

**CLE HANDOUT** | 12/16/2022| Cindy Arends Elsberry

**Tackling Bias in Jury Selection: Putting GR 37 to Work**

**GR 37 Caselaw**

**Cases re: Race Bias in Jury Selection Before GR 37**

***Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (defendant must show purposeful discrimination based on race)**

Mr. Batson, a Black man, appealed his conviction in Kentucky state court. During jury selection the prosecutor used his peremptory challenges to strike all four of the Black potential jurors, resulting in an all white jury for the trial. *Held*, Equal protection forbids the prosecutor challenge a juror solely based on race or on the assumption that Black jurors will be unable to impartially consider the State’s case against a Black defendant. *Held*, the defendant must make a prima facie showing of purposeful racial discrimination.

* First, the defendant must show that they are a member of a cognizable racial group, and that the prosecutor has exercised a peremptory strike to remove members of the defendant’s race. This first step of the [Batson](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000708&originatingDoc=Ia1204360df3f11e8a99cca37ea0f7dc8&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=db44f4827b4c446b8f928eb59b7b741a&contextData=(sc.Search)) test also includes a bright-line rule that the trial court must recognize a prima facie case of discriminatory purpose when a party strikes the last member of a racially cognizable group. *Seattle v.* *Erickson*, 188 Wn.2d 721, 734.
* Second, “the burden shifts to the State to come forward with a [race-]neutral explanation for [the challenge] ....” *Batson,* 476 U.S. at 97, 106 S.Ct. 1712.
* Third, if the State meets its burden at step two, then “[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.” *Id.* at 98, 106 S.Ct. 1712. The purpose of *Batson* is to ensure that jury selection proceedings are free from racial discrimination. *Erickson*, 188 Wn.2d at 732.

***Seattle v. Erickson,* 188 Wn.2d 721, 398 P.3d 1124 (2017)(The peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination)**

Pre-GR 37.

The City of Seattle prosecuted Mr. Erickson, a Black man, for unlawful use of a weapon and resisting arrest. During voir dire, the prosecutor exercised a peremptory challenge to excuse the only Black juror from the panel. After the jury was empaneled and excused from the courthouse with the rest of the venire, Mr. Erickson objected to the peremptory challenge, claiming the strike was racially motivated. The court found that there was no prima facie showing of racial discrimination and overruled Mr. Erickson’s objection.

*Held*, the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full [*Batson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000708&originatingDoc=If16b08a062d111e794a1f7ff5c621124&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=abd879bb0cfc44a890c6b26a0a1440ce&contextData=(sc.UserEnteredCitation)) analysis by the trial court.

***State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018)**

Pre-GR 37.

Prosecution for attempted murder and other crimes. During voir dire, the State exercised a peremptory challenge on the only Black juror in the panel. The State excused the juror because he had brought extraneous evidence into prior jury deliberations, and because the juror had responses about the film *12 Angry Men* that were different from other jurors. In addition the prosecutor called out the juror with a sarcastic comment for no apparent reason.

*Held*, modify the *Batson* rule at step three. The trial court must ask whether an objective observer could view race or ethnicity as a factor in the use of peremptory strike. If so, the strike must be denied and the challenge to that strike accepted. Here, the reasons provided by the State for striking the juror were not supported in the record and they reflect differential treatment of the sole Black juror. An objective observer could view race or ethnicity as a factor in the use of peremptory strike

**Cases on Race Bias in Jury Selection after GR 37**

**(effective April 24, 2018)**

**Washington Supreme Court**

***State v. Tesfasilasye,* \_\_\_ Wn.2d \_\_\_,518 P.3d 193 (2022)** (trial court improperly denied defendants GR 37 objection to State’s challenge of two jurors of color)

The State prosecuted Mr. Tesfasilasye for third degree rape. During jury selection, Mr. Tesfasilasye raised GR 37 objections when the State made two peremptory challenges to potential jurors of color, juror 25 and juror 3. One of the State’s reasons for striking juror 25, an immigrant woman from Korea, was because she felt her son had been treated unfairly by the criminal legal system. Juror 25 also shared her own experience as a victim of sexual assault and her professional experience in sexual assault investigations. The State’s reason for striking juror 3, a Latino immigrant man, was because he would “harbor unreasonable doubts” without concrete evidence. The State did not request to strike other jurors who had similar experiences and provided similar answers. ***Held***, **Under these facts an objective observer could view race as a factor for striking both jurors. The trial court improperly denied the defendant’s GR 37 objection to the State’s challenge of two jurors of color who had similar experiences and provided similar answers as other jurors the State did not strike.**

***State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020) (plurality opinion) (3 judges held that State violated GR 37 by excusing Black juror)**

First degree felony murder prosecution. During voir dire the State exercised a peremptory to excuse juror 6, a Black juror. The State’s explanation for excusing juror was that the juror had a brother who was convicted of attempted murder and that that process of conviction and sentence “left a bad taste in her mouth.” The state repeatedly stressed that juror 6 frequently paused before answering questions.

