

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
6/13/2018 4:14 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 94853-4

---

---

**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TYREE WILLIAM JEFFERSON, PETITIONER

---

Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 13-1-02796-0

---

**Second Supplemental Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. IDENTITY OF RESPONDING PARTY. .... 1

B. ISSUE PRESENTED..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT WHY GENERAL RULE 37 - JURY SELECTION  
SHOULD NOT APPLY TO THIS CASE..... 2

E. CONCLUSION..... 6

## Table of Authorities

### State Cases

*State v. Knapstad*, 107 Wn.2d 346, 353, 729 P.2d 48, 53 (1986) ..... 5

### Rules and Regulations

General Rule 36 ..... 1

General Rule 37 ..... 1, 2, 3, 4, 5, 6

GR (a) (1) and (3) ..... 2

GR 9 ..... 2, 3

GR 9(b), (f), (g) and (h) ..... 3

GR 9(h)(4) ..... 3

GR 9(h)(5) ..... 4

GR 9(i) ..... 4

GR 9(i)(4) ..... 3

GR 9(j)(1) ..... 3

RAP 9.11(a) ..... 5, 6

### Other Authorities

*In re: Proposed New Rule General Rule 37 Jury Selection*,  
No. 25700-A-1221 ..... 2

A. IDENTITY OF RESPONDING PARTY.

Respondent State of Washington respectfully submits this supplemental brief regarding the applicability of General Rule 37 – Jury Selection.

B. ISSUE PRESENTED.

Should newly adopted General Rule 37 – Jury Selection, which had not been suggested, proposed or adopted at the time of the trial in this case, be applied to this case where the rule has not yet taken effect?

C. STATEMENT OF THE CASE.

The defendant’s trial in this case began on April 30, 2015. 1 RP 3. In 2015 the American Civil Liberties Union (the “ACLU”) proposed a new general rule concerning jury selection that was originally entitled General Rule 36 – Jury Selection. *See* Letter from the Court dated July 17, 2017, re: Supreme Court Convened Workgroup on Proposed New General Rule (GR) 37 – Jury Selection. The court published the proposed rule for comment with the original comment period scheduled to end on April 30, 2017, two years to the day after the start of the trial in this case. *Id.*

After the original suggestion of the proposed new rule, alternative versions were also suggested, including an alternate version submitted by the ACLU. *Id.* Also, in July 2017 this court convened a workgroup and

noted that the original proposed new general rule was re-designated as proposed new General Rule 37 – Jury Selection. *Id.* The workgroup was tasked with considering the submitted alternative proposals for the rule and providing the court with input “which would assist the court in taking action on the rule proposals.” *Id.*

The order adopting GR 37 was entered on April 5, 2018. The order provided that the rule was “adopted” and “will become effective upon publication.” *In re: Proposed New Rule General Rule 37 Jury Selection*, No. 25700-A-1221. Neither the order nor the attached copy of the rule specified a date of publication. They also did not reference the effective date provisions of GR 9.

D. ARGUMENT WHY GENERAL RULE 37 – JURY SELECTION SHOULD NOT APPLY TO THIS CASE.

The effective date of newly adopted rules of court is covered by GR 9. The stated purposes of GR 9 include: that “(1) The adoption and amendment of rules proceed in an orderly and uniform manner ...”, and that “(3) There is adequate notice of the adoption and effective date of new and revised rules. . . .” GR (a) (1) and (3). To adopt or apply rules in an impromptu or ad hoc manner would be inconsistent with these express purposes and by implication all of the stated purposes of GR 9.

Under GR 9, the orderly implementation of new rules progresses from submission to adoption to publication to taking effect. GR 9(b), (f), (g) and (h). Adoption is not the final step. GR 9(h)(4) provides that:

All adopted rules, or other final action by the Supreme Court for which this rule requires publication, shall be published in a July edition of the Washington Reports advance sheets and in the Washington State Register immediately after such action. The adopted rules or other Supreme Court final action shall also be posted on the Internet sites of the Supreme Court and the Washington State Bar Association. An announcement of such publication shall be made in the Washington State Bar News.

As to the effective date, adoption is likewise not the same as the effective date. Instead GR 9(i)(4) provides: “Proposed rules published in January and adopted by the Supreme Court shall be republished in July and shall take effect the following September 1.”

