, THE INNOCENCE PROJECT, THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL, GERALDINE S. HINES, NANCY GERTNER, RONALD S. SULLIVAN JR., AND JACK MCDEVITT IN SUPPORT OF THE DEFENDANT-APPELLANT

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September 17, 2018

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutory Authorities

Rules and Regulations

Additional Authorities

Interest of Amici Curiae

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM"), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has a longstanding interest in addressing persistent racial

inequalities in the Commonwealth's justice system. See, e.g., Commonwealth v. Warren, 475 Mass. 530 (2016); Commonwealth v. Laltaprasad, 475 Mass. 692 (2016).

The New England Innocence Project (NEIP) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. NEIP is committed to raising public awareness of the prevalence, causes, and costs of wrongful convictions, including bringing to light the racial disparities that exist within the criminal legal system and that have led to a disproportionate number of people of color who have been wrongfully convicted.

The Innocence Project, founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law in New York, New York, is an organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established primarily through post-conviction DNA evidence. The Innocence Project also seeks to prevent future wrongful convictions by

researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system – reforms that both help free the innocent and help lead to the prosecution of actual perpetrators. The Innocence Project has served as counsel or provided critical assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide.

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the twentieth century's most important legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, Brown v. Board of Education. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing, criminal sentencing, and punishment that created mass

incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies.

The Criminal Justice Institute at Harvard Law School is the curriculum-based criminal law clinical program of the Harvard Law School. The Institute also researches criminal justice issues, particularly those that impact poor people and racial and ethnic minorities nationally. The issue whether it is proper to exclude prospective jurors who express a view with respect to the fairness of the criminal justice system relative to people of color presents a question of particular importance to the administration of criminal justice.

Amicus Gerladine S. Hines is a Massachusetts resident whose interest in this case arises from two distinct aspects of her life experience. First, as a person of color with decades of experience as a criminal defense attorney, she witnessed firsthand the way in which implicit and overt bias in the criminal justice system disadvantages persons of color. Second, as a former member of the Massachusetts judiciary, she believes she has important insights into how racial bias infects the criminal justice system. If prospective jurors who bring this perspective to jury service may be

struck for cause, notwithstanding their ability to be fair and impartial, she is concerned that such a procedure would undermine the defendant's right to a fair trial.

Amicus Nancy Gertner is a Massachusetts resident who is a retired U.S. District Judge, a Lecturer on Law at Harvard Law School, and of counsel at Fick & Marx LLP. She is concerned that, because of her views about the criminal justice system, she might be excluded from jury service if this Court holds that jurors can be struck for cause for their belief that the criminal justice system is unfair to people of color.

Amicus Ronald S. Sullivan Jr. is a Massachusetts resident and the Jesse Climenko Clinical Professor of Law at the Harvard Law School. He teaches and writes in the area of criminal law and criminal procedure. He is concerned that, because of his own views about the criminal justice system, he may be excluded from jury service if this Court holds that jurors can be struck for cause for their belief that the criminal justice system is unfair to people of color.

Amicus Jack McDevitt is a Massachusetts resident, professor of criminology and criminal justice, and the director of Northeastern’s Institute on Race and

Justice. He has written a number of articles and reports regarding bias in the criminal justice system. He is concerned that, because of his views about the criminal justice system, he might be excluded from jury service if this Court holds that jurors can be struck for cause for their belief that the criminal justice system is unfair to people of color.

Statement of Issues

As it relates to the interests of amici, this case raises the following issue:

> Whether the trial judge wrongly excused a juror, on the Commonwealth's challenge for cause, after the juror expressed her view that the criminal justice system was unfair to young African-American men.

Statement of the Case and Statement of the Facts

Amici adopt the statement of the case and statement of the facts set forth in the brief of Defendant-Appellant Quinton Williams.

Introduction and Summary of the Argument

The right to a fair jury trial is enshrined in both the Massachusetts Declaration of Rights and the United States Constitution. This Court has long recognized that any racial discrimination during that process represents a constitutional threat to defendants and

jurors alike. Commonwealth v. Soares, 377 Mass. 461 (1979). Indeed, this Court has taken action about racial disparities across the criminal justice system. E.g., Commonwealth v. Ortega, SJC-12145 (Sept. 17, 2018) (jury selection); Commonwealth v. Robertson, 480 Mass. 383 (2018) (same); Commonwealth v. Warren, 475 Mass. 530, 539-540 (2016) (stops); Commonwealth v. Bastaldo, 472 Mass. 16 (2015) (cross-racial eyewitness identification); Commonwealth v. Lora, 451 Mass. 425 (2008) (stops and arrests).

Here, the Commonwealth seeks to take a juror's recognition of the problem of racial disparities in the criminal justice system and exacerbate that very problem by removing her from the venire -- and do so "for cause." Ample empirical evidence shows that Juror 15's expressed viewpoint is factually true. This rational and widely-held viewpoint cannot be a permissible basis for a for-cause challenge. Allowing this particular viewpoint to trigger for-cause strikes will disproportionately exclude black jurors, denying defendants' jury trial rights and denying a class of jurors the opportunity to serve. Moreover, upholding the exclusion of jurors with views such as Juror 15 would compromise the fairness of,

and critically undermine public confidence in, the jury system.