*Held*, (Gonzales, Wiggins, Yu) The trial court improperly refused to inform prospective jurors that it was not death penalty case. Exercising a peremptory to remove a juror who does not qualify under death qualification is a presumptively invalid basis for exercising a peremptory challenge. The State’s reasons for excusing juror 6 are presumptively invalid under GR 37(h)(ii) and (iii). The state repeatedly stressed that juror 6 frequently paused before answering questions, potentially violating GR 37 (i). Dismissal of juror 6 violated GR 37(e)’s injunction that the challenge must be rejected if “an objective juror could view race or ethnicity as a factor in the use of the peremptory challenge.

*Held* (Stephens, Gordon McCloud concurring) would reverse the convictions based on the extensive death qualification discussion. Trial court erred when it denied the defense motion for a mistrial based on the entire area of questioning. The trial court erred when it failed to recognize the problem and its impact on fairly selecting a jury. It is unnecessary to consider how to apply GR 37 to this 2015 trial.

Dissent (Madsen, Fairhurst, Owens and Johnson) GR 37 does not apply to jury selection that occurred in a 2015 trial, but even if it did, the State did not violate GR 37 by excusing the only Black juror. The juror stated she would not be able to deliberate and do her job as a juror because of her concerns about the possible severity of the punishment that might follow.

**Washington Court of Appeals**

***State v. Omar*, 12 Wn.App.2d 747, 460 P.3d 225 (2020) (Defense violated GR 37 by excusing a juror who appeared to be of Asian descent)**

**Div. I**

First degree robbery prosecution. During voir dire, defense counsel exercised a peremptory challenge against juror 16 who claimed to have been present at a bank robbery while working at a bank. Juror 16 appeared to be of Asian descent, and the trial court applied GR 37 and asked the defense to state a race-neutral reason for the challenge. Defense counsel stated that he “didn’t like some of the responses that the juror gave to questioning and that he “felt uncomfortable about the way she was responding.” The trial court denied the challenge and seated juror 16. The jury convicted.

*Held*, an objective observer could conclude that race was factor in use of peremptory challenge against prospective juror, warranting denial of challenge. The reasons provided by defense “ring nearly tantamount to a characterization of Juror 16’s demeanor and …such a characterization has historically been associated with improper discrimination in juror selection.” The reasons the defense provided for challenging juror 16 were nebulous and fail to identify a specific problem with her responses.

***State v. Listoe*, 15 Wn.App.2d. 308, 475 P.3d 534 (2020) (State improperly excused Black juror).**

**Div. II**

The State prosecuted Mr. Listoe for two drug crimes. During voir dire, the prosecutor exercised a peremptory challenge to dismiss juror 17, the only Black juror. The prosecutor relied on juror 17’s responses to two questions about whether he would find a person guilty of a silly law and argued juror 17 indicated his inability to follow the law.

*Held*, the trial court improperly permitted the State to peremptorily strike juror 17. Given that juror 17 was the only Black member of the venire, that he was the only juror who voiced some skepticism with the criminal justice system due to his personal experience, and that juror 17 merely expressed discomfort at the idea of convicting someone under a hypothetical scenario involving a ridiculous law, an objective observer aware of implicit, institutional, and unconscious bias could view race as a factor in the State's exercise of this peremptory challenge.

***State v. Lahman*, 17 Wn.App.2d 925, 488 P.3d 881 (2021) (*published in part*) (State improperly excused juror with Asian surname)**

**Div. III**

Prosecution for domestic violence kidnapping and assault with weapons enhancements. Jury selection took place over two days in 2019. Juror 2 was a 23 year old man who worked at Target. He had an Asian surname, and appeared to be one of the few racial minorities on the venire. In his answers to a written questionnaire, he did not report past experience with domestic violence. Twenty-two add’l prospective jurors provided the same answer, they also had no past experience with DV either personally or through a close associate. Of the 13 jurors seated, nine of them likewise did not report any experience with domestic violence. The prosecutor exercised a peremptory to remove a juror because he was young and inexperienced in domestic matters. Defense raised a GR 37 challenge. The prospective was never asked any questions about his experience in domestic matters. He was not asked many questions at all. Given the limited basis from which the prosecutor cold conclude the juror was inexperienced along with the possible influence of implicit stereotyping, it is conceivable an objective observer could conclude race or ethnicity place some sort of role in the decision to strike the prospective juror.

