Proposed New GR 37—Jury Selection Workgroup

FINAL REPORT

"Twenty-six years after *Batson*, a growing body of evidence shows

that racial discrimination remains rampant in jury selection."

Justice Charles Wiggins *State v. Saintcalle*, 178 Wn.2d 34, 35 (2013).

BACKGROUND

In 2015, the American Civil Liberties Union (ACLU) proposed to the Supreme Court a new GR 36—Jury Selection. The court published the proposed rule for comment with a comment period ending April 30, 2017. During that time, the court received thirty comment letters including two letters proposing alternative rules. Also during that time, a new GR 36—Trial Court Security was adopted, therefore the court re-numbered the ACLU's proposed new GR to 37.

One of the alternative rule proposals was submitted by the Washington Association of Prosecuting Attorneys (WAPA), and the ACLU subsequently submitted an alternate version of their original proposal. Based on these three proposals and the subsequent comments, the court requested a workgroup be formed to see if a consensus could be reached on integrating the proposals and if not, to provide a clearer description of the positions and concerns which would assist the court in taking action on the rule proposals.

WORKGROUP OBJECTIVE

Consider the three rule proposals to see if consensus can be reached on integrating such proposals, if not, to provide a clearer description of positions and concerns which would assist the court in taking action on the rule proposals.

WORKGROUP PROCESS

To begin their process, the workgroup started with the three rule proposals and created a small drafting group to capture areas of consensus and decisions as they were made. Almost all workgroup members attended regularly in person or by phone. Workgroup members discussed various state and federal cases and had access to the 2017 Minority and Justice Commission Symposium on Jury Diversity materials as well as to the comments that had been posted regarding the original published rule.

Specifically, the workgroup discussed juror selection jurisprudence, including such cases as: *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013); *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010); *State v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), and *State v. Evans*, 100 Wn. App 757, 998 P.2d 373 (2000). Workgroup members also discussed statutes and court rules such as RCW 4.44.120 and CrR 6.4 to review current jury selection requirements and identify the need for changes.

In addition to reviewing relevant materials, workgroup members discussed various approaches to addressing the issue of juror discrimination. Through these discussions, areas of agreement and disagreement emerged and four recommendations were made, including a rule proposal. After multiple drafting attempts by individuals and collectives of members, ultimately, Mr. Taki Flevaris and Mr. Jim Whisman produced the final draft rule proposal with alternative options that were discussed and voted on at the last meeting. The recommendations and final rule proposal are discussed in detail below.

Although the proposed rule is the final product of the workgroup's process, it does not incorporate all of the areas of consensus or disagreement. For this reason, a brief overview of areas of general consensus and disagreement is provided below. Workgroup members agreed to submit individual statements in support or opposition to concepts or language included in the final proposed rule. Those statements follow the proposed rule.

AREAS OF CONSENSUS

The history of the exclusion of potential jurors based on race and/or ethnicity is significant, meaningful, and should be referenced in the rule proposal.

Workgroup members have different opinions on where the history of exclusion should be reflected in the rule. Suggestions included: 1) a detailed history in the GR 9 cover sheet as part of the rule's purpose statement, or 2) incorporating the history in the definition of who a "reasonable" observer is within the proposed rule. Ultimately, the majority of the workgroup members voted to include the definition within current subsection (f).

It is appropriate for the proposed rule to be a General Rule, which applies to both criminal and civil jury trials.

Members discussed the differences in impact of a jury selection rule on civil and criminal trial practices. Members reached consensus on maintaining the proposal as a General Rule which is implemented in both criminal and civil jury trials.

Eliminating peremptory challenges is not the preferred way to address juror discrimination.

Workgroup members discussed the idea of eliminating peremptory challenges and concluded that they are still useful as long as they are not based on the race or ethnicity of potential jurors. One member commented that the removal of peremptory challenges would force appellate courts to examine the challenges for cause, which could lead to an inconsistent or possibly unwanted outcome.

The proposed rule should not simply codify *Batson* and its progeny.

Workgroup members discussed the shortcomings and procedural difficulties under the current juror selection framework. Generally, workgroup members agreed that the Supreme Court has signaled the need for substantial reform through its jurisprudence in juror selection and the convening of this workgroup.

It is necessary to address implicit bias.

Workgroup members rejected the "purposeful discrimination standard" established by *Batson* because it fails to consider discrimination caused by implicit bias. Members concluded that the court's recent opinions such as *Saintcalle* and *Erickson* make it clear that the final rule should address implicit bias.

A low threshold for the basis to hear the objection is preferred.

Workgroup members acknowledged that while there should be some threshold to hear an objection under the new rule, most concurred that the threshold should not prevent the striking party from having to present a race neutral reason for a peremptory challenge. Using the *prima facie* standard, if the trial judge erroneously overrules an objection, or if the appellate court changes the standard which had been correctly applied by the trial judge, the appellate court currently has no information about the reason for the peremptory. If the striking party is always required to state a race neutral reason for the peremptory, there will be an appropriate record for the appellate courts to consider.

The argument regarding the objection should be heard outside of the presence of the jury pool.

Upon review of the narratives delivered at the Minority and Justice Symposium, workgroup members agreed the colloquy between both litigants and the judge's determination related to a GR 37 objection should be made outside of the presence of the jury pool.

The GR 37 objection should be made before the potential juror is excused.

Although workgroup members acknowledged that this provision could be perceived to conflict with the ruling in *Erickson*, where the court determined that the objection could be raised after the jury pool has been excused, they agreed that objection before dismissal is preferred. The issue raised in *Erickson*, where the defense claimed the trial court never allowed an opportunity for counsel to make a *Batson* objection, can easily be avoided if, after peremptory challenges have been completed but before any jurors have been released, the court simply asks counsel if there are issues regarding the jury selection process. If any counsel indicate the existence of an issue, the jurors should be escorted from the courtroom before any discussion of the issue.

The burden of proof should rest with the challenging party.

Workgroup members generally agreed that when the evidence could go either way and a judge could see both sides of the argument, the judge ultimately relies on whether the burden of proof has been met. Historically, the burden has rested with the objecting party. Therefore, instead of requiring the defendant or objecting party to prove a *prima facie* case of discrimination against a particular juror, workgroup members generally agreed the burden should be carried by the striking party to give reasons to justify the peremptory challenge for the judge's determination. However, members did not agree regarding the standard of the burden.

The judge is allowed to raise the issue on his or her own motion.

Workgroup members discussed the option of having the judge raise the issue on his or her own motion, ultimately they agreed that current law already provides for the judge to raise the issue. *State v. Evans*, 100 Wn. App 757 (Div. 1, 2000).

Requiring blind voir dire was raised but not explored.

The suggestion of blind voir dire, in which attorneys do not see the jurors they are questioning, was raised as a means to eliminate the possibility of challenge based on perceived or actual race or ethnic identification. However, the group chose not to explore the suggestion further.

AREAS OF DISAGREEMENT

Including gender and sexual orientation in the current rule proposal.

Initially, the workgroup focused on issues of race and ethnicity as they had been discussed in *Batson* and Washington state court cases. Members hoped that if they found an agreed-upon approach regarding challenges to jurors based on race and ethnicity that the approach could simply be extended to issues of gender and sexual orientation. At the final meeting, some members expressed concern about extending the rule proposal to include gender and sexual orientation when those categories or classifications had not specifically been discussed. Additionally, members agreed that while gender and sexual orientation should be included in the proposed rule at a later time after thoughtful consideration, in order to meet the court's requested time frame and objective, it was necessary to postpone further discussion on gender and sexual orientation.

Allowing additional time for voir dire.

Although the overwhelming majority of workgroup members voted not to include a provision allowing additional time for voir dire in the proposed rule, members did agree that the nature of voir dire may change under the new rule and judges should be aware that more time might be necessary. Workgroup members acknowledged that judges already have the ability to manage voir dire as well as the discretion to grant additional time so removal of the reminder provision from the proposed rule should not prove detrimental. Workgroup members generally agreed that the reminder to the court that additional time for voir dire may be necessary or appropriate may be included in a best practices document or education about the new rule.

The group did agree that after a *Batson* objection is raised, the juror in question should not be subject to any additional voir dire. Doing so only makes jurors feel they are on trial, and magnifies their perceived insult if they are ultimately excused.

Standard for determination of objection – "could view" vs. "would view".

