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.