

April 29, 2021

VIA ONLINE FORUM

Honorable Justices of the Arizona Supreme Court
Court Rules Forum



SCHOOL OF
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Re: R-21-0008 Petition to Adopt New Arizona Rule of Supreme Court 24 on Jury Selection

Dear Honorable Justices:

Due to its involvement in Washington State’s recent adoption of a general rule on the use of peremptory challenges similar to that proposed in the instant Petition, the Korematsu Center for Law and Equality at Seattle University School of Law (“Korematsu Center” or “Center”)¹ has been asked to comment on what the experience has been in Washington since our state’s new rule was adopted. As explained below, available data is limited, but anecdotal evidence and emerging case law indicate that the new rule has been generally well received and working as intended. This bodes well for our state’s justice system and for the new rule’s continued success. Were it otherwise, our conclusion would be that the only remaining, viable way to address the serious problem of racial bias in jury selection—which greatly outweighs any real or imagined benefits from the availability and use of peremptory challenges—would be the complete abolition of peremptory challenges from jury selection. We hope Arizona will join the growing list of states to pursue significant, meaningful reform in this area.

The Korematsu Center advances justice and equality through research, advocacy, and education, with a focus on combatting discrimination. One of the issues the Center has focused on in recent years is the problem of racial bias in jury selection, particularly in the use of peremptory strikes. The Center played an active role in the adoption of Washington’s new General Rule 37 (“GR 37”), including by serving on the Washington Supreme Court’s GR 37 Jury Selection Workgroup as a precursor to the rule’s adoption. In that role, the Center participated in detailed stakeholder discussions about potential reforms. Based on those discussions, the Center ultimately reached three key conclusions: first, that a stringent standard that does not require a finding of intentional misconduct would be needed to make any progress on the problem of racial bias in peremptory usage; second, that the “objective observer could view” standard that had been proposed was appropriate and workable, as reflected in prior case law; and third, that the potential costs of adopting such a standard were speculative and relatively minor. Attached as **Exhibit A** is a copy of the Center’s memorandum to the Workgroup at that time explaining these conclusions. The Washington Supreme Court ultimately agreed in adopting that stringent standard, ensuring peremptory challenges will be disallowed whenever, considering the totality of circumstances, there is a plausible concern that racial bias is at play. This rightly prioritizes the elimination of racial bias in jury selection over parties being able to remove jurors without demonstrable justification.

¹ The Korematsu Center does not, in this letter or otherwise, represent the official views of Seattle University.

Washington's new rule went into effect on April 24, 2018. The Korematsu Center is not aware of any scientific data regarding the implementation of the rule in Washington since then. Such data would be of limited usefulness regardless, because there is no detailed data about peremptory usage in Washington from the time period *before* GR 37 was adopted, and the new rule is still in the early stages of implementation, with practitioners still learning and adapting to the new framework. The rule's implementation has also been unexpectedly limited over the past year due to the COVID-19 pandemic, which has resulted in far fewer jury trials being conducted in Washington.

Notwithstanding the above limitations, the available indicators to date suggest that the adoption and implementation of GR 37 has been very positive. First, **anecdotal evidence** from legal practitioners strongly suggests that GR 37 is working well. In our numerous discussions with lawyers and judges in our state about the new rule since its adoption, reactions have been largely neutral or positive. Practitioners have reported that the rule is triggered in cases only from time to time; that the rule has been followed without fanfare or disruption; and that the rule appears to be accomplishing its purpose, in large part because peremptories are being attempted far less often in circumstances that would raise concerns about potential racial bias. Judges have also reported applying the rule to preclude suspect peremptories, which in itself is a departure from prior practice, and a very promising one.

