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May 3, 2021

Submitted Electronically

Chief Justice Robert Brutinel
Arizona Supreme Court
1501 W. Washington 4th Fl.
Phoenix, AZ 85007

RE: R-21-0008 Petition to Adopt New Rule 24 on Jury Selection

Dear Chief Justice Brutinel,

The Loren Miller Bar Association (LMBA), formed in Seattle in 1968, is Washington State's oldest minority bar and only affiliate chapter of the National Bar Association—the oldest minority bar association and largest organization of African American attorneys in the United States. LMBA was founded to confront institutionalized racism and socio-economic disparities affecting the African American community. LMBA's members include African American lawyers, judges, court staff, legal educators, and law students.

For over 50 years, LMBA has played an active role in advocating anti-racism, access to justice, and equity within Washington State's legal profession and judiciary. LMBA's engagement in Washington's adoption of General Rule (GR) 37 - Jury Selection was consistent with this mission. We submitted comment in support of the proposed rule. Comment to Washington State Supreme Court by Loren Miller Bar Association (Mar. 31, 2017).¹ And LMBA was appointed by the Washington Supreme Court to its GR 37 Workgroup. After numerous meetings, discussions with stakeholders, and research, the Workgroup submitted a Final Report to the Court. Final Report, Proposed New GR 37—Jury Selection Workgroup.² The Workgroup considered multiple proposals for Washington's new rule on jury selection and ultimately drafted a proposal for the Court that included alternative options where the Workgroup did not meet consensus. GR 37, as adopted effective April 24, 2018, reflects the Workgroup's proposal and the version that LMBA—along with the ACLU of Washington, Washington Ass'n of Criminal Defense Lawyers, Fred T. Korematsu Ctr. for Law & Equality, Legal Voice, and the Latina/o Bar Association of Washington—urged the Washington Supreme Court to adopt.

In support of the Petition to Adopt New Rule 24 on Jury Selection, LMBA submits this comment to provide its first-hand experience and observations with Washington's GR 37. We hope the information that follows aids this Court in adopting its new rule to block implicit and systemic racial or ethnic bias from tainting Arizona's juries.

¹ Available at: https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Chalia%20Stallings-Ala-ilima.pdf (link last visited May 3, 2021).

² Available at: <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> (link last visited May 3, 2021).

Introducing GR 37

Racial discrimination remains alive and well in the jury selection process through implicit bias—a form of bias that *Batson* simply cannot address. The impacts of implicit bias are great and the effect it has on the fairness of a trial is insurmountable. *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013); *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018). In light of this, in 2018, Washington State adopted GR 37 to address implicit bias in the jury selection process.

Simply put, GR 37 prohibits the discriminatory and unfair exclusion of potential jurors based on race or ethnicity. GR 37 (a). That is, it goes beyond the explicit and purposeful discrimination required to sustain a *Batson* challenge and looks at whether an objective observer “could view race or ethnicity as a factor in the use of [a] peremptory challenge...” *State v. Berhe*, 193 Wn.2d 647, 664, 444 P.3d 1172 (2019).³

GR 37 creates a basis for objecting to a peremptory challenge due to improper bias. GR 37 (c). The objection may be raised by the litigants or the court itself. *Id.* After it is raised, the party attempting to exclude a juror via peremptory challenge must articulate their reasons. GR 37 (d). The court then determines if an objective observer—one who is aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination—could view race or ethnicity as a factor in the peremptory challenge. GR 37 (e)–(f). As part of the court’s assessment, it must consider certain reasons listed within GR 37 as presumptively invalid based on their historic association with discrimination in Washington jury selections. GR 37 (h). The court further considers the circumstances leading to the peremptory challenge, including conduct of the juror—and the party excusing a juror must provide prior notice of the conduct to allow for an opportunity to correct the behavior. GR 37 (g), (i).

If the court determines the standard under GR 37 has been met, the peremptory challenge shall be denied. In short, GR 37 goes beyond what *Batson* simply cannot do and aims to correct and address the harms implicit bias has on our juries, courts, and criminal justice system.

GR 37’s Implementation

Immediately following GR 37’s adoption, the Washington legal community jumped into action with education and training on its use.⁴ The new rule was heralded by advocacy groups.⁵ The courts ensured that the judges were aware of GR 37 and provided trainings to prepare judges to make rulings on its use, including at the statewide Judicial Conference.⁶ LMBA reviewed GR 37

³ LMBA advocated for this standard within the GR 37 Workgroup’s Final Report. *See* Final Report at 28.

⁴ *See, e.g.*, Washington State Minority & Justice Comm’n Meeting Notes (Apr. 6, 2018) https://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20180406_m.pdf; Washington Defenders Ass’n News (Apr. 6, 2018) https://defensenet.org/washington-state-supreme-court-adopts-general-rule-37/?fbclid=IwAR2QrMQPsfISWBT0baIh8WKu7lbqKNfyGH155sOUW9cmaPLcfJ_RKUwe2o (shared on social mediate by local law firm (Apr. 22, 2018) <https://www.facebook.com/sekhonlaw/posts/1925723037461671>); Access To Justice Board Meeting Agenda (Apr. 20, 2018) https://www.wsba.org/docs/default-source/legal-community/committees/atj-board/atj-board-meeting-materials/2018-4-20-meeting-materials-atj-board805662f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=728f07f1_2; King Cnty. Bar Ass’n Bar Bulletin (July 1, 2018) <https://www.kcba.org/For-Lawyers/Bar-Bulletin/PostId/482/understanding-washingtons-new-general-rule-on-racial-bias-in-jury-selection> (links last visited May 3, 2021).

⁵ *E.g.* ACLU Press Release (Apr. 9, 2018) <https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury> (link last visited May 3, 2021).

⁶ *E.g.* District & Municipal Court Judges Ass’n (June 4, 2018) <https://www.facebook.com/378780688914028/posts/dmcja-spring-conference-is-underway-district-and-municipal-court-judges-are-gett/1587579018034183/> (link last visited May 3, 2021).

with our members in-person at our monthly meetings and publicized its adoption via newsletter and social media.⁷ Judges themselves provided training for lawyers and law students.⁸ Washington State’s Attorney General’s Office—the largest public law office in the state, with more than 600 attorneys—provided training on GR 37 office-wide.⁹ The Washington State Bar Association developed CLE programming on GR 37 and made it available to all members.¹⁰ The Washington Race Equity & Justice Initiative’s Organizational Race Equity Toolkit included the new rule within its section on Applying an Anti-Racist Lens to Programs, Advocacy, & Decision-Making in its discussion of shifting from intent to impact within the legal system. REJI Toolkit at 67.¹¹ And judges go over GR 37 with counsel at pretrial hearings and/or before beginning *voir dire*—leaving no question of its existence and how the court will handle it being invoked.

GR 37’s Impact

The impact of GR 37 has had an immediate, deep-rooted, and profound impact on Washington State case law. In *Jefferson*, the Washington Supreme Court considered an appeal after GR 37’s adoption of a *Batson* claim from a trial that concluded before GR 37’s adoption. *Jefferson*, 429 P.3d 467. The *Jefferson* decision set the standard for appellate review as de novo, *Id.* at 480, and also sent a strong “message to lawyers and trial judges: GR 37 means business.” Brooks Holland, *Confronting the Bias Dichotomy in Jury Selection*, 81 La. L. Rev. (2020).¹²

In *Berhe*—recognizing the pernicious ways that implicit bias seeps into jury deliberations—the Washington Supreme Court extended the protections of GR 37 to jury deliberations. *Berhe*, 193 Wn.2d at 665. As the Court explained:

We now hold that similar standards apply when it is alleged that implicit racial bias was a factor in the jury’s verdict. The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.

Id. (citing *State v. Jackson*, 75 Wn. App. 537, 543-44, 879 P.2d 307 (1994)).

⁷ See, e.g., LMBA social media page (Apr. 8, 2018)

<https://www.facebook.com/groups/LorenMillerBar/permalink/10155319012227551/> (link last visited May 3, 2021).

⁸ E.g. Tacoma Pierce Cnty. Bar Ass’n (Oct. 2, 2018)

<https://www.facebook.com/JusticeSteveGonzalez/posts/10209827770890469>; Washington Attorney General’s Office (Nov. 14, 2018) <https://www.justicehelenwhitener.com/photos/gallery/a355db24-58f8-4871-824c-09814f0b3ca2>; University of New Mexico School of Law (Jan. 30, 2019)

<https://www.facebook.com/JusticeSteveGonzalez/posts/10210459029871549>; South King Cnty. Bar Ass’n (Oct. 30, 2019) <https://www.facebook.com/skcbba.org/photos/pcb.2241244729320871/2241244119320932/> (links last visited May 3, 2021).

⁹ Judge Whitener Teaches Implicit Bias & Jury Selection to State Attorneys (Nov. 14, 2018)

<https://www.justicehelenwhitener.com/photos/gallery/a355db24-58f8-4871-824c-09814f0b3ca2>; LMBA social media page (Nov. 14, 2018) <https://www.facebook.com/groups/LorenMillerBar/permalink/10155827889667551/> (links last visited May 3, 2021).

¹⁰ See <https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=251&productId=16900892> (link last visited May 3, 2021).

¹¹ Available at: <https://justleadwa.org/wp-content/uploads/2020/11/REJI-Toolkit-v2-Final-2020-3.pdf> (link last visited May 3, 2021).

¹² Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol81/iss1/10> (link last visited May 3, 2021).

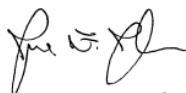
In *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020), the Washington Supreme Court applied GR 37 to overturn two defendants' criminal convictions in a non-capital case after a prosecutor improperly elicited information about the death penalty during *voir dire*, and then used an African American juror's response to that question as grounds to dismiss that juror.

While official tracking data is not currently available, LMBA is aware through anecdotes that judges are making rulings on GR 37 objections. Some of those rulings, though certainly not all, have resulted in appeals—demonstrating that GR 37 is working. See, e.g., *State v. McCrea*, No. 37416-5-III, 2021 WL 1550839 (Wash. Apr. 20, 2021) (unpublished); *State v. Dotson*, No. 79604-6-I, 2021 WL 1177372 (Wash. Mar. 29, 2021) (unpublished); *State v. Bango*, No. 81045-6-I, 2021 WL 1091506 (Wash. Mar. 22, 2021) (unpublished); *State v. Saylor*, No. 80946-6-I, 2021 WL 960832 (Wash. Mar. 15, 2021) (unpublished); *State v. Pieler*, No. 80244-5-I, 2021 WL 778095 (Wash. Mar. 1, 2021) (unpublished); *State v. Abbott*, 15 Wn. App. 2d 1011 (2020) (unpublished); *State v. Listoe*, 15 Wn. App. 2d 308, 475 P.3d 534 (2020); *State v. Smith*, 14 Wn. App. 2d 1040 (2020) (unpublished); *State v. Omar*, 12 Wn. App. 2d 747, 460 P.3d 225 (2020).

Indeed, despite early reservations about the objective observer standard, Washington has managed to use and apply GR 37 in these first three years of the rule's existence. According to a study of GR 37 conducted in 2018, "the reforms have at least initially changed lawyers' approaches to jury selection. In particular, lawyers have become more hesitant to strike jurors of color." Annie Sloan, "What to do about Batson?": *Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Cal. L. Rev. No. 1 (Feb. 2020).¹³ Meanwhile, "prosecutors who had rarely faced *Batson* challenges in the past told [Sloan] that their county experienced multiple GR 37 objections in the first six months of the rule's enactment." *Id.* Sloan's study states, "according to public defenders and prosecutors in different counties, the rule has already been used against the defense, including by judges *sua sponte*." *Id.* Consistent with Sloan's results, LMBA is aware that both prosecutors and defense are using GR 37 in courts throughout Washington State.

Based on our experience, LMBA encourages this Court to adopt proposed new rule 24. Similarly, we strongly recommend training and education on the new rule. And, we suggest this Court set up a structured way to collect and track data on the new rule's use.

Regards,



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President

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¹³ Available at: <https://www.californialawreview.org/print/what-to-do-about-batson/> (link last visited May 3, 2021).