POSITION PAPER – Comments Re: Proposed General Rule 36

To: Honorable Justices of the Washington State Supreme Court
From: Washington Defense Trial Lawyers
Date: April 28, 2017

I. INTRODUCTION

Proposed General Rule 36 ("GR 36"), proposed by the ACLU of Washington, is a new court rule altering the *Batson* standard for challenging a peremptory strike on the grounds of race or ethnicity. Most fundamentally, it seeks to shift the standard from requiring evidence of "purposeful discrimination" to whether an "objective observer could view race or ethnicity as a factor" in the peremptory strike. The stated goal of the proposed rule is "to protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of juries." As set forth in detail below, in spite of this laudable goal, the proposed draft leaves inadequate clarity as to when a peremptory strike is improper, and therefore risks unintended consequences and various opportunities for abuse.

II. BACKGROUND

A. Background On *Batson* And Call By Washington State Supreme Court For Reform

In *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), the Washington State Supreme Court expressed its concerns that the federal *Batson* test may provide insufficient protection against biased uses of peremptory challenges, particularly with respect to unconscious prejudice and implicit bias.

Under *Batson*, in order to sustain an objection to a peremptory challenge based on improper discrimination: (a) "the person challenging the peremptory must 'make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose"; (b) the striking party must "come forward with a [race-] neutral explanation' for the challenge"; and (c) the court must "determine if the defendant has established purposeful discrimination." *Saintcalle*, 178 Wn.2d at 42 (2013).

The Washington State Supreme Court was explicit in *Saintcalle*, that it believed this standard was insufficient:

> Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only "purposeful discrimination," whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.

Saintcalle, 178 Wn. 2d at 35-36. In its decision, the Court cited to "a growing body of evidence" demonstrating that *Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges. *Id.* at 44. The Court noted that "[i]n over 40 cases since *Batson*, Washington appellate courts have never reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge." *Id.* at 45-46.

The Court's particular concern with *Batson* is rooted in unconscious prejudice and implicit bias. The Court noted that:

> Unconscious stereotyping upends the *Batson* framework. *Batson* is only equipped to root out "*purposeful*" discrimination, which many trial courts probably understand to mean conscious discrimination. *See Batson*, 476 U.S. at 98, 106 S.Ct. 1712. But discrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious. Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it.

Saintcalle, 178 Wn. 2d at 48-49 (emphasis in original).

In spite of its concerns regarding the sufficiency of *Batson*, the *Saintcalle* Court affirmed the conviction at issue, holding that "we will not create a new standard in this case because the issue has not been raised, briefed, or argued, and indeed, the parties are not seeking to advance a new standard." *Id.* at 36. Rather, the Court made a pronouncement seeking "to enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis."

In spite of seeking to enlist the best ideas from the legal community, the *Saintcalle* Court set forth an idea to achieve this objective:

> As a first step, we should abandon and replace *Batson's* "purposeful discrimination" requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant's race, the peremptory would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge.

Id. at 53-54.

Proposed GR 36 stems from the Washington State Supreme Court's call to action, and per the Court's suggestion, does so by addressing the "third-prong" of the *Batson* analysis regarding "purposeful discrimination." However, as set forth below, proposed GR 36 goes further than the Supreme Court's call for a "reasonable probability standard" or "more likely than not standard," instead requiring that "[i]f the court determines that an ***objective observer***

could view race or ethnicity as ***a factor*** for the peremptory challenge, the challenge shall be denied." Proposed GR 36 (emphasis added).

B. Proposed GR 36

Under the ACLU's proposed GR 36, the existing third prong of *Batson*, which requires the Court to "determine if the defendant has established purposeful discrimination," would be replaced with an "objective standard." Specifically, under proposed GR 36, "[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." Proposed GR 36 (emphasis added). A number of key components of the proposed rule are not contained in the rule itself, but rather are incorporated through the "comments" to the proposed rule.

Comment No. 2 provides that "[a]n objective observer" would be "aware that purposeful discrimination and implicit, institutional, or unconscious bias have resulted in the unfair exclusion of potential jurors based on race in Washington."

Comment No. 3 instructs the court that in determining whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, the court shall consider the following: (a) 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 type of questions asked about it; (b) whether the party exercising the peremptory challenge asked significantly more questions or different questions of minority jurors than other jurors; and (c) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party.