Second, Washington **case law** similarly indicates the new rule is working well and not generating substantial litigation or other external costs. The number of appellate decisions resolving claims made under GR 37 have been modest, especially considering the rule is in its early stages, and a significant change from the state's prior *Batson* framework which itself generated substantial litigation. In more than three years, there have been only two Washington Supreme Court decisions,² two published Court of Appeals decisions,³ and five unpublished Court of Appeals decisions⁴ addressing the application of GR 37. This is comparable to the number of cases arising under the state's prior framework in the three years preceding GR 37.⁵

In substance, the cases arising under GR 37 reflect that Washington courts are now weeding out racial bias from the use of peremptory challenges, in part because the rule does not require purposeful misconduct and may be raised *sua sponte*. *See, e.g., State v. Listoe*, 15 Wash. App. 2d 308, 324, 475 P.3d 534 (2020) (finding violation of rule while clarifying "we do not mean to suggest that the State, in exercising the challenge, acted with a discriminatory purpose"); *State v. Saylor*, No. 80946-6-I, 2021 WL

² *State v. Jefferson*, 192 Wash. 2d 225, 429 P.3d 467 (2018); *State v. Pierce*, 195 Wash. 2d 230, 455 P.3d 647 (2020).

³ *State v. Omar*, 12 Wash. App. 2d 747, 460 P.3d 225 (2020); *State v. Listoe*, 15 Wash. App. 2d 308, 475 P.3d 534 (2020).

⁴ *State v. Smith*, No. 79626-7-I, 2020 WL 5759768 (Wash. Ct. App. Sept. 28, 2020); *State v. Pieler*, No. 80244-5-I, 2021 WL 778095 (Wash. Ct. App. Mar. 1, 2021); *State v. Saylor*, No. 80946-6-I, 2021 WL 960832 (Wash. Ct. App. Mar. 15, 2021); *State v. Bango*, No. 81045-6-I, 2021 WL 1091506 (Wash. Ct. App. Mar. 22, 2021); *State v. McCrea*, No. 37416-5-III, 2021 WL 1550839 (Wash. Ct. App. Apr. 20, 2021).

⁵ *See, e.g., State v. Anderson*, 187 Wash. App. 706, 350 P.3d 255 (2015); *State v. Bardwell*, No. 72356-1-I, 2016 WL 513259 (Wash. Ct. App. Feb. 8, 2016); *State v. Bowman*, No. 73069-0-I, 2017 WL 325700 (Wash. Ct. App. Jan. 23, 2017); *City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017); *In re Coley*, No. 74770-3-I, 2017 WL 4640320 (Wash. Ct. App. Oct. 16, 2017); *State v. Burch*, No. 74833-5-I, 2017 WL 5664781 (Wash. Ct. App. Nov. 27, 2017); *State v. Hawthorne*, No. 76342-3-I, 2018 WL 1256228 (Wash. Ct. App. Mar. 12, 2018); *State v. Blair*, No. 49481-7-II, 2018 WL 1500674 (Wash. Ct. App. Mar. 27, 2018).

Honorable Justices

April 29, 2021

Page 3

960832 (Wash. Ct. App. Mar. 15, 2021) (“The State concedes that, based on the totality of the circumstances in the record, an objective observer could have viewed race or ethnicity as a factor in the challenge to the potential juror. . . . We accept the State’s concession.”); *State v. McCrea*, No. 37416-5-III, 2021 WL 1550839, at *4 (Wash. Ct. App. Apr. 20, 2021) (discussing circumstance in which trial court raised its own concerns sua sponte due to pattern of peremptory strikes indicating racial discrimination). If this trend continues, racial bias in jury selection will be meaningfully reduced in Washington, and public confidence in our justice system will substantially increase.

The Korematsu Center looks forward to monitoring the continued implementation of GR 37 in Washington State over time. The early signs are abundantly positive, and we believe that trend will continue. If GR 37 ultimately proves ineffective, however, then the only remaining answer for the courts will be to abolish peremptory challenges. Peremptories are in tension with fundamental principles of our justice system, including that court procedures are managed by neutral judges and not subject to the unsupported whims of litigants, especially when competing rights are implicated. Washington’s new rule maintains the use of peremptories in our state, but disallows them whenever there are plausible concerns about racial bias. Such strong medicine is necessary given the intractable nature of the underlying problem, including the difficulty of identifying racial discrimination in individual cases, the prevalence and magnitude of unconscious racial bias in peremptory usage, and the historical failure of prior attempts to address this issue. We hope that this Court will take a similar step forward to eradicate racial discrimination from jury selection.

