No. 93408-8

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

MATTHEW ERICKSON,

Petitioner.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON DEFENDER ASSOCIATION, AND LOREN MILLER BAR ASSOCIATION

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INTRODUCTION

"A time comes when silence is betrayal."

--Martin Luther King, Jr. (quoted in Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* 23 (March 2011) (Hereinafter "*Task Force Report*").

Despite the promise of Equal Protection enshrined in the Fourteenth Amendment, "a growing body of evidence shows that racial discrimination remains rampant in jury selection." *State v. Saintcalle*, 178 Wn. 2d 34, 35, 309 P.3d 326 (2013). The present case demonstrates that this epidemic of exclusion continues. The prosecutor exercised a peremptory challenge against an African American juror who was angry and embarrassed about having been racially profiled by police. Despite the inherently race-based nature of the exclusion, the trial court ruled the defendant did not even make out a prima facie showing of discrimination.

The trial court erred under existing law and this Court should so hold. But this Court should not stop there. Bias is often unconscious, but the current standard requires proof of purposeful discrimination. This Court should adopt a new rule in Washington based on an "objective observer" standard that does not require an allegation of subjective intent to discriminate. Such a rule would better protect the rights of litigants, honor the dignity of jurors, and promote respect for the justice system.

ISSUES ADDRESSED BY *AMICI*

1. In addressing the first step of a *Batson* challenge, did the trial court err in requiring proof of a pattern of discrimination, in treating all non-white jurors as one class, and in failing to consider the prosecutor's inherently race-based reason for excluding the juror?

2. In light of the persistent problem of excluding minorities from jury service, should this Court adopt the rule favored by five justices in *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010), that a defendant establishes a prima facie case of discrimination when the prosecutor exercises a peremptory challenge against the sole remaining venire member of the defendant's racial group or the last remaining minority member of the venire?

3. Given that racial bias is often unconscious but *Batson* addresses only intentional discrimination, should this Court adopt an "objective observer" standard akin to the appearance of fairness doctrine used for judicial recusals?

STATEMENT OF THE CASE

Washington State resident Mr. Meyer, who is African American, reported for jury duty in Seattle Municipal Court in October of 2014. He and other potential jurors were escorted into a courtroom for voir dire in the case of *City of Seattle v. Erickson*. The judge explained the process and introduced the parties. RP 110-14.

During voir dire, the prosecutor asked: "Has anyone here ever argued with a police officer, been in a situation where they were, you were arguing with a uniformed or on-duty police officer?" RP 151-52. Mr.

Meyer, who was assigned juror number 5, raised his card. RP 152. The prosecutor asked him to explain the circumstances. Mr. Meyer said:

> I was walking to Volunteer Park to meet some friends when two police cars pulled up and asked me to come up to the car and put my hands on the car. And I asked them for what reason. They said that somebody had just stole something from a church nearby and that I fit the description. I was kind of upset with that because I didn't think I fit the description of somebody who just. And I asked the what was the description of somebody who just. I said, "Was it a guy with long hair?" because I wore my hair long. And they wouldn't tell me what the description was, so I talked back to a cop.

RP 152. Mr. Meyer said that the officers let him go after checking his identification. RP 152.

The prosecutor asked, "How did it make you feel to be accused by the police of doing something you hadn't done?" Mr. Meyer responded: "Angry, embarrassed, and upset." RP 152.

After voir dire, the parties exercised peremptory challenges. The court had told the jurors not to "take offense if you are challenged since the challenge is not exercised as a personal reflection upon you." RP 112. The prosecutor exercised his first peremptory challenge against Mr. Meyer. RP 173.

Right after the jury was selected and the bailiff escorted the jurors out of the courtroom, Mr. Erickson's attorney objected to the prosecutor's removal of Mr. Meyer. RP 180 (citing *Batson v. Kentucky*, 476 U.S. 79,

106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). The judge responded that the jurors had already been excused, but Mr. Erickson's attorney explained that he was raising the issue at "the first moment that we were not directly in front of the jury." RP 180. The judge stated he would have preferred a contemporaneous objection with a sidebar if necessary, but he addressed the objection on its merits. RP 181-208.