*Held*, the trial court erred when it allowed the State’s peremptory challenge to juror 2. Objective observer could have concluded that race or ethnicity was factor was factor in prosecutor's peremptory strike of juror with Asian surname. Juror 2’s statements during voir dire did not differ markedly from those of other prospective jurors. The prosecutor received limited information from Juror 2 largely due to the fact that Juror 2 was asked few questions. The prosecutor's focus on Juror 2's youth and lack of life experiences played into at least some improper stereotypes about Asian Americans, particularly given the lack of any record about the relative ages of other jurors.

***State v. Orozco,* 19 Wn.App.2d 367, 496 P.3d 1215 (2021) (State violated GR 37 when it excused the only Black juror)**

**Div. III**

Prosecution for murder and other crimes. During voir dire, the State excused the only Black juror in the panel. The State‘s reasons for excusing the juror included that the State had prosecuted her in the past and that her name appeared in a number of police reports.

*Held*, Personally prosecuting a prospective juror for minor crimes is a race neutral reason to excuse her, but recognizing her name from police reports indicates she has “prior contact with law enforcement officers” and “a close relationship with people who have been stopped, arrested, or convicted of a crime.” These reasons violate Gr 37. Combining a race-neutral justification with a presumptively invalid one is not “race neutral.”

***State v. Hillman,* 519 P.3d 593 (Wash. Court of Appeals, Div. 3) (2022) (Trial court properly granted State’s GR 37 objection to juror based on juror’s demeanor)**

**Div. III**

The State prosecuted Mr. Hillman for forgery. During voir dire, the defense did not ask Juror 11 any questions. At the conclusion of juror questioning, the defense moved to strike Juror 11 from the panel using a peremptory challenge, claiming she appeared inattentive and disinterested. Juror 11 was the only Black person on the panel.

*Held*, the trial court properly sustained the State’s GR 37 objection to the defense’s peremptory challenge. The defense did not provide a valid reason for striking the lone Black jury on the venire. Juror demeanor is a basis for a peremptory strike that has historically been associated with improper discrimination. When a party seeks to justify a peremptory challenge based on ambiguous conduct such as demeanor, the party must provide reasonable notice to the court and other parties so that the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior invalidates the given reason for the peremptory challenge.

***In re Rhone*, 23 Wn.App.2d 307, 516 P.3d 401 (2022) (*Seattle v. Erickson* and *State v. Jefferson* are significant changes in the law that are material to the petitioner’s conviction)(*Note:* Pending at the Washington Supreme Court*,* see summary below)**

The State prosecuted Mr. Rhone in 2005 for robbery and other crimes. During voir dire, Mr. Rhone, who is Black, objected to the jury selection process on the ground that the State had used a peremptory strike to remove the only remaining Black juror from the venire. The trial court applied *Batson* and declined Mr. Rhone’s challenge. Mr. Rhone filed a PRP arguing that a significant change in the law that was material to his case entitled him to relief.

*Held*, *Seattle v. Erickson* and *State v. Jefferson* are significant changes in the law that are material to Mr. Rhone’s conviction. Because Mr. Rhone raised the issue in a successive PRP, the Court of Appeals transferred the case to the Supreme Court for consideration under RAP 16.4(d).

***State v. Booth,* 22 Wn.App.2d 565, 510 P.3d 1025 (2022) (The trial court erred when it denied the defendant’s peremptory challenge to prospective juror based on GR 37)**

**Div. I**

The State prosecuted Ms. Booth for DUI. At her jury trial, she exercised a peremptory challenge to a prospective juror who was of East Asian descent. The State made a GR 37 objection, and the court prohibited the peremptory challenge.

*Held*, the trial court erred when it denied the defendant’s peremptory challenge to the prospective juror. The totality of the circumstances would not lead an objective observer to conclude race could have been a factor in defense counsel’s decision to exercise a peremptory challenge. *Held*, retrial is not required where the trial court erroneously denies a peremptory challenge.

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**Cases Pending at the Washington Supreme Court** (

**Personal Restraint—Petition—Timeliness—Statutory Limits—Exceptions— Significant Change in Law—Appellate Decisions—Retroactivity—Changes to Batson framework**

Whether the supreme court’s decisions in *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), holding that the State must provide a race-neutral reason for exercising a peremptory challenge against the only remaining minority member of a defendant’s cognizable racial group or the only remaining minority in the venire; and *State v. Jefferson*, 192 Wn.2d 225, 230, 429 P.3d 467 (2018), changing the Batson three-part test to require at the third stage an inquiry into whether an objective observer could view race or ethnicity as a factor in the use of the peremptory strike, constitute a “significant change in law” that applies retroactively, exempting this personal restraint petition from the one-year limit on collateral relief under RCW 10.73.100(6).

No. 101204-7, *In re Pers. Restraint of Rhone* (petitioner) (Oral argument 2/28/23).