The amici respectfully urge this Court to continue its critical role in safeguarding the integrity of the jury system by granting appellant's requested relief and taking action to prevent further racial discrimination in for-cause challenges.

Argument

I. THE EXCLUSION OF JURORS WHO QUESTION THE FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM IS DISCRIMINATORY AND DISTORTS THE COMPOSITION OF THE JURY.

Juror 15 observed that the criminal justice system treats young black males unfairly. That observation is correct. Empirical studies demonstrate that the criminal justice system discriminates against people of color at every stage of criminal proceedings.

The Supreme Judicial Court has already recognized the criminal justice system's disparate treatment of black men, as has the Boston Police Department (BPD) and a host of other authoritative sources. Commonwealth v. Warren, 475 Mass. 530, 539-540 (2016); Jeffrey Fagan et al., Final Report, An Analysis of Race and Ethnicity Patterns in Boston Police Department and Field Interrogation, Observation,

Frisk, and/or Search Reports, at 2 (June 15, 2015) (the "Fagan Report").[1]

What is more, whether or not the observation made by Juror 15 is true -- and it is, see Section I.A, infra, -- this viewpoint is widely recognized and widely held in the Commonwealth and throughout the country, particularly among the communities and groups most affected by the disparities. As a result, eliminating "for cause" those potential jurors who also recognize and acknowledge this disparity is discriminatory and distorts the composition of the jury.

Other jurisdictions have refused to allow disqualifying such a juror for cause. In Mason v. United States, 170 A.3d 182 (D.C. 2017), the D.C. Circuit confronted the exact issue present here: whether a juror could be disqualified for expressing the view that the criminal justice system is unfair to blacks. The court held: "standing alone, the belief that the criminal-justice system is systemically

[1] This report was commissioned by the Boston Police Department. Even after controlling for non-race factors, it found "racially disparate treatment of minority persons" in Boston. Id. at 20.

unfair to blacks is not a basis to disqualify a juror. Rather, that belief is neither uncommon nor irrational. Moreover, there is no basis for an inference that potential jurors holding that belief are necessarily unable to be impartial." Id. at 187 (emphasis added).

Whether the observation made by Juror 15 is true or not -- though the amici submit that it is true -- the belief is certainly neither uncommon nor irrational, considering the large amount of empirical data, academic consensus, and recognition by prominent institutions and figures throughout the Commonwealth supporting Juror 15's belief.

If this court were to hold that expressing this viewpoint justifies a for-cause dismissal of a juror, the result would be that a disproportionate number of minority jurors will be excluded from the jury pool. Because the viewpoint is so widely-held and recognized, the result would also disqualify a large number of otherwise well-qualified jurors from the pool, further distorting the composition of the jury.

A. The criminal justice system discriminates against young black men.

Juror 15 stated that "frankly, I think the system is rigged against young African-American males."[2] In light of the vast amount of research and evidence supporting this point, Juror 15's observation is no surprise. Indeed, this discrimination permeates every stage of the criminal process.

1. Black men are disproportionately stopped and arrested.

The decision about who to stop, who to search, and who to arrest is affected by race. The Supreme Judicial Court recognized as much in Warren, citing the Boston Police Department's own Field Interrogation and Observation (FIO) report data which showed that between 2007 and 2010 "[t]he targets of FIO reports were disproportionately male, young, and Black. For those 204,739 FIO reports, the subjects were 89 percent male, 54.7 percent ages 24 or younger, and 63.3 percent Black." Id. at 539 n. 15; Fagan Report at 2.[3]

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[2] Trial Transcript 109:7-8.

[3] The Fagan Report, commissioned by the BPD to further study the FIO data, also found that "the percentage of Black and Hispanic residents in Boston neighborhoods were also significant predictors of increased FIO

Confronted with this clear proof of disparate treatment of young black men, the court in Warren instructed judges to consider this "reality for black males in the city of Boston" in the calculus for determining whether police officers have a reasonable suspicion of a suspect. Id. at 540 (ultimately concluding that the police in that particular instance had "far too little information" to support a stop of the defendant).[4] It is deeply ironic that judges are instructed to consider this reality in reaching their decisions, but Juror 15 was disqualified from service as a juror for merely acknowledging it.

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activity after controlling for crime and other social factors. These racial disparities generate increased numbers of FIO reports in minority neighborhoods above the rate that would be predicted by crime alone. For instance, a neighborhood with 85 percent Black residents would experience approximately 53 additional FIO reports per month compared to an 'average' Boston neighborhood. Id. at i.

