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GONZAGA UNIVERSITY
SCHOOL OF LAW

April 28th, 2017

Dear Clerk of the Washington Supreme Court,

Attached to this email please find five separate comments regarding proposed General Rule 36 that I am submitting on behalf of the authors. I am a professor at Gonzaga University School of Law, and each submitted comment was authored by a group of five students in my Spring 2017 Advanced Criminal Procedure course. I did not direct the drafting of any of these student comments. Rather, each student group independently prepared its comment after several class sessions of studying *Batson* jurisprudence and issues of discrimination in jury selection. The students also studied this Court's decision in *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (Wa. 2013), and the published comments to Rule 36, including the counter-proposal by the Washington Association of Prosecuting Attorneys. Finally, the students benefitted from a question-and-answer session with Salvador Mungia, Esq., a member of the workgroup that proposed General Rule 36.

I recognize that student comments to a proposed Supreme Court Rule may not be entirely orthodox. But these students are 2L and 3L students who are interested in a career in criminal law, and they applied themselves diligently to drafting a meaningful public comment by group consensus. Several of these students also are working as interns in prosecutor and defender offices. These comments thus offer a small sample of the perspectives that entering members of our profession have on this important topic after studying the issues.

I hope that these comments will aid the Court in its deliberations on proposed General Rule 36. Please let me know if I should clarify or correct anything in this submission.

Respectfully submitted,

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"It is better to take many small steps in the right direction than to make a great leap forward only to stumble backward."

~Proverb

Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin. *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326, 332–33 (2013). We agree with the court in *Saintcalle* that discrimination frustrates the integrity of the courts and we recognize that racial bias in jury selection continues to be a prominent issue. While we agree with the sentiment and purpose behind Rule 36, we oppose the adoption of Rule 36 because we believe that it would not adequately solve the problem of implicit bias and would only cause more problems and inefficiencies within the jury selection process.

Saintcalle provides that it is crucial that we have meaningful and effective procedures for identifying racially motivated juror challenges because "[r]acial discrimination in selection of jurors' harms not only the accused whose life or liberty they are summoned to try"; it also shamefully belittles minority jurors who report to serve their civic duty only to be turned away on account of their race. *State v. Saintcalle*, 178 Wn.2d 34, 41, 309 P.3d 326, 332 (2013). Effective procedures are designed with the intent of eliminating racially motivated peremptory challenges. The proposed rule frustrates this objective and instead focuses on whether race or ethnicity is a *factor* for the challenge and whether there is an unconscious bias, rather than purposeful discrimination. Diving into the unconscious is something courts should be wary of, considering "people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it." *State v. Saintcalle,* 178 Wn.2d 34, 49, 309 P.3d 326, 336 (2013). Despite the impossibility of it, proving that someone's unconscious bias weighed in as just a *factor* of their peremptory strike is exactly what the new rule is proposing we do. *See State v. Saintcalle,* 178 Wn. 2d 34, 89, 309 P.3d 326, 361 (2013) (Gonzalez, J., concurring) ([I]t is nearly impossible for any observer to identify the presence of unconscious bias in any particular instance).

Saintcalle addresses the fact that people are often unaware of their discrimination and therefore the reasons they provide may not reflect those biases. The proposed rule requires the judge to uncover these unconscious biases through an "objective observer" test. However, under the objective observer standard, if the court finds that an objective observer *could* view race or ethnicity as a factor for the peremptory challenge, the challenge shall be denied. GR 36(c). Further, Comment [2] defines an objective observer as "one who is aware that purposeful discrimination and implicit, institutional, or unconscious bias have resulted in the unfair exclusion of potential jurors based on race in Washington." As written, the objective observer test lowers the standard to a level that is too easy to satisfy. It also appears that in an attempt to reconcile past discrimination, the new test presumptively concludes that an individual's unconscious bias is the motivator of the decision, and fails to consider other non-racial motives. It appears as though any competent attorney can always manage to conjure up a discriminatory "factor" that "could" have been used unknowingly in the mind of the attorney attempting to use his or her peremptory strike.