Sincerely,

KOREMATSU CENTER FOR LAW AND EQUALITY AT
SEATTLE UNIVERSITY SCHOOL OF LAW



Professor Robert S. Chang
Executive Director



Taki V. Flevaris
Faculty Affiliate

Exhibit A



MEMORANDUM

TO: GR 37 Committee Members

FROM: Taki V. Flevaris, Korematsu Center

DATE: December 15, 2017

SUBJECT: Korematsu Center Proposal

This memorandum explains the proposal of the Korematsu Center¹ (the “Center”) to the GR 37 Committee (the “Committee”) to adopt a modified version of the ACLU’s rule to govern peremptory challenges in Washington State. The Center’s proposal incorporates provisions that have been agreed upon within the Committee, transforms prior commentary into the text of the rule, and makes technical refinements. As for the ultimate standard for reviewing suspect peremptory challenges—which is the primary issue for which consensus has not yet been reached—the Center has conducted additional analysis and research in light of the Committee’s discussions to date, to identify the most appropriate standard available. Based on a review of the potential standards that could be used, relevant authorities in support, and the relative interests at stake, the Center urges the Committee to adopt the standard from the ACLU’s rule: whether “an objective observer could view race or ethnicity as playing a role in the use of the peremptory challenge.”

As explained below, the nature of the problem at issue—racial and ethnic discrimination in jury selection, including the significant influence of unconscious bias—requires an impersonal and highly stringent standard to accomplish anything meaningful. The use of an “objective observer could view” standard is thus appropriate, for both practical and symbolic purposes. Moreover, such a standard has a strong basis in existing law, in precisely the kind of situation at issue here: when a critical harm demands intervention but is difficult to prove in particular cases. As they have done in other contexts, courts applying such a standard in this context would do so sensibly and in furtherance of the underlying policy of the rule. That is what the situation demands, in order to protect constitutional rights of the highest order and one of the fundamental forms of civic engagement. On the other hand, the potential costs of such an approach are speculative and would be relatively minor.

In sum, the Korematsu Center urges the Committee to adopt the proposed rule it has submitted, including the “objective observer could view” standard.

¹ The Korematsu Center does not represent the official views of Seattle University.

1. An Impersonal and Stringent Standard Is Needed.

The Washington Supreme Court has already recognized the difficulties of the critical problem we are trying to address. Racial discrimination “remains rampant in jury selection.” *State v. Saintcalle*, 178 Wn.2d 34, 35 (2013). Yet much of it is in “our subconscious thought processes,” and thus difficult to identify. *Id.* at 46. As made clear in one study—previously discussed in the Committee and referenced in *Saintcalle*—race can have a significant effect on peremptory usage notwithstanding the appearance and conscious acceptance of plausible reasons for a given challenge. See Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications*, 31 LAW & HUM. BEHAV. 261 (2007). Further, even when there are signs race is influencing a peremptory challenge, lawyers and judges tend to be uncomfortable raising or pursuing the issue, not wanting to accuse a lawyer or party of being racist. *Saintcalle*, 178 Wn.2d at 53 & n.7. All of this contributes to the rampant nature of the problem, violating multiple constitutional rights and contributing to a growing public perception of unfairness regarding this critical civic institution. See *id.* at 50; *id.* at 100 (Gonzalez, J., concurring).

So far, the Committee has rightly agreed that peremptory challenges should be treated as suspect whenever an objection about the potential influence of race or ethnicity can be articulated, in which case the reasons for the peremptory should be disclosed. The critical question remaining is the ultimate standard of proof by which such peremptories may be defended and upheld. This is at bottom a policy question. The “function of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have . . . for a particular type of adjudication.” *In re A.W.*, 182 Wn.2d 689, 702 (2015) (internal marks omitted). A “higher burden of proof has both practical and symbolic consequences.” *Id.*

Here, the Supreme Court has already identified the importance and difficulty of addressing the problem of racial discrimination in jury selection. And for the reasons the Court has identified, an impersonal and stringent standard is needed to make any meaningful progress. First, the chosen standard must allow for racial discrimination to be explored and adjudicated in a way that is impersonal, minimizing the accusatory aspects of the process. Second, the standard must indicate to practitioners and courts the importance of weeding out the effects of unconscious racial bias. Third, given the difficulty of identifying racial bias in a particular case, and because unconscious discrimination operates “far more often” when there are plausible, neutral reasons for action, see *Saintcalle*, 178 Wn.2d at 49, the standard must demand the utmost degree of confidence in order to preserve a suspect peremptory challenge. Otherwise, the process will not practically root out invidious discrimination in individual cases or prevent the disparate effects of such discrimination on a systemic basis. Fourth, the standard must reflect to the public the importance of this issue. Finally, the standard must be sufficiently stringent to overcome the inevitable loopholes, circumvention, and pushback that arise whenever remedial systemic change of this nature is attempted.