[4] The SJC's acknowledgment of this type of racial disparity is not new. In Commonwealth v. Phillips, 413 Mass. 50 (1992), the SJC upheld the lower court's finding that the BPD had pursued a "search on sight" policy of young black men in Roxbury, finding that evidence of numerous unconstitutional searches "tends to support the further evidence of an official policy approving such procedures." Id. at 57. Even if such policies may not be in effect today, past instances such as these contribute to the validity of observations such as Juror 15's that the system is "rigged" against young African-American men.

The BPD's findings are consistent with what has been found in studies across the country. For instance, a four-year study of sixty million state patrol stops conducted across twenty states found that blacks and Hispanics were more likely to be ticketed, searched, and arrested than white drivers, even after controlling for age, gender, time, and location.[5] A similar study conducted in Massachusetts found that non-white drivers were more likely to be cited and more likely to be searched.[6]

An analysis of over eight million marijuana arrests between 2001 and 2010 found that a black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though the two groups use marijuana at similar rates.[7]

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[5] Emma Pierson, et al. A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, 5-7, Stanford University (2017). The study further found that the threshold for searching black and Hispanic drivers was lower than for searching white drivers. Id. at 11.

[6]Amy Farrell, et al. Massachusetts Racial and Gender Profiling Study, 24-27 (2004).

[7] American Civil Liberties Union, The War on Marijuana in Black and White, 4 (2013). The study authors found that this disparity persisted "in all regions of the country, in counties large and small, urban and rural,

Minority youth are more likely than white youth to be stopped by the police and to report negative experiences with police officers. Police misconduct occurs at higher levels in minority neighborhoods.[8]

2. Racial disparities persist in the trial and punishment stages.

The racial disparities that begin in the pre-arrest and arrest phases persist into the assessment of guilt and punishment phases. A comprehensive review of literature regarding prosecutorial decisions, for instance, found that black defendants were forty-four percent less likely to receive "pre-trial diversion"[9] than their white counterparts charged

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wealthy and poor, and with large and small black populations." Id.

[8] Rod K. Brunson & Ronald Weitzer, Police Relations with Black and White Youths in Different Urban Neighborhoods, 44 Urb. Aff. Rev. 858-859 (2009) (citing Donald J. Black & Albert Reiss, Jr., Police Control of Juveniles, 35 Am. Soc. Rev. 63-77 (1970); John Hagan et al., Race, Ethnicity, and Perceptions of Criminal Injustice, 70 Am. Soc. Rev. 381-407 (2005); Jeffrey Fagan & Garth Davies, Street Stops and Broken Windows: Terry, Race, and Disorder in New York City, 28 Fordham Urb. L. J. 457-504 (2000)).

[9] "Pre-trial diversion" allows a prosecutor to dismiss a criminal charge if the defendant successfully completes a community-based diversion program.

with similar offenses.[10] Prosecutors are more likely to engage in charge bargaining with white defendants than with black or Latino defendants with similar legal characteristics.[11] They are also less likely to withhold adjudication for a black defendant who pleads guilty.[12]

A study published this year on plea bargaining revealed similar racial disparities: "White defendants are more likely than black defendants to receive a reduction in their principal initial charge. As a result, white defendants who face initial felony charges are more likely than black defendants to end up being convicted of misdemeanors rather than more

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[10] Traci Schlesinger, Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts, 3 Race & Just. 210, 223 (2013).

[11] Schlesinger, supra, at 212 (citing Shawn D. Bushway & Anne Morrison Piehl, Social Science Research and the Legal Threat to Presumptive Sentencing Guidelines, 6 Criminology & Pub. Pol'y, 641 (2007)). Bushway and Piehl further found that disparities at the plea bargaining stage work to produce disparities in sentencing outcomes as well. Id.

[12] Schlesinger, supra, at 212 (citing Stephanie Bontrager, et al. Race, Ethnicity, Threat and the Labeling of Convicted Felons, 43 Criminology 589-622 (2005)). "Withholding adjudication" allows a judge to order probation without formally convicting the defendant.

serious crimes. Similarly, white defendants initially charged with misdemeanors are more likely than black defendants to be convicted for crimes carrying no possible incarceration or not being convicted at all."[13]

The federal government has also recognized significant sentencing disparities between similarly-situated black and white defendants. The United States Sentencing Commission first released a report in 2010 that analyzed federal sentencing data to determine whether the length of sentences correlated with demographics. That report found that black male offenders received longer sentences than similarly-situated white male offenders. The Commission updated that report in 2012 and most recently in 2017, finding as of 2017 that sentences still average 19.1 percent longer for black male defendants, a figure that the

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[13] Carlos Berdejó, Criminalizing Race: Racial Disparities in Plea-Bargaining, 59 B.C.L. Rev. 1187, 1240 (2018).

