To: Judge John Dailey, Chair of the Colorado Criminal Rules Committee, and the Colorado Criminal Rules Committee

From: Kevin McGreevy

Date: January 11, 2021

RE: Crim. P. 24(d), Use of Peremptory Challenges, Challenging Race as a Factor in Exclusions – Report of the Subcommittee

Our subcommittee considered whether Crim.P. 24 should be amended to recognize and address implicit bias in jury selection by adopting provisions similar to Washington State Rule GR 37. GR 37 was adopted by the Washington State Supreme Court in April, 2018, to address limitations of *Batson v. Kentucky,* 476 U.S. 79 (1986) by altering the framework for objections to peremptory challenges. At the time *Batson* was issued, Justice Marshall noted that "conscious or unconscious racism" may render "the protection erected by the Court today … illusory." 476 U.S. at 106 (Marshall, J., concurring).

I. Proposal

Amend Crim. P. 24(d) by adding the following language:

(5) **Improper Bias**: the unfair exclusion of potential jurors based on race or ethnicity is prohibited.

(A) **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 the objecting party shows that new information is discovered.

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons for the peremptory challenge.

(C) **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.

(D) **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 comparison to other prospective 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 given to explain the peremptory challenge might be disproportionately associated with 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.

(E) **Reasons Presumptively Invalid**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, 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 by law enforcement, 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.

(F) **Reliance on Conduct.** The following reasons for peremptory challenges have also historically been associated with improper discrimination in jury selection: 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 during *voir dire* 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.

Both Washington and California have modified *Batson*'s test and Connecticut is currently considering the issue. We are not aware of similar efforts yet in the other states.

II. PROCESS

The subcommittee met multiple times to discuss the proposal. In addition, we met with King County Superior Court Judge (and former veteran prosecutor) Roger Rogoff, King County prosecutor Hugh Barber, and Justices Steven Gonzalez, and Sheryl Gordon McCloud of the Washington Supreme Court. We also reviewed materials provided by Kathryn Michaels.

The subcommittee voted 3 in favor of recommending the adoption of the proposed rule, 1 in favor of some rule, but unsure of the GR37 model, and 1 against recommending the proposal to amend Crim. P. 24. The members of the subcommittee included Judge Gilman, Judge Nichols, defense attorneys Sheryl Uhlmann and Kevin McGreevy, and prosecutors David Vanderburg and Bob Russel. In December, Mr. Vanderburg resigned from the subcommittee and this committee, and was not a member of the subcommittee when we eventually put this matter to vote.

Attached to this memorandum are:

a. Washington GR 37, the template for our proposed language;

b. California AB-3070, the legislation addressing the same issue;

c. Notes from our discussion with Washington Supreme Court Justices Gonzalez and Gordon-McCloud;

d. Notes from our discussion with Judge Roger Rogoff and prosecutor Hugh Barber.

III. ARGUMENT FOR ADOPTION

A. This Amendment Will Directly Address Implicit Bias in the Courts and Thereby Strengthen Public Confidence in Colorado's Judiciary

On June 11, 2020, the Colorado Supreme Court wrote, "By redoubling our efforts to ensure that our decisions are free of bias, we can help build a more universal faith in our courts and our system of justice." The Court urged all in the Judicial Branch to "engage respectfully and productively in the difficult dialogue that we must have to address the issues confronting the Black community and thus our community as a whole." The Court has recognized that "appearances can be as damaging to public confidence in the courts as actual bias or prejudice[.]" *People v. District Court,* 192 Colo. 503, 510, 560 P.2d 828, 833 (1977).

This proposed amendment to Crim.P. 24 is a concrete step towards putting these ideals into action to address unconscious racial bias in the administration of justice and is an acknowledgment that *Batson*'s framework is often insufficient to prevent this bias.

B. The Proposed Amendment Replaces Those Parts of the *Batson* Analysis That Leave Room for Implicit Bias in Jury Selection with an Effective, Workable Framework for Preventing It.

