April 21, 2017

SCHOOL OF
LAW

Hon. Susan L. Carlson
Clerk of the Washington State Supreme Court
Washington State Supreme Court
Temple of Justice
P.O. Box 40939
Olympia, WA 98504

VIA E-MAIL TO SUPREME@COURTS.WA.GOV

Re: Proposed General Rule 36

Dear Honorable Justices of the Washington State Supreme Court:

The Korematsu Center for Law and Equality at Seattle University School of Law ("Korematsu Center") supports Proposed General Rule 36 ("GR 36") as a first step toward addressing the ongoing problems surrounding the use of peremptory challenges in Washington. As the members of this Court recognized in *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), the current framework for addressing bias in the use of such challenges has failed to curb invidious discrimination; entrenches the historical underrepresentation of disadvantaged groups on juries; worsens the overall accuracy and effectiveness of juries; and undermines fairness and the appearance of fairness in our justice system. The time has come for this Court to address this lingering problem.

The Korematsu Center's support for GR 36 follows from its mission, which is to champion the cause of civil liberties and civil rights for all people through research, advocacy, and education. In light of the systemic problems resulting from the current framework for peremptories, the rights of all citizens to a fair and impartial justice system are at stake. The Korematsu Center thus urges the Court to act.[1]

This comment proceeds in three parts. In **Part 1**, we explain the Korematsu Center's support for GR 36, including (a) the need to address the systemic problems this Court has already identified and acknowledged related to the current framework for addressing bias in the use of peremptories, (b) the effectiveness of GR 36's objective observer standard for reviewing peremptory challenges, and (c) the importance of including gender within the rule's scope. In **Part 2**, we identify proposed improvements that could be made to GR 36, namely, (a) moving certain official comments into the body of the rule, (b) expressly allowing any party to raise an

[1] The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

objection rather than only adverse parties, and (c) requiring that any justification for a peremptory under review be supported by the record. The Korematsu Center supports GR 36 regardless of whether these changes are adopted. In **Part 3**, we respond to a discrete concern raised in another comment and demonstrate that there is no federal or state constitutional right to the use of peremptory challenges. The procedures that Washington follows for striking qualified jurors from service are subject to this Court's discretion. Whether as written, or with additional improvements, the Korematsu Center urges the Court to adopt GR 36.

Part 1: Support for GR 36

The Korematsu Center supports the currently proposed, updated version of GR 36 that the American Civil Liberties Union of Washington submitted to the Court on February 24, 2017. The proposed rule would establish an "objective observer" standard for determining whether a peremptory strike should be disallowed due to the potential influence of race, ethnicity, or gender. This is a sensible and effective way to begin addressing the rampant problems associated with the ongoing use of peremptory challenges in this state.

As this Court acknowledged in *Saintcalle*, the misuse of peremptories causes numerous harms related to jury service, and the current legal framework for regulating peremptory usage is ineffectual at preventing such harms. The most prominent harm is invidious discrimination against stereotyped and disadvantaged groups—often based on race, ethnicity, or gender—and the resulting exclusion of qualified members of those groups from jury service. *See Saintcalle*, 178 Wn.2d at 41-42, 44-49; *see also id.* at 85-91, 110-11 (González, J., concurring). In addition, bias in the use of peremptories results in juries that are less fair and effective and threatens the fairness and appearance of fairness in our justice system. *See id.* at 49-50; *see also id.* at 98-102, 111-12 (González, J., concurring).

This Court in *Saintcalle* also rightly recognized that the current framework for regulating peremptory usage—based on the minimum standards set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)—is ineffectual. There are numerous reasons for this, including most notably that (1) many invidiously discriminatory peremptories go unchallenged; (2) once challenged, it is difficult to determine whether a prima facie case of discrimination has been shown and thus whether a justification for the peremptory is required; (3) it is easy to conjure up facially valid reasons for any given peremptory; (4) the ultimate standard of "purposeful discrimination" is ambiguous and does not effectively address unconscious bias, which is a substantial source of invidious peremptory usage; and (5) that same standard also ostensibly requires trial judges to accuse legal practitioners of racism or other improper discrimination in order to refuse a peremptory, which is uncomfortable and difficult. *See Saintcalle*, 178 Wn.2d at 35-36, 44-49, 53-54; *see also id.* at 91-93, 98 (González, J., concurring).

GR 36 would ameliorate many of the problems with the current framework. For one, not only can a party object to a peremptory as improper, "[t]he court may also raise this objection on its own." GR 36(b). Further, the rule bypasses the requirement of a prima facie case, requiring

counsel to justify the peremptory whenever a bona fide objection has been raised. *See* GR 36(c). This streamlines the process and avoids "needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). Finally, and most importantly, the rule directs the trial judge to determine whether "an objective observer could view race, ethnicity, or gender as playing a role" in the use of the peremptory challenge. GR 36(d). This ultimate standard encompasses unconscious bias, renders the trial judge's denial of any peremptory less accusatory, and appropriately emphasizes the need to maintain the appearance of fairness.