Commission found to be "relatively unchanged" compared to the prior time period studied.[14]

The Massachusetts Sentencing Commission has recognized that racial disparities in the Commonwealth are even worse than the national numbers. At the national level, 5.8 blacks are incarcerated for every 1 white person. In Massachusetts, however, the ratio jumps to 7.9 blacks incarcerated for every 1 white. Massachusetts courts' treatment of Hispanics was similarly poor – the national ratio of 1.3 to 1 in 2016 jumps to 4.9 to 1 in Massachusetts.[15] In fact, this report prompted Massachusetts Supreme Judicial Court Chief Justice Ralph Gants to create an independent research team to examine the reasons for racial disparities in the criminal justice system.[16]

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[14] United States Sentencing Commission, Demographic Differences in Sentencing: An Update to the 2012 Booker Report, (2017).

[15] Massachusetts Sentencing Commission, Selected Race Statistics (2016).

[16] Shira Schoenberg, Mass Courts to Examine Racial Disparities in Imprisonment Rates, MassLive, Oct. 20, 2016, available at: https://www.masslive.com/politics/index.ssf/2016/10/mass_courts_to_examine_dispari.html. To the amici's knowledge, the results of this research have yet to be released.

As a report to the United Nations Human Rights Committee summarized: "African-Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences. African-American males are 5.9 times more likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos -- compared to one of every seventeen white boys. Racial and ethnic disparities among women are less substantial than among men but remain prevalent."[17]

This is just a sampling of the substantial amount of research that has been done on this topic. The racial disparities present in police stops, arrests, prosecutorial decisions, sentencing, and incarceration rates support the juror's statement that the system is "rigged" against young African-American men. The

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[17] The Sentencing Project, Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System, 1 (2018).

conclusion is inescapable -- the system does not treat young black men the same way that it treats anyone else.

B. The criminal justice system's disparate and discriminatory treatment of young black men is widely recognized, and this belief is widely held, particularly among the most affected communities and groups.

Beyond the empirical data supporting the objective validity of Juror 15's observation, the belief that Juror 15 expressed is extremely common in the general population. It is the prevailing view in this country across the entire population, and it is by far the dominant view within black and Hispanic communities.

An NBC News Exit Poll conducted during the last presidential election found that forty-nine percent of voters nationwide believe that the criminal justice system treats blacks unfairly, while just forty-two percent believed that all persons are treated fairly.[18] Among black voters, eighty-two percent believed that the criminal justice system was unfair to blacks, with

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[18] NBC News, Voters Split on Whether Criminal Justice System Treats All People Fairly, (Nov. 8, 2016), available at https://www.nbcnews.com/card/nbc-news-exit-poll-voters-split-whether-criminal-justice-system-n680366.

approximately sixty percent of Hispanic voters agreeing that blacks are unfairly treated.

A 2014 poll, conducted by the Public Religion Research Institute, found that fifty-two percent of all Americans disagreed with the statement that "police officers generally treat blacks and other minorities the same as whites." That number jumped to seventy-five percent among black respondents and sixty-nine percent among non-white respondents generally.[19] The numbers also diverge with respect to political affiliation – according to the same poll, while sixty-nine percent of Democrats believe blacks are treated unfairly, approximately sixty-six percent of Republicans believe they are treated fairly.[20]

In other words, if a juror's statement that they believed the criminal justice system treated African-Americans unfairly were allowed to be used as a basis to disqualify that juror for cause, most jurors in the venire could be struck on that basis. Further, the

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[19] PRRI, Race, the Criminal Justice System, and Police, (Nov. 14, 2014), available at https://www.prri.org/spotlight/prri-fact-sheet-race-the-criminal-justice-system-and-police/.

[20] Id.

vast majority of black and minority jurors could also be struck, leading to juries that would be predominantly white and predominantly of a single political viewpoint.

The identity of Juror 15 in this case is unknown, but there are many, many potential Juror 15s across the Commonwealth. For instance, Juror 15 could have been Senator Elizabeth Warren, who recently stated in a speech that the criminal justice system is "racist . . . front to back."[21] Juror 15 could have been Chief Justice Gants, who noted that Massachusetts' incarceration rate, higher than the national average, were a "troubling disparity" worthy of further study, and that the Commonwealth needs "the courage and commitment to handle the truth" once the reasons for the disparities are learned.[22] Juror 15 could have

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[21] CBS News, Elizabeth Warren Declares Criminal Justice System "Racist" From "Front to Back", (August 4, 2018), available at https://www.cbsnews.com/news/elizabeth-warren-declares-criminal-justice-system-racist-from-front-to-back/.

[22] Milton Valencia, SJC Chief Wants to Know if Minorities Get 'Equal Justice', Boston Globe (Oct. 21, 2016), available at https://www.bostonglobe.com/metro/2016/10/20/sjc-chief-probe-sentencing-disparities-for-minorities/44Dxw4qDmqOcKYSGGOpw5I/story.html.

been any of the numerous individual amici who have signed on to this brief. Or, and perhaps most importantly, Juror 15 could be any average person who holds this completely rational and well-supported viewpoint. To hold that all of these people are unqualified to serve on a jury would only serve to continue to undermine the public's confidence in the criminal justice system.

II. THE FOR-CAUSE EXCLUSION OF JURORS HOLDING CRITICAL VIEWS OF THE CRIMINAL JUSTICE SYSTEM INVITES RACIAL DISCRIMINATION BY PROXY AND IMPERILS THE CONSTITUTIONAL GUARANTEE OF A FAIR JURY TRIAL.

Both the Massachusetts Declaration of Rights and the United States Constitution guarantee defendants the basic right to trial "by a fair cross-section of their community." Commonwealth v. Soares, 377 Mass. 461 (1979)(right based on Article 12 of the Massachusetts Declaration of Rights and the 6th and 14th Amendments of the United States Constitution). This right is "critical," not only "to guard against the exercise of arbitrary power" but also to ensure "public confidence in the fairness of the criminal justice system." Id. at 480. This Court has previously addressed the problems of racial prejudice in the context of venire selection and the use of

peremptory challenges. Because racial discrimination is no less likely to emerge in the use of for-cause challenges, this Court needs to confront it in this context as well.

A. This Court has acted to eradicate racial prejudice in other phases of jury selection.

Over the past half-century, this Court has recognized the dangers racial discrimination at any point in the jury selection process poses to the constitutional right to a fair trial.

For example, in Commonwealth v. Arriaga, this Court confronted the threat of racial discrimination at the earliest phase of jury selection: formulation of the venire. 438 Mass. 556 (2003). While a venire drawn randomly from the community can be fair on its face, this random selection is only as fair as the list of residents from which it is drawn. See G. L. c. 234A, § 10 (requiring each municipality of the Commonwealth to submit yearly an updated list of residents to use in random jury selection). Arriaga recognized that any systemic prejudice in formation of the venire threatened the "critical constitutional protection" of a fair trial. 438 Mass. at 571. In response to the threat, this Court acted, ordering the

Office of the Jury Commissioner to begin to collect racial demographic data from prospective jurors. Id. The availability of this previously unknown data supplies defendants (and the Court) with the means to detect impermissible discrimination at this phase in formation of the venire.

This Court has likewise confronted the threat of racial discrimination at the last phase of jury selection: the exercise of peremptory challenges. Forty years ago, Commonwealth v. Soares addressed a prosecutor who had struck twelve of thirteen black prospective jurors before a trial convicting three black defendants. At that time, the Supreme Court of the United States had previously held that a prosecutor was entitled to a presumption of fairness in the use of peremptory challenges, and that presumption was not overcome even when all potential black jurors were struck because they were black. Swain v. Alabama, 380 U.S. 202, 222-23 (1965). Rather than follow the Supreme Court, this Court created an entirely new procedure to be used during jury selection, allowing a defendant to challenge discriminatory peremptory strikes as they occurred. And seven years later it was the Supreme Court who

followed this Court's lead by crafting analogous procedures in Batson v. Kentucky, 476 U.S. 79 (1986).

What this Court has not yet done, however, is undertaken analysis of a middle link in the jury-selection chain: for-cause challenges. The Soares court itself anticipated the need for the development of protections against discriminatory for-cause challenges in the wake of its decision: "[I]t may be desirable to study the experience which develops in the application of the present decision -- experience with challenges, for cause and peremptory, and with judicial reactions -- as a basis for formulating rules of court." Soares, 377 Mass. at 489 n. 34 (emphasis added). In the decades since Soares, no such rules have been promulgated. This case now squarely presents the Court with this issue.

B. This Court should ensure that racial prejudice plays no part in for-cause challenges.

The sequencing of jury selection means that discriminatory for-cause challenges can undermine the existing protections of Soares. If prosecutors are able to excise all jurors of a protected class under the cover of for-cause challenges, instead of peremptories, the possibility of a Soares objection is

wholly eliminated. And even if some jurors of that class remain, a pattern of racially-motivated peremptories would necessarily be more difficult to detect and argue to the judge.

In fact, discriminatory for-cause challenges are even more insidious than their impermissible peremptory counterparts. While peremptories are facially adversarial, for-cause strikes are clothed in a mantle of impartiality. When a juror is struck for cause, it is not the work of a zealous prosecutor, but the decision of the impartial court. If views such as Juror 15's are allowed to serve as the basis for a for-cause challenge and are utilized as a proxy for race, the result is the court itself blessing "a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced." Soares, 377 Mass. at 488. Such a result was impermissible in Soares, and should be impermissible now.

Here, this Court is confronted with both the threat of racially discriminatory for-cause challenges and an opportunity to take steps to prevent the harm of such discrimination in the future. As discussed above, Juror 15's observation that the criminal

justice system is unfair to young black men is not only accurate and widespread, it is disproportionately held by black men and women. If such views authorize striking a juror for cause, they may be used as a proxy for race. A prosecutor could, by exposing jurors concerned about the fairness of the justice system, disproportionally induce the dismissal of black jurors -- and do so for cause.

The procedures of voir dire make it virtually certain that such views will surface. Voir dire questioning includes mandatory questions about possible bias, which can lead jurors to disclose (as Juror 15 did) their views spontaneously. See Mass. R. Crim. P. 20(b). If these critical views are not revealed there, a prosecutor can easily utilize attorney-requested voir dire, which, as a rule, is allowed. See, e.g., Superior Court Rule 6.3 ("The trial judge shall allow attorney or party voir dire if properly requested" and "should generally approve a reasonable number of questions."). Once the views are revealed, the jurors would be struck, either sua sponte by the judge or on motion by the prosecution.

The framework of Soares offers defendants an opportunity to sniff out constitutional error in

peremptory challenges ahead of trial, and provides the mechanism by which a judge can investigate, make findings, and cure the error before it taints the entire proceeding. No such real-time protections exist to probe whether for-cause challenges are racially animated. Defendants have no immediate recourse if they suspect the prosecution of using observations about the fairness of the justice system as cover for racial animus in making for-cause challenges. Instead, they are left to "undertake[] a heavy burden in attempting to persuade an appellate court that there was error" in a trial judge's for-cause decision. Commonwealth v. Ascolillo, 405 Mass. 456, 459 (1989) (finding no error in judge's refusal to excuse active police sergeant for cause).

Indeed, the Commonwealth's brief focuses on the discretion that must be afforded to the trial judge in this area as if the judge's for-cause decision is virtually untouchable on appellate review. This is the precise danger defendants face when racial bias infects the for-cause process, and until now, there has not been an opportunity for this Court to develop a protocol to confront it.

For-cause and peremptory challenges are both vital parts of "a system designed to preclude prejudice." Id. at 485 n. 28. Allowing discriminatory for-cause challenges would be no less a "perversion" of that system than allowing discriminatory peremptories, and the constitutional threat to a defendant's right to trial by a fair cross-section of their community is identical. Id.

C. Discrimination deprives prospective jurors of their constitutional right to serve on a jury.

Discriminatory disruption of the jury also infringes on the constitutional rights of prospective jurors to serve. Commonwealth v. Benoit, 452 Mass. 212, 218 n.6 (2008); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991). This right to participate in the administration of the criminal law "is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." Soares, 377 Mass. at 480 (quoting Taylor v. Louisiana, 419 U.S. 522, 528 (1975)). And because violations of this right can easily evade review, vigilance must be exercised. An individual wrongfully excluded from the prospective juror list may not even be aware of the

fact, and a juror struck before trial is in no position to argue on their own behalf that the strike was discriminatory.

Given the threat to the rights of both defendants and jurors, the risk of discriminatory for-cause challenges deserves action by this Court, just as it acted to uncover any systematically discriminatory venire selection in Arriaga, and just as it acted to stamp out discriminatory peremptory challenges in Soares. The continued relevance of Soares challenges in this Commonwealth serves as proof that such action is still needed. See, e.g., Commonwealth v. Ortega, SJC-12145 (Sept. 17, 2018); Commonwealth v. Robertson, 480 Mass. 383, 384 (2018); Commonwealth v. Jones, 477 Mass. 307 (2017); Commonwealth v. Benoit, 452 Mass. 212 (2008).

III. AUTHORIZING TRIAL JUDGES TO STRIKE JURORS WHO BELIEVE THAT THE JUSTICE SYSTEM IS UNFAIR TO BLACK MEN WOULD COMPROMISE THE FAIRNESS OF THE JURY SYSTEM AND UNDERMINE PUBLIC CONFIDENCE IN THAT SYSTEM.

A. Authorizing trial judges to strike jurors who believe that the justice system is unfair to black men will lead to even less diverse juries, reduce the quality of jury deliberations, and lead to more wrongful convictions.

Jury selection procedures that result in the exclusion of people of color are not simply discriminatory, see supra at Section II; they also are more likely to result in incorrect and less supported verdicts. Substantive outcomes are negatively affected when non-diverse or less diverse juries are seated. The public, in turn, rejects such outcomes, undermining confidence in the judicial system and its legitimacy.

1. The presence of jurors of color improves deliberations.

The inclusion of people of color on juries has a measurable impact on the quality of juror deliberations. As one study found, "By every deliberation measure examined in the present research, heterogeneous groups outperformed homogeneous groups."[23] Diverse juries were superior in the following ways:

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[23] Samuel R. Sommers, On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial

First, the very presence of people of color positively impacted the jury's deliberations. With respect to "predeliberation judgments" – the acceptance of the presumption of innocence – "jurors were less likely to believe the defendant was guilty when they were in a diverse group." Id. at 603. This finding was notable because there was an impact on "white participants [just by being part of a diverse jury] before any information exchange occurred." Id.

Second, deliberation times were longer for diverse groups, potentially because diverse groups also "discussed more case facts [] than all-White groups." Id. at 605.

Third, deliberations of diverse groups were more factually accurate than those of all-white groups, "suggest[ing] that White jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group." Id. at 604, 607.

Composition in Jury Deliberation, 90 J. Personality & Soc. Psychol. 597, 608(2006).