The proposed amendment does away with the requirement that the objecting party first establish a prima facie case of purposeful discrimination in order to rebut the initial presumption "that a [party] has exercised peremptory challenges on constitutionally permissible grounds[.]" *People v. Morales,* 356 P.3d 972, 978 (Colo. App. 2014). This ensures that when a party suspects a peremptory challenge is based on the prospective juror's race, the issue will be addressed on its merits. And the proposed amendment continues to afford the party making the peremptory challenge the opportunity to explain its basis.

Instead of requiring the objecting party to prove purposeful discrimination, the proposed amendment directs the trial court to consider the totality of the circumstances and deny the peremptory challenge if an objective observer could view race or ethnicity as a factor in the peremptory challenge. Establishing an objective inquiry subject to *de novo* appellate review is critical to preventing the unfair exclusion of minorities from jury service.[1]

This new standard addresses *Batson*'s problematic requirement that the party objecting to the strike show purposeful discrimination. That requirement does not account for the

[1] This also does away with the need to remand cases for further findings, often years after the fact, when the passage of time makes any attempt to assess discriminatory intent unlikely to be reliable.

"unconscious racism" Justice Marshall recognized in his concurrent in *Batson* (which is more commonly described now as "implicit bias"), which—by its very nature—is never purposeful. It also removes the implication that, by sustaining the objection, the trial court is in a sense finding the striking party is both dishonest about its proffered race-neutral reasons and is racist with respect the challenge itself.

Section 5(E) of the proposed amendment identifies as presumptively invalid those challenges that are inextricably connected to a prospective juror's race. Minority community members are often more likely to live in "high-crime" neighborhoods and/or know people who have been stopped by police or arrested and/or prosecuted for a crime than their white counterparts, and that these experiences are "inextricably linked" to their race. *People v. Ojeda,* 2019 COA 137 M ¶ 26 (collecting cases).

Section 5(F) of the proposed amendment focuses on race-neutral reasons based on a prospective juror's demeanor and requires corroboration of the cited demeanor by the trial court or opposing counsel to sustain the peremptory challenge. This change makes sense as courts have long recognized that characterizing a prospective juror's demeanor as the impetus for a peremptory challenge is inherently subjective and "particularly susceptible to the kind of abuse prohibited by *Batson.*" *United States v. Sherrills,* 929 F.2d 393, 395 (8th Cir. 1991). Under this proposal, even if the trial court does not observe the complained-of demeanor or make any findings with respect to it, it may still uphold the peremptory challenge and a reviewing court will defer to that conclusion.

The proposed amendment simply requires corroboration by the court or opposing counsel of a demeanor-based race-neutral reason before it can defeat an objection to the peremptory challenge on which it is based. That small requirement—that the trial court or opposing counsel also notice the alleged demeanor—is reasonable and easily satisfied.

C. The Proposed Amendment Has Achieved the Desired Effect in Washington: Increased Participation in Jury Service by People of Color.

In Washington, the strongest opponents to the proposed rule change were prosecutors. Both Judge Rogoff and Mr. Barber told our subcommittee that they were afraid of the change, and Mr. Barber noted his initial resentment of the perceived need for the rule. *Batson* applies equally to prosecutors and defense lawyers, and the subcommittee does not intend to single out one side of the aisle in criminal trials. Once the Washington rule was enacted, both Rogoff and Barber realized that its benefits overwhelmingly outweighed their initial fears. They report that juries are indeed more diverse since the rule was put into place, which increases the diversity of views in deliberations. Judge Rogoff is hopeful that, over time, the rule will increase the number of minority community members who show up in response to a jury summons, based on the positive experiences related by increased numbers of minority community members who are able to serve on a jury rather than be dismissed. Both men agreed that in the wake of the rule, training for lawyers immediately improved and did much to disabuse lawyers of the notion that the color of a prospective juror's skin was a proxy for how that person might receive a party's evidence. Neither Judge Rogoff nor Mr. Barber described the rule as an increased burden on judges or practitioners

during trials. In fact, the rule made practitioners more thoughtful about the basis for their challenges.