2. The “Objective Observer Could View” Standard Is Appropriate and Workable.

The standard that the ACLU has proposed and the Center is supporting—whether “an objective observer could view race or ethnicity as playing a role”—satisfies all the needs here for an impersonal and stringent standard. It allows for an impersonal inquiry, reflects the importance of unconscious bias, demands the utmost degree of confidence to sustain any suspect

peremptory, reflects the overall importance of addressing the underlying problem, and is stringent enough to compensate for inevitable systemic pushback. Indeed, no one on the Committee has questioned that this standard would be highly effective at weeding out invidious racial and ethnic discrimination in jury selection.

Instead, the primary concern has been whether this standard is workable as a jurisprudential matter. The Center's research and analysis has confirmed that the standard is indeed recognizable under law and workable in practice. To begin with, Washington courts conduct "objective observer"-type inquiries for a variety of purposes when useful. *See, e.g., State v. Solis-Diaz*, 187 Wn.2d 535, 539-40 (2017) (appearance of fairness); *In re Anderson*, 185 Wn.2d 79, 92 (2016) (indefinite commitment); *State v. Jasper*, 174 Wn.2d 96, 115 (2012) (testimonial nature of statements); *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 273 (1990) (effect of extrinsic evidence on jury). Likewise, Washington courts apply "could"-based tests in various contexts when such a stringent standard is deemed appropriate. *See, e.g., Richards*, 59 Wn. App. at 273 (new trial granted if extrinsic evidence "could have affected the jury's determination"); RCW 9A.72.010(1) (defining element of perjury as statement that "could have affected the course or outcome of the proceeding"); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 539 (2004) (noting post-loss misrepresentation to insurer is material "if, when made, it could have affected the insurer's investigation" (emphasis in original)).

Courts in Washington and elsewhere have also combined these two elements into a single standard when the circumstances demand it, for distinct reasons that apply with special force here. As one example, Washington courts apply a similar standard to determine whether to grant a new trial when a jury has considered extrinsic evidence. *See, e.g., Richards*, 59 Wn. App. at 273; *Kuhn v. Schnall*, 155 Wn. App. 560, 575-76 (2010). In such cases, "an *objective* inquiry" is made "into whether the extraneous evidence . . . could have affected the jury's determination . . ." *Richards*, 59 Wn. App. at 273 (emphasis in original). An objective test is needed, because the court is legally barred from delving into the jury's deliberations; and a high bar is set for overcoming the presumption of prejudice, given the potential effects of such conduct. Here, an objective test is also needed, because the court is practically barred from delving into a party's or counsel's unconscious biases, and might be hesitant to make any direct accusations against them; and a high bar should also be set, given the prevalence and problematic nature of racial discrimination in jury selection.

As an example from elsewhere, New Jersey courts apply a similar standard to determine whether a commercial license was properly revoked based on a potentially corrupt relationship. *See In re Pontoriero*, 439 N.J. Super. 24 (N.J. Super. Ct. App. Div. 2015). New Jersey has established a detailed regulatory scheme to "combat corruption and organized crime on the New Jersey . . . waterfronts," including business licensing that is subject to revocation for improper relationships. *Id.* at 29. Based on "the history of corruption on the waterfront," the need for such "strict regulation" was "well established." *Id.* at 39. To determine whether a license is properly revoked under the scheme, New Jersey courts consider "whether a reasonably objective observer could believe that [a known] criminal associate could influence the licensee in his or her role as a [licensee]." *Id.* at 41. This stringent standard "is meant to encompass the risk of actual corruption," which is notoriously difficult to prove, "as well as any reasonable perception of corruption by the public." *Id.* at 42. Here, the history of racial discrimination and need for strict regulation is well established. And an objective and stringent standard is needed, because of the

difficulty of proving racial discrimination and to account for the public appearance of racial inequity in jury selection.