Workgroup members disagreed as to the standard of proof for determining whether a peremptory challenge would be allowed. Although three alternative standards are proposed in subsection (e) of the final proposed rule, much of the workgroup's discussion focused on whether an objective observer "could view" or "would view" race or ethnicity as a factor in the challenge. Workgroup members had strong opinions about the standard for determination, which was one of the most significant areas of disagreement within the workgroup. Therefore, statements in support or opposition of a standard were requested from members and are included in this report.

Directing vs. advising the court to explain its ruling on the record.

Workgroup members generally agreed that the court should explain its ruling on the record but disagreed on whether the language directing the court to do so should be mandatory ("shall") or advisory ("should"). These alternatives are reflected in subsection (e) of the final proposed rule.

Including circumstances to be considered and reasons that are presumptively invalid.

The original and alternative rule proposals submitted by the ACLU included both of these areas as comments to the proposed rule. Several workgroup members strongly disfavored including comments in a proposed rule and suggested that any such factor or circumstance should be included either in the GR 9 cover sheet as part of the rationale or in the rule itself if it is determined that the factors contribute substantively to the determination of the challenge. Members were evenly split on including circumstances or presumptively invalid reasons in the proposed rule. Therefore, statements in support or opposition of the three alternative standards were requested from members and are included in this report.

WORKGROUP RECOMMENDATIONS

- Adopt a version of the proposed rule submitted by the workgroup.
- Independently review how the rule can be expanded to include gender and sexual orientation.
- Require education sessions for judges related to the implementation of the rule prior to its effective date, if possible.
- Consider the creation of a list of best practices for jury selection as it relates to the new rule.

Adopt a version of the proposed rule submitted by the workgroup.

The proposed rule is located in Appendix 1 and is presented in a red-lined format in order to demonstrate as many points of agreement and disagreement as possible within the workgroup. The footnotes indicate areas when there was an overwhelming majority, agreement by consensus, or an evenly divided vote.

The following is the workgroup's effort to provide a roadmap for the court for those areas where the workgroup is evenly divided and the resolution is left for the court. Subsections (e), (h), and (i) include decision points that the workgroup was unable to resolve and are highlighted below. Alternative language is noted in brackets throughout the proposed rule.

1. Subsection (e) includes three alternative standards:

   [If the court determines that 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.**] OR**

   [The peremptory challenge shall be denied unless an objective observer would conclude that race and ethnicity was not a factor in the use of the peremptory challenge.**] OR**

   [If the court determines that an objective observer would view race or ethnicity as factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.**]**

2. Subsection (e) includes a choice between "should" and "shall".

   The court [should/shall] explain its ruling on the record.

3. Workgroup members are evenly divided regarding whether subsection (h) [Reasons Presumptively Invalid]/[Suspect Reasons]—should be included or removed.

   First, a determination must be made regarding whether subsection (h) should be included or removed. If (h) is included, the alternative language bracketed in (h) should be reviewed. Based on the evenly divided vote to include or remove subsection (h), workgroup members did not discuss which alternative within the bracketed language was preferred.

4. Workgroup members are evenly divided regarding whether subsection (i) Reliance on Conduct—should be included or removed.

   First, a determination must be made whether subsection (i) should be included or removed. If (i) is included, the alternative language within the brackets should be reviewed. Based on the evenly divided vote to include or remove subsection (i), workgroup members did not discuss which alternative within the bracketed language was preferred.

Please see Appendix 2 for individual or organizational statements in support or opposition to the alternatives cited above.

Independently review how the rule can be expanded to include gender and sexual orientation.

While the majority of workgroup members agreed that the rule as proposed should focus on race and ethnicity in order to accomplish the objective within the time given, several members agreed that gender and sexual orientation should be included in the rule after thoughtful consideration of issues specific to those subjects. The workgroup recommends that the court either continues to work on, or convenes another workgroup to focus on adding gender and sexual orientation to the rule once it is adopted.

Require education sessions for judges regarding the implementation of the rule prior to its effective date, if possible.

Workgroup members acknowledge that implementing the new rule will change the voir dire process as it currently exists as that is one of the purposes. Thus, judges should be educated about the history of this process, the intent behind the language of the rule and guidance on the practical application of the rule if possible.

Consider the creation of a list of best practices for jury selection as it relates to the new rule.

Workgroup members reviewed several suggestions related to best practices but did not vote or agree on what practices should be included. Best practices could include pre-trial questionnaires, discussions with counsel about the peremptory process, and written recording of peremptory challenges.

Conclusion

Collectively, members agree that a general court rule is the best vehicle to address the discriminatory use of peremptory challenges during jury selection. The workgroup's proposed rule is intended to shift the burden to the striking party to prove a race-neutral basis for the challenge, instead of the current standard that requires a judge to make sometimes subjective determinations about the motivations of a peremptory challenge. The

workgroup would also like to offer a few members to be present at any review of the report to answer any questions the Court may have.

APPENDIX 1 – WORKGROUP PROPOSED NEW RULE GR 37—JURY SELECTION

APPENDIX 1

denotes decision points for choosing between alternative language within brackets.
denotes decision points regarding keeping or removing section.

RULE 37. JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on **[**race or ethnicity**]**[1] ~~/~~ **[**~~race, ethnicity, gender, or sexual orientation~~**]**. ~~Eliminating the appearance of improper bias in jury selection is necessary because that appearance undermines public confidence in the justice system.~~[2] ~~**[**This rule is consistent with RCW 2.36.080, which states that a citizen shall not be excluded from jury service on account of race or color.~~**]**[3]

(b) Scope. This rule applies in all jury trials.

(c) Objection. ~~The court shall provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information.~~[4] A party may object to the use of a peremptory challenge to raise the issue of improper bias. ~~If a party believes that race or ethnicity~~[5] ~~might be playing a role in the exercise of a peremptory challenge, the party may object~~. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. ~~The basis for the objection shall then be articulated~~.[6] The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances.

> **[**If the court determines that an objective observer could view race or ethnicity as ~~playing a role~~ a factor[7] in the use of the peremptory challenge, then the peremptory challenge shall be denied.**]**
>
> **[**The peremptory challenge shall be denied unless an objective observer would conclude that race and ethnicity was not a factor ~~played no role~~ in the use of the peremptory challenge.**]**
>
> **[**If the court determines that an objective observer would view race or ethnicity ~~gender, or sexual orientation~~ [8]as ~~playing~~ a ~~role~~ factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.**]**[9]

[1] Vote of 13-2 to exclude gender and gender orientation and focus on race and ethnicity.
[2] Unanimous to remove the second sentence.
[3] Members agreed by consensus to remove citation to statute and include it in GR 9 cover sheet.
[4] Vote of 14-1 to remove sentence "The court shall provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information."
[5] Vote of 13-2 to exclude gender, focus on race and ethnicity.
[6] Vote of 14-1 against requiring a standard or requirement to make a *prima facie* case.
[7] Workgroup members did not have strong opinions on using "playing a role" vs. "factor" but agreed that the use of "factor" is ok.
[8] This language is removed per the vote on subsection (a).
[9] The vote was equally split between alternatives. Statements in support or against alternatives are included in the final report.

[~~Whether it can be proved that a prospective juror's race or ethnicity played a motivating role in the exercise of a peremptory challenge is immaterial.~~**]** / **[**The court need not find purposeful discrimination to deny the peremptory challenge.**]**[10]

The court [should/shall] ~~state~~ explain its ruling on the record .[11] ~~reasons for allowing or disallowing the peremptory challenge.~~

(f) Nature of Observer. 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.[12]

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

> **[**(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.**]**
>
> ~~**[**(i) whether the reason may be disproportionately associated with race, ethnicity, or gender because of its adverse effects upon that identifiable group or groups; (ii) whether the party exercised peremptory challenges against similarly situated venire persons; (iii) whether the party has disproportionately exercised peremptory challenges against a particular race, ethnicity, or gender in the instant case or in past cases.**]**~~[13]

(h) [Reasons Presumptively Invalid] / [Suspect Reasons]. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following **[**are presumptively invalid reasons for a peremptory challenge:**]** / **[**reasons should be allowed only where the court finds that the juror's views may prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath:**]** (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.[14]

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[10] Workgroup members generally agreed to strike the first alternative and adopt the second alternative.

[11] Members generally agreed on including the sentence but evenly split between whether using "should" or "shall".

[12] Vote of 14-1 to include subsection (f) in the proposed rule.

[13] Vote of 10 for alternative I, 2 for alternative II, 1 opposed both alternatives.

[14] The vote was equally split between including subsection (h) and removing subsection (h). Workgroup members did not vote on the alternative language within subsection (h) due to the split vote on inclusion of the subsection. Workgroup members will submit comments in favor or against inclusion of subsection (h) and alternative language within subsection (h) if they choose.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, **[**that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.**] / [**the court in making its determination shall consider whether the judge or others can corroborate the alleged conduct.**]**[15]

(j) Disallowed Challenges Preserved. If a peremptory challenge is disallowed under this rule, the party exercising it retains the right to use the peremptory challenge against another potential juror.

~~**(k) Appellate Review.** Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.~~[16]

[15] The vote was equally split between including subsection (i) and removing subsection (i). Workgroup members did not vote on the alternative language within subsection (i) due to the split vote on inclusion of the subsection. Workgroup members will submit comments in favor or against inclusion of subsection (i) and alternative language within subsection (i) if they choose.

[16] Vote of 8 to remove subsection (k) and 4 to include subsection (k).

APPENDIX 2 – INDIVIDUAL AND ORGANIZATIONAL STATEMENTS

To: Chief Justice Mary Fairhurst, Supreme Court of Washington
From: Superior Court Judge Blaine Gibson
Date: February 13, 2018
Re: Thoughts Regarding the Batson Work Group Proposal

Elimination of Peremptory Challenges

After having served as co-chair of the *Batson* work group, I have concluded that the only way discrimination can be eliminated from the jury selection process is to eliminate peremptory challenges.

Such a drastic change from the status quo will, of course, have negative consequences. The focus of voir dire will shift to challenges for cause. Attorneys will demand more time for voir dire in order to develop grounds for such challenges. Defendants who are convicted will appeal every adverse ruling on challenges for cause. More cases will be sent back for retrial because of erroneous rulings on challenges for cause. There may be more hung juries. Finally, there will most certainly be vigorous push back from trial attorneys, even including those who advocate changing the *Batson* rule.

Fairness to All Involved

Although eliminating peremptory challenges would have undesirable effects, at least it would be equally fair, or equally unfair, to all parties. The report you have received from the *Batson* work group proposes the outline of a new rule, but it leaves the task to the Supreme Court of making the required policy decisions. In assessing the report, the court should be aware that the work group fixated solely on the rights of jurors who are currently experiencing discrimination. No consideration was given to how any of the options in the proposed rule might affect the rights of the litigants or of the other jurors. Although I raised these issues, the group chose not to discuss them. What began in the *Batson* case as a concern about the right of the defendant to a jury of his peers has shifted 180 degrees to a focus on the rights of jurors, without regard for the rights of the litigants.

Consider the example of a juror of color who has witnessed or experienced behavior by the police that has caused the juror to be distrustful of them. Assume the juror has survived a challenge for cause. Most members of the

group felt a peremptory challenge against that juror would constitute racial discrimination because it would be a continuation of the discrimination exercised by the police. This is despite the fact that striking a juror who has expressed a distrust of the police has been held to be a valid use of a peremptory challenge. *Cook v. LaMarque*, 593 F.3d 810, 824–25 (9th Cir. 2010). The countering argument is that, if a juror has expressed a bias which has been recognized as a legitimate basis for a peremptory challenge, it should not make any difference how the juror acquired the bias. It is the existence of the bias that is important, not how or why the bias was acquired.

In deciding whether to adopt a rule that partially or completely immunizes a biased juror against a peremptory challenge, the Supreme Court must decide whether, and to what extent, to consider the rights of the party who wants to strike that juror. The court might also want to consider the rights of a juror who does not fall into a protected class, but who also has a distrust of the police. If there are two jurors who have expressed an identical bias, is it fair to allow one to be stricken but not the other?

Other problems with the Proposal

There are many other potential problems with the group's proposal, depending upon which options the court choses. If the court places the burden of proof on the striking party, the opposing parties may well object to every peremptory challenge. The proposed rule eliminates the requirement of a prima facie showing to establish the sufficiency of the objection, so there would be no reason not to object. The objectors would have nothing to lose, and they might get lucky once in a while.

One of the options in the group's proposal is a standard that would disallow a peremptory challenge if an objective observer "could view race or ethnicity as a factor" in the use of the challenge. The problem with this standard is that it is the same as asking if it is "possible" race or ethnicity was a factor in the use of the challenge. As everyone knows, anything is possible. In applying such a standard, at least some judges would hold that, whenever a juror is a member of a protected class, discrimination is a possible factor in the use of the peremptory, so those judges would not allow any peremptory challenges against such jurors, regardless of what

biases they may have shown. This court would need to decide whether that standard would be fair to the litigants and the other jurors.

Other Possible Approaches

Most of the members of the group preferred a drastic change to the existing *Batson* rule, so they did not consider lesser modifications. If the Supreme Court decides to keep peremptory challenges, but cannot agree on the options in the group's proposal, the court could still improve the *Batson* rule by lowering the standard from "purposeful discrimination" to one that recognizes the existence of implicit bias. This would not solve the overall problem, but it would lower the bar for establishing discrimination.

Finally, there is my "out of the box" proposal: blind voir dire. Symphony orchestras used to consist almost entirely of white men. Then, in the 1950s, many orchestras began using blind auditions. The musicians were screened off from the people doing the judging. The number of women and minorities selected has been increasing ever since.

If attorneys discriminate during jury selection, they do so mostly because of the juror's name and what the juror looks like. If the attorneys do not have that information, they cannot use it to discriminate.

My proposal is attached. It is not without cost, both financial and otherwise. It would not eliminate discrimination, but it would substantially reduce it, while preserving peremptory challenges.

If the Supreme Court is interested in experimenting with blind voir dire, Yakima County Superior Court would be willing to be a test site, provided we can obtain a grant to cover the set-up costs.

Best Practices for Peremptory Challenges

Assuming the court retains peremptory challenges, there are steps that can be taken to minimize potential problems caused by their use. My proposed list of best practices is attached.

There are three primary principles in these best practices:

> Peremptories are exercised in secret, so jurors are not told they are being stricken;

Except for those who are excused for hardship or cause, no jurors are excused until peremptory challenges have been completed and all *Batson* or other jury selection issues have been resolved; and

If there is a *Batson* challenge, no additional voir dire is allowed.

Use of these practices will prevent the jurors from feeling that they are on trial, lessen the adverse effects of being stricken, and reduce the likelihood of other complications.

Reducing Discrimination Using Blind Voir Dire

A Proposal from Judge Blaine Gibson

1. The goal of blind voir dire is to prevent trial counsel, as much as reasonably possible, from obtaining information about jurors which might be used to discriminate against them during the jury selection process because of race, ethnicity, or any other protected class status.
2. The judge, counsel, the parties, the clerk, and the court reporter, or electronic recording equipment, will be in a courtroom that is open to the public.
3. The venire, and needed court staff, will be in another room that is not open to or visible to the public.
4. There will be a two-way audio link between the courtroom and the venire room. There may also need to be a one-way video link between the rooms so the jurors can see counsel and the parties.
5. During the entire voir dire process the jurors will be identified only by their numbers. Counsel will not be provided with any information about the jurors [except for age, occupation, other?].
6. Voir dire will be conducted by audio only. Counsel will not be allowed to ask jurors their names, race, country of origin, or ethnicity. If possible, the voices of the jurors should be modified so as to make it more difficult for the people in the courtroom to glean additional identifying information about a juror, such as gender.
7. During breaks, if the jurors are allowed out of the venire room, their juror numbers must be covered so outside observers cannot correlate a face with a number.
8. After voir dire and all peremptory challenges have been completed, the jurors and alternates selected for the trial shall be conducted into a courtroom.

Discussion

Blind voir dire is modeled after the blind audition process used by many symphony orchestras. After orchestras began using blind auditions, the number of women and minorities selected increased substantially, presumably because race and gender discrimination

had been eliminated. Similarly, blind voir dire would eliminate most of the opportunities to discriminate against jurors, while preserving the advantages of the peremptory challenge process.

Blind voir dire would involve some cost. To begin with, courts would have to be equipped with the appropriate electronic equipment. This would be a one-time cost, with some small ongoing expense for maintenance. For courtrooms that are already connected to an intranet, or to the actual internet, it may not be necessary run any additional wiring between rooms. Furthermore, all courtrooms would not have to be wired for blind voir dire. One or more small courtrooms could be used for voir dire, and then after the jury has been selected, the trial could be held in a courtroom that was not wired for voir dire.

Even though two separate rooms would be used for voir dire, the actual amount of valuable floor space required may be less than is currently used. Presently, if the venire consists of 100 jurors, voir dire has to be conducted in a large courtroom, and there must also be a room available that is large enough to accommodate the entire venire for those occasions on which a matter must be heard outside the presence of the jury. With blind voir dire, the actual courtroom only has to be large enough for the judge, counsel, the parties, the clerk, the court reporter, and a few members of the public. It would not even need a jury box. The venire room does not have be near the courtroom, or even in the same building. Furthermore, time would be saved because the venire would never have to be conducted into and out of the courtroom in order to hold hearings outside the presence of the jury.

Prosecutors will be concerned that not knowing the names of the jurors will prevent them from researching them ahead of time to see if they have criminal records. However, it is unlikely most prosecutors actually research jurors before voir dire in ordinary cases. After the jury has been selected, their names would be disclosed to the attorneys. If it turns out a juror has a felony conviction, or is otherwise disqualified, an alternate juror can be substituted.

There is some concern that additional court personnel might be required to wrangle the venire. There is no way to know for certain at this time, but it might not actually require any more staff than are currently used, especially since the venire would not repeatedly be conducted into and out of the courtroom.

Trial attorneys would certainly claim that blind voir dire would deprive them of the opportunity to observe the body language and demeanor of the jurors. First, it is questionable whether attorneys actually gain any accurate or useful information from body language or demeanor. Second, body language and demeanor have long been suspect as merely pretexts for racial discrimination. The loss of the opportunity to observe the jurors during voir dire would be a small price to pay for minimizing discrimination.

It is possible that having the venire in a separate room that is not accessible to the public may raise a constitutional issue regarding open courtrooms. This issue would have to be resolved by the Supreme Court.

Best Practices for Peremptory Challenges

Proposed by Judge Blaine Gibson

Whether or not a new *Batson* rule is adopted, there are steps the trial court can take to reduce the problems associated with *Batson* challenges.

1. The questionnaires some counties give to jurors before trial ask the race of the juror. No information about the race of any juror should be furnished to counsel.
2. At a pre-trial conference, the court should have a discussion with counsel about the peremptory process. The court should confirm how many peremptories each party is allowed, and how they will be exercised.
3. At the pre-trial conference, the court should advise counsel that, after the peremptory process has been completed, the court will ask counsel if there are any issues with regard to the jury selection process. The court should explain that the purpose of this question is to give counsel the opportunity to raise a *Batson* challenge, or any other appropriate issue, before any jurors have been excused. The court should also advise counsel that, if they wish to raise any issue about the selection of the jury, they should simply indicate there is an issue, but they should not articulate the nature of the issue until all jurors been conducted out of the courtroom. This process is designed to avoid the argument raised in *Erickson*, in which defense counsel claimed the court never allowed any opportunity to raise a *Batson* objection before the excess jurors had been excused.
4. At the pre-trial conference, the court should remind counsel that, during the peremptory process, if they pass, waive, or take any action other than exercise a peremptory, they will be deemed to have accepted the top 6, or 12, jurors, depending on the size of the jury, and they will not be allowed to exercise any remaining peremptories against those jurors. The same would be true for selection of alternates.
5. After voir dire has been completed, the court should confer with the clerk and counsel in order to compare juror lists to verify that all lists

identify the same jurors who remain after excusals for hardship and cause.

6. Peremptory challenges should be made in writing, on a form designed for that purpose. As counsel exercise a peremptory, they should write on the form the number and the name of the juror being challenged. The form is then given to the bailiff, who shows it to opposing counsel, the clerk, and the judge, before giving the form to opposing counsel for the next peremptory. The jurors should not be told which jurors have been stricken. After the jury has been selected, the peremptory form must be given to the clerk for filing.
7. If there is a *Batson* challenge, no additional voir dire should be allowed.
8. No jurors who have been the subject of peremptory challenges should be excused until all *Batson* or other jury selection issues have been resolved.
9. The court should not announce the names and numbers of the jurors who have been selected to sit on the case until after all *Batson* or other jury selection issues have been resolved.

INDIVIDUAL STATEMENT BY JUDGE FRANKLIN L. DACCA - February 16, 2018 -

I. INTRODUCTION

First of all, I was very honored to serve on this important Committee as one of two representatives from the District Municipal Court Judges Association ("DMCJA"). The comments recited below regarding the Committee's Final Report are, however, my personal and individual comments and should not be construed in any way as the position or positions of the DMCJA.

My comments below are drawn from my judicial experience as a Pierce County District Court Judge since 2003. I also have been a licensed attorney in the State of Washington since 1973. I have tried and presided over hundreds of criminal and civil trials in Federal, Superior and District Court in Washington and California.

I am respectfully submitting comments regarding three specific sections of the proposed GR 37, namely sections (e), (h) and (i). I have strong feelings regarding the language set forth in these sections, and I appreciate your consideration of my perspective.

II. SECTION (e) - DETERMINATION

Under this section, the Committee has submitted three alternative sentences which address the threshold or test which the trial court shall properly consider in evaluating an objection to the use of a peremptory challenge. The order of the three alternatives does NOT reflect in any way the preferences by the Committee as to these options. All three, I might add, have language which is drawn from the doctrine of appearance of fairness which is recognized in this jurisdiction.

As a trial judge, I respectfully submit that the only reasonable and workable alternative is the third test as follows in Section (e): "If the court determines that an objective observer would view race or ethnicity as playing a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." It is true that the

Committee was equally split between alternatives one and three. Option one is identical to choice three, but instead of the word "would", option one has the word "could".

I fully recognize that option one has been submitted in good faith. And I respect the position of my colleagues who support this language and the language in Sections (h) and (i). However, if the very low threshold of the "could" language is adopted, it is stating that if it is "possible" that an objective observer could view race or ethnicity as a factor in the exercise of a peremptory challenge, then the peremptory challenge shall be denied.

I respectfully submit that this "could" alternative in this proposed rule, is unworkable and will virtually result in the denial of every peremptory challenge exercised when objected to by a party. In other words, if option one is adopted, then I would respectfully recommend that the use of peremptory challenges be abolished entirely with only challenges for cause left. Option three (the "would" language) reflects language which is a reasonable and workable standard for the trial court's determination, and further reflects a much needed departure from the current law relating to purposeful discrimination.

III. SECTION (h) – PRESUMPTIVELY INVALID REASONS

As to both proposed sections (h) and (i), I have maintained a consistent position that these two sections should not be included in any way in the body of Rule 37. Arguably, it may be appropriate to include this language in a GR 9 Cover Sheet to highlight the purpose and context of the proposed rule. Moreover, for the reasons discussed below, I am strongly recommending that these two sections also not be included in the "Comments" to Rule 37 due to the language and presumptions created.

The language in section (h) reflects a number of responses from potential jurors which create a presumptively invalid reason for exercising a peremptory challenge. I understand the arguments of the proponents of this section. However, the main reason I find this language unacceptable and inappropriate is that it would unduly invade the province of the trial court's discretion and management of the voir dire process. By setting forth identifiable "trigger points", it would set up an unworkable (and unduly lengthy) voir dire process which would likely compromise the rights of the parties and litigants and the rights and privacy of the jurors themselves. In sections (a) through (g), the proposed Rule

37 specifically identifies how the objection should be made, the nature of the response, the tests and threshold of the court's determination, and also clearly sets forth in section (g), the totality of the circumstances to be considered by the trial court. Every case and trial is unique, and I submit that sections (h) and (i) unduly interfere with the trial judge's responsibilities in exercising good discretion and managing the voir dire process and trial.

IV. SECTION (i) – RELIANCE ON CONDUCT

As noted above, the language in proposed section (i) should not properly be included in the proposed Rule or included in any Comments section. At best, similarly to section (h), this language referring to specific conduct which requires close scrutiny, may properly be included in a GR 9 Cover Sheet to assist the Court and litigants.

It is to be noted that due to the time constraints even after five complete sessions, the Committee had very little time, if any, to address this language in section (i). Similarly to section (h), the requirements of this section unduly invade the trial court's discretion and management of the voir dire process. This section further creates an unworkable scenario where certain alleged conduct creates presumptions and even requires advance notice to the trial court and corroboration throughout the voir dire process well before the actual exercise of the peremptory challenge. If adopted in the Rule or Comments, this section (i) will create an unworkable voir dire process subject to lengthy interruptions, delay, confusion and inappropriate scrutiny of individual jurors.

Therefore, I respectfully recommend that sections (h) and (i) be deleted. The other sections of the Rule set forth well-defined standards which will let the trial judge and litigants do their job consistent with the law in this jurisdiction and the Canon of Ethics.

Judge Franklin L. Dacca
Pierce County District Court

Statement of American Civil Liberties Union of Washington, Washington Association of Criminal Defense Lawyers, Fred T. Korematsu Center for Law & Equality, Legal Voice, Loren Miller Bar Association, and Latina/o Bar Association of Washington

Introduction

The six organizations listed above respectfully request that this Court adopt the version of proposed GR 37(e) that requires a court to deny a peremptory challenge if "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge[.]" This standard provides stronger protection against discrimination than the alternative proposals, and is necessary to address the serious problem of race-based exclusion from jury service.

We also urge the Court to adopt subsections (g), (h), and (i) of the proposed rule. Subsection (g) lists circumstances courts are already obliged to consider under *Batson*, and 12 of 13 workgroup members voted to include it. Subsection (h) designates certain reasons for exclusion as presumptively invalid because they are highly correlated with race and perpetuate systemic discrimination. These reasons include having been stopped by police, having a family member in prison, and believing law enforcement officers engage in racial profiling. Subsection (i) requires heightened scrutiny of demeanor-based justifications for exclusion, because such reasons are often borne of implicit biases and have historically been used to eliminate prospective jurors of color.

Implementing these recommendations is essential given the nature and magnitude of the problem. By adopting the stronger version of proposed GR 37, this Court will fulfill its pledge to address racial and ethnic bias in the use of peremptory challenges in Washington.

This Court should adopt the first option under subsection (e).

This Court should adopt the following language for GR 37(e):

> **(e) Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.[1]

The difference between "could" and "would" is critical. The "would view" standard is not meaningfully different from the "purposeful discrimination" standard under *Batson*. It requires a court to conclude that an observer would view the party exercising the challenge

[1] Judge R.W. Buzzard, working group co-chair, joined the undersigned organizations in voting for this version of subsection (e).

as being motivated by the juror's race or ethnicity. It essentially compels a judge to endorse "an accusation of deceit or racism" in order to sustain a challenge to a peremptory strike. *Saintcalle*, 178 Wn.2d at 53 (describing problem with *Batson* standard). It will not solve the problem this Court set out to address.

The "could view" standard, in contrast, softens the accusatory edge of the objection. It allows a judge to deny a peremptory challenge without suggesting that the party *actually* exercised the peremptory challenge based on race. Instead, the strike would be disallowed if an observer *could* view race as a factor, given the prevalence of implicit biases, the historical use of certain justifications to exclude prospective jurors based on race, and any other relevant circumstances. The rule would preclude those strikes that raise meaningful concerns about race or ethnicity, all things considered. This is critical to making any headway against unconscious bias, which operates "far more often" when there are plausible, neutral reasons for action. *Saintcalle*, 178 Wn.2d at 49.

The "could" standard is familiar and workable, and has been applied in comparable circumstances. For instance, it is sometimes used to evaluate the prejudice caused by misconduct. When a jury improperly considers extrinsic evidence, a court reviewing a motion for a new trial will make "an objective inquiry into whether the extraneous evidence … *could have* affected the jury's determination[.]" *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 273 (1990) (emphasis added). As another example, a "conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *In re the Personal Restraint of Benn*, 134 Wn.2d 868, 936 (1998) (emphasis added). In these situations, courts apply the "could" standard because the errors at issue are serious. *See Benn*, 134 Wn.2d at 936 ("could" standard applied to address "fundamentally unfair" practice); *Richards*, 59 Wn. App. at 273 ("Any doubt that the misconduct affected the verdict must be resolved against the verdict"). The same standard is necessary to address the serious problem of race discrimination in jury selection.

As an example from elsewhere, New Jersey courts apply a similar standard to combat corruption from organized crime. *See In re Pontoriero*, 439 N.J. Super. 24 (N.J. Super. Ct. App. Div. 2015). In particular, New Jersey has established a detailed regulatory scheme to "combat corruption and organized crime on the New Jersey ... waterfronts," including business licensing that is subject to revocation for improper relationships. *Id.* at 29. Based on "the history of corruption on the waterfront," the need for such "strict regulation" was "well established." *Id.* at 39. To determine whether a license is properly revoked under the scheme, New Jersey courts consider "whether a reasonably objective observer could believe that [a known] criminal associate could influence the licensee in his or her role as a [licensee]." *Id.* at 41. This stringent standard "is meant to encompass the risk of actual corruption," which is notoriously difficult to prove, "as well as any reasonable perception of corruption by the public." *Id.* at 42. Here, the history of racial discrimination and need for strict regulation are well-established. And a similarly stringent standard is needed, because of the difficulty of proving racial discrimination and to account for the public appearance of racial inequity in jury selection.

As in these other contexts, if the "could view" standard is adopted, it will be interpreted and applied sensibly and in furtherance of the rule's underlying policy purposes. Court rules "are interpreted in the same manner as statutes." *Jafar v. Webb*, 177 Wn.2d 520, 526 (2013). This means the standard adopted would be interpreted in a way that is "sensible." *Kinnan v. Jordan*, 131 Wn. App. 738, 751 (2006). It would also be interpreted in a way that advances the underlying intent and policy behind the rule, and in conjunction with the rest of its provisions. *See, e.g., Dept. of Nat. Res. v. Marr*, 54 Wn. App. 589, 593 (1989); *State v. Base*, 131 Wn. App. 207, 213-14 (2006).

At bottom, the question of which standard to use is a policy question. The "function of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have … for a particular type of adjudication." *In re A.W.*, 182 Wn.2d 689, 702 (2015) (internal marks omitted). When it comes to racial and ethnic bias in jury selection, this Court has already recognized that the problem is widespread, harmful, and demands intervention, but it is difficult to identify in individual cases. The "could view" standard addresses this problem by requiring a high degree of confidence that race was not a factor before permitting a peremptory challenge.

In sum, this Court should adopt a standard requiring courts to disallow a peremptory challenge if an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.

This Court should adopt proposed subsection (g).

This Court should adopt subsection (g), which provides:

> **(g) Circumstances Considered.** In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

Subsection (g) is already the law, and the new court rule cannot provide less protection than already exists under the Fourteenth Amendment. *See Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005). It is helpful for trial judges and practitioners to have these considerations in the court rule, rather than requiring them to consult the relevant cases for some requirements and the court rule for others.

This Court should adopt proposed subsections (h) and (i).

This Court should adopt subsections (h) and (i), which provide:

> **(h) Reasons Presumptively Invalid.** Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.
>
> **(i) Reliance on Conduct.** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Subsections (h) and (i) are essential tools for determining whether an objective observer could view race or ethnicity as playing a role in the exercise of a peremptory challenge. Each subsection identifies certain types of justifications that historically have been used to exclude people of color from juries, whether as a pretext, due to unconscious bias, or otherwise. These justifications standing alone should be deemed insufficient, as a matter of law, to sustain a questionable peremptory strike. Without these subsections, attorneys and judges who are unaware of the mechanisms that have been used to exclude people of color will conclude that no one could view race as a factor where these justifications are offered.

Subsection (h)

The justifications for exclusion listed in subsection (h) are highly correlated with race and have been used historically to exclude people of color from jury service. These justifications, standing alone, provide little reason to question a person's fitness to serve as a juror. And they are systemically harmful in the aggregate. More should be required to sustain a questionable peremptory challenge under review. Identifying and prohibiting these justifications in the governing rule, as a matter of law, would promote equitable results and provide needed clarity for judges and litigants.

The listed justifications related to contacts with the criminal justice system are especially troublesome, because African Americans and other minority groups in Washington are arrested, searched, and charged at significantly higher rates than Caucasians – and this difference cannot be explained by a difference in crime commission rates. *See* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* at 7 (March 2011). In light of this disparity, permitting parties to

remove jurors on the basis of police contacts is doubly discriminatory and perpetuates the lack of jury diversity in Washington. *See Saintcalle*, 178 Wn.2d at 100 (Gonzalez, J., concurring) (citing study noting that striking all persons with a relative in prison could disproportionately exclude racial minorities).

This Court witnessed this phenomenon in *Seattle v. Erickson*, 188 Wn.2d 721 (2017). There, the prosecutor exercised a peremptory challenge against an African-American potential juror because the juror stated during voir dire that he was "angry, embarrassed, and upset" at having been stopped by police and wrongly accused of a crime. RP 152, 202. Just as this juror was upset about being profiled by police, people who are excluded from jury service because of their race may feel "shame and humiliation" as a result of their exclusion. Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* (August 2010) ("EJI Report") at 28. More should be required to exclude a citizen from jury service. At the very least, police contacts standing alone should be deemed insufficient, as a matter of law.

This Court also heard directly from a potential juror who had been the subject of a peremptory challenge based on her negative experiences with police. *Minority & Justice Commission Symposium on Jury Diversity in Washington*, http://bit.ly/2rS4nAc at ~2:08. The potential juror described the poor treatment she and her family had received from law enforcement officers, the embarrassment she felt when the prosecutor exercised a peremptory challenge against her and all of the potential jurors were ushered into the hallway, and the indignation she felt at the suggestion that she could not be fair. Her experience is not unique; it is representative. *See* USA Today: "It's still too easy to push blacks, minorities off of juries" https://usat.ly/2C8s6jY (describing case in which black potential juror was excluded, despite assuring lawyers he could be fair, because he expressed concerns about unfair law enforcement practices).

There is "no question" that racial disparities exist with respect to police contacts and arrests. Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pl'y Rev. 387, 394 (2016). "[S]tudies verify the prominent impact of negative police contacts on the citizenry's general perceptions of fairness and bias in our justice system." *State v. E.J.J.*, 183 Wn. 2d 497, 513 (2015) (Madsen, C.J., concurring). Excluding potential jurors on the basis of their negative police contacts only exacerbates the unfairness, both actual and perceived. This Court should adopt proposed subsection (h) to address one of the primary mechanisms historically used to exclude people of color from juries.

Subsection (i)

Subsection (i) is equally important. Litigants "frequently justify [peremptory] strikes by making unverifiable assertions about African-American potential jurors' appearance and demeanor." EJI Report at 18. These demeanor-based justifications for exclusion should be treated with caution because they are often rooted in bias – whether conscious, implicit, or institutional. Requiring such justifications to be corroborated would promote accuracy, prevent improper challenges, and establish a clear framework for courts and litigants to follow.

Justice Marshall anticipated this issue. He noted that a party's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is sullen, or distant, a characterization that would not have come to his mind if a white juror had acted identically." *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Others subsequently acknowledged this phenomenon:

> [W]e now know that implicit biases can lead members of different races to perceive members of other races as lazy, or hostile, or threatening. Thus, accepting "body language or demeanor" as a purportedly legitimate reason for a peremptory challenge provides another "Handy Race-Neutral Explanation" because it disregards the effect of implicit bias upon perceptions of body language or demeanor.

Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 164 (2010).

In *Saintcalle,* the prosecutor described the African-American juror as "very checked out" and not "engaged" – yet the record reflected that she participated in voir dire far more than any other juror. *Saintcalle*, 178 Wn.2d at 59-60. The prosecutor had also described a Mexican-American potential juror as "not very intelligent," even though the juror was a real estate broker, parent, and college student who provided reasoned responses during voir dire. *Compare* EJI Report at 17 ("A startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged 'low intelligence'").

Thus, if any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party should be required to provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior should invalidate the given reason for the peremptory challenge. This would be a workable approach to a serious problem.

Race discrimination should be addressed now; other issues should be referred for further study

The Committee was tasked with developing a proposal that would address the long history of race discrimination in jury selection – particularly the implicit bias that the *Batson* standard has failed to uproot. The forms this discrimination takes, and the stereotypes it relies on, are different in the context of gender, sexual orientation, and gender identity. Washington State must also address and act to end discrimination in jury selection based on gender, sexual orientation, and gender identity, yet putting those statuses in this rule without context would, in our view, fail to address that discrimination. It is our recommendation that this rule be adopted as proposed, and that a second task force with additional expertise and background in gender, sexual orientation, and gender identity discrimination be convened to squarely address those issues.

Conclusion

The undersigned organizations urge this Court to adopt the stronger version of proposed GR 37 set forth above. A peremptory challenge should be denied if an objective observer could view race or ethnicity as a factor in the exercise of the challenge. A juror's negative experience with police or the justice system should be a presumptively invalid justification for excluding the juror. Demeanor-based reasons for exercising a peremptory challenge should be invalid absent corroboration. Adopting these provisions will reduce discrimination, honor the dignity of jurors, and promote respect for the justice system.

Respecfully submitted this 16th day of February, 2018 by:

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STATEMENT ON THE WORKGROUP FINAL REPORT WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

INTRODUCTION

The core concern of the Washington Association of Prosecuting Attorneys (WAPA) is to recommend a rule that recognizes principles of unconscious bias in jury selection, while preserving the right of all parties to remove jurors unlikely to fairly consider the facts of the case.

Both parts of this balance are important. Jurors should not be excluded because of their race, gender, or sexual orientation, but jury trials exist to fairly adjudicate disputes between parties. If there are concrete race and gender-neutral reasons to believe a juror may not be fair, a party has a limited right to ask that such juror be excused. This concern is particularly acute for the plaintiff, who carries the burden of proof at trial, and it is most acute for the State in a criminal case, because a single unfair juror can cause a mistrial.

To this end, WAPA recommends this Court consider the proposed rule that is attached to this comment. This proposal was shaped by the many profitable discussions with the members on the workgroup, but it is ultimately offered as a choice to the overly-complex proposal that has emerged from that group.

The comments below will follow the structure of Jury Selection Workgroup's Final Report.

BACKGROUND

This section supplements the background provided in the official report to more fully describe attempts by the Washington Association of Prosecuting Attorneys (WAPA) to foster agreement among committee members.

WAPA proposed for discussion three different frameworks for a rule. The first was the original WAPA proposal which essentially codified existing law under Batson v. Kentucky. This proposal adhered to the purposeful discrimination test used in the traditional constitutional analysis from Batson. At the second committee meeting, WAPA proposed an alternative that used a "but-for" test for determining whether discrimination was occurring. (This proposal included sexual orientation as a protected class.) At either the third or fourth meeting, following up on a proposal by one workgroup member to use the appearance of fairness standard, WAPA proposed a rule that adapted that standard to this context,

attempting at the same time to accommodate existing proposals from other groups.

Ultimately, WAPA believes that use of the appearance of fairness standard is proper, but that many other provisions in the rule are either unnecessary, compromise the rule's application to gender and sexual orientation, and/or make the rule unduly complex for the trial process.

AREAS OF CONSENSUS

Consensus is a difficult concept to measure in any committee, and it is even more difficult to describe in a group of this size and as to a topic as complex as this rule became. And, because the framework for decision-making was not discussed until the last meeting, there remains some confusion as to how the progress of this group should be measured. It is fair to say, however, that the committee report accurately summarizes many areas of agreement. WAPA includes the following qualifications to that summary.

The history of inappropriate exclusion of jurors is important to appreciate the need for this rule and to understand how it is to be implemented. That history is best addressed in the GR 9 statement supporting the rule.

WAPA agrees with the notion that there should be a low threshold for raising an objection under this rule; in fact, the only limit to raising a GR 37 objection should be a lawyer's obligations under the rules of professional responsibility. In WAPA's view, there should be no other threshold inquiry. The first step of the Batson inquiry, a prima facie test, has historically cut off discussion as to meaningful objections to peremptory challenges. That step ultimately served to mask intentional or unconscious bias. Eliminating the prima facie showing will be a highly significant improvement in the process, insofar as it will force litigants to root their challenges in concrete reasons focused directly on a juror's ability to serve.

WAPA believes, however, that the burden of carrying the objection should remain on the party lodging the objection.

Areas of Disagreement

Gender and Sexual Orientation:

Twenty four years ago the Supreme Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994). Gender-based discrimination occurs across a spectrum of cases, including paternity,

family law, employment, domestic violence, and sexual assault, to name just a few. Like discrimination based on race, peremptory challenges to women are often masked (intentionally or not) in more benign language: the juror seemed "emotional" or "irrational" in her views. Such practices are unquestionably forbidden under the state constitution. Wa. Const. Article XXXI, sec. 1.

Exempting gender discrimination from this rule is a mistake. The issue will be litigated in numerous cases because discrimination based on gender is unconstitutional. But if dropped from GR 37, the issue will be litigated under the Batson framework rather than under this rule. Trial judges will be forced to juggle multiple, complex legal analyses during voir dire instead of applying a single standard. And, appellate courts will need to constantly refine the contours of two quite distinct legal tests for what are essentially two facets of the same problem. The law is complex enough without creating unnecessary additional burdens in this fashion.

Every proposed version of GR 37 presented to this committee prohibited gender discrimination and most pubic commenters to the proposed rules earlier opened for comment agreed that gender discrimination should be included. The issue was not debated or discussed by the workgroup. At the final meeting, several organizations that earlier supported gender discrimination language announced that they would no longer support that part of the proposed rule. This announcement apparently followed discussion among a block of representatives conferring outside the workgroup process. That decision was ill-advised and should be reconsidered.

WAPA also proposed to the workgroup that sexual orientation be analyzed under GR 37. Discrimination based on sexual orientation is clearly prohibited. RCW 49.60.030(1) (declaring a "right to be free from discrimination because of .... sexual orientation"). This Court and other courts have recognized that "members of the LGBT community are vulnerable to discrimination." In re Marriage of Black, 188 Wn.2d 114, 129–30, 392 P.3d 1041 (2017), citing Obergefell v. Hodges, ___ U.S.___, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015) (holding unconstitutional state laws that prohibit same-sex marriage) and Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) 130 (holding that heightened scrutiny applies to classifications based on sexual orientation and that equal protection forbids striking a juror on the basis of sexual orientation). See also Pavan v. Smith, ___ U.S. ___, 137 S. Ct. 2075, 198 L. Ed. 2d 636 (2017) (The Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples) and American Bar Association, Criminal Justice Section, National LGBT Bar Association, Report to the House of Delegates, http://www.abajournal.com/files/2018_hod_midyear_108D.pdf

(encouraging states and federal courts to prohibit discrimination based on sexual orientation).

WAPA acknowledges that sexual orientation is less-readily apparent to the observer and that direct inquiry of jurors should be avoided to respect juror privacy. However, these concerns do not justify omitting sexual orientation from the rule. The rule that WAPA now recommends is broader than the current proposal and would permit objections to peremptory challenges based on both gender and sexual orientation.

Additional Time For Voir Dire

Any version of this proposed rule will require lawyers and the trial judge to more carefully weigh peremptory challenges. This might require additional time for voir dire; it will certainly require lawyers to use their time efficiently and to focus on a juror's ability to fairly consider the case. This point need not be addressed in the body of the rule, but might be an appropriate topic for either the GR 9 cover sheet or the commentary.

Standard for determination of objection

The standard used in the committee proposal derives from the appearance of fairness standard—whether an objective observer "would view" the challenge as based on a prohibited basis. The ACLU proposes to replace the usual "would view" language with "could view."

The "would view" standard permits courts to disallow a suspect peremptory challenge while still allowing litigants to challenge jurors who likely cannot fairly consider the evidence. It is a standard that already exists in the law and a body of case law has applied it in various contexts. The "objective observer would view" standard does not require that a trial judge find purposeful discrimination by a lawyer.

There is no legal precedent for using a "could view" standard. The standard would be nearly impossible to meet, especially when considered along with other proposed definitions and presumptions included in the ACLU version of the rule. And, there is no existing body of case law against which that standard could be judged.

Directing versus advising the court to explain its ruling on the record

Trial courts should explain the bases for rulings so that litigants can understand the court's ruling and to facilitate appellate review. Trial courts may be encouraged to do so by comment to the rule.

Including circumstances to be considered and reasons that are presumptively invalid

"Circumstances to be considered." No rule can delineate all possible circumstances that must be considered. Some of the "circumstances" outlined in the existing rule are duplicative, others are unnecessary, and the totality is far too dense and ambiguous to be useful in the fast-moving and fluid process of an actual voir dire. Other "circumstances considered" are internally contradictory: a challenge can be denied because the challenger didn't ask enough questions of the juror ((g)(i)), but also because the challenger asked too many questions ((g)(ii)).

WAPA recommends that the most important circumstances be outlined in a comment. Those would include the following:

> (1) Whether the reason for the peremptory is disproportionately associated with one race, ethnicity, gender or sexual orientation because of its adverse effects upon that identifiable group; (2) If the basis for the challenge is attributed to the juror's demeanor, whether the judge or others can corroborate that demeanor; (3) Whether the party exercised peremptory challenges against similarly situated venire persons.

"Reasons that are presumptively invalid." No reason should be *presumed* invalid. Although some questions posed to jurors have historically masked racism or sexism, those same questions can also have a direct bearing on the juror's ability to assess the evidence objectively, and answers to those questions may uncover unconscious bias in a juror.

For example, a litigant might ask whether a juror has a family member or close friend who was the victim of sexual assault, or who was harassed at work. Women are disproportionately the victims of sexual assault and workplace harassment, and are thus more likely to answer "yes" to this question. Some litigants might use this line of questioning as a proxy for a sexist peremptory challenge. On the other hand, a juror might credibly say in voir dire that she could be fair to a defendant convicted of sexual assault, even though she herself was a victim, because she firmly believes that nobody should be convicted of a crime they did not commit. Alternatively, it might become clear that the juror's personal experiences make her unable to serve, whether she realizes it or not. The decision on such matters should be left to the trial court's discretion.

Similarly, a lawyer might ask jurors whether they or family or friends immigrated to this country. This question might be directed at Hispanic jurors in a case where a White defendant is charged with assaulting a Hispanic person, or in a case where an immigrant plaintiff is suing her employer. The lawyer for the White

defendant or the employer might try to remove jurors the lawyer believes are sympathetic to the victim or plaintiff. A person's experience as an immigrant might, or might not, make that person unable to fairly consider a particular case. The decision should not, however, be made on the basis of presumptions about the juror's experience, either for or against the juror's service. Rather, the decision should be left to the discretion of the trial court asking whether the exercise of the peremptory challenge would appear to the reasonable person to be racially-based.

Taking another example, a juror might answer that he or she has family members convicted of crimes, but credibly say that he or she could still be fair to the State in a criminal case. Or, it might become apparent from the juror's answers that he or she *cannot* be fair.

In sum, a mere "yes" answer to questions like those above provides little information and should not fail the appearance of fairness test. However, upon further questioning, a clearer picture might emerge, making it apparent that this juror either is, or is not, able to consider the case fairly. Discerning a juror's fitness to serve cannot be reduced to mere presumptions, it should be left to the trial court's judgment based on in-court questioning.

WORKGROUP RECOMMENDATIONS

This workgroup labored for many hours in an effort to achieve consensus on this difficult topic. Significant progress was made in reaching near agreement to eliminate a prima facie showing and regarding the use the appearance of fairness standard as a basis for the key decisional standard.

Still, the "final' rule with its multiple alternatives is, in WAPA's judgment, too cumbersome for implementation in real-world trials. Voir dire is a complex and nuanced process. Lawyers and the trial judge must constantly assess a juror's language as well as her facial expressions, body language, and tone of voice. The language of this proposal (in either form) is complex, multi-layered, and multi-factored. It will burden rather than assists trial judges.

For that reason, WAPA respectfully suggests this Court consider the following proposed rule, which, using the appearance of fairness standard as its core, provides trial judges with a tool to curtail inappropriate challenges based on race, gender or sexual orientation, whether the challenge is rooted in intentional or unconscious bias. Because this version eliminates race-specific language in the factors and presumptions, it can be used to discourage peremptory challenges based on all forms of discrimination, and it avoids the need to apply two standards, one rule-based and the other constitutionally-based.

SUGGESTED AMENDMENT
GENERAL RULES (GR)

Rule 37 JURY SELECTION

(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity, gender or sexual orientation.

(b) If a party believes that an adverse party is exercising a peremptory challenge on the basis of race, ethnicity, gender, or sexual orientation the party may object to the exercise of the challenge. An objection is waived unless made before the court excuses the juror. The objection shall be made outside of the presence of the panel.

(c) Upon objection to the exercise of a peremptory challenge pursuant to this rule, the adverse party shall articulate the reasons that the peremptory challenge was exercised.

(d) The court shall disallow the peremptory challenge if in the exercise of discretion it finds that a reasonably prudent and disinterested observer would conclude that the party exercised the peremptory challenge on the basis of race, ethnicity, gender or sexual orientation.

(e) Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.