Justices Gonzalez and Gordon-McCloud stated that the rule sent an explicit, clear message that in Washington courts, racial minorities are valued in the administration of justice: their voices in jury rooms are valued and their life experiences matter in how trials are decided. Our subcommittee recognizes—as did the Washington drafters—that the rule does not address peremptory challenges improperly motivated by gender or sexual orientation. But we agree with Washington's conclusion that race is different, should be addressed first given the history of its use in the criminal justice system, and that this amendment should not be rejected solely because it does not wholly solve all issues with improper peremptory challenges.

By adopting this proposed amendment, the Court will demonstrate unequivocally its commitment to ensuring that citizen juries - vital to the protection of our democratic principles - necessarily includes the voices and experiences of those who have for too long often been excluded.

V. Argument against adoption of proposed Crim. P. 24(d)(5):

These will be supplied later, or potentially orally at the Committee's meeting on January 15, 2021.

A: Washington GR 37

West's Revised Code of **Washington** Annotated
Part I. **Rules** of **General** Application
General Rules (GR) (Refs & Annos)

General Rules, GR **37**

Rule 37. JURY SELECTION

Currentness

(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 that 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.

(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.

Credits

[Adopted effective April 24, 2018.]

Relevant Notes of Decisions (1)

View all 1

Notes of Decisions listed below contain your search terms.

Construction and application

New **rule** governing jury selection, which was adopted to remedy problems with the existing *Batson* test, applied prospectively to all trials occurring after its effective date, and thus, did not apply to murder defendant's case, even though it was on direct appeal at the time the **rule** went into effect; in defendant's case, the jury selection and *Batson* challenge both occurred before the **rule** became effective, and while the **rule** was partly remedial, it also affected substantial constitutional rights, and was therefore partly substantive. State v. Jefferson (2018) 429 P.3d 467. Criminal Law ⇐ 1181(2)

GR 37, WA R GEN GR 37

Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 10/1/20. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 10/1/20.

End of Document

B: California Code

AB-3070

2020 Cal. Legis. Serv. Ch. 318 (A.B. 3070) (WEST)

CALIFORNIA 2020 LEGISLATIVE SERVICE

2020 Portion of 2019-2020 Regular Session

Additions are indicated by **Text**; deletions by
* * * .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

CHAPTER 318
A.B. No. 3070

AN ACT to add, repeal, and add Section 231.7 of the Code of Civil Procedure, relating to juries.

[Filed with Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, Weber. Juries: peremptory challenges.

Existing law provides for the exclusion of a prospective juror from a trial jury by peremptory challenge. Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of the sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation of the prospective juror, or on similar grounds.

This bill would, for all jury trials in which jury selection begins on or after January 1, 2022, prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. The bill would allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria. Upon objection, the bill would require the party exercising the challenge to state the reasons the peremptory challenge has been exercised. The bill would require the court to evaluate the reasons given, as specified, and, if the court grants the objection, would authorize the court to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate. The bill would subject the denial of an objection to de novo review by an appellate court, as specified. The bill would, until January 1, 2026, specify that its provisions do not apply to civil cases.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or

perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

SEC. 2. Section 231.7 is added to the Code of Civil Procedure, to read:

<< CA CIV PRO § 231.7 >>

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d)(1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2)(A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, "unconscious bias" includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under Batson v. Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g)(1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) This section shall not apply to civil cases.

(*l*) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(m) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(n) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 3. Section 231.7 is added to the Code of Civil Procedure, to read:

<< CA CIV PRO § 231.7 >>

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d)(1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be

sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2)(A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, "unconscious bias" includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under Batson v. Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g)(1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(*l*) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(m) This section shall become operative January 1, 2026.

