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February 24, 2017

The Honorable Susan L. Carlson
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Via Electronic Mail

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JEAN ROBINSON
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KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Re: ACLU of Washington Comments Regarding Proposed General Rule 36

TO: Honorable Justices of the Washington Supreme Court:

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization of over 50,000 members dedicated to the preservation of civil liberties. A fundamental civil liberty, long protected by the state and federal constitutions, is the right to a jury trial.

To ensure that the right to a jury trial is untainted by discrimination, the ACLU submitted proposed GR 36 and now writes to urge the Court to approve adoption of same. The compelling legal authority and evidence supporting adoption of GR 36 are described in detail in the GR 9 cover sheet which was submitted with proposed GR 36 (available at http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537).

The proposed rule addresses protections for potential jurors of color. Since submission of proposed GR 36, the ACLU has been informed of instances where *Batson* has been insufficient to protect against gender discrimination in the use of peremptories, especially in domestic violence and sexual abuse cases. To address these concerns the ACLU is submitting with this comment letter an alternate version of proposed GR 36, for the Court's consideration if it determines that gender should also be addressed in the rule.

***Batson* is Broken; Proposed GR 36 Offers a Solution**

As the GR 9 cover sheet to proposed GR 36 explains, it proposes a new rule meant to protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of juries. Proposed GR 36 adopts a test for evaluating peremptory challenges that provides stronger protections against bias than

the *Batson* test for peremptories used against potential jurors of color. Based on this Court's broad rulemaking authority, which is not limited by the United States Supreme Court's interpretation of the federal constitution, the Court has the authority to adopt heightened protections.

The justices of this Court in the *Saintcalle* case recognized that discrimination in the selection of juries remains a pervasive problem, in part because a party objecting to a peremptory challenge must prove purposeful discrimination under the *Batson* rule. *See State v. Saintcalle*, 178 Wn.2d 34, 36, 43, 309 P.3d 326 (2013). Explaining how the *Batson* rule is clearly broken, the *Saintcalle* Court stated that "it is evident that *Batson*, like *Swain* before it, is failing us," that there was ample data demonstrating that racial bias in the jury selection process remained "rampant," and that there was "[a] growing body of evidence . . . that *Batson* has done very little to make juries more diverse." *Saintcalle* at 35, 44. Confirming the evidence demonstrating that the *Batson* test is broken in Washington was the fact that at the time of the *Saintcalle* ruling "[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 Washington Association of Prosecuting Attorneys (WAPA) and comments submitted by several prosecutors are critical of the proposed rule because it is different than the *Batson* test. But that is the entire point. This Court, together with numerous commentators, has recognized the failings of *Batson*. WAPA, in its comments on proposed GR 36, is proposing to encapsulate *Batson* in a court rule. That would keep the status quo. The ACLU is responding to this Court's call for change and that is the reason for the proposed rule.

Proposed rule GR 36 eliminates the obstacles posed by the *Batson* test by using an objective observer standard drawn from the well-established doctrine of appearance of fairness applicable to recusal of judges. It contains comments to provide guidance to the judiciary and attorneys about how to apply the rule, using factual scenarios in the comments which are supported by the case law and other research.

We agree with trial judges that it is helpful to use a standard with which the entire legal community is familiar. That is why the comments section of our alternate proposed version of GR 36 explicitly references the appearance of fairness doctrine as an analogous standard. This makes clear that the proposed rule is intended to remove any requirement of showing fault.

The proposed rule would achieve greater diversity on juries, so that juries in Washington are more representative of the communities they serve. The rule would also improve the appearance of fairness and promote the administration of justice. The rule preserves the use of peremptory challenges as part of the right to a jury trial while at the same time protecting the right to a jury trial untainted by discrimination.