Comment No. 4 lists a number of reasons for peremptory challenges that will have a presumption of invalidity applied "[b]ecause historically the following reasons proffered for peremptory challenges have operated to exclude racial and ethnic minorities from serving on juries in Washington." These include: (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."

Similarly, Comment No. 5 provides: "The following reasons proffered for peremptory challenges also have historically been used to perpetuate exclusion of minority jurors: 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 confuse answers. If any party intends to offer one of those reasons or reasons similar to them as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the opposing party so the behavior can be verified and addressed in a timely manner. A lack of corroborating evidence observed by the judge or opposing counsel verifying the behavior in issue shall be considered strongly probative that the reasons proffered for the peremptory challenge are invalid."

GR 36 would also allow trial courts to raise *Batson* objections to a peremptory strike *sua sponte*.

C. WAPA Alternative Proposed GR 36

Dissatisfied with the ACLU's proposal, the Washington Association of Prosecuting Attorneys ("WAPA") submitted comments opposing the ACLU's proposed rule, and also submitted a proposed alternative rule (the "proposed alternative rule").

The proposed alternative rule claims to address two primary issues. First, it adds gender to the list of impermissible grounds upon which to exercise a peremptory strike, reflecting existing law that gender-based strikes are impermissible in the same manner as race-based strikes. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). Second, it keeps the "purposeful discrimination" standard from *Batson*, while providing some guidance in what factors should be used in analyzing whether the proffered race-neutral or gender-neutral reason is legitimate or a pretext for racial or gender discrimination.

These factors include: (a) whether the party adopted a factor that may be disproportionately associated with one gender or race because of its adverse effects upon an identifiable group; (b) whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror; (c) whether the party exercised peremptory challenges against similarly situated jurors; (d) whether the party has disproportionately exercised peremptory challenges against one gender or race in the instant case or in past cases; and (d) whether any other information demonstrates purposeful discrimination. WAPA asserts that the use of such a "comparative analysis" can "identify a disparity that may be based upon a bias the party was unaware of possessing, and can prevent the manifestation of the bias by denying the party's peremptory challenge."

The WAPA proposed alternative rule also includes a provision which requires courts to "provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information." WAPA quotes the California Supreme Court's decision in *People v. Lenix*, 187 P.3d 946, 962 (Cal. 2008), to argue that " [i]f the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition."

The alternative proposed rule also includes a few other procedural additions. First, it requires that a *Batson* objection must be made outside of the presence of the venire. Second, the objection must be made before the court excuses the juror, with the failure to make a timely objection waiving the issue on appeal. Third, it requires the objection to identify whether it is based upon the gender, race, color or ethnicity of the juror and the facts that support claim of purposeful discrimination. Finally, it includes an express provision that "[d]isallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice."

D. ACLU Response to WAPA Alternative Proposed GR 36, And Offering of ACLU Alternative Incorporating Gender

The ACLU rejected WAPA's alternative proposed rule. The ACLU rejected WAPA's criticisms of proposed rule GR 36, and claims that alternative proposed rule is merely "proposing to encapsulate Batson in a court rule," and noting that doing so "would keep the status quo." It did acknowledge that gender was also a protected class, and offered a revised version of its original proposed GR 36 that adds gender to the list of improper bases for exercising a peremptory challenge.

The new version of the proposed rule, in Comment No. 3, also attempts to make clarify the "objective observer" test by stating "As with the appearance of fairness doctrine for the recusal of judges, it is sufficient if an objective observer could view race, ethnicity, or gender as playing a role in the exercise of the peremptory challenge."

In spite of these additions, the ACLU refused to take a position on whether its original proposal or its new proposal was "superior."

III. ANALYSIS

While the goal of eliminating unconscious prejudice and implicit bias in jury selection is certainly laudable for the reasons outlined by the *Saintcalle* Court, the proposed rule risks the following five undesirable and unintended outcomes, among others: (a) allowing too much discretion as to what "a reasonable observer" could believe; (b) limiting, through comments, peremptory strikes that may be probative in particular cases; (c) risking abuse of the use of *Batson* challenges to object to valid peremptory strikes; (d) risking abuse of the use of *Batson* challenges to injure the image of prosecution; and (e) the risk of chilling the proper exercise of peremptory challenges; (f) swapping one person's biases (counsel) with another's (the judge) seems problematic. Each is discussed further below. Also addressed below, *see* section (g), is a response to WAPA's proposed rule.