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C: Notes on discussion with Justices Gonzalez and Gordon-McCloud

December 15, 2020
Notes: Crim. P. 24 Subcommittee Meeting
Q&A with Justices Gonzalez and Gordon-McCloud

Attendees: Kevin McGreevy, Shelly Gilman, Sheryl Uhlmann, Karen Taylor, Bob Russel, John Dailey, Dana Nichols

The subcommittee met, with other members of the committee, to hear from Washington Supreme Court Justices Gonzalez and Gordon-McCloud. Justice Steven Gonzalez has been a member of the Washington Supreme Court since January 1, 2012. Prior to his appointment, Justice Gonzalez was a state and federal prosecutor, as well as a private practice litigation attorney, handling both criminal and civil cases. Immediately prior to his service on the Supreme Court, Justice Gonzalez was a trial court judge. In January 2021, he will become the Chief Justice of the Washington Supreme Court.

Justice Sheryl Gordon-McCloud has been a member of the Washington Supreme Court since 2012. She currently serves on the Court's Rules Committee. Prior to her membership on the Court, Justice Gordon-McCloud was an appellate attorney, often taking up the causes of those whose access to impact litigation was limited. She has received numerous awards for her advocacy.

In April of 2018, the Washington Supreme Court voted 9-0 to adopt GR 37. Justices Gonzalez and Gordon-McCloud have graciously agreed to discuss with us their perspective on the Rule, and answer questions from us.

Q1: Prior to the adoption of GR 37, what did you perceive to be the shortcomings of *Batson* as a guardrail against improper use, based on race/ethnicity, of peremptory challenges?

Gordon McCloud: *Batson* is so limited in its ability to protect against actual bias, because a lot of bias is implicit. The *Batson* framework offers no protection against implicit bias. In trials, especially in smaller jurisdictions, *Batson*'s purposeful discrimination means the judge has to call someone out as a racist, someone the judge probably interacts with every single day. Who wants to do that? The analytical basis of *Batson* is flawed. So, there was a real disincentive to uphold *Batson* challenges given that it requires explicitly calling out purposeful racism.

Gonzalez: From the perspective of a person of color sitting on the trial court bench, it was my expectation that counsel would dismiss people of color either for cause or with a peremptory. I think that peremptory challenges should be eliminated, but I understand there are good reasons for keeping peremptory challenges. GR37 is the next best step to getting rid of peremptory challenges. All of the studies showed that bias infected peremptory challenges even when attorneys thought they were exercising those challenges fairly. GR37 protects not just the rights of the accused but also the rights of jurors not to be removed for race. *Batson* did not meaningfully protect that right

Q2: What do you perceive to be the strengths of GR 37 in addressing these problems?

Gonzalez: GR 37 eliminates the need for making explicit findings that an attorney was acting with racist intent, or purposeful discrimination. GR37 makes it much more difficult to remove a minority member for jury service with a peremptory challenge. It means more diverse panels. There is no decline in quality of panels. Studies have shown that heterogeneous panels make better decisions than homogenous panels.

Gordon-McCloud: It's only been in effect for a year or two, and we are already getting some cases [on the Washington Supreme Court]. A study is being undertaken already about how it works – I think the study should wait about five years, so there is more data to draw meaningful conclusions. Unlike Justice Gonzalez, the key problem I saw (before GR 37) was the State excusing persons of color, not both sides. I think GR37 addresses that problem but maybe not completely.

Q3: The standard for a trial court to evaluate an objection (based on race/ ethnicity) to a peremptory challenge in GR 37 is, "if an objective observer could view race or ethnicity as a factor in the use of a peremptory challenge...".

(a) Why "an objective observer"?

Gordon-McCloud: The next sub paragraph in GR 37 defines 'objective observer' as "aware of implicit bias." We always think we are objective and neutral, so defining the objective observer as someone who is aware of implicit bias is the key to the meaning of the phrase.