GR 36's "objective observer" standard is workable and is similar to standards that have been used reliably in other contexts. Most pertinent here, both Washington and federal courts use similar standards to ensure the overall appearance of fairness in judicial proceedings. *See, e.g.*, *State v. Solis-Diaz*, 187 Wn.2d 535, 539-40, 387 P.3d 703 (2017) (a "reasonably prudent, disinterested observer"); *In re Bernard*, 31 F.3d 842, 844 (9th Cir. 1994) (an "informed, rational, objective observer"). Likewise, a similar standard has been used in Washington to evaluate the indefinite commitment of sexually violent predators, *see, e.g.*, *In re Anderson*, 185 Wn.2d 79, 92, 368 P.3d 162 (2016) (an "objective person knowing the factual circumstances" (internal marks omitted)); and the testimonial nature of prior statements, *see, e.g.*, *State v. Jasper*, 174 Wn.2d 96, 115, 271 P.3d 876 (2012) (an "objective witness"). In federal court, a similar standard has also been used to evaluate whether the government has improperly endorsed religion. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (an "objective observer" acquainted with "history" and "implementation" of challenged statute). Here, a similar standard can be used to ensure a proper inquiry into the potential influence of unconscious bias, to mitigate concerns over accusing counsel of wrongdoing, and ultimately to weed out invidious discrimination.

Ignoring the need for change, some comments submitted to the Court ask for mere codification of existing procedures. These comments overlook the numerous problems described above and in *Saintcalle*, which call for action. Other comments ask for further discussion before taking action, but without offering any meaningful alternatives or suggested improvements. As this Court has already recognized, what to do about peremptory challenges is a thorny, difficult issue. *See Saintcalle*, 178 Wn.2d at 52-55; *see also id.* at 65 (Stephens, J., concurring); *id.* at 113 (González, J., concurring). There will never be an easy answer. *See id.* But GR 36 is a refined, workable approach. It equitably balances relevant interests, and it is far superior to the status quo. The Court should proceed with this rule.

Other discrete concerns with GR 36 have been raised in comments to the Court, but these concerns do not merit rejecting the proposed rule and, to the extent necessary, could be addressed over time. One comment raises practical concerns about trial judges determining race and tracking voir dire. But these concerns apply equally to the current framework, and to the legal system more broadly. *See, e.g.*, *Saintcalle*, 178 Wn.2d at 43 (discussing "comparative juror analysis" under current law). If anything, GR 36 helps by clarifying that the concern in this context is over the appearance of race, ethnicity, and gender; their potential influence on counsel;

and whether invidious discrimination might be playing a role. Further clarification could be provided in training, guidance, and in future cases.

Other comments question whether an objection must be made within a certain time, whether any given party has a burden of proof, and the potential standards of review on appeal. But court rules need not be so specific; such procedural matters may be inferred from the text, structure, and context of a given rule and the general principles of this Court's jurisprudence. *See, e.g., State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979) (discussing "general rule" for timeliness of objections). In any case, these concerns could be addressed over time if necessary, whether in case law, further rulemaking, or otherwise.

Still other comments question the workability of GR 36's objective observer standard. As noted above, the standard is workable and has a solid foundation in existing law. And to whatever extent the Court has any particular concerns with the current formulation in GR 36, it should simply adjust the wording to its satisfaction rather than reject the approach entirely. The "objective observer" approach remains the best option available.

For any pressing concerns that remain, the Court should simply order a hearing to discuss refinements to the proposed rule prior to enactment. *See* GR 9(h)(1). The Court should not reject the proposal. Notably, none of the criticisms that have been leveled against GR 36 before this Court include suggested improvements or any superior alternatives.

Finally, the Korematsu Center also supports the inclusion of gender in the updated rule. This appears to be a matter of universal agreement among commenters, and for good reason. For one thing, gender is a protected class under the current *Batson* framework, and it would be undesirable to have trial judges operating under two separate and potentially intersecting frameworks of review in this context. More importantly, there is a long history of gender-based discrimination in this country, including the exclusion of women from jury service and disparate use of peremptory challenges based on gender. *See, e.g., Rosencrantz v. Territory*, 2 Wash. Terr. 267, 278-79, 281, 5 P. 305 (1884) (Turner, J., dissenting); *Harland v. Territory*, 3 Wash. Terr. 131, 137, 13 P. 453 (Turner, J.), *overruling Rosencrantz*; *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). This Court should ensure that such discrimination is not allowed to operate unabated through the use of peremptory challenges.