The Alternate Version of Proposed GR 36 Includes Protection Against Gender Bias

The version of proposed GR 36 which has been published for comment is supported by diverse stakeholders who will be submitting comments prior to the closing of the comment period in April. However, as several stakeholders, including WAPA, have advocated for the addition of gender to the rule, we submit with this comment letter a version of the proposed rule that protects against gender bias while also not perpetuating the failed *Batson* test as the WAPA proposed alternative does.[1] Adding protection against gender bias is consistent with the U.S. Supreme Court's ruling that both race and gender discrimination are forbidden under *Batson*. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).[2] The alternate version of the proposed rule also makes clearer that the "objective observer" standard is drawn from the appearance of fairness doctrine used in the context of recusal of judges.

The ACLU takes no position on whether the original proposal or the enclosed alternate version is superior. However, we strongly urge the Court to conclude that inaction is not an option and to approve adoption of GR 36 in a form that provides stronger protection than the *Batson* test. The version offered by WAPA should be rejected because it simply codifies the *Batson* standard and retains the requirement that a party prove intentional discrimination, precisely the standard this Court in *Saintcalle* recognized was a failure. The proposed rule published for comment or the alternate version submitted with this comment answers this Court's call in *Saintcalle* and addresses the fundamental flaws in *Batson* while preserving the use of peremptory challenges.

Sincerely,

/s/Salvador A. Mungia	/s/ La Rond Baker
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Spokespersons for Proponent ACLU-WA

[1] Other changes to improve proposed GR 36 as a whole are also included in the alternate proposed rule attached to this letter.

[2] Some courts have recognized that *Batson* protects other categories as well, and nothing in the original or alternate proposed rule diminishes the rulings that have applied *Batson*.

RULE 36. JURY SELECTION

(a) **Scope of rule.** This procedure is to be followed in all jury trials.

(b) A party may object to an adverse party's use of a peremptory challenge on the grounds that an objective observer could view race, ethnicity, or gender as playing a role in the use of the peremptory challenge. The court may also raise this objection on its own.

(c) When such an objection is made, the party exercising the peremptory challenge must articulate on the record the reasons for the peremptory challenge.

(d) After evaluating the reasons given to justify the peremptory challenge in light of the entire voir dire process, if the court determines that an objective observer could view race, ethnicity, or gender as playing a role in the use of the peremptory challenge, then the peremptory challenge shall be denied.

Comment

[1] The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race, ethnicity, or gender. Eliminating the appearance of racial, ethnic, and gender bias in the empanelment of juries is necessary because such an appearance undermines public confidence in the justice system. This rule is consistent with R.C.W. 2.36.080(4) which states that a citizen shall not be excluded from jury service on account of race, color, or sex. RCW 2.36.080(3).

[2] This rule responds to problems with the *Batson* test described in *State v. Saintcalle*, 178 Wn.2d 34 (2013), and establishes an "objective observer" standard for determining whether a peremptory challenge is invalid instead of the standard articulated in *Batson v. Kentucky*, 476 U.S. 79 (1986). This rule also supports one of the underlying

goals of the jury selection process which is to ensure the appearance of fairness. *State v. Saintcalle*, 178 Wn.2d at 76 (Gonzalez, J. concurring.) For purposes of this rule it is irrelevant whether it can be proved that a prospective juror's race, ethnicity, or gender actually played a motivating role in the exercise of a peremptory challenge.

[3] An objective observer is 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, ethnicity, and gender in Washington State. 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.

[4] In determining whether an objective observer could view race, ethnicity, or gender as a factor in the use of the peremptory challenge, the court shall consider the entire voir dire process including 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 types of questions asked about it; (b) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; and (c) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party.

[5] Because historically the following reasons for peremptory challenges have operated to exclude minorities from serving on juries in Washington, 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.

[6] The following reasons 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 confused 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 shall be considered strongly probative that the reasons given for the peremptory challenge are invalid.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
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Subject: RE: ACLU-WA Comments re. Proposed General Rule 36

Received 2/24/17.

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From: Edward Wixler [mailto:ewixler@aclu-wa.org]
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Subject: ACLU-WA Comments re. Proposed General Rule 36

Good afternoon,

I have attached the comments of the American Civil Liberties Union of Washington regarding Proposed Rule GR 36 for posting with the Comments on this proposed rule. The Court posted this Proposed Rule for comment in November, 2016 (https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537).

Please contact me if you have any difficulty accessing these files.

Sincerely,

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