If a reason is offered up at each peremptory strike, which is quite feasible, this would slow down the process, creating a new procedural issue. Furthermore, there will also be a predictability issue once the trial judge examines the Rule 36 challenge. Each judge has their own implicit biases and there is no

way of knowing how each trial judge will decide whether race was a factor in the peremptory strike. As stated in Comment [1], proposed Rule 36's purpose is "to eliminate the unfair exclusion of potential jurors based on race." While Rule 36 is facially neutral, it would operate only to include racial minority groups instead of working to eliminate all racially based exclusions. *See* Comment [4]. Looking to Comment [4] of the proposed change, it only offers guidance in relation to potential jurors of racial and ethnic minorities while remaining silent with regards to discrimination based on non-minority racial groups. By failing to address race based exclusions to non-minority members, it fails to achieve its intended purpose of eliminating exclusions based on race. If any rule is adopted to address the shortcomings of the Batson Rule, it should seek to eliminate discrimination and bias towards all racial groups as exclusions happen to all races. *See State v. Saintcalle*, 178 Wn.2d 34, 44 (2013) (the court offered a list of studies, reports and statistics showing that both racial minority groups and non-racial minority groups are struck based on race.)

Most of the "invalid reasons" for peremptory challenges listed in Comment [4] can be just as race-neutral as they can be racially related. While these reasons are considered only presumptively invalid, the proposal as written ("*could* view race... as a factor") leaves too much room for speculation. It would likely create more difficulty for judges in assessing the legitimacy of trial attorneys' reasons rebutting the presumptions. Various federal and state courts have expressed their views that excluding a juror that is of a cognizable race for the reasons detailed in Comment [4] is valid. *E.g., United States v. Alvarez-Ulloa,* 784 F.3d 558, 567 (9th Cir. 2015) (*Batson* challenge against the exclusion of a Hispanic woman that "disclosed negative encounters with law enforcement" failed.); *State v. Wright,* 78 Wn. App. 93, 102-103, 896 P.2d 713, 719 (1995) (Wright had argued that "because [juror's] opinion of the police was the result of being an African-American, excusing him on the basis of his views was necessarily a discriminatory act." Held trial court did not err in ruling that prima facie case of discrimination was not established.) Changing the standard required to disprove discrimination puts an unnecessary and difficult burden on trial attorneys by requiring the attorney to generate additional rationale for their decision.

Overall, looking at the judicial process and the development of law in the country, there is overwhelming evidence showing that making drastic changes in the law does not necessarily solve the problem the changes seek to address. *See* Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law's Power to Advance Equality,* 13 Tex. Wesleyan. L. Rev. 515, 516 (2007) ("[L]aw must remove the source of the problem. But the law simply cannot get at that source directly. A change in the law does not immediately change beliefs, and so a change in the law cannot immediately right a social wrong."); *See also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Misconduct*, 15 U. Pa. L. Rev 959, 978 (2009) ("By and large, traditional external regulation has shown itself to be ineffectual, at least as a source of rules and priorities"). In fact, most changes in law are minimal and take place over an elongated period. The proposed amendment would change one of the most significant, and historical, facets of our adversarial process based on an objective observer, or more correctly stated, a judge's subjective assessment of implicit bias. The proposed change assumes an implicit bias, which can never be completely proven. While we do believe that an unconscious bias may exist, there is no way to prove this, resulting in uncertainty in a judicial system that requires proof beyond a reasonable doubt when dealing with an individual's liberty. Further, as "[t]he point at which to consider the constitutionality of the selection process has usually been at the selection of a master list from which the panel for each jury term is selected," we feel as though the proposed amendment fails to correct the

actual problem, the lack of diversity at the beginning of the jury venire, while simultaneously causing more issues for attorneys and the court. *See State v. Salinas*, 87 Wn.2d 112, 114-15, 549 P.2d 712, 714 (1976)(citations omitted).