The court asked Mr. Erickson to make a prima facie showing of discrimination. Defense counsel noted that his client was African American and Mr. Meyer was the only African American panelist. RP 193-94. The prosecutor responded that Mr. Erickson was required to show "a pattern or practice of discrimination in peremptory challenges as in one by one, people of color were being eliminated by the government." RP 200.

The court and prosecutor were not sure whether Mr. Meyer was the only African American panelist, but they emphasized that the jury included Asian Americans and a Hispanic juror. RP 195. The court even asked the prosecutor to put on the record his own status as a "nonwhite" person. RP 201. The prosecutor stated that he was originally from India. RP 201. Mr. Erickson pointed out that he was objecting to the removal of an *African American* juror, and "the concept of Batson has to do with

cognizable racial groups rather than minorities versus white people and minorities versus non-minorities." RP 203.

Before the court ruled on the question of whether Mr. Erickson made a prima facie showing of discrimination, the prosecutor provided his purported "race-neutral" reason for removing Mr. Meyer:

> I had asked the question if anybody had been in an argument or a disagreement or talked back to the officers. Juror No. 5 [Mr. Meyer] had specifically said that there was an incident where he was stopped and he was temporarily detained by the officers. He was argumentative in the sense that he asked them why they were being stopped. They told him they were being stopped because there was a robbery and he met the description. He asked the officers for the description. The officers didn't provide a description. They asked for his ID. He provided that ID and thereafter, he was let go. And he said that he felt embarrassed and angry by, by that and he felt that was appropriate to push back and argue.

RP 202.

The court ruled Mr. Erickson had not even made a prima facie showing of discrimination because he failed to "establish a pattern" and because non-white jurors were seated:

> [Defense counsel], you indicated in your argument that this one strike indicates a pattern, which is almost impossible. According to the defense, -- which again, I don't agree with. I don't disagree with either; it's an unknown situation we're in. There was a strike against an African American male. But that doesn't establish a pattern. And you indicate that it doesn't matter what the other backgrounds of the jurors are, it's constitutionally cognizable groups. But we understand the process, you

> know, people who have been in a protected class at some point, or could be considered a protected class.
>
> In light of the makeup of this jury as I understand it now, which is not complete, but it involves the panel, Juror No. 2, Mr. Metuacha, clearly to me seems to be of a protected class. I could guess he might be Polynesian of some sort, or Hawaiian. I'm not exactly sure. It's not my point to guess. My point is that he is constitutionally protected. Julie Chen appears to me to also be constitutionally protected. She was on the panel. And Estevan Hernandez. I don't remember Anne Toda and I do believe Mr. Teodoro Geronimo, No. 17, also likely was in a protected class.
>
> Of note, the City only struck one person, Juror No. 5, that I've been able to identify as in a protected class, and I haven't heard any argument to the contrary. And in fact, Jurors No. 2, No. 14 and -- excuse me -- No. 2, No. 11, and No. 12 are all seated on the jury. Neither side struck them. And No. 17, who I do remember as being in a protected class, nobody struck him. He didn't make it onto the jury, but that had nothing to do with his situation except that he was sitting in the back and he was Juror No. 17. We didn't need that many jurors. Again, I don't remember Anne Toda.
>
> So when I look at striking one juror who was African American in light of the facts that I know, which is I know there were, there was a diverse jury. And I don't know if there were any other African American jurors on the panel. I can't establish a pattern. I don't believe that the defense has shown a prima facie case, made a prima facie showing that the City acted in a non-race neutral manner.

RP 206-07.

Amici submit this brief to address the important constitutional and policy questions raised by the frequent removal of African American citizens from juries in Washington.

ARGUMENT

1. The trial court committed legal error under *Batson* by requiring proof of a pattern, by treating all non-whites as one class, and by ignoring the prosecutor's inherently race-based reason for removing Juror no. 5.