Finally, "diverse groups discussed more examples of 'missing' evidence [] than did all-White groups." Id. at 604. Summarizing then,

> Even though they deliberated longer and discussed more information, diverse groups made fewer factual errors than all-White groups. Moreover, inaccuracies were more likely to be corrected in diverse groups. . .. [R]acially heterogeneous groups had discussions that were more comprehensive and remained truer to the facts of the case. As detailed above, diverse groups were also more open-minded in that they were less resistant to discussions of controversial race-related topics.

Id. at 608.

Others have also observed that "studies indicate that racially diverse juries . . . may make fewer cognitive errors than homogeneous jurors, and that learning about or experiencing diversity and multicultural ideologies in general can reduce implicit bias."[24]

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[24] Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345, 414-15 (2007) (citing Samuel R. Sommers, On Racial Diversity and Group Decision-Making: Informational and Motivational Effects of Racial Composition on Jury Deliberations, 90 J. Personality & Soc. Psychol. 597 (2006)).

2. The presence of jurors of color improves outcomes.

"[A] significant number of studies have found that changing the racial composition of juries does change verdicts."[25] These include the findings "that white jurors are more likely than black jurors to convict black defendants and that they are also more likely to acquit defendants charged with crimes against black victims." Id.[26]

Indeed, in one particularly stark study, researchers found a large, statistically-significant sixteen-point gap in conviction rates for black versus white defendants when there are no blacks in the jury.[27] Notably, that gap is effectively eliminated when even a single black juror was seated. Id. Even more significantly, researchers found that all-white juries "convict black defendants of drug crimes at an almost 25

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[25] Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Jury Race on Jury Decisions, 92 Mich. L. Rev. 63, 82 (1993).

[26] Citing Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611 (1985), and the scholarship developed since then.

[27] Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, The Impact of Jury Race in Criminal Trials, 127 Q.J. Econ. 1017, 1035 (2012).

percentage point higher rate than white defendants." Id. at 1038. Again, introducing diversity to the jury eliminates this discrepancy entirely. Id.

In a criminal trial, the role of the jury is to find the facts, leading to either an acquittal or a conviction and the resulting life-altering consequences that follow. According to the research, the racial composition of the jury can be the deciding factor in whether a trial with black defendant, or in which there is a black victim, has a fair outcome. Therefore, to improve access to justice for all, this Court should look to remove barriers to seating jurors of color at every stage of jury selection, including where jurors are struck for cause.

3. All-white juries increase the risk of wrongful convictions.

By contrast, if the decision of the trial court stands, the result will be less diverse juries, with less thoughtful and accurate deliberations and less fair outcomes. Among those outcomes are the increased risk of wrongful convictions. Unfortunately, the examples of cases in which black defendants were wrongfully convicted by all-white juries are legion. However, the following are just a few:

- Laurence Adams was wrongfully convicted of murder and sentenced to death by an all-white jury in Massachusetts in 1974. Despite testimony from his entire family that he was at home with them when the crime was committed, he was convicted based on incentivized witness testimony. He was exonerated after serving thirty years in prison.[28]
- Darryl Hunt was wrongfully convicted of murder in 1985 by an all-white jury in North Carolina based on eyewitness misidentification and jailhouse informant testimony. He was exonerated by DNA evidence after serving nineteen years in prison. The real perpetrator, who had been incarcerated for another murder, eventually pled guilty to having committed this murder as well.[29]
- Glenn Ford was wrongfully convicted of murder and sentenced to death by an all-white jury in

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[28] Laurence Adams, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2983, last visited September 15, 2018.

[29] Darryl Hunt, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3314, last visited September 15, 2018.

> Louisiana after the prosecution struck all potential black jurors from the venire. He was convicted, in part, based on faulty forensic evidence and he was exonerated when the prosecutor's office moved to vacate his conviction and death sentence based on evidence of innocence in 2014. Glenn Ford served thirty years in prison for a crime he did not commit.[30]

Any wrongful conviction reveals critical failures in the criminal justice system, and any practice that homogenizes the juries exacerbates the risk that such critical errors will occur.

B. Public confidence in jury verdicts depends on the fairness of the underlying process.

The legitimacy of the criminal justice system depends on the public acceptance of decisions reached by juries. In Taylor v. Louisiana, the Supreme Court recognized that "[c]ommunity participation in the administration of the criminal law . . . is also critical to public confidence in the fairness of the criminal justice system." 419 U.S. 522, 529 (1975). In

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[30] Glenn Ford, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4395, last visited September 15, 2018.

particular, when certain members of that community are prevented from participating, the harm is especially insidious and "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." Powers v. Ohio, 499 U.S. 400, 412 (1991). The risk is that any ensuing "verdict will not be accepted or understood if the jury is chosen by unlawful means at the outset." Id.

In the context of peremptory challenges used to exclude men, the Supreme Court determined that "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the 'deck has been stacked' in favor of one side." J.E.B. v. Ala. ex. rel. T.B., 511 U.S. 127, 140 (1994). The same result abides here; if this Court permits a for-cause challenge against a prospective juror who has concerns about the disparate treatment of black men by the criminal justice system, for-cause strikes will disproportionately exclude people of color. This will not only "create the impression . . . that the 'deck has been stacked,'" it will, in fact, stack the deck. Id.

