Washington Supreme Court Passes New Rule to Tackle the State's All-White Jury Problem

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Prosecutors have spent decades concocting reasons that are race-neutral enough to pass court muster.
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Washington recently became the first state to tackle racial bias in the jury selection process in a move that advocates hope will lead to fewer all-white juries—and, consequently, fairer trials.

On Thursday, the Washington Supreme Court passed General Rule 37, which "will expand the prohibition against using race-based peremptory challenges during jury selection," according to a press release issued by the American Civil Liberties Union (ACLU) of Washington.

“For decades in Washington state, many people of color have been blocked from participating fully in our democracy as jurors for reasons unrelated to their ability to serve,” said ACLU-WA senior staff attorney Nancy Talner.

The rule outlaws intentional racial discrimination, of course; such a thing is already unconstitutional. But it also outlaws peremptory challenges based on “implicit, institutional, and unconscious” race and ethnic biases. Presumably, it is meant to poke holes in some of the purportedly race-neutral reasons frequently offered in court by prosecutors purposefully trying to empanel an all-white jury. At this point, a prosecutor can claim that a juror had a poor attitude, or seemed uninterested, nervous, indecisive, bewildered, or unintelligent, and that’s a good enough reason, as far as court history is concerned, to strike a juror. (All of these reasons have been accepted by federal courts across the country.)

Lawyers can use peremptory challenges, also sometimes called peremptory strikes, to remove a potential juror without stating a reason, though they may be required to do so later. Peremptory challenges are not supposed to be used to exclude jurors based on race, but they frequently are anyway. All a prosecutor has to do is come up with racially neutral reasons for striking a juror that operate as racially discriminatory reasons.

Race neutrality is the cornerstone of the U.S. Supreme Court’s jurisprudence regarding racial discrimination in jury selection. In 1986, in a case called *Batson v. Kentucky*, the Court ruled that jurors could not be excluded from sitting on a jury because of their race. If defense counsel believes that the prosecution is excluding jurors of color because of their race, a trial court can hold a special *Batson* hearing and determine whether a prosecutor was striking jurors due to their race, or due to some “race-neutral reason.”

But the race-neutral standard has proved to be utterly toothless. Prosecutors simply began coming up with reasons to strike Black jurors that were—*wink, wink*—not race-based.

Washington’s new rule is an effort to address that problem. The rule requires courts to evaluate the reasons that prosecutors give for peremptory challenges, and if the judge determines that “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge,” then the court should deny that peremptory challenge.

The rule lists several factors that courts should consider in making their determination. For example, if a prosecutor bombards a juror of color with significantly more and different questions, and then strikes that juror from the jury pool, the court must examine whether the prosecutor similarly questioned a white juror who was not stricken from the jury pool.

If a prosecutor strikes a juror who gives similar answers to the same questions posed to a white juror whom the prosecutor doesn’t strike, the court must examine whether the juror of color was stricken because of implicit, institutional, or unconscious biases.

Courts must also examine whether a particular reason given for striking a juror of color might be disproportionately associated with a given race or ethnicity.

The rule also requires the court to look into the prosecutor's past conduct and determine whether a prosecutor has a history of using peremptory challenges disproportionately against a particular race or ethnicity. This provision of the rule, by the way, would be useful in Georgia, where one prosecutor, Doug Pullen—who was already busted by the Supreme Court for intentionally excluding Black people from the jury pool that convicted and sentenced to death Timothy Foster—is also the prosecutor in the case of Johnny Lee Gates. Like Foster, Gates was sentenced to death by an all-white jury empaneled by Pullen.

The sort of court scrutiny into ostensible "race neutrality" that General Rule 37 calls for will likely make some prosecutors in Washington sweat.

Prosecutors have spent decades concocting reasons that are race-neutral enough to pass court muster. They even attend seminars and training sessions where they learn specific ways to cover up racial discrimination in the jury selection process, according to an amicus brief that a group of prosecutors filed with the Supreme Court in *Foster v. Chatman*. In North Carolina, for example, the North Carolina Conference of District Attorneys held a statewide training course in 1995 where it provided a list entitled "*Batson* Justifications: Articulating Juror Negatives." Presumably, the list was full of justifications that prosecutors could use when striking jurors without fear of being accused of bias.

And in a now-infamous training video from 1987, former Philadelphia District Attorney Jack McMahon advised trainees that keeping Black, low-income, and educated citizens off juries is key to securing convictions.

As reported by the *Los Angeles Times* in 1997, McMahon's advice to a group of trainees is so racist that it would be comical if it weren't so dangerous:

In selecting blacks, you don't want the real educated ones. This goes across the board. All races. You don't want smart people. If you're sitting down and you're going to take blacks, you want older black men and women, particularly men. Older black men are very good …. My experience, young black women are very bad. There's an antagonism. I guess maybe because they're downtrodden in two respects. They are women and they're black … so they somehow want to take it out on somebody and you don't want it to be you …. The blacks from the low-income areas are less likely to convict. I understand it. It's an understandable proposition. There's a resentment for law enforcement. There's a resentment for authority. And as a result, you don't want those people on your jury.

Washington's new rule is supposed to strip prosecutors of these courtroom tricks and to ensure that prosecutors aren't relying on intentional racism or unconscious biases when they use their peremptory challenges.

A key provision of the rule addresses some of these biases outright and presumes that certain reasons that prosecutors have historically used to strike Black jurors are invalid. For example, if a prosecutor strikes a juror who has had prior contact with law enforcement, that strike is presumptively invalid. And with good reason: Considering the overpolicing of communities of color, it is no surprise that a lot of Black jurors would have had prior contact with the police.

In addition, having a close relationship with people who have been stopped, arrested, or convicted of a crime is a presumptively invalid reason to be stricken from a jury, as is living in a high-crime neighborhood, having a child outside of marriage, receiving state benefits, and not being a native English speaker

Prosecutors routinely use these sort of reasons that Washington now presumes are invalid to strike Black jurors. But no longer: “The court has recognized that the fair and impartial administration of justice requires changing the conversation about racial and ethnic bias in our courtrooms,” said Talner. “It has expressly acknowledged the insidious role of implicit and structural bias, and reasons previously considered as acceptable for excluding a juror will now be rejected for their association with bias.”

No longer can prosecutors hide their racial discrimination by cloaking it as race neutrality, at least in theory. But given prosecutors’ track record of bending over backward to propagate racist nonsense, only time will tell if juries in Washington become more diverse as a result.