The Equal Protection Clause of the Fourteenth Amendment prohibits the use of peremptory challenges to remove jurors based on their race. U.S. Const. amend. XIV; *Batson*, 476 U.S. at 85-86. Race-based removal violates both the litigant's rights and the rights of the excluded juror. *Batson*, 476 U.S. at 87. Indeed, the harm from discriminatory jury selection touches "the entire community" and "undermine[s] public confidence in the fairness of our system of justice." *Id*.

When a party challenges the exercise of a peremptory strike under *Batson*, courts apply a three-step procedure. First, the party challenging the strike must make a prima facie showing of intentional discrimination. This is achieved "by showing that the totality of relevant facts give rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94.

Second, the burden shifts to the party exercising the strike to provide a race-neutral explanation for the exclusion. *Id.* That party "must give a clear and reasonably specific explanation of his legitimate reasons" for removing the juror. *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 1317, 162 L.Ed.2d 196 (2005).

Third, the trial court must determine whether, in light of all of the circumstances that bear upon the question, the party challenging the strike has shown purposeful discrimination. *Id.* at 251-52.

In this case, the trial court ruled that Mr. Erickson failed to make a prima facie showing of discrimination at step one of the analysis. The trial judge erred and imposed a more difficult burden upon Mr. Erickson than case law permits. As the Supreme Court has explained:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson v. California, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005).

The municipal court's analysis of Mr. Meyer's exclusion was flawed in three respects: (1) it required the objecting party to "establish a pattern" of race-based removal; (2) it treated all non-white jurors as fungible; and (3) it failed to account for the prosecutor's inherently race-based reason for removing Mr. Meyer.

First, the court and prosecutor wrongly stated that Mr. Erickson was required to prove a pattern of race-based juror removal in order to

make a prima facie showing of discrimination. RP 200, 206-07. This is incorrect, because "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008).

Sanchez v. Roden, 753 F.3d 279 (1st Cir. 2014) is instructive. There, as here, both the prosecutor and trial court stated that the defendant failed to make out a prima facie showing of discrimination because he did not establish a "pattern" of race-based removals. *Id.* at 287, 288. The Massachusetts appellate court ("MAC") similarly held that, because five African Americans remained on the jury, the defendant failed to meet his burden at step one of the *Batson* analysis. *Id.* at 289.

The First Circuit disagreed. *Id.* at 299-300. It held that the MAC wrongly "dismissed the racial challenge out-of-hand by its facile and misguided resort to the undisputed fact that the prosecutor had allowed some African Americans to be seated on the jury." *Id.* at 299.

> [B]y focusing exclusively on the presence of other African Americans on the jury at the time of Sanchez's *Batson* challenge, the MAC ignored Juror No. 261's right not to be discriminated against on account of his race. The MAC simply missed the core concern addressed in the Supreme Court's jurisprudence.

Id.; *see also Batson*, 476 U.S. at 87 (individual juror has Fourteenth Amendment right not to be excluded based on race).

The court continued, "Even more troubling, the MAC's application of *Batson* sent the unmistakable message that a prosecutor can get away with discriminating against *some* African Americans …," so long as he does not discriminate against all of them. *Sanchez*, 753 F.3d at 299-300. The court denounced this attitude, and emphasized that a *Batson* claim for one juror may not be rejected simply because the prosecutor has not discriminated against other minority panelists. Instead, at both steps one and three of the analysis, all of the circumstances that bear upon the question must be considered. *Id.*; *Snyder*, 552 U.S. at 478. Thus, although a pattern of strikes is a factor to be taken into account in the totality of circumstances, it is by no means dispositive.

The trial court here further erred in treating all non-white jurors as fungible. The defendant, Mr. Erickson, is African American, and the prosecutor removed Mr. Meyer, who was the only African American to make it into the jury box.[1] It makes no sense to say that because the prosecutor did not strike Julie Chen, assumed to be a Chinese American woman, that this somehow means the prosecutor was not discriminating against Mr. Meyer, who is an African American man. *See Batson*, 476 U.S. at 89 ("the Equal Protection Clause forbids the prosecutor to

[1] The prosecutor and court were not sure that Mr. Meyer was the only African American *on the panel*, but they appeared to agree that no other African Americans made it into the jury box. RP 174-75, 180, 193-95, 206-07.

challenge potential jurors solely on account of their race *or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant*.") (emphasis added).