C. Criminal justice processes appear fairer if juries are racially diverse.

In circumstances like these, impressions or appearances can be just as important as reality, and it has been long recognized that "due process is denied by circumstances that create the likelihood or the appearance of bias," "even if there is no showing of actual bias." Peters v. Kiff, 407 U.S. 493 (1972), see also In re Murchison, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness").

Social science and psychology researchers have shed light on some of the circumstances that can cause individuals to reject jury verdicts, finding that, "people's satisfaction with a decision is strongly related to their perceptions of the fairness of the procedures used to reach it."[31] That is, "even absent evidence of unequal distribution of outcomes, system-wide procedures that are viewed as unfair are likely to undermine confidence in that system." Id. Jury

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[31] Samuel R. Sommers, Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research, 2 Soc. Issues & Policy Rev. 65, 80 (2008) (citing the work of John Thibault and Laurens Walker).

composition is one way in which people judge the system's fairness. Indeed, one study found that "[t]he representativeness of juries has clear implications for citizens' perceptions of a legal system's legitimacy," id. at 79, and that there is a link between unrepresentative juries and procedural justice concerns."[32]

Another study that considered how jury composition impacted the perceptions of fairness came to the same conclusion.[33] The researchers determined that, "When the verdict was not guilty, fairness ratings for a trial with a racially homogeneous and heterogeneous jury did not differ. However, when the verdict was guilty, respondents viewed the trial with a homogeneous jury as less fair than the trial with a heterogeneous jury." Id. at 1048. They concluded:

> In summary, the relationship between verdict and the racial composition of the jury suggests that when the process is inclusionary (i.e., the jury is racially heterogeneous), the outcome does not influence the perceived fairness of the trial. However, when the

[32] See also Tom R. Tyler, Social Justice: Outcome and Procedure, 35 Int'l J. Psychol. 117 (2000).

[33] Leslie Ellis & Shari Seidman Diamond, Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy, 78 Chi.-Kent L. Rev. 1033 (2003).

> process fails to produce a heterogeneous jury (i.e., the all-White jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair. The negative effect of an outcome that is perceived to be inappropriately severe (a guilty verdict) is ameliorated when the outcome is the result of a legitimate process.

Id. at 1049.

Between this empirical evidence about the appearance of justice and the data of disparate treatment discussed supra, the fact that many communities of color in the Commonwealth reject jury verdicts as the product of an unfair process is unsurprising. In Boston, only twenty-seven percent of black individuals believe that the courts treat black and Latino individuals "somewhat" or "very" fairly.[34] Only forty-four percent were "very" or even "somewhat" confident in the criminal justice system. Id.

This is consistent with nationwide data, in which eighty-two percent of black voters believe the criminal

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[34] The Hyams Foundation and MassInc Polling Group, Racial Inequities, Policy Solutions: Perceptions of Boston's Communities of Color on Racism and Race Relations (Mar. 2018), 19, available at https://static1.squarespace.com/static/59a6d1d0e9bfdf582649f71a/t/5ac3e863575d1fa2760902a6/1522788452849/Racial+Inequities+Policy+Solutions.pdf.

justice system treats black individuals unfairly.[35] In recent years, these feelings seem to be fueled by the fact that, despite video evidence showing the killings of black men by white police, juries have consistently failed to return indictments or guilty verdicts. For example, in 2014, after the killings of Eric Garner and Michael Brown, seventy percent of black individuals reported decreased confidence in the legal system.[36]

Perception is, in this case, reality. The public's declining confidence in the criminal justice system is backed by data showing racial disparities at all points in the criminal process. See supra at Section I.A. Jury selection is a critical point in that process, and this Court has been a leader in attempting to eradicate racial discrimination where it has come in the form of a peremptory challenge. To safeguard the rights of defendants and jurors, and to promote the integrity of

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[35] NBC News, Voters Split On Whether Criminal Justice System Treats All People Fairly, (Nov. 8, 2016), available at https://www.nbcnews.com/card/nbc-news-exit-poll-voters-split-whether-criminal-justice-system-n680366.

[36] NBC News/Marist Poll, National Questionnaire (Dec. 2014), available at http://newscms.nbcnews.com/sites/newscms/files/nbc_news_marist_poll_usa_annotated_questionnaire_december_2014.pdf.

the criminal justice system as a whole, it should act again here.

Conclusion

For the foregoing reasons, amici respectfully request that this Court grant appellant's requested relief and implement procedural protections against racial discrimination into the exercise of for-cause challenges.

Respectfully submitted,

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September 17, 2018

MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18; and Mass. R. App. P. 20.

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Christopher J. Cifrino

MASS. R. APP. P. 13(D) CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on September 17, 2018, I caused two copies of the Brief of the Amici Curiae Massachusetts Association of Criminal Defense Lawyers et al. to be served by U.S. mail on the following counsel for Defendant-Appellant Quinton Williams:

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