WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

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January 4, 2017

Honorable Susan L. Carlson
Supreme Court Clerk
P.O. Box 40929
Olympia, WA 98504-0929

supreme@courts.wa.gov

Re: Proposed Rule GR 36

Dear Clerk Carlson:

The Washington Association of Prosecuting Attorneys (WAPA) opposes the ACLU's proposed rule GR 36. WAPA believes the proposed rule does not comply with existing United States Supreme Court precedence and, to that extent, may violate Washington Constitution art. I, sec. 21. The proposed rule is also under inclusive as it fails to address the constitutional right of prospective jurors to not be excluded based solely upon gender.

WAPA asks the Court to adopt our alternative, which is a practical guide for implementing current standards on peremptory challenges. It expressly protects against discrimination based upon gender. It takes advantage of the trial judge's greater ability to assess the actions of attorneys and the attitudes and qualifications of potential jurors. "Deference to trial court findings is critically important in *Batson* cases because the trial court is much better positioned than an appellate court to examine the circumstances surrounding the challenge." *State v. Saintcalle*, 178 Wn.2d 34, 55-56 (2013).

History of Peremptory Challenges in Washington

The right to trial by jury includes the right to an unbiased and unprejudiced jury. An examination of the prospective jurors is permitted to determine their fitness to sit as jurors in the particular case. The voir dire examination of prospective jurors has the purpose of enabling parties to determine whether prospective jurors are subject to challenge for cause and to decide whether to exercise a peremptory challenge. CRLJ 38(d)(1); CrR 6.4(b); CrRLJ 6.4(b).

Peremptory challenges are "one means of assuring the selection of a qualified and

unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91 (1986). The United States Constitution, however, "does not confer a right to peremptory challenges." *Id.*, at 91.

Peremptory challenges are subject to protection under Washington Const. art. I, § 21. Const. art. I, § 21 provides, in pertinent part, that "[t]he right of trial by jury shall remain inviolate." The Washington Supreme Court has interpreted this provision as protecting the right to jury as it existed at the time of the constitutions adoption in 1889. *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 652-56 (1989).

Territorial statutes expressly authorized peremptory challenges. RCW 4.44.130, which provides that "Either party may challenge the jurors. The challenge shall be to individual jurors, and be peremptory or for cause," was derived from Code 1881 § 207; 1877 p 43 § 211; 1854 p 165 § 186; RRS § 324. Code of 1881, § 1079, which was later codified as RCW 10.49.060, before being incorporated into CrR 6.4(e), granted peremptory challenges to defendants. A separate provision, Code of 1881, § 1080, granted peremptory challenges to the prosecuting attorney. This provision was essentially combined with Code of 1881, § 1079, in Laws of 1923, ch. 25.

The definition of a peremptory challenge has largely remained unchanged since territorial days. *Compare* RCW 4.44.140 ("A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror."), *with* Code 1881, § 208 ("A peremptory challenge is an objection to a juror for which no reason need by given, but upon which the court shall exclude him.").

The modern scope of peremptory challenges that is protected by Washington Const. art. I, sec. 21, is more restrictive than that of the Washington Territories. This is because the Washington Constitution recognizes the preeminence of the Constitution of the United States. *See* Const. art. I, sec. 2. The federal constitution protects the equal protection rights of prospective jurors to not be excluded based solely upon gender, race or national origin. *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Prospective Jurors and Equal Protection

In a series of cases beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court announced constitutional restrictions placed upon a party's exercise of peremptory challenges. The *Batson* line of cases prohibit the exercise of peremptory challenges based upon a finding of purposeful discrimination. *Saintcalle*, 178 Wn.2d at 66, ¶ 67 (Stephens, J., concurring). Purposeful discrimination occurs when race or gender is used as a proxy for juror bias or competence. *See generally J.E.B.*, 511 U.S. at 128 ("We hold that gender, like race, is an unconstitutional proxy for juror competency and impartiality."); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence.").