Group 2

Re: Comment to Proposed Rule 36

The ACLU proposed a new rule to replace *Batson*, and it is problematic on many fronts. First, Comment #1 to the proposed rule states "[f]or purposes of this rule it is irrelevant whether it can be proved that a prospective juror's race or ethnicity actually played a motivating role in the exercise of a peremptory challenge." Second, the court takes an objective observer view when looking at the reasons for the peremptory challenge. Lastly, the standard to deny the peremptory challenge looks at whether race, ethnicity, or gender could have played a role, then the challenge is granted.

To satisfy the first part of the test, one need not show that the alleged discrimination was the reason for the peremptory challenge, but that it *may have* played a role. This means that any possible trace of theoretical discrimination will allow a challenger to proceed easily to the second part of the test. The new test does not even require the challenger to make a showing of a prima facie case of discrimination. A rule that takes away the requirement that the party making the *Batson* challenge must make a prima facie showing of the basis for the challenge, changes peremptory challenges into a quasi-challenge for cause. The whole basis for peremptory challenges, which attorneys hold dear, is that they are strikes that lawyers do not have to justify.

Then, to decide whether to grant the peremptory challenge, courts will look at the proffered reason through an objective observer view. This poses many problems. An objective view likely does not take into consideration the vast knowledge experienced trial attorneys have when considering what characteristics prospective jurors have that would make them unfavorable to their case. What most attorneys may see as a legitimate reason to strike a juror, an objective observer could interpret as discrimination.

The comments to the ACLU's proposed rule create a "presumption" of impropriety based upon factors that may have a disproportionate impact on a specific group. The list is slanted to require the State to seat jurors who are biased against the State's witnesses.

Comment #3 of the proposed rule sets out three different factual scenarios that govern whether an objective observer could view race, ethnicity, or gender as a factor in the peremptory challenge. These scenarios are both too narrow and arbitrary. Furthermore, these scenarios are extreme overkill in limiting advocacy compared to the eradication of bias that they are trying to achieve. An attorney may base their decision to exercise a peremptory challenge on a juror for several reasons. Courts cannot accurately determine a prejudicial motive on arbitrary identifying background questions and answers of prospective jurors.

Also, Comment #4 to the proposed rule provides seven scenarios that are presumptively invalid for peremptory challenges. The first two look at contact with law enforcement or a distrust in law enforcement. These should not be presumptively invalid reasons for striking a prospective juror. These are legitimate biases that could have a substantial outcome on any case. As the Court said in *United States v. Salamone*, "the central inquiry in the determination whether the juror should be excused for cause is whether the juror holds a particular belief or opinion that

will 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 800 F.2d 1216, 1226 (3d. Cir. 1986) (internal citation omitted). Especially in cases involving law enforcement officers, a peremptory challenge for a prospective juror that has a pre-case bias against law enforcement officers is not an impartial jury under the 6th Amendment.

Further, having a close relationship with people who have been stopped, arrested, or convicted of a crime, while allowing challenges for people who have a close relationship with victims of crimes, will also have a disparate impact upon racial and ethnic minorities. Courts usually find these types of relationships to be proper. *United States v. Monell*, 801 F.3d 34, 44 (1st Cir. 2015). The next two scenarios provide presumptive invalid challenges to jurors who have any relationship with people who have been stopped, arrested, or convicted of a crime, or live in a high-crime neighborhood. Not only is this standard broad, and difficult to define, but these too are possible biases that are real; allowing them on an impartial jury would only promote jury nullification. The two scenarios about receiving state benefits and having a child out of wedlock seem like reasonable prohibitions because, while they may not be inherently prejudicial, it is not difficult to see how they could be used improperly eliminate prospective jurors because of their race. We agree that a challenge based on language is a presumptively invalid challenge under *Hernandez v. New York*, 500 U.S. 352 (1991).

Finally, the proposed ACLU rule does not require a timely objection; the rule does not explicitly define when the challenge must be raised. This could cause substantial problems in the future. *Batson* issues should be raised and resolved at the trial court level. Allowing parties to raise *Batson* issues on appeal will substantially affect the finality of judgments, which undermines the efficiency and integrity of courts.

