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March 13, 2017

Honorable Charles W. Johnson  
Washington State Supreme Court  
PO Box 40929  
Olympia, WA 98504-0929

Dear Justice Johnson:

RE: PROPOSED GR 36

The Superior Court Judges' Association (SCJA) reviewed both the ACLU's proposed GR 36, which appears on the Court's website, and the rule proposed by the Washington Association of Prosecuting Attorneys, which appears in their submitted comments. The SCJA supports the review and reformulation of the standard for the evaluation of Batson challenges over the current subjective standard. The SCJA agrees that Batson has not achieved its goal of eliminating race-based use of peremptory challenges.

Under Batson, the subjective standard requires the trial judge to find "purposeful discrimination" by the attorney exercising the peremptory challenge. This inquiry into the striking attorney's motivation ignores the research showing that bias largely operates at the unconscious level, and so sets up an impossible task for the trial judge. In addition, nearly any reason has been held under case law to suffice to rebut a claim of pretext. There are few standards to guide the trial court in evaluating a Batson challenge.

The proposed GR 36 submitted by the ACLU, however, creates standards that could prove problematic and difficult to implement. We are concerned with the definition of "objective observer," the use of the phrase, "could appear," an unclear allocation of the burden of proof, whether the rule attempts to create a prima facie standard, the presumptions contained in the comments, and the general structure of rule.

The version of GR 36 submitted by Washington Association of Prosecuting Attorneys has merit, but it fails to address the central problem of Batson: how the trial judge finds purposeful racial discrimination in order to sustain a Batson challenge.

SCJA, therefore, recommends that the stakeholders in the legal community confer in an effort to propose a general rule that addresses the problem, but in a manner that is workable for the bar and the bench.

STATE OF WASHINGTON

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Judge Charles W. Johnson  
March 13, 2017  
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SCJA also recommends that the rule apply to peremptory challenges based on gender and sexual orientation, in order to align with the governing case law.

As I will be out of the office for the next two weeks, if you have questions concerning our recommendations, please contact Judge Sean O'Donnell at 206.447.1504 or by email at sean.o'donnell@kingcounty.gov.

Very truly yours,



Michael T. Downes  
SCJA President-Judge

cc: SCJA Board of Trustees  
Judge Roger Rogoff  
Ms. Janet Skreen

## Tracy, Mary

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, March 28, 2017 12:54 PM  
**To:** Tracy, Mary  
**Subject:** FW: SCJA Comment on GR 36  
**Attachments:** Downes to J.Johnson re GR 36.pdf

Forwarding.

**From:** Skreen, Janet  
**Sent:** Tuesday, March 28, 2017 12:44 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** SCJA Comment on GR 36

With apologies for the inconvenience.....the letter I sent last week from the Superior Court Judges' Association's President Michael T. Downes did not bear his signature. I am attaching one that does. Would you be so kind as to change the letter on the Website to the attached? Please let me know if you have questions.

Thank you.

*Janet Skreen  
Court Association Coordinator  
Administrative Office of the Courts  
PO Box 41170  
Olympia WA 98504-1170  
360-705-5252*