Under the foregoing adoption, publication and effective date rules, GR 37 has not yet been published in the July edition of the advance sheets and has not yet taken effect. Thus, it does not yet apply to cases being tried around the state much less to a case that was tried to guilty verdicts three years ago.

The only exception to the adoption, publication and effective date rules is found in subsection (j). That provision allows the court to “adopt, amend, or rescind a rule, or take any emergency action with respect to a rule without following the procedures set forth in this rule.” GR 9(j)(1).

However even where the court declares an emergency “because of exceptional circumstances” it “shall publish the rule in accordance with sections (g) or (h) as applicable.” *Id.* Subsection (h) in turn provides that adopted rules become effective as provided above “unless the Supreme Court determines that a different effective date is necessary.” GR 9(h)(5).

The order accompanying GR 37 did not declare exceptional circumstances or an emergency. It did not invoke the need for an effective date different than the effective date provided by GR 9(i). It follows that GR 37 has not been published and is not yet effective. It would be the antithesis of adopting rules in an “orderly and uniform manner” and with “adequate notice of the adoption and effective date”, to apply GR 37 to this case. GR 37 may have been suggested but it was not adopted nor published nor effective before (1) completion of the briefing of this case in the court below, (2) consideration of the petition for review by this court, and (3) completion of the supplemental briefing in this court. Furthermore, while the rule was adopted before oral argument it has not yet been published in the advance sheets and is three months from taking effect.

It would be speculation for either party in this case to argue what would have happened during the *Batson* challenge in 2015 if the trial court were to have applied GR 37. Admittedly trial courts “are often

asked to decide procedural questions which have not before arisen and for which there exists no formal, written rules.” *State v. Knapstad*, 107 Wn.2d 346, 353, 729 P.2d 48, 53 (1986). In such cases this court “will later determine whether these actions are a proper exercise of the trial court’s authority”. *Id.* The power to conduct such a review does not imply that speculation about trial court actions that did not happen is appropriate. *Id.*

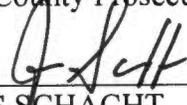
Without waiving its primary arguments above, the state suggests that if GR 37 is to be considered for application to this case, the court should consider directing that additional evidence be taken pursuant to RAP 9.11(a). In *Knapstad* the trial court entered a dismissal order, thus enabling this court to review the trial court’s resolution of the pretrial sufficiency of the evidence issue. *State v. Knapstad*, 107 Wn.2d 348-49. In this case the trial court has not considered GR 37 and has not entered any orders related to it. With nothing to review, this court is presented with quite a different circumstance compared to *Knapstad*. Thus, as to the rule’s application to the peremptory challenge at issue in this case, there is nothing before the court to review.

E. CONCLUSION.

Respectfully, for the foregoing reasons, newly adopted GR 37 should not be applied to the *Batson* challenge issue in this case. However, if it is to be applied over the state's objection, this court should direct that additional evidence be taken by the trial court pursuant to RAP 9.11(a).

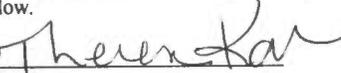
DATED: June 13, 2018.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
\_\_\_\_\_  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-13-18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**June 13, 2018 - 4:14 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94853-4  
**Appellate Court Case Title:** State of Washington v. Tyree William Jefferson  
**Superior Court Case Number:** 13-1-02796-0

**The following documents have been uploaded:**

- 948534\_Briefs\_20180613161244SC040859\_3167.pdf  
This File Contains:  
Briefs - Respondents Supplemental  
*The Original File Name was Jefferson Second Supp Brief--Respondent.pdf*
- 948534\_Motion\_20180613161244SC040859\_6066.pdf  
This File Contains:  
Motion 1 - Other  
*The Original File Name was jefferson mot to file supp brief.pdf*

**A copy of the uploaded files will be sent to:**

- Liseellnerlaw@comcast.net
- lila@washapp.org
- peterg@atg.wa.gov
- taki.flevaris@pacificallawgroup.com
- tricia.okonek@pacificallawgroup.com
- valerie.liseellner@gmail.com
- wapofficemail@washapp.org

**Comments:**

---

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

**Filing on Behalf of:** James S. Schacht - Email: jschach@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7400

**Note: The Filing Id is 20180613161244SC040859**