Though the ACLU tried to address a clear problem in Washington's criminal justice system, other organizations have come up with better proposals to solve this problem. WAPA's proposed Rule 36, while not perfect, is a better option for Washington State than the ACLU's proposed Rule 36. First, WAPA's rule expands the current *Batson* rule to include gender as a protected group that may not serve as a basis for a party's peremptory challenge. This expansion is in line with the Supreme Court's holding in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), which applied *Batson* challenges to peremptory challenges based on gender.

Second, WAPA's rule requires that the party challenging the peremptory challenge to articulate the basis for the challenge and "the facts that support a claim of purposeful discrimination." This is an important aspect of the proposed rule because it ensures that any *Batson* challenge that is made is done so with a proper foundation. It will prevent lawyers from blindly throwing out *Batson* challenges without an articulable basis, and shifting the burden to the party using the peremptory challenge. Peremptory challenges are an important part of the adversarial system. They provide lawyers on both sides of the isle an opportunity to use strategy to pick a jury, and to not rely on the random luck of the draw that is a jury pool.

Further, requiring the party making the *Batson* challenge to make a prima facie showing of the basis for the challenge keeps peremptory challenges what they are, which is what WAPA's

rule does. A rule that takes away the requirement that the party making the *Batson* challenge must make a prima facie showing of the basis for the challenge, changes peremptory challenges into a quasi-challenge for cause. The whole basis for peremptory challenges is that they are strikes that lawyers do not have to justify. This is a crucial benefit for lawyers because it is a core component of the jury trial and adversary system.

Finally, WAPA's proposed rule provides courts deciding *Batson* challenges a list of factors to consider when determining whether a peremptory challenge is impermissibly based on race or gender. However, the rule does not limit courts to these factors, it allows courts to consider "any other information that demonstrates purposeful discrimination." This gives the courts broad discretion to "read between the lines" and prohibit discrimination implicitly or subconsciously and covers much of the bases that the ACLU proposed rule attempts to address.

Critics of the proposed rule 36 argue that *Batson* challenges are often not successful because it requires judges to make a finding that basically calls attorneys racist or gender biased. To grant a *Batson* challenge under the ACLU's rule, the judge can claim that it is using an objective observer standard. At the end of the day it's the judge who is making the decision. Judges make many tough decisions. A judge conducts many trials and observes the voir dire process daily. They are the ultimate objective observer. If the judge is unwilling to make a finding that a peremptory challenge is based on race or gender, when in fact that is the case, then maybe judges are not fit to make the kind of decisions required.

Overall, *Batson* offers sufficient protection against discriminatory jury selection procedures. The ACLU and WAPA submitted proposals for the Court to consider, suggesting changes to how *Batson* is applied. WAPA's proposed rule codifies *Batson* and creates a process for bringing in good faith challenges to peremptory challenges that appear to be based on racial or ethnic biases, while also expanding the rule to include gender as a protected class. The ACLU's proposed rule effectively turns peremptory challenges into quasi challenges for cause. For the reasons outlined in this analysis, the Court should adopt WAPA's proposal.

Comment in Support of Proposed Rule 36

After reviewing both the proposed New General Rule 36 submitted by the American Civil Liberties Union of Washington (ACLU), and the rule proposed by the Washington Association of Prosecuting Attorneys (WAPA), as well as additional comments, we are in full support of the ACLU's amended proposal of General Rule 36 that includes protection for gender-based discrimination. The version of GR 36 submitted by WAPA fails to address the problem with the Batson standard, nor does it provide a solution to unconscious stereotyping in jury selection. see *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S.Ct. 1712 (1986); see *State v. Saintcalle*, 178 Wash. 2d 34, 54, 309 P.3d 326, 339 (2013). In particular, the WAPA version of GR 36 still requires a prima facie showing of purposeful discrimination. The Court in *Saintcalle* recognized that, "we should abandon and replace [the] purposeful discrimination requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias..." Id., at 53–54, 309 P.3d 339. We only take direct issue with the rule automatically invalidating specific biases regarding police officers for peremptory challenges. (*See* subsection 3). However, on the whole, the ACLU's proposed GR 36 effectively addresses both implicit and explicit racial bias and is the most effective way to reduce discrimination in the jury system.

I. Concerns Regarding Comment 2

Although we support the ACLU's proposed changes to GR 36, we also have some concerns we feel need further explanation in the rule. In addition to the use of the "objective observer" standard[1], the trial court should evaluate if the party in question has disproportionately exercised preemptory challenges (regarding the gender or race at issue) in the past. It should also consider whether the party adopted a factor that may be disproportionately associated with the gender or race at issue, due to its adverse effects on said identifiable group.

II. Concerns Regarding Comment 3

We are concerned about who is unilaterally deciding a juror's race, ethnicity, sex and gender association. Our main concern is whether or not the juror in question actually identifies as the classification presumed by the judge and the attorneys. The objective observer test may prove faulty in such a situation, if a juror believes they belong to a different group than presumed.

We also take issue with the amount of questions being asked of jurors compared to one another. If there are a certain number of questions presumed to be fair, then what is a reasonable amount? Once determined, would that number remain consistent among differing situations? Who would be responsible for keeping track of posed questions? If the duty were to lie with attorneys, impartiality would

[1] *See* Comment 2.

be an issue. If it were to lie with the judge, bias may still result. The questions could continue, and lead to a final conclusion — as written, it may be difficult for attorneys to know what the rule expects.

III. Proposed Changes to Comment 4

Expressing a distrust of law enforcement can, and should be considered, a legitimate reason to strike a juror through the use of a peremptory challenge. This should not justify the use peremptory challenges in all instances where a juror expresses any distrust of law enforcement no matter how slight. Indeed, healthy skepticism is an intellectual virtue which should be cherished in the law. However, not all skepticism is valuable in the adjudication of criminal cases. For example, a juror who believes that *all* law enforcement personnel are engaged in widespread, government-mandated racial discrimination may be unfairly prejudiced against the government's case from the outset. Therefore, a balance must be struck. The standard for finding this balance should be an objective one: Would a reasonable person be led to believe — based on the statements made by the juror — that the juror believes all law enforcement officers are presumptively untrustworthy or disreputable. Expressing mere skepticism regarding the trustworthiness of law enforcement officers generally, or expressing a belief that law enforcement officers engage in racial profiling would not be enough to meet this standard. Using this test seems consistent with the spirit of the proposed rule.

IV. Support of Comment 5

Peremptory challenges have historically been used to exclude minority jurors through alleged distracted or unintelligent answers. For that reason, we find it important to express our full support of Comment [5]. Judges should be alerted to certain issues so that they can be observed by an objective third party. Issues range from allegations that the prospective juror was: sleeping; inattentive; staring or failing to make eye contact; exhibited a "problematic attitude"; concerns with body language or demeanor; or provided unintelligent or confused answers.

V. Overall Support of Proposed Rule 36

As the Court in *Saintcalle* stated, "twenty-six years after *Batson*, it is increasingly evident that discriminatory use of peremptory challenges will be difficult to eradicate [;] [however,] we should not shrink from this challenge." 178 Wash. 2d 58, 309 P.3d 341. Therefore, despite any other concerns, we strongly support the proposed new General Rule 36 submitted by the ACLU of Washington.

As a group of Gonzaga law students, we write in opposition of Proposed General Rule 36.

A simple policy behind voir dire is to find the most qualified jurors for the case at hand. *See* James J. Gobert, *The Search of the Impartial Jury*, 79 J. of Crim. L. and Criminology 269, 271 (1988). However, an issue with selecting jurors from a fair cross-section is that all members of society hold implicit biases. Judge Mark W. Bennett in *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Baston and Proposed Solutions*, explains that "implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgments. 4 Harv. L. & Pol'y Rev. 149, 149 (2010). Most live their lives completely unaware of them. *Id.* "As a result, we unconsciously act on such biases even though we may consciously abhor them." *Id.* Though these implicit biases operate in the darkness of our subconscious, their influence is pervasive and powerful. *Id.* at 152.