(b) Any discussion on whether "a factor" was too low a bar, compared to "significant factor"?

Gonzalez: There was lots of discussion on this topic, and many iterations of the rule and arguments about whether we were going too far. Another issue was if the standard should be whether an objective observer "would" or "could" consider race as a factor, in addition to whether it should be "a factor" or a "significant factor" My concern is that these higher standards to sustain an objection to use of a peremptory challenge would water the rule down, and diminish what we are trying to accomplish. It's important not to substitute what is normal for what is neutral. In fact the norm is to assume jurors of color will not be neutral. This rule is an attempt to pass a rule that actually works at keeping people of color on a jury, unlike *Batson* which allows counsel to do an end run around the rule be coming up with race neutral reasons. In my view if the rule is stronger than it should be that is a good thing because it means more jurors of color will serve.

Q4: GR 37 lists seven facially race-neutral reasons that are presumptively invalid in defending a peremptory challenge.

(a) Where did these reasons come from?

Gonzalez: The research; the *State v. Saintcalle* [178 Wash.2d 34 (2012)] decision contains the research. We wanted to call out things indicated by research.

(b) Why list some reasons in the rule, when surely there are more pretextual reasons to mask improper uses of peremptory challenges?

Gordon-McCloud: The reasons are illustrative, not exhaustive. The reasons we chose were based on the case law on reasons that have been used in the past to get rid of jurors of color. The rule is open ended so other reasons are not excluded.

(c) Walk us through an example. If an African-American juror says that she distrusts law enforcement, given her and her family's experiences, but believes she can be fair in this case (and the challenge for cause is denied), why is it important for the court to disallow a peremptory challenge as to that juror?

Gonzalez: experience of people of color are different. I grew up in LA and was routinely pulled over when my white friends were not. So if you ask me, do I distrust the motives of law enforcement, the answer is yes, even though I also served as a prosecutor. It has also been my experience that both sides discriminate – this is my experience as a judge and as a prosecutor, so that perspective informs my view. It is important to disallow peremptory challenge in this situation you have outlined above to preserve the integrity of the system.

[d] Is there room between a denial for cause, but overcoming the presumption of one of the seven reasons, such that a GR 37 objection would be over-ruled?

Gonazlez – this is yet to be determined, I'm not sure there always is.

Gordon- McCloud – There's just so much education that needs to happen. A juror being suspicious of law enforcement is not a bias, it's their experience. I would not grant a challenge for cause for a juror like the one in the example. [The experience of being discriminated by law enforcement should have a place in the jury room, alongside other experiences with law enforcement.]

Q: do you harbor some belief that judges should be more lenient in granting cause?

Gonzalez: yes, absolutely. Jurors should not be rehabilitated by judges, it is coercive. The power of the authority of the court should be injected to keeping some jurors. If it is easier to get a challenge for cause granted, then we can be more comfortable with higher standard for exercising peremptory challenges.

Q5: GR 37 also prohibits unverified demeanor rationales for exercising peremptory challenges. Why?

Gordon-McCloud: We wanted demeanor to be raised at the time the demeanor was occurring during jury selection, so there would be adversarial comment when the demeanor was perceived. Again the demeanor issue is from the cases, where an after-the-fact discussion with the juror out of room made demeanor observations unverifiable.

Q6: During the debate over GR 37 before it became GR 37, what were some of the concerns raised in adopting a rule [that have not been previously discussed]?

Gonzalez: Tradition and resistance to change was a big hurdle. Concern that the rule should address other demographics, which we discuss in a later question. Concern that this was unfair to counsel who need to have peremptory challenges so they could have a fair jury, except that counsel is really always trying to get a jury that favors their side, not an unbiased jury. It is really the court's job to ensure that a jury is unbiased.

Gordon McCloud: I was concerned it would be a first step towards eliminating peremptory challenges but that's not the case so far.