Part 2: Additional Suggested Improvements

The Korematsu Center supports adoption of the updated version of GR 36. To further improve Washington's framework for peremptory challenges, the Korematsu Center suggests three specific adjustments be made to the rule prior to adoption, in order to add clarity in implementation and to increase its effectiveness.

First, the official comments to the rule that are directory or prescriptive should be moved into the body of the rule. The legal status of official comments to a court rule is not well established in Washington. In some cases, Washington courts have treated comments as merely advisory or persuasive. *See, e.g., Shanghai Commercial Bank Ltd. v. Kung Da Chang*, 195 Wn.

App. 896, 902 n.17, 381 P.3d 212 (2016). That is consistent with this Court's "customary practice" of disclaiming official comments to court rules as "only 'advisory' or 'included for the reader's convenience.'" Karl B. Tegland, 5 Wash. Practice, Evid. Law and Practice, at § 101.7 (6th ed. 2016); *see also State v. Smalls*, 99 Wn.2d 755, 769, 665 P.2d 384 (1983) (Dimmick, J., dissenting) ("The comment, of course, is not the rule and thus we are not bound by it."). In other cases, however, the Court has treated such comments as authoritative, albeit without discussion. *See, e.g.*, *State v. Tracer*, 173 Wn.2d 708, 719, 272 P.3d 199 (2012); Tegland, *supra*, at n.4.

The official comments to GR 36 contain some substantive and important elements of the rule, including a definition of "objective observer" that expressly incorporates awareness of unconscious bias (cmt. 3). This comment is especially appropriate for incorporation into the body of the rule, as it clarifies the ultimate governing standard to be followed. Additional substantive comments include a list of important factors for determining the appearance of impropriety (cmt. 4); a presumption against certain historically suspect justifications for peremptory challenges (cmt. 5); and notice and verification requirements for certain other suspect justifications (cmt. 6). These elements should be included within the body of the rule rather than in the comments. At the very least, the legal significance of the comments should be clarified as substantive rather than merely advisory.[2]

Second, the rule should specify that *any* party, not merely an "adverse" party, may object to the use of a peremptory. GR 36(b). This is consistent with the court's ability to review a peremptory on its own motion. *See id.* It would also help prevent improper challenges from going unquestioned, which often happens under the current framework. *See Saintcalle*, 178 Wn.2d at 91-92 (González, J., concurring).

Third, the rule should be adjusted so that any justification offered in response to an objection must be supported by the record. Subsection (c) of the rule would simply need to be amended as follows:

---

[2] The list of presumptively invalid reasons in comment 5 has been called into question in some of the comments to the Court, but that aspect of the rule is important and appropriate. Such reasons have been used systematically to exclude racial minorities from jury service, whether intentionally or unintentionally, and would continue to cause substantial harm to disadvantaged groups if left unchecked. *See, e.g.*, Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 115 Mich. J. Race & L. 57, 90 (2013) ("A link to the criminal justice system ranks second only to ambivalent views on the death penalty as the most frequently cited reason for using peremptory challenges to remove African American jurors [in a 20-year review of capital cases]. As levels of incarceration continue to increase among African Americans, incarceration rates are not only a factor in abridging the rights of African American felons, but also other African Americans who are connected through filial and social networks.").

> When such an objection is made, the party exercising the peremptory challenge must articulate on the record the reasons for the peremptory challenge, which must be supported by the record.

This modest requirement would ensure that all questionable peremptories are at least grounded in some objective facts, rather than mere supposition, innuendo, or "gut" feelings. In turn, this would help mitigate the effects of unconscious bias and prevent the use of pretext, while still providing substantial flexibility for counsel to lodge peremptory challenges when deemed appropriate. The system would thus be substantially improved.

Part 3: No Constitutional Right to Peremptories

This Court has the authority to adopt GR 36, whether as written, or with additional improvements. One of the comments suggests there might be a constitutional right to peremptory challenges, but that is incorrect. The law on this issue is clear: there is no federal or state constitutional right to exercising peremptory challenges in jury selection.

As to federal law, the United States Supreme Court "has long recognized that peremptory challenges are not of federal constitutional dimension." *Rivera v. Illinois*, 556 U.S. 148, 152, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (internal quotations omitted). The use of peremptory challenges is "but one state-created means" of selecting a jury and "may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (citing cases). As this Court recognized in *Saintcalle*, the federal *Batson* framework "explicitly grant[s] states flexibility" in formulating appropriate procedures to the extent peremptory challenges are allowed. 178 Wn.2d at 51.

Washington law is equally clear and equally flexible. On multiple occasions, this Court has held that peremptory challenges are not guaranteed under the state constitution, may be withheld entirely, and are subject to procedural changes over time to the extent they are allowed at all:

> It seems plain to us . . . that the right of peremptory challenge is wholly a creature of statute, and not of common law. This being true, we are unable to see that [a] restriction . . . upon such right, in the granting of it, is any more an infringement of the rights of a party than if . . . withheld . . . entirely, which, of course, could be done.

