

JURY SELECTION – Peremptory Challenges based on *Batson* in Washington State after *City v. Erickson* and GR 37

Bench Card

THREE-PART BATSON TEST (initially established in *State v. Rhone*, 168 Wn.2d 645, 651 (2010) and modified in *City v. Erickson*, 188 Wn.2d 721 (2017)):

1. The moving party must make a prima facie case of purposeful discrimination by raising an inference that a peremptory challenge was used to exclude a potential juror because of his or her race (or other Constitutionally cognizable group).

DISCRETION: In WA the prima facie case of purposeful discrimination *shall be recognized* by the trial court when the sole member of a racially cognizable group has been struck from the jury. (The presence of other nonwhite jurors does not affect this finding.) Alternatively, the discriminatory purpose *may be found* in the court's discretion because of overt racism or a pattern of impermissible strikes. *Erickson* at 734.

TIME FOR OBJECTION: In WA the challenge should be brought "at the earliest reasonable time while the trial court still has the ability to remedy the wrong.... [A]llowing some challenges after the swearing in of the jury does not offend that ability." *Erickson* at 729.

UNDER GR 37 there is no requirement of a prima facie case of purposeful discrimination; instead, a party need only raise an objection.

2. Under *Batson*, once a prima facie case is made, the non-moving party must provide the reasons for using the peremptory challenge.
3. Under *Batson*, considering the challenge, the adequacy of the neutral response, and the record as a whole, the court must determine if the moving party has established purposeful discrimination by a preponderance of the evidence.
 - The court must closely scrutinize the proffered reasons, which must be logically plausible and not refuted by the jury selection transcript.
 - The court must apply "rigorous scrutiny" to the reasons for the strike to determine whether they are accurate, logical and credible.

Under GR 37, if the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge then the peremptory challenge is denied. An "objective observer" is one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

TRIAL COURT REMEDY: Replace stricken juror in the panel *OR* dissolve venire and bring in new panel *OR* mistrial.

STANDARD OF APPELLATE REVIEW: If the court follows the *Batson* procedure, the judge's determination is given great deference on appeal and the ruling will stand unless it is clearly erroneous. GR 37 contains requirements for challenges and trial court corroboration and findings. **REMEDY:** Remand for *Batson*/*Erickson*/GR 37 analysis or remand for new trial or dismissal.

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) 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 types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

GR 37, continued:

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or 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 these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

PRACTICE CONSIDERATIONS

The judge should make note of the apparent diversity composition of the jury pool at the onset of jury selection, and of any pattern of challenges for cause or pass of all jurors.

The judge should make note of the reasons (and consistency of reasons) given for challenges for cause and any other peremptory challenges of all jurors for which a record has been made.

If the possibility of a Batson or GR 37 challenge is made known before jury selection, establish a 'key' objection that will trigger judicial removal of the venire panel to enable a record to be made.

IN EVERY CASE, CRIMINAL AND CIVIL, BEFORE RELEASING THE JURORS STRUCK ON PEREMPTORY, ON THE RECORD AND OUTSIDE THE PRESENCE OF THE VENIRE PANEL:

INVITE CONSIDERATION OF THE ISSUE: After conclusion of peremptory challenges, take a recess and outside the presence of the panel, ASK THE LAWYERS: "Does either party have a challenge to any peremptory strike under the principles established by Batson/Erickson or Rule 37?" Allow enough time for the lawyers to consider their response: "Do you need a recess to consider your response?"

ALLOW RESPONSE ON THE RECORD: Give the attorney offering the peremptory challenge a timely opportunity on the record **and** outside of the presence of the jury to make a race-neutral explanation.

SUA SPONTE BY THE JUDGE: If the sole member of an ethnic or racially cognizable group has been struck from the jury, before dismissing the juror, and outside of the presence of the panel, the judge should make a record, and ask the lawyer offering the peremptory challenge to make a race-neutral explanation. Also See GR 37(b).