Finally, because the trial court wrongly ruled that the failure to establish a pattern of strikes against African Americans was dispositive, it did not go on to consider "all relevant circumstances" as required. *Batson*, 476 U.S. at 96. One highly relevant circumstance the trial court ignored was the prosecutor's proffered reason for the peremptory challenge. Although the court did not require the prosecutor to reveal his reason for the strike, once he did so, this information became part of the totality of circumstances the court was obliged to consider.

The prosecutor's reason for removing Mr. Meyer was that Mr. Meyer said he was "embarrassed and angry" when he was racially profiled by Seattle police officers. This reason for exercising the peremptory strike is inherently race-based. *See Turnbull v. State*, 959 So.2d 275, 277 (Fla. Dist. Ct. App. 2006) ("jurors' experiences with racial profiling and their beliefs that racial profiling is prevalent … is not a genuinely race-neutral justification to purge them from the final jury panel"). Furthermore, like the problem of race discrimination in jury selection, racially biased policing adversely affects not only the targeted individuals, but also society at large. "[S]tudies verify the prominent impact of negative police

contacts on the citizenry's general perceptions of fairness and bias in our justice system." *State v. E.J.J.*, 183 Wn. 2d 497, 513, 354 P.3d 815 (2015) (Madsen, C.J., concurring).

The city's exclusion of Mr. Meyer from jury service because he was a victim of racially biased policing is doubly discriminatory and violates the Fourteenth Amendment's promise of equal protection under the law. Most non-Black jurors would not have been mistaken for criminal suspects; it is only because Mr. Meyer is African American that he suffered this indignity. *See Task Force Report* at 7 (African Americans in Washington are arrested, searched, and charged at significantly higher rates than Caucasians – and this difference cannot be explained by a difference in crime commission rates); Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pl'y Rev. 387, 394 (2016) (there is "no question" that racial disparities exist with respect to police contacts and arrests). Because the explanation for the strike is inherently racial, Mr. Erickson met his minimal burden to show a prima facie case of discrimination at step one of the *Batson* analysis.

In sum, the trial court misapplied *Batson* and its progeny when it required proof of a pattern of discrimination, treated all non-white jurors as one class, and failed to consider other relevant circumstances like the

prosecutor's inherently race-based reason for removing Mr. Meyer. This Court should reverse.

2. In light of the persistent problem of race discrimination in jury selection, this Court should adopt a rule in Washington that provides stronger protection than the federal *Batson* standard.

Although Mr. Meyer's exclusion from jury service violated *Batson*, this Court should not end the analysis with this conclusion. This Court should take the opportunity to adopt a stronger standard in Washington that better protects against race-based exclusion from jury service. This Court has the authority to do so under both the Fourteenth Amendment and article I, section 21. U.S. Const. amend. XIV; Const. art. I, § 21; *Saintcalle*, 178 Wn.2d at 51.

Batson has not worked. The procedures it established are not "robust enough to effectively combat race discrimination in the selection of juries." *Saintcalle*, 178 Wn.2d at 35. Indeed, "[t]oday in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries." Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* (August 2010) ("EJI Report") at 4.

A better standard is necessary to safeguard the rights of litigants, protect the rights of jurors, and promote respect for the system. Just as Mr.

Meyer felt "angry, embarrassed, and upset" about being profiled by police, RP 152, people who are excluded from jury service because of their race may feel "shame and humiliation" as a result of their exclusion. *EJI Report* at 28. *Contrast* RP 112 (court tells jurors not to "take offense if you are challenged since the challenge is not exercised as a personal reflection upon you.").

The "main problem" is that *Batson* "requires a finding of 'purposeful discrimination,'" but "discrimination is often unconscious." *Saintcalle,* 178 Wn.2d at 53. Excluding a juror because of implicit bias is as harmful and discriminatory as excluding a juror because of explicit bias, but *Batson* addresses only the latter problem. *Id.* at 48-49. Most courts read *Batson* as requiring a judge to endorse "an accusation of deceit or racism" in order to sustain a challenge to a peremptory strike. *Id.* at 53; *accord Arresting Batson*, 34 Yale L. & Pl'y Rev. at 404. Indeed, the judge in this case considered a *Batson* challenge to be a personal attack: He told the prosecutor, "the allegations are being made against you." RP 201.

Thus, this Court "should abandon and replace *Batson's* 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion." *Saintcalle,* 178 Wn.2d at 53-54. Amici propose two options: this Court should either adopt the bright-line rule advocated

by five justices in *State v. Rhone*, or should adopt an "objective observer" standard akin to the appearance of fairness doctrine used for judicial recusals. These proposals meet the challenge issued in *Saintcalle* to "take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge." *Saintcalle*, 178 Wn.2d at 54. "This, in turn, would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *Id.*

a. This Court should adopt the majority rule from *Rhone*: A defendant establishes a prima facie case of discrimination when the prosecutor exercises a peremptory challenge against the sole remaining venire member of the defendant's racial group or the last remaining minority member of the venire.

In *Rhone*, five justices of this Court endorsed a "bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged." *Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting); *see also id.* at 658 (Madsen, C.J., concurring) ("[G]oing forward, I agree with the rule advocated by the dissent). In a later case, this Court explained that Justice Madsen's fifth vote for the above rule was dictum, and that no new rule emerged from *Rhone*. *State v. Meredith*, 178 Wn.2d 180, 182, 306 P.3d 942 (2013).

This Court in *Meredith* did not, however, reject the above rule on its merits. Indeed, Justice Madsen concurred again in *Meredith* because that case had gone to trial before *Rhone. Meredith*, 178 Wn.2d at 186-87 (Madsen, C.J., concurring). Justice Madsen continued to endorse the new standard for all future cases. *Id.*

This Court should now formally adopt the *Rhone* rule. A simple, bright-line rule would prevent problems like the one that occurred in this case, where both the prosecutor and the court wrongly believed Mr. Erickson was required to prove a pattern of discrimination. It would "provide clarity and certainty concerning the [prosecutor's] obligations in future cases and would simultaneously engender greater fidelity to *Batson* and its equal protection guaranty." *Rhone*, 168 Wn.2d at 662 (Alexander, J., dissenting).

b. Because the primary problem with *Batson* is the requirement of proving intentional discrimination, this Court should hold that a peremptory challenge is invalid if an objective observer could view race or ethnicity as playing a role in the use of the peremptory challenge.

Although adopting the *Rhone* rule would be an improvement, this Court should go further. The problems with *Batson* do not stop at step one of the procedure. To the contrary, "plausible race-neutral reasons are quite easy to conjure up in any given case, regardless of whether the peremptory challenge is actually based on racial discrimination and regardless of

whether such racial discrimination is conscious or unconscious." *Saintcalle*, 178 Wn.2d at 92-93 (Gonzalez, J., concurring). "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Furthermore, as noted, "*Batson* recognizes only 'purposeful discrimination,' whereas racism is often unintentional, institutional, or unconscious." *Saintcalle*, 178 Wn.2d at 36; *see also Task Force Report* at 19 (implicit biases are pervasive).

This Court should adopt a rule that combats racial bias in jury selection even if that bias is covert, unintentional, or unconscious. Just as a judge must recuse herself where there is an appearance of unfairness – regardless of whether she is actually biased – a peremptory challenge should be prohibited if an objective observer could view race or ethnicity as playing a role in the use of the peremptory challenge, regardless of whether the party striking the juror actually intended to discriminate. This is the standard of proposed General Rule 36.[2]

The proposed standard "simplif[ies] the task of reducing racial bias in our criminal justice system, *both conscious and unconscious*." *Saintcalle*, 178 Wn.2d at 54 (emphasis added). It eliminates the problem

[2] For the Court's convenience, proposed GR 36 is attached as an appendix. As the Court is aware, this proposed court rule was published for comment for the period of January through April, 2017.

of having to accuse a fellow bar member of racism. And it promotes diversity in juries and respect for the legal system.