Q7: What changes would you make, if any, if you were adopting a GR 37 today?

Gordon-McCloud: I am fine with it as it is until we get the data back (to see if changes needed). I originally wondered if it should be applied to all lawyers or just to the state because historically it was the state that was responsible for the racist system. I would like to wait another 4 years and see how it is doing.

Gonzalez: I suppose it is possible to pass a less stringent rule, but that lessons the importance of accounting for racial discrimination, conscious or unconscious. *Batson* does not work, so we are trying something else. I think it is a clean, very strong rule and believe it is going to make a better system and already has. It is good for the judicial system in Washington to communicate that racial bias, purposeful or implicit, does not belong.

Q8: Why adopt a rule on use of peremptory challenges regarding race/ethnicity, but not gender, sexual orientation, or economic status?

Gordon-McCloud: the right to peremptory challenges is valuable and critical to the underdog and limiting peremptory challenges is like using chemo to address a growing cancer. We do not want to target more broadly than needed.

Gonzalez: It is also about the jurors. People of color feel like fodder coming to a courtroom knowing that we will not be treated fairly so why come at all? If that perception changes then more people of color may show up. It's also important to address just one thing initially to be

able to measure whether it works. You cannot address all the problems in one rule, so you do what we can.

Q9: **How does GR 37 assist reviewing courts in evaluating objected-to uses of peremptory challenges?**

Gordon-McCloud: You are getting a better record. For example by requiring discussion of demeanor to occur while it's happening. At least in the more urban areas lawyers are more aware of how they are asking questions and they are aware of making a better record.

Q10: **Questions from the other Committee members:**

Bob Russel: Before the rule, what was the test the reviewing court using?

Gonzalez: No clear agreement. I used the 9th circuit approach.

Bob Russel: After GR37 was adopted, when a court is reviewing error in for the denial of an objection to use of a peremptory challenge on someone of color under GR 37, is that evaluated under a constitutional error framework following *Batson*, or a lesser standard as a violation of a court rule?

Gordon McCloud: We discussed whether the rule was constitutionally compelled or within the powers of the court – there are different views on our court by people who voted for the rule – we haven't answered this question yet. Certainly the rule is based on *Batson* but whether it's constitutional error remains an open question.

Gonzalez: Undecided currently, I think we will be asked to decide in cases coming up.

D: Notes on discussion with Judge Rogoff and prosecutor Hugh Barber

12/8/20 Notes: Crim. P. 24 Subcommittee Meeting

Q&A with Judge **Roger Rogoff** and Prosecutor **Hugh Barber**

Attendees: Kevin McGreevy, Shelly Gilman, Sheryl Uhlmann, Karen Taylor, Bob Russell, John Dailey

The subcommittee met, with other members of the committee, to hear from a judge and prosecutor in Washington on how Washington's GR37 plays out in criminal trials, its impact, its faults, and its usefulness. Judge Rogoff, until early December 2020, was a judge on the Superior Court bench in King County, Washington. Prior to his seven years on the bench, he spent 14 years as a prosecutor in King County. Hugh Barber is a senior prosecutor in King County, and has been for 27 years. The format was question and answer, and lasted about 45 minutes.

Background of Guests (not noted)

Q: Was GR 37 needed & impact

Roger: Change was needed – *Batson* had lost its power. The initial response – this is a scary new rule – prosecutors and judges were concerned about how it'd work. Both prosecutors and judges now believe it works. Overwhelmingly positive feedback from judges. Did informal survey of colleagues and they had positive response.

Recap: forces us to be more cognitive of our biases and makes us better participants in system and thus makes system more trustworthy for everyone. Hasn't impacted outcomes, and has meant that more people of color on juries.

Hugh: If you look at it in terms of King county – no compelling need because very progressive office/county and not a tremendous amount of diversity. Rule addresses absolutely real problem and was absolutely needed statