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STATE OF WASHINGTON  
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NO. 94853-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TYREE JEFFERSON

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY NO. 47826-9-II

The Honorable Frank Cuthbertson, Judge

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SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUE

GR 37 should apply to Mr. Jefferson's case.

B. STATEMENT OF THE CASE

Mr. Jefferson adopts and incorporates by reference the statement of facts in his petition for review and supplemental brief.

C. ARGUMENT

1. GR 37 SHOULD BE APPLIED TO MR. JEFFERSON'S CASE.

In this Court's order granting review, this Court expressly requested briefing on *Batson's* efficacy and whether a stricter standard was necessary. With the adoption of GR 37, this Court has now answered this question and designated this case as the vehicle for addressing the issue.

It is essential that this Court explain: *Batson's* failings; why GR 37 is the right response; and demonstrate how GR 37 works in practice by applying it to this case.

Justice Madsen's concurring opinion in *State v. E.J.J.*, 183 Wn.2d 497, 509, 354 P.3d 815 (2015) (Madsen, C.J., concurring) is helpful. Therein, Justice Madsen and two other Justices disagreed with the majority's holding that the defendant's First Amendment

rights were violated. Instead, Justice Madsen would have adopted a new common-law rule to address the racially disparate enforcement of the obstruction statute, *and she would have applied it in E.J.J.*:

[D]espite the fact that sufficient evidence supports the conviction under the current law, I believe this court must take this opportunity to add a common law requirement to the obstructing statute to ensure its constitutional application as follows: where the officer's conduct substantially contributed to the escalation of the circumstances that resulted in the arrest for obstruction, the State has failed to meet its burden to show that the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of his or her official powers or duties. Under this common law requirement the State would be required to prove that the defendant's obstructing conduct was not substantially produced by the officer's escalating conduct.<sup>1</sup> This additional requirement is necessary because our system of justice cannot condone disparate treatment of the people we serve, based on race, through the use of obstruction statutes. Applying this requirement here, E.J.J.'s conviction must be reversed.

*E.J.J.*, 183 Wn.2d at 509 (Madsen, C.J., concurring).

This Court is familiar with applying new rules to cases on direct review. *Id*; *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

GR 37 applies to all jury trials. Mr. Jefferson's case presents

this Court with its first opportunity to apply GR 37 which took effect April 30, 2018, eight days prior to Mr. Jefferson's oral argument on direct review before this Court. This Court is neither prohibited nor compelled to apply GR 37 to Mr. Jefferson's case, but common sense suggests this Court should apply GR 37 to Mr. Jefferson's case. GR 9.

In *Templeton*, this Court recognized that rules such as CrRLJ 3.1 (right to counsel) create a procedural rule in which "a clear line of demarcation cannot always be delineated between what is substantive and what is procedural" and that there is "some mingling and overlapping of powers between the three separate departments of our government". *State v. Templeton*, 148 Wn.2d 193, 213, 216, 59 P.3d 632 (2002). GR 37, like CrRLJ too creates a procedural rule without a clear line of demarcation between what is substantive and procedural. *Templeton*, 148 Wn.2d at 213.

As part of this Court's inherent power, it is authorized<sup>1</sup> to apply GR 37. "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *Lunsford v. Saberhagen, Holdings, Inc.*, 166 Wn.2d 264, 279, 208 P.3d 1092 (2009). In the context of

announcing a new rule of law in a case, “the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law.” *Id.*

While this Court is not required to apply GR 37 in Mr. Jefferson’s case it should apply this rule to Mr. Jefferson’s case for the following reasons. First, as in *Lundsford*, GR 37 raises issues of state law. Second, the lower courts will necessarily need guidance and direction regarding implementation of GR 37 to protect against equal protection violations. Third, Mr. Jefferson’s case is on direct review providing this Court with a timely opportunity to analyze and apply the new rule for the first time, to offer the much needed guidance to the trial bar and lower courts. Fourth, during oral argument, this Court suggested that the best way to understand the efficacy of GR 37 would be to test the rule. This Court should apply GR 37 to test the new rule.