The process and history of *Batson* and the proposed American Civil Liberties Union (ACLU) rule 36 are respectable, but they are not effective enough. Our main focus as students is to advocate for a rule that we believe will not only be effective, but also be navigable for present and future lawyers. The lack of "bite" behind Batson, and the ease with which it may be manipulated creates serious concerns for our group. As will be further expanded upon we also have concerns about the ACLU rule. We believe that the proposed rule of the Washington Association of Prosecuting Attorneys (WAPA) would be the best way to address the complicated issues stemming from *Batson*.

The new court rule proposed by the ACLU is rife with flaws, and adhering to this new rule would be a mistake on the part of Washington state. First, the "objective observer" test put forth by the ACLU to replace *Batson* test is paradoxical. In *State v. Saintcalle*, the court found that unconscious bias does play a role in jury selection and that *Batson* only targets purposeful discrimination. *State v. Saintcalle*, 178 Wash. 2d 34 (2013). The court goes further to say that "we live all our lives with stereotypes that ingrained and often unconscious...that endure despite our best efforts to eliminate them." *Id.* at 46. If we are all unconsciously bias, how can anyone be an "objective observer?" The court acknowledges that everyone, even the court itself, deals with these implicit biases.

A second critique of the ACLU's proposed rule comes from its comments. Comment 4, for example, states:

> there is a presumption that the following are invalid reasons for a peremptory challenge: (a) having prior contact with law enforcement officers; (b) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (c) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (d) living in a high-crime neighborhood; (e) having a child outside of marriage; (f) receiving state benefits; and (g) not being a native English speaker.

Cmt. 4. Even though these examples are derived from case law – in which the Batson challenges were often unsuccessful - a lawyer presented with this rule and comment still must presume those reasons demonstrate disparate impact on specific racial groups. However, neither the proposed rule nor the comments show evidence how those reasons for peremptory challenges were traditionally a substitute for race.

Comment 5 under the proposed rule, which deals with a juror's temperament and behavior during the jury selection process, also runs into the same problems faced in comment 4. cmt 5. The comment gives a host of supposedly historical reasons for striking jurors based on race - such as sleepiness, inattentiveness or confused answers – which, again, requires an unnecessary presumption that an attorney struck the juror based on race. However, aside from stating that these are historically racially motivated factors, the evidence offered does not demonstrate that these motives consistently correlate to racial bias. Fundamentally, the rule lacks supporting evidence and creates an unfair presumption for an already burdened attorney to work against.

Another concern with the ACLU rule is the following provision:

> [u]sing an objective observer standard, the court shall evaluate the reasons proffered for the challenge. If the court determines that an objective observer could view race or ethnicity as a factor for the peremptory challenge, the challenge shall be denied.

See proposed GR 36(c).

Under this objective observer standard, the comments to this rule lay out several different factors and situations that could give rise to implicit racial bias by the striking party. *See* proposed GR 36 cmt. 3. However, the comment suggests that a court shall look at the number of questions asked to a specific juror, and could potentially deny the strike if a specific juror was asked "significantly" less or more questions than other jurors. *Id.* Further, the court shall look at the answers given by the juror of which the strike is being used against, and compare his answers with other jurors that are not being subjected to the peremptory strike. *Id.* The point being, this would undoubtedly undermine the efficiency of voir dire. It would further subject prosecutors, as well as defense attorneys, to an entirely new level of review (objective observer standard) for which they must satisfy to surpass a Batson objection.

The rule proposed by WAPA is the better alternative to the ACLU proposed rule 36. The WAPA rule still allows the trial court ample discretion to decide whether a peremptory challenge was utilized based on race, color, ethnicity or *gender*. Although the comments may suggest that gender is implied within the ACLU rule, it is not directly stated as it is in the WAPA rule. Furthermore, the WAPA rule allows trial courts to essentially look at the totality of the circumstances, be it the demeanor of the juror, and whether other similarly situated jurors were also struck. There also is a catchall in the WAPA rule that allows a trial court to look at "any other information that demonstrates purposeful discrimination." WAPA Proposed GR 36(d)(5).

Overall, the WAPA rule allows a court to make a meaningful inquiry into whether a peremptory challenge was based on race, gender, ethnicity or color. However, it does not drastically change the standard by which a court may view a Batson challenge to the objective

observer standard, such as the proposed ACLU rule. In this respect, it is the better alternative for the sake of predictability and consistency. Considering the prevalence of implicit bias, the objective observer standard of proposed rule 36 radically lowers the bar for which a court may view a Batson challenge. It could open the floodgates to a great deal of litigation and appeals to flesh out what exactly the objective observer means.

Comment to Proposed Wash. GR 36 – Our group believes that some problems exist with the proposed rule and we suggest creating a bright line rule, which we have explained further below.

Grounds for Objections Under GR 36(b)

An objection can be made solely on the ground that "race or ethnicity of the prospective juror could be viewed as a factor in the use of the challenge . . . ."[1] The purpose of this rule is not to prevent actual racial bias, but rather to preclude peremptory challenges on what "could" be bias. The proposed Rule 36 goes too far in its attempt to remove bias - so far in fact that it is no longer a rule in which bias is readily identifiable. Although this rule rightfully furthers the interests of eliminating bias and attempts to reach many of the ways in which minorities have historically been discriminated against,[2] it in turn creates a rather amorphous standard which has the potential for abuse. Those seeking to bring claims for self-interested purposes will try to argue bias where none may exist.

The obscurities of GR 36 for preventing bias, requires the judge as the objective observer to make a certain amount of assumptions regarding the "biased person" (the attorney using a peremptory challenge) in order to determine whether there *could* be bias. Consequently, almost any situation may be spun in an unfavorable light to make it seem as if "an objective observer could view race or ethnicity as a factor for the peremptory challenge[.]"[3] Accordingly, GR 36 ignores the nature of *voir dire*, which already requires a certain amount of assumptions about jurors to be made. Undoubtedly, *voir dire* is an essential ingredient to our adversarial process, and permits lawyers to strike jurors simply from an inherent feeling a lawyer may have, regardless of whether such a feeling is based on any articulable fact(s). The proposed rule, however, denies this feature of our system and will instead read in implicit bias where none might exist.

Objective Observer Standard Under GR 36(c)

In an attempt to reorganize the shortcomings of the *Batson* framework, the proposed rule disregards proof of actual bias in favor of a more malleable "objective observer standard." Specifically, the definition provided in comment two is too broad to give judges any guidance for determining potential bias, as it permits wholly inconsistent results among trial and appellate courts throughout Washington.[4] Namely, comment two states that an objective observer is "one who is aware" of discrimination (purposeful or unconscious), but it importantly excludes the objective definition of "one who is aware," leaving each judge to make a determination of whether they are "aware."[5] Thus, without a definition of who is "aware," different trial and appellate judges will come to different results based on similar circumstances because of their

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[1] GR 36 (b).
[2] GR 36 cmt. 4.
[3] GR 36 (c).
[4] GR 36 cmt. 2.
[5] GR 36 cmt. 2.

subjective beliefs. Accordingly, if these judges are not "aware," they cannot be an objective observer, ultimately collapsing the argument for an "objective observer" standard; which happens to be what this rule is premised on. Consequently, this proposed standard is weak and largely undefined in actual application, leaving too much discretion upon the subjective beliefs of a supposed objective observer, which will ultimately be the trial or appellate judge.

Another concern regarding the application of the objective observer standard stems from the delineated factors found in comment three. The proposed factors command judges to inquire into the motives by turning only to three considerations when making a determination of bias.[6] Why not require judges to make a rather extensive inquiry whenever any issue of racial, ethnic, or gender bias in a peremptory challenge is raised? Moreover, the factors seem to suggest that asking too many questions is indicative of race, ethnicity, or gender playing a role in the use of a peremptory challenge, but the factors also seem to suggest that asking too few of questions is indicative of the same.[7] This seems to suggest that a perfect number of questions needs to be asked for the peremptory challenge to not be viewed as being on the basis of race, ethnicity, or gender.

In addition, although the comments to the rule provide a list of historical discriminatory practices in both Washington State and American history in general, these examples do not provide the necessary guidance that judges (and attorneys) require. Specifically, the factors here should include a delineation of nonexhaustive factors, thereby requiring judges to focus on a broader list of considerations. Giving a list of both invalid and historically used reasons is instructive, but only if the case at hand falls under one of the enumerated categories. Likely, many cases will fall into the gray area outside of what is listed, and, therefore, further guidance into how to appropriately conduct the inquiry as an "objective observer" will be the true alleviation of racism. It is not as if the proposed rule does not give any guidance at all, rather it does not reach the root of the implicit bias it seeks to eliminate.

Inconsistencies in Actual Application

To make GR 36 effective in practical application, the second step of *Batson* would need to go further than the current 'neutral explanation' standard. However, the 'neutral explanation' standard provided in proposed GR 36 relies on what a particular judge believes subjectively to be an objective observer standard, which is confusing and could lead to inconsistent results. Consequently, the proposed GR 36 misses the mark in its attempt to bridge the gap between a pre-textual *Batson* challenge and a justifiable challenge for cause. In this regard, Washington State courts have already examined the distinction and proposed a solution:

> Although a neutral explanation is one based on something other than the race of the juror and need not rise to the level justifying a challenge for

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[6] GR 36 cmt. 3.

[7] *Id.*

cause, the neutrality of that explanation must be viewed in the totality of the prosecutor's comments.[8]

Therefore, Washington courts already retain the power to bridge the gap between a proper *Batson* challenge and the higher standard of a challenge for cause. With this in mind, a trial court is in the best position to review the neutral reason for a *Batson* challenge based on their own judgment of the totality of the challenge. Thus, the new "objective observer standard" of proposed Rule 36 creates a distinction without a difference between a peremptory challenge and a challenge for cause. At bottom is whether the peremptory strike was, in fact, based on sex or race, and the neutral reason stated was a pre-textual justification for discrimination. Regardless of the standard imposed, a trial court must decide based on all the available information before them, which is already the standard in place.

Moving Forward

Instead of an unpredictable objective observer standard that will create uncertainty amongst attorneys and judges, we would support something similar to the system suggested by Justice Gerry Lee Alexander in *State v. Rhone*,[9] and Justice Tom Chambers in *State v. Saintcalle*.[10] In both dissenting opinions, the Justices propose a bright line rule which provides that a challenging party establishes a *Batson* violation when the opposing party uses a preemptory challenge to strike the last member of a racially cognizable and protected group from the jury. Adopting such a rule would attempt to serve the same goal as the proposed objective observer standard in GR 36: permitting a reasonable presumption that the peremptory challenge was based on race, ethnicity, or gender, which otherwise may fail to establish a *Batson* claim. In practice, when considering Washington's demographics, establishing a *Batson* claim is already difficult.[11] Accordingly, a new proposal similar to the one suggested here would provide much needed clarity and certainty in the law, while affording some security for protected groups and, in doing so, will ensure the right to a fair trial.

Conclusion

Although we do not agree with proposed GR 36, this does not mean that no standard should exist; rather, Washington needs to create a standard which allows for more predictable and consistent results. As currently proposed, GR 36 could lead to inconsistent outcomes based on each judge's own perception as an 'objective observer,' especially when you consider that issues of racial, ethnic, and gender bias in the United States runs on a spectrum. If the reason for removing the standard of actual bias under *Batson* is to further the interests of excluded

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[8] *State v. Cook*, 175 Wn. App. 36, 43, 312 P.3d 653, 657 (Div. I 2013).
[9] 168 Wn.2d 646, 658-64, 229 P.3d 752, 758-61 (2009) (Alexander, J., dissenting).
[10] 178 Wn.2d 34, 118-19, 309 P.3d 326, 371-72 (2013) (Chambers, J., dissenting).
[11] *Rhone*, 168 Wn.2d at 661, 229 P.3d at 759-60.

minorities, then it logically follows that the rule protecting those minorities should provide more guidance to judges in deducing whether any bias may exist.

Tracy, Mary

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Please see attached cover letter and comments regarding proposed General Rule 36.

Sincerely,
Brooks Holland
Gonzaga University School of law
(509) 313-6120