The prohibition upon purposeful discrimination in jury selection recognizes that the practice causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that

motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders. *J.E.B.*, 511 U.S. at 140.

Individual jurors have a right to nondiscriminatory jury selection procedures. *J.E.B.*, 511 U.S. at 140-41. "Over time the original *Batson* standard was modified in recognition that it was the *juror's* rights, rather than those of a party, that were being violated by discriminatory peremptory challenges." *State v. Bennett*, 180 Wn. App. 484, 488, *review denied*, 181 Wn.2d 1005 (2014) (emphasis in the original.) While an improperly excluded juror has standing to bring suit on his or her own behalf, the barriers to such a suit are daunting. *Powers*, 499 U.S. at 414. For this reason, any party to a court proceedings has the standing to challenge the alleged violation of the juror's rights. *George v. McCollum*, 505 U.S. 42 (1992) (State could challenge criminal defendant's discriminatory peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (either party in a civil case could challenge the other party's discriminatory peremptory challenges); *Powers v. Ohio*, *supra* (criminal defendant, regardless of race, could challenge prosecutor's discriminatory peremptory challenges).

The *Batson* line of cases do not preclude a party from considering specific facts about a prospective juror in determining whether to exercise a peremptory challenge. Factors such as employment, military experience, exposure to children, past interactions with police or status as a crime victim may all be considered by a party in deciding whether to exercise a peremptory challenge even though one race or gender may be disparately impacted. *See, e.g., J.E.B.*, 511 U.S. at 143 ("Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext.").[1]

Disparate racial impact, although relevant, is alone insufficient to establish purposeful discrimination under *Batson*. *Hernzndez v. New York*, 500 U.S. 352, 359-60 (1991). Rather, "[p]roof of racially discriminatory intent or purpose is required." *Id.* (internal quotation marks omitted).; Unless a party "adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality." *Id.*, at 362. *Batson* and *J.E.B.* are only violated when the party making the peremptory challenge selected that factor "'at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *United States v. Stephens*, 514 F.3d 703, 710 (7th Cir.), *cert. denied*, 555 U.S. 969 (2008) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

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[1]The Supreme Court provides these examples of challenges that have disproportionate impact that, absent a showing of pretext, do not violate the equal protection clause:

> For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based. *See Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991).

J.E.B., 511 U.S. at 143 n. 16.

Critique of ACLU Proposed Rule

The ACLU's proposed rule seeks to "'extend greater-than-federal *Batson* protections.'" GR 9 Cover Sheet re New Rule GR 36 – Jury Selection quoting *State v. Saintcalle*, 178 Wn.2d 34, 51 ¶ 37 (2013). In actuality, the ACLU's proposed rule falls far short of *Batson* as it is silent on the prohibition against gender based strikes.

To the extent the ACLU's proposed rule contains more restrictions upon the exercise of peremptory challenges than those required by the United States Constitution, the proposal may violate Const. art. I, sec. 21. A greater-than-federal *Batson* rule might require an amendment to Const. art. I, sec. 21. The Washington Constitution contains only two methods by which it may be amended, both of which require a vote of the people. *See* Const. art. 23, secs. 1 and 2. The Washington Constitution cannot be amended by court rule. *See Sackett v. Santilli*, 146 Wn.2d 498, (2002) ("This Court cannot, however, contradict the state constitution by court rule.").

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. No evidence, however, is offered that these grounds for exercising peremptory challenges are a pretext for race. The list, moreover, is slanted to require the State to seat jurors who are biased against the State's witnesses. *See, e.g.*, Comment 4 to Proposed Rule ("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 which will also have a disparate impact upon racial and ethnic minorities).[2]