A. The "Objective Observer" Standard, The Breadth Of The Proposed Rule, And Judicial Discretion

The proposed rule provides that "[i]f the court determines that an objective observer could view race or ethnicity as a factor for the peremptory challenge, the challenge shall be denied." Proposed GR 36 (emphasis added). This language contains three separate word choices that make the remedy potentially overbroad.

First, the term "objective observer" is not defined, thereby giving courts substantial discretion, and little guidance as to how the term should be applied. Although the term "objective observer" is used at times in federal law (e.g., Establishment Clause jurisprudence), it has proved to be a nebulous construct. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348, 107 S. Ct. 2862, 2875, 97 L. Ed. 2d 273 (1987) (Brennan, J., Concurring) ("The determination whether the objective observer will perceive an

endorsement of religion 'is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.'"). Under Washington law, other than off-hand mentions of the concept, there is no practical guidance regarding the term "objective observer." Of the nine published and unpublished Washington cases that reference the term "objective observer," none provides any analysis as to what the term means or how it should be applied. This is further complicated by Comment 2 to the proposed rule which mandates that "[a]n objective observer" would be "aware that purposeful discrimination and implicit, institutional, or unconscious bias have resulted in the unfair exclusion of potential jurors based on race in Washington."

Second, the proposed language allows a court to sustain a *Batson* challenge where an objective observer "*could* view" race or ethnicity as a factor. Again, the vagueness of the phrase "could be" limits the rule's usefulness in establishing a meaningful standard. Alternative language such as "likely" or "more probably than not" would alleviate some of this concern.

Third, the proposed language allows a court to sustain a *Batson* challenge to a peremptory strike where an objective observer could view race or ethnicity to be "a" factor. The concept of causation requires more clarity. As written this rule would allow the court to sustain an objection if there is *any* consideration of race or ethnicity, no matter how inconsequential. Mandating such complete hypothetical blindness to race and ethnicity is not a realistic outcome. Taken together, there is a real concern that the standard in the proposed rule is insufficient to provide any meaningful guidance as to when a *Batson* challenge should be sustained, and may allow almost any *Batson* challenge to be sustained, should the judge choose to sustain it.

B. Strikes Identified As Presumptively Improper May Be Relevant In Certain Cases Regardless of Disparate Impact

Comment No. 4 to the proposed rule lists a number of reasons for peremptory challenges that will have a presumption of invalidity applied "[b]ecause historically the following reasons proffered for peremptory challenges have operated to exclude racial and ethnic minorities from serving on juries in Washington." These include: (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."

Such a presumption of invalidity may be too strong, given that many of these scenarios could have real consequences in a particular case, regardless of race and ethnicity. The mere fact that they may have been misused at times does not mean that they are irrelevant or being misused in any given instance.

C. Risk for Abuse Of *Batson* Challenges To Legitimate Strikes

Because of the lack of a clear standard, as articulated in Section (a), above, there is little disincentive for a party to file a *Batson* challenge on any non-white juror if they do not agree that the challenged juror is undesirable. Again, there is a real concern that the standard in the proposed rule is insufficient to provide any meaningful guidance as to when a *Batson* challenge should be sustained, and may allow almost any *Batson* challenge to be sustained, should the judge want to sustain it.

D. Risk for Abuse Of *Batson* Challenges For Purpose Of Prejudicing Jury

As set forth above, because of the lack of a clear standard, there is little disincentive for a party to file a *Batson* challenge. This also risks one side making a *Batson* challenge for the purpose, or with the effect, of attempting to label the party or its attorneys as biased or racist, particularly if made in front of the jury. There are a number of means by which this could be addressed, including by requiring that such challenges be made outside of the presence of the venire.

In addition to abusing the process for prejudicing the jury, there is also a concern that this will be utilized as an attempt to ascertain work product from the opposing party, perhaps even in front of the jury. The process of selecting a jury is crucial to ensure that trials are fair an impartial – which is why the proposed rule is being offered – but there is too much opportunity here for the other side to discern the work product of their courtroom adversary.