In determining whether an objective observer could view race or ethnicity as playing a role in the exercise of the strike, reasons for exclusion like the one given here should be considered presumptively invalid. App. 2. The fact that a juror or juror's family member has had law enforcement contacts is highly correlated with race and rarely relevant to the case. *Arresting Batson,* 34 Yale L. & Pl'y Rev. at 417-18; *Saintcalle,* 178 Wn.2d at 100 (Gonzales, J., concurring). Excluding jurors on this basis only exacerbates the problem of racial bias in the justice system. *Arresting Batson* at 406; *see also Task Force Report* at 21 ("race matters in ways that are not fair, that do not advance legitimate public safety objectives, that produce racial disparities in the criminal justice system, and that undermine public confidence in our legal system").[3]

For the same reason, demeanor-based reasons for exclusion should be treated with extreme caution. App. 2-3. As Justice Marshall noted, a party's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is sullen, or distant, a characterization that would not have come to his mind if a white juror had

[3] A juror could still be removed for cause in cases where police credibility is a central issue and the juror harbors such negative views about police that it would hinder his or her ability to judge the case fairly. *See Arresting Batson*, 34 Yale L. & Pl'y Rev. at 418.

acted identically. *Batson*, 476 U.S. at 106 (Marshall, J., concurring). After surveying the practices of multiple states, the Equal Justice Initiative found that "[p]rosecutors frequently justify strikes by making unverifiable assertions about African-American potential jurors' appearance and demeanor." *EJI Report* at 18. Others agree that the problem is pervasive:

> [W]e now know that implicit biases can lead members of different races to perceive members of other races as lazy, or hostile, or threatening. Thus, accepting "body language or demeanor" as a purportedly legitimate reason for a peremptory challenge provides another "Handy Race-Neutral Explanation" because it disregards the effect of implicit bias upon perceptions of body language or demeanor.

Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 164 (2010) (internal citations omitted).

In this case, an objective observer could view race as playing a role in the exercise of the peremptory challenge. The city removed an African American juror who had discussed his humiliating experience of being wrongly suspected of a crime. Regardless of whether the prosecutor intended to discriminate, the exclusion of Mr. Meyer undermines the appearance of fairness, and should be deemed invalid.

CONCLUSION

Amici ask this Court to hold that Mr. Erickson made a prima facie showing that the prosecutor's exclusion of Mr. Meyer from the jury violated the Equal Protection Clause of the Fourteenth Amendment. Amici further urge this Court to adopt a new rule prohibiting a peremptory challenge where an objective observer could view race or ethnicity as playing a role in the use of the challenge.

Respectfully submitted this 13th day of February, 2017.

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APPENDIX
PROPOSED GR 36

Published for Comment November 2016

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 the race or ethnicity of the prospective juror could be viewed as a factor in the use of the challenge, or the court may raise this objection sua sponte. When such an objection is made, the party exercising the peremptory challenge must articulate on the record the reasons for the peremptory challenge.

(c) Using an objective observer standard, the court shall evaluate the reasons proffered for the challenge. If the court determines that an objective observer could view race or ethnicity as a factor for the peremptory challenge, the challenge shall be denied.

Comment

[1] The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race. This rule responds to problems with the *Batson* test described in *State v. Saintcalle*, 178 Wn.2d 34 (2013), and provides a different standard for determining whether a peremptory challenge is invalid than that provided for in *Batson v. Kentucky*, 476 U.S. 79 (1986). For purposes of this rule it is irrelevant whether it can be proved that a prospective juror's race or ethnicity actually played a motivating role in the exercise of a peremptory challenge.

[2] 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 in Washington.

[3] In determining whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, the court shall consider 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 type of questions asked about it; (b) whether the party exercising the peremptory challenge asked significantly more questions or different questions of minority jurors than other jurors; and (c) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party.

[4] Because historically the following reasons proffered for peremptory challenges have operated to exclude racial and ethnic 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.

[5] The following reasons proffered 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 in issue shall be considered strongly probative that the reasons proffered for the peremptory challenge are invalid.