Comment

In determining whether a reasonably prudent and disinterested observer would conclude that a party exercised a peremptory challenge on the basis of race, ethnicity, gender, or sexual orientation, a court should consider the totality of circumstances, including: (1) Whether the reason for the peremptory is disproportionately associated with one race, ethnicity, gender or sexual orientation because of its adverse effects upon that identifiable group; (2) If the basis for the challenge is attributed to the juror's demeanor, whether the judge or others can corroborate that demeanor; (3) Whether the party exercised peremptory challenges against similarly situated venire persons.

February 15, 2018

Ms. Shannon Hinchcliffe
Office of Legal Services and Appellate Court Support
Administrative Office of the Courts
P.O. Box 41174
Olympia, WA 98504-1170

Dear Ms. Hinchcliffe,

Enclosed is the Washington Defense Trial Lawyers' Comments on the Workgroup Draft of GR 37, prepared by our representative, Past President Michael Nicefaro.

We thank you for your time and effort in facilitating this group and hope for a rule that embodies the carefully considered comments of the Washington Defense Trial Lawyers.

Kind Regards,

Lori K. O'Tool
WDTL President

Enclosure

Washington Defense Trial Lawyers' Comments on Workgroup Draft of GR 37

February 16, 2018

Contact: Mike Nicefaro, WSBA No. 9537

Regarding Section (a) Policy and Purpose:

The WDTL motto is "Fighting for Justice and Balance in Civil Courts." Consistent with that tenet, WDTL believes that GR 37 should not be limited to protection of potential jurors' race and ethnicity, but should extend to protect potential jurors' sex, sexual orientation, gender expression and gender identity, and that these attributes be expressly listed in the rule. Washington law (See RCW 49.60, WAC 162-32, etc.) protects these attributes. Exclusion of these protected groups from specific mention in GR 37 will incorrectly suggest that the groups are not protected by law, and deprive group members of a process to test whether a peremptory challenge asserted against them is consistent with the spirit of this rule as well as overarching Washington law. WDTL acknowledges that other sections of this draft are more specific to race and ethnicity than to sex and gender, but believes that inclusion of reference to other protected classes will not create any inconsistencies, the modified rule will be workable, and the advantages of inclusion far outweigh the disadvantages of exclusion.

Regarding Section (b) Scope:

The WDTL has no comment on this section.

Regarding Section (c) Objection:

The WDTL has no comment on this section.

Regarding Section (d) Response:

Traditionally, by definition, a party asserting a peremptory challenge had no restriction for doing so (other than by a *Batson* challenge). WDTL agrees that the *Batson* rule is inadequate, and acknowledges that imposing some restrictions on the use of peremptory challenges is appropriate if doing so will allow for accountability in the use of such challenges to increase the confidence of litigants

and their communities in the fairness of our jury trial system. This rule will replace the traditional essentially unlimited right to exercise peremptory challenges with a qualified right through a process whereby the court balances the reasons given for asserting the challenge (Section (d) of this rule) against the perceived impact of the challenge (Section (e) of this rule). It should be recognized that this new process will be subject to abuse by a party using an objection to compel an opponent to disclose attorney work product, such as juror prejudice or bias that the attorney is trying to avoid. For that reason, WDTL suggests that this section include language to the effect "In obtaining such statement, the court shall protect against unreasonable disclosure of the mental impressions, conclusions, opinions, or legal theories of the party exercising the peremptory challenge." This language mirrors that of CR 26.

Regarding Section (e) Determination:

WDTL believes that GR 37 should not be limited to protection of potential jurors' race and ethnicity. Rather, WDTL believes it should extend to protect potential jurors' sex, sexual orientation, gender expression and gender identity. Therefore, WDTL believes that these attributes should be listed here in Section (e) as well as in Section (a).

As between the three bracketed alternatives, WDTL believes that the third alternative should be adopted, for the following reasons. The first alternative, ("…could view…") is disfavored because it is too vague and hypothetical. Under this new rule, parties that previously had an absolute right (subject to *Batson*) to resolve impartiality concerns following a denied challenge for cause or otherwise through the exercise of a peremptory challenge will now be subject to a demand that they provide a reason for the challenge. The reason offered will be balanced against the perceived impact of allowing the challenge. While a rule like GR 37 is appropriate to provide protection to prospective minority jurors and their communities, it should extend no further than necessary to implement that protection while still allowing the use of peremptory challenges to assure litigants that they have a means, when challenges for cause are insufficient, to assure themselves of as fair a jury as possible. The second alternative ("…was not a factor…") is disfavored because it assumes improper motive (conscious or unconscious) is the norm unless proven otherwise. Although, sadly, it is undeniable that bias, conscious and otherwise, has historically affected the use of peremptory challenges, most would say that it is unfair to hold that it is the norm. Consequently, WDTL supports the use of the third bracketed alternative ("…an objective observer would view race or ethnicity as a factor…") with the additional sex and gender protection language added.

WDTL supports the language "…need not find purposeful discrimination…" because it allows the court to, after balancing the reasons given for exercising the challenge against the impact of allowing the challenge, make a finding based on discriminatory impact rather than on discriminatory intent. Discriminatory impact should be less difficult to establish than discriminatory intent, and as such more practical than the former *Batson* process.

Finally, WDTL supports the use of mandatory language requiring the judge to explain its ruling on the record, thereby creating a sufficient and more complete record for appellate review.

Regarding Section (f) Nature of Observer:

The WDTL has no comment on this section.

Regarding Section (g) Circumstances Considered:

WDTL disfavors inclusion of this section that is intended to reflect the holdings of past appellate decisions. Incomplete listings of legal holdings is potentially misleading. Moreover, subsequent opinions can change the law, rendering the language of the rule inaccurate. Perhaps most important, the language of the rule should not suggest whether, in the unique aspects of a particular case, the circumstance listed automatically taints a peremptory challenge. If this section is included, WDTL believes that the first two subjections ((i) and (ii)) should be deleted entirely, or at the very least qualified by appropriate language indicating that the number of questions asked and the duration of time spent with a potential juror is not necessarily indicative of an inappropriate conscious or unconscious bias or motive for exercise of a peremptory challenge, or of a discriminatory impact of such challenge.

Regarding Section (h) [Reasons Presumptively Invalid] / [Suspect Reasons]:

WDTL disfavors inclusion of this section that is intended to reflect the holdings of past appellate decisions. Incomplete listings of legal holdings is potentially misleading. Moreover, subsequent opinions can change the law, rendering the language of the rule inaccurate. Perhaps most important, the language of the rule should not prejudge whether, in the unique circumstances of a particular case, the reason listed supports a peremptory challenge notwithstanding a challenge for cause having been denied. If this section is included, WDTL

prefers the second alternative ("reasons should be allowed…") because it realistically suggests a more fact-based analytic process that the first alternative.

Regarding Section (i) Reliance on Conduct:

WDTL disfavors inclusion of this section that is intended to reflect the holdings of past appellate opinions. There is an entire body of law beyond these statements that addresses proper reasons for dismissing prospective jurors based on their conduct. Incomplete listings of legal holdings is potentially misleading. Moreover, subsequent appellate opinions can change the law, rendering the language of the rule inaccurate.

Regarding Section (j) Disallowed Challenges Preserved:

The WDTL has no comment on this section.

APPENDIX 3 – GR 37 WORKGROUP MEMBERSHIP LIST

GR 37 WORKGROUP MEMBERSHIP LIST

Name	Representing
Judge Blaine G. Gibson, Co-chair	Superior Court Judges' Association
Judge R.W. Buzzard, Co-chair	District and Municipal Court Judges' Association
Judge Beth Andrus	Superior Court Judges' Association
Judge Franklin Dacca	District and Municipal Court Judges' Association
Jeffrey Robinson	American Civil Liberties Union of Washington
Jim Whisman	Washington Association of Prosecuting Attorneys
Lila Silverstein	Washington Association of Criminal Defense Lawyers
Peter Meyers	Washington State Association for Justice
Michael A. Nicefaro, Jr.	Washington Defense Trial Lawyers
Rachael DelVillar	Superior Court Jury Administrator
Tina Marusich	Courts of Limited Jurisdiction Jury Administrator
Taki Flevaris	Korematsu Center for Law and Equality
La Rond Baker Chris M. Sanders Chalia Stallings-Ala'ilima	Loren Miller Bar Association of Washington
David Perez	Latina/o Bar Association of Washington
Sara L. Ainsworth	Legal Voice
Andrea T. Chin	Asian Bar Association of Washington
Shannon Hinchcliffe	AOC Staff