The factors that the ACLU identify as presumptively invalid in comment 4, moreover, are ones that courts regularly find to be proper. *See, e.g., United States v. Monell*, 801 F.3d 34, 44 (1st Cir. 2015) (disparate impact, such as disproportionately negative interaction with police in a particular group, alone, cannot sustain *Batson* challenge); *Green v. Travis*, 414 F.3d 288, 300 (2d Cir. 2005) ("[A] juror's perceived bias against law enforcement can constitute a race-neutral explanation for a peremptory challenge"); *People v. Cowan*, 50 Cal. 4th 401, 450, 236 P.3d 1074 (2010), *cert. denied*, 131 S. Ct. 1784 (2011) ("A prospective juror's negative experience with the criminal justice system, including arrest, is a legitimate, race-neutral reason for excusing the juror."); *State v. Rhodes*, 82 Wn. App. 192, 203 (1996) (negative contact with the police was sufficient race- neutral explanation even the though trial court did not rule on the State's reason); *State v. Sanchez*, 72 Wn. App. 821, 826-27 (1994) (no prima facie case, but distrust of police was sufficient explanation as was exclusion of non-native speaker who may have difficulty in accepting the translator's rendition of Spanish-language testimony).

[2] *See, e.g.*, James Alan Fox & Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, Homicide Trends in the United States: 1998 Update, at 3 (2000); Callie Rennison, U.S. Dep't of Justice, Bureau of Justice Statistics, Violent Victimization and Race, 1993-1998, at 10 tbl.14 (2001), available at http://www.bjs.gov/content/pub/pdf/vvr98.pdf.

WAPA Proposed Rule

WAPA is in agreement with the ACLU that a court rule may assist in protecting the equal protection rights of prospective jurors. WAPA's proposed rule codifies the holdings of both *Batson* and *J.E.B.*, and includes reasonable procedural safeguards. WAPA respectfully requests that this Court publish the enclosed proposed rule for comment.

Sincerely,

Rich Weyrich
President

Enc.

GR 9 COVER SHEET

Suggested Change to the
GENERAL RULES
Rule 36 – Jury Selection

Submitted by the Washington Association of Prosecuting Attorneys

A. **Name of Proponent**: Washington Association of Prosecuting Attorneys

B. **Spokesperson**: Pam Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys

C. **Purpose:** Proposed General Rule 36 ("GR 36") is a new rule that is designed to protect the equal protection rights of prospective jurors to not be excluded based solely upon gender, race or national origin.

Proposed GR 36 expressly prohibits the use of race or gender as a proxy for juror competency and impartiality, as required by *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

The proposed rule addresses procedural issues, such as who may raise an objection to a peremptory challenge, when the objection must be asserted, the content of the objection, the content of the response, issues to be considered by the court in ruling upon the objection, and the proper remedy[1] for a sustained challenge to an unconstitutional peremptory challenge.

Because of the importance of achieving diversity in juries, the proposed rule creates a process for bringing good faith challenges to peremptory challenges that appear to be based on racial or ethnic biases. In *State v. Vreen*, 143 Wn.2d 923 (2001), the Washington Supreme Court held that the erroneous denial of a peremptory challenge cannot be harmless. In that case, the 20-year-old defendant was charged with vehicular homicide and assault in Spokane County. The defendant, who was African-American, sought to use a peremptory challenge against the only African-American on the panel. The State raised a *Batson* challenge, and the trial court found that defense counsel's reasons were inadequate. The Supreme Court reversed the conviction based on

[1] *See Batson*, 476 U.S. at n. 24 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, *see Booker v. Jabe*, 775 F.2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, *see United States v. Robinson*, 421 F.Supp. 467, 474 (Conn. 1976), *mandamus granted sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977).").

"structural error" although there was no evidence that any of the jurors were unqualified or biased. The holding of *Vreen* appears to be overruled by *Rivera v. Illinois*, 556 U.S. 148 (2009) (peremptory challenges are not constitutionally protected and erroneous overruling of a peremptory challenge does not require reversal). *See also People v. Singh*, 234 Cal.App.4th 1319 (2015) (overruling of peremptory challenge not reversible unless the defendant affirmatively demonstrates prejudice); *State v. Carr*, 300 Kan. 1, 124-39 (2014) (finding erroneous denial of peremptory challenge to be harmless). By providing that disallowing a peremptory challenge shall not be deemed reversible error absent a showing of prejudice, the rule protects a prospective juror's right to serve on a jury and thus serves the goal of jury diversity.

