April 28, 2017
Hon. Susan Carlson, Clerk
Supreme Court of Washington

Re: Proposed amendment to GR 36

Dear Ms. Carlson,

I urge the court to reject the proposed amendment to GR 36. The proposed rule would profoundly alter jury selection in a way that will hamper fair trials. It would obstruct the basic purpose of peremptory challenges: to remove biased jurors when their bias is insufficient to support a challenge for cause.

The current procedure under Batson forbids peremptory challenges based on racial or gender stereotypes. It allows, however, challenges that are based on statements and actions of jurors that indicate bias. For example, an attorney could not challenge an African-American juror based on a stereotype that African-Americans are biased against law enforcement. The attorney could, however, challenge the juror based on statements that indicate such a bias.

The proposed amendment would apparently prevent this. Under the proposed rule, a peremptory challenge is impermissible if "an objective observer could view race or ethnicity as a factor." The comment specifically mentions, as an example of an improper reason for a challenge, "expressing a distrust of law enforcement." Thus, a juror who is biased against law enforcement cannot be challenged, unless the bias is so blatant as to support a challenge for cause. Such a rule is contrary to the basic goal of jury selection – to select a jury that is free from bias.

The proposed amendment is both overtly and subtly slanted. On the overt side, most of the listed examples of improper challenges reflect potential biases against the prosecution in criminal cases. None of the examples are situations that would suggest bias against criminal defendants.

On the subtle side, invoking the rule would be a very risky exercise for prosecutors, while involving almost no risk for defense attorneys. If a trial court disallows a peremptory challenge brought by the defense, that ruling will lead to

a new trial if an appellate court disagrees. If, on the other hand, a trial court disallows a challenge brought by the prosecution, that ruling is essentially immune from challenge. If the defendant is nonetheless convicted, any error will be harmless. On the other hand, if an error by the trial court allows the defendant to escape conviction, the error will be unreviewable.

Conversely, a defense attorney's decision to seek a peremptory challenge on questionable grounds will likewise be almost risk-free. If the challenge is disallowed, nothing is lost, and a potential appellate issue is gained.

The rule is also slanted because of the nature of the jury system. It takes 12 jurors to convict, but only one to prevent conviction. In some situations, a single dissenting juror can even force an outright acquittal on some charges. This can occur when a jury considers lesser included offenses. Conviction of a lesser offense prevents retrial on the offense charged. In effect, a vote of 11-1 to convict the defendant as charged can be an acquittal of that offense.

I have personally experienced several cases in which defendants were acquitted of serious charges because one juror refused to consider the evidence. Prosecutors have a strong and legitimate interest in ensuring that all 12 jurors can consider the case without bias. The proposed rule prevents this, by blocking peremptory challenges of biased jurors. The rule should be rejected.

Very truly yours,

Seth A. Fine

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 28, 2017 8:12 AM
To: Tracy, Mary
Subject: FW: Commont on Proposed GR 36
Attachments: gr 36 comment.docx

Forwarding.

From: Seth Fine [mailto:dpafine@yahoo.com]
Sent: Friday, April 28, 2017 6:36 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Commont on Proposed GR 36

Attached is a latter commenting on this rule.

Seth Fine