Crandall v. Puget Sound Traction, Light & Power Co., 77 Wash. 37, 40, 137 P. 319 (1913). And again:

> [T]he United States Constitution and . . . the Washington Constitution provide . . . the right to an impartial jury. However, neither constitution requires . . . peremptory challenges . . . . Nor does either constitution provide for any

> particular method of securing . . . the right to exercise [] peremptory challenges . . . .

State v. Persinger, 62 Wn.2d 362, 365-66, 382 P.2d 497 (1963).

The suggestion has been made that the current procedures governing peremptory challenges might be protected under Article I, Section 21 of the Washington Constitution, which provides that the "right of trial by jury shall remain inviolate." This suggestion not only ignores the precedents quoted above specifically addressing and resolving this issue, it also misunderstands the underlying nature of the state constitutional jury right in Washington.

As this Court has held, Article I, Section 21 "guarantees those *rights* to trial by jury which existed at the time of the adoption of the constitution." *Firchau v. Gaskill*, 88 Wn.2d 109, 114, 558 P.2d 194 (1977) (emphasis added); *see also State ex rel. Goodner v. Speed*, 96 Wn.2d 838, 841, 640 P.2d 13 (1982) (noting that it "is the right to trial by jury as it existed at common law which is preserved" (internal quotations omitted)). As noted above, there has never been such a right to peremptory challenges in Washington. *See Crandall*, 77 Wash. at 40; *Persinger*, 62 Wn.2d at 365-66. Nor has a constitutional right to *any* particular jury selection procedure ever been recognized in this state.

As this Court's precedents make clear, the "core" of the state constitutional right to trial by jury is not the method used to select qualified jurors, but rather, the right "to have a jury resolve questions of disputed material facts." *Davis v. Cox*, 183 Wn.2d 269, 289, 351 P.3d 862 (2015); *see also State Bd. of Med. Examiners v. Macy*, 92 Wash. 614, 622, 159 P. 801 (1916) (stating that the "right of trial by jury" is "simply the right to that kind of trial" (internal quotations omitted)). Consistent with this understanding, from the founding of this State to the present, this Court has acknowledged on many occasions that the rules governing juror selection are subject to change. *See, e.g., Redford v. Spokane Cnty. Street-Railway Co.*, 15 Wash. 419, 421-22, 46 P. 650 (1896) (upholding new requirement that jurors be "householders"); *State v. Boggs*, 80 Wn.2d 427, 434, 495 P.2d 321 (1972) (upholding age requirement). Were it otherwise, the Court would be forced to upend all of the numerous refinements to juror selection that have taken place in that time, including prior adjustments to the number of peremptories allowed. *See, e.g.*, Laws of 1969, 1st Ex. Sess., ch. 37, § 1, ch. 41, § 1. But that is not the law.

Conclusion

In conclusion, the time has come for this Court to fulfill the promise of *Saintcalle* and take a meaningful step toward preventing ongoing invidious discrimination in jury selection. The updated version of GR 36 is a well-balanced and effective proposal that would address many substantial failings of the current framework for peremptories. The Court should move the rule's substantive comments into the body of the rule, acknowledge the right of any party to object, and require that any justification for a peremptory under review be supported by the record. The

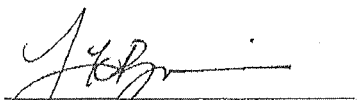
///

Court should then adopt GR 36. Doing so would be well within this Court's discretion, and would put Washington at the forefront of this issue in the pursuit of systemic fairness and justice.

Sincerely,

KOREMATSU CENTER FOR LAW AND EQUALITY AT
SEATTLE UNIVERSITY SCHOOL OF LAW

Professor Robert S. Chang
Executive Director



Professor Lorraine Bannai
Director

Taki V. Flevaris
Faculty Affiliate

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 21, 2017 2:35 PM
To: Tracy, Mary
Subject: FW: Korematsu Center Comment on Proposed GR 36
Attachments: Korematsu Center GR 36 Comment.pdf

Forwarding.

From: Taki Flevaris [mailto:Taki.Flevaris@pacificalawgroup.com]
Sent: Friday, April 21, 2017 2:05 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Korematsu Center Comment on Proposed GR 36

Dear Clerk,

Attached please find a comment from the Korematsu Center for Law and Equality at Seattle University School of Law regarding Proposed General Rule 36.

Please let me know if you would like any follow-up on this.

Thank you,
Taki

Taki V. Flevaris
Attorney

PACIFICA
LAW GROUP

T 206.245.1700 D 206.245.1735 F 206.245.1785
1191 Second Avenue, Suite 2000, Seattle, WA 98101
taki.flevaris@pacificalawgroup.com