Finally, the proposed rule contains a number of provisions to reduce the impact of implicit bias on jury selection. First, the proposed rule urges courts to "provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information." As noted by the California Supreme Court in *People v. Lenix*:

> trial courts must give advocates the opportunity to inquire of panelists and make their record. If 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.

187 P.3d 946, 962 (Cal. 2008).

Second, the rule directs a judge in deciding whether the race-neutral or gender-neutral reason is legitimate or a pretext for racial or gender discrimination to perform a comparative analysis.[2] 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.

Third, when the race-neutral or gender-neutral explanation for the peremptory challenge is based upon a jury's demeanor, the rule directs the trial judge to confirm the reasonable of the party's observations.[3]

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[2] *See Foster v. Chatman*, 195 L. Ed. 2d 1, 20 (2016) (if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (using comparative juror analysis to adjudicate a *Batson* claim).

[3] *See generally Snyder v. Louisiana*, 552 U.S. 472, 477 ("race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.").

D. Hearing: None needed.

E. Expedited Consideration: It is requested that this proposed rule be considered along side the American Civil Liberties Union of Washington's proposed GR 36.

WAPA's Proposed General Rule 36. JURY SELECTION

(a) A party may not exercise a peremptory challenge on the basis of gender, race, color or ethnicity. A court shall provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information.

(b) If a party believes that any other party is exercising a peremptory challenge on the basis of gender, race, color or ethnicity, the party may object to the exercise of the challenge.

(1) The objection shall be made outside the presence of the venire.

(2) The objection must be made before the court excuses the juror. A failure to make a timely objection fails to preserve the claim for appeal.

(3) The objection shall identify whether the objection is based upon the gender, race, color or ethnicity of the juror and the facts that support a claim of purposeful discrimination.

(c) If the court determines that the challenger has made a prima facie showing of purposeful discrimination, the party seeking to exercise the peremptory challenge shall be provided an opportunity to offer a race-neutral or gender-neutral reason or reasons for the peremptory challenge.

(d) The trial court shall decide whether the race-neutral or gender-neutral reason is legitimate or a pretext for racial or gender discrimination. In deciding whether the race-neutral or gender-neutral reason is legitimate or a pretext for racial or gender discrimination, the court shall consider:

(1) 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;

(2) Whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror;

(3) Whether the party exercised peremptory challenges against similarly situated jurors; and

(4) Whether the party has disproportionately exercised peremptory challenges against one gender or race in the instant case or in past cases;

(5) Whether any other information demonstrates purposeful discrimination.

(e) The trial court shall deny any peremptory challenge that it finds to be race-based or gender-based. If the trial court determines that one or more peremptory challenges were erroneously allowed prior to a denied race-based or gender-based peremptory challenge, the trial court may discharge the entire panel and select a new jury from a panel not previously associated with the case.

(f) Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.

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(f) Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, January 04, 2017 8:38 AM
To: Tracy, Mary
Subject: FW: Proposed General Rule 36
Attachments: WAPA Alternative GR 36.pdf; WAPA Comment Letter re ACLU GR 36 Proposal.pdf

Good morning Mary! I think this is for you but not sure if I should process out front? Let me know and I would be happy to do that. ☺

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Wednesday, January 04, 2017 8:13 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Rich Weyrich <richardw@co.skagit.wa.us>; Tom McBride <tmcbride@waprosecutors.org>
Subject: Proposed General Rule 36

Dear Clerk Carlson:

Attached is a letter commenting on the ACLU's proposed general rule 36 and a proposed alternative general rule 36.

Please let me know if you encounter any difficulty in opening either document or if I can be of further assistance with respect to the alternative general rule 36.

Respectfully,

Pam Loginsky
Staff Attorney
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501

Phone (360) 753-2175
Fax (360) 753-3943

E-mail pamloginsky@waprosecutors.org