Beyond the recognizable and workable nature of the “objective observer could view” standard, it must also be remembered that if the standard is adopted into a court rule, it will be interpreted and applied sensibly and in furtherance of the rule’s underlying policy purposes. Court rules “are interpreted in the same manner as statutes.” *Jafar v. Webb*, 177 Wn.2d 520, 526 (2013). This means the standard adopted would be interpreted in a way that is “sensible.” *Kinnan v. Jordan*, 131 Wn. App. 738, 751 (2006). It would also be interpreted in a way that advances the underlying intent and policy behind the rule, and in conjunction with the rest of its provisions. See, e.g., *Dept. of Nat. Res. v. Marr*, 54 Wn. App. 589, 593 (1989); *State v. Base*, 131 Wn. App. 207, 213-14 (2006). This would further ensure that the “objective observer could view” standard would be workable and effective.

3. The Potential Costs Are Speculative and Relatively Minor.

As detailed above, there are numerous compelling reasons to adopt the “objective observer could view” standard as the type of impersonal and stringent standard that is needed to combat racial discrimination in jury selection. At the same time, some concerns have been raised that adopting such a standard could impose costs on the system. In particular, the concerns are that (1) confidence litigants have in jury verdicts could be lessened, (2) one party could be affected more than another in a given case, and (3) litigation over causal challenges could increase. These concerns could apply to *any* reform that narrows the types of peremptory challenges that may be exercised; they are not specific to the “objective observer could view” standard in particular. Indeed, they apply to *Batson*. In any case, these concerns are also speculative and relatively minor in comparison to the invidious racial discrimination that remains “rampant” in jury selection. *Saintcalle*, 178 Wn.2d at 35.

As to a potential decrease in litigant confidence, no evidence has been cited in support of this concern, which overlooks the numerous robust procedures in place to ensure fairness and thus promote the confidence of litigants. This includes the right to be heard, the right to an impartial judge, the right to counsel, and the right to exercise challenges for cause, among others. Further, the adjudication of causal challenges could adapt to meet this concern over time, which would also lessen as lawyers and clients became accustomed to the new framework. Indeed, it is unlikely that this concern would be raised now if peremptories had never been allowed before. In any case, marginal confidence of litigants pales in comparison to the ongoing, rampant violation of multiple constitutional rights, and the shaken confidence of the public in the equity of the jury system and the justice system more broadly.

As to a potential lack of parity between litigants, the proposed standard and rule would apply equally to all litigants, ensuring a fair process. It is not problematic to preclude one party’s peremptory challenge for being suspect and invalid, while allowing another party’s challenge because it is not suspect in the first place or is adequately justified. That is simply the fair application of a rule to different circumstances. To the extent certain groups of litigants currently tend to benefit more than others from peremptory challenges that are questionable, those litigants have no right and should not be allowed to exercise those challenges on equal terms. In any case, the same concern about parity could be applied to challenges for cause, or for

that matter, to all motions practice. This is no reason to abandon rules that are fair and effective. At the very least, it is not a reason to tolerate increased constitutional violations and distrust of the jury process.

As to increased litigation over causal challenges, there is already an incentive to litigate such challenges to the fullest, including because of *Batson*. And this concern would apply to any reform that narrowed the ability to exercise peremptories. Regardless, reasonable restrictions can be imposed based on time and resource limitations. And causal challenges still could not be litigated without reasonable grounds for doing so. But again, the increase in administrative costs is minor in comparison to the pressing need to address racial discrimination in jury selection.

In sum, the presence of racial discrimination in jury selection is rampant and difficult to address. To make any meaningful progress, we need a standard that is impersonal and stringent. It is for this reason that the “objective observer could view” standard is needed. It is a workable standard grounded in existing legal authority that would be interpreted and applied sensibly. The potential costs from adopting it are speculative and relatively minor. The Korematsu Center respectfully urges the Committee to adopt the proposal the Center has submitted, including the “objective observer could view” standard. I welcome the opportunity to discuss these issues further with the members of the Committee at our next meetings.