Fifth, and finally, “when a statute or rule not explicitly made retroactive is remedial in nature, it can operate retrospectively. A statute or rule is remedial when it relates to practice, procedure or remedies and does not affect a substantive or vested right.” *Yellam v. Woerner*, 77 Wn.2d 604, 607-08, 464 P.2d 947 (1970).

In *Yellam*, this Court applied CR 41(b)(1) retroactively to cases pending on direct review because the rule was procedural and remedial in nature. *Yellam*, 77 Wn.2d at 608. The rule did not involve a substantive right, but rather encouraged the courts to decide cases on their merits. *Id.* Here too, GR 37 is procedural and remedial, in the sense that it provides a litigant the opportunity to a jury selection free from racial discrimination in violation of the Equal Protection Clause. GR 37. Since GR 37 does not indicate that it is to be applied prospectively only, this Court may in its discretion choose to apply the rule to Mr. Jefferson's case.

Relatedly, in *Erickson*, 188 Wn.2d 721, this Court applied a new rule to Matthew Erickson's case recognizing, that since *Rhone*, the time had arrived to take action to prevent the ongoing and persistent failings of the *Batson* test. *Erickson*, 188 Wn.2d at 735.

In *Erickson*, this Court was not concerned with announcing a new rule for the first time in this Court rather than in a trial court. Rather, this Court recognized the urgency in applying its newly formulated rule to the case in hand. *Id.* Here too, this Court should not wait for an unknown period to apply GR 37, but should take advantage of the opportunity this case presents to apply GR 37.

The federal retroactivity analysis is also useful in determining why new rules should apply to all cases on direct review. The United States Supreme Court in *Griffith v. Kentucky* explained the value of applying a new rule of law to all cases pending on direct review because the new rule would necessarily embody the court's best understanding of the issue, and to disregard the Court's best understanding of an issue defies constitutional norms. *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

“If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all....

(Emphasis added) *Griffith*, 479 U.S. at 323.

Even though GR 37 was not adopted through the adjudicatory process, and is procedural, it is a new rule where the demarcation between procedure and substance is mingled and the reasoning in *Griffith* to afford a litigant the court's best understanding of a new rule, should apply to Mr. Jefferson's case which is pending on direct review. *Griffith*, 479 U.S. at 322-23; *Templeton*, 148 Wn.2d at 213.

The adoption of GR 37 with stakeholder input prior to adoption versus adopting a new rule in the context of a case on review permits this Court the opportunity to issue an opinion on the new rule understanding the stakeholder issues in the context of a case. It makes no sense to defer application of a new rule that this Court and the citizens have waited years to unveil. In *Griffith*, the Court expressly articulated that the application of a new rule was not dependent on the trial court or lower court's having a first attempt at application. *Griffith*, 479 U.S. at 323.

As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from “[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.”.

Second, selective application of new rules violates the principle of treating similarly situated defendants the same. .... As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is “the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary” of a new rule. (citation omitted)(emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: “The

time for toleration has come to an end.” *Ibid.*  
Id.

It “hardly comports with the ideal of ‘administration of justice with an even hand,’ ”when “one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.” *Griffith*, 479 U.S. at 327.

Mr. Jefferson respectfully requests this Court exercise its discretion to apply GR 37 to his case on direct review to avoid the inequity of applying it to some other case on direct review when his case presents this Court with its first opportunity to apply GR 37 without engaging in selective application of the new rule.

D. CONCLUSION

For the reasons stated herein this Court should apply GR 37 to Mr. Jefferson’s case.

DATED this 23<sup>rd</sup> day of May 2018.

Respectfully submitted,



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LISE ELLNER, WSBA No. 20955  
Attorney for Petitioner

## CERTIFICATE OF SERVICE

On today's date: I, Lise Ellner, a person over the age of 18 years of age, electronically served:

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and by depositing in the mails of the United States of America, properly stamped and addressed to:

Tyree Jefferson/DOC#305122  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

DATED this 23rd day of May 2018.



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**LAW OFFICES OF LISE ELLNER**

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