E. Risk of Chilling Permissible Use Of Peremptory Strikes

As noted by the Washington State Supreme Court in *Saintcalle*, some commenters have called for abolishing peremptory strikes all together. However, unless and until such a ban were enacted, it is the right of a party and its attorney to use peremptory strikes as it sees fit, within the confines of then existing rules. Another potential risk under the proposed rule is, given the lack of a meaningful standard and lack of disincentive for a party to file a *Batson* challenge, that parties and attorneys will be chilled in exercising their peremptory challenges for fear of them or their clients being labeled as biased or racists in front of the venire.

F. Exchanging One Person's Bias for Another's Seems Problematic

The goal of the proposed rule change is laudable since it acknowledges that each person has implicit or unconscious biases. The problem, however, given the extreme discretion handed to the trial court under the proposed framework, is that the system merely exchanges one person's implicit or unconscious biases (trial counsel) for another's (judge). Indeed, if the literature is correct – that everyone suffers from implicit or unconscious bias – then so, too, does the presiding judge. Absent a revised framework which generates a more complete record outside the presence of the jury, the goal of minimizing an individual's biases is not attained.

G. WAPA's Alternative Proposed Rule, Although Providing Some Desirable Guidance Under *Batson*, Does Not Adequately Address The Issues Of Unconscious Prejudice And Implicit Bias

Several of the WAPA's proposals under its alternative rule are sensible additions to the GR to clarify practice under the existing *Batson* framework that have not previously been codified in the Rules. That said, WAPA's alternative rule does not adequately address the Washington State Supreme Court's concerns regarding unconscious prejudice and implicit bias.

V. RESPONSE

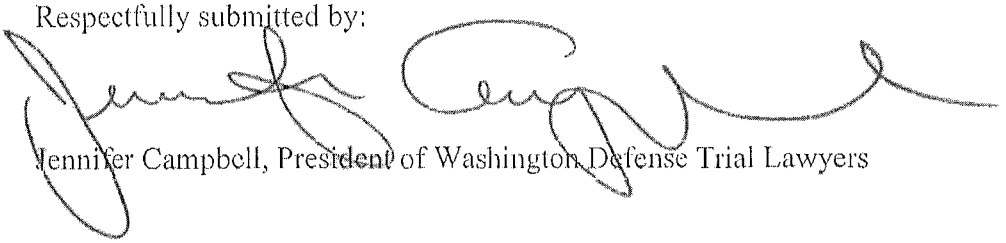
The Washington Defense Trial Lawyers ("WDTL") applauds the laudable goals outlined in the ACLU's proposed GR 36. It cannot, however, support the proposed rule as currently written. While the WDTL supports comprehensive review of the standard for the evaluation of *Batson* challenges, including analysis of implementation of standards to address unconscious prejudice and implicit bias, extreme care must be taken in determining the proper course to achieve this goal while at the same time avoiding undesirable outcomes and unanticipated consequences. Unfortunately, the proposals thus far are not yet positioned for final approval, and the WDTL strongly encourages the formation of a commission to work through these concerns before voting on a final proposal.

Indeed, the current language of the proposed GR 36 presents a substantial risk of such undesirable consequences. Notably, the use of the "objective observer" standard, combined with the use of the phrases "could appear" and "a factor" do not create a reasonably clear standard whereby parties could rely upon consistent application. Because of the lack of a reasonably clear standard, the proposed GR 36 runs the risk of inconsistent application, and a plethora of undesirable or unintended consequences that could result.

The WDTL has also reviewed the WAPA counter-proposal contained in its filed objections. The WDTL also does not believe the WAPA counter-proposal is sufficient. While the WDTL believes that many of the provisions included in the counter-proposal are sensible additions to a final rule addressing *Batson*-type challenges, the WAPA counter-proposal does not do enough to address the Washington State Supreme Court's concerns regarding unconscious prejudice and unanticipated consequences.

Accordingly, the WDTL respectfully urges further study and consensus-building regarding how to address the problem within a plausible framework that protects both sides of a case, the jurors themselves, and the interests of justice. As litigators who must deal with the consequences of these rules in our daily practice, we all have a strong interest in not only ensuring this work gets done, but that it gets done correctly.

Respectfully submitted by:



Jennifer Campbell, President of Washington Defense Trial Lawyers

Tracy, Mary

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Subject: WDTL Comment on Proposed GR 36

Attn: Clerk of the Supreme Court

Dear Sir or Madame Clerk,

Attached please find Washington Defense Trial Lawyers' Position Paper on Proposed General Rule 36.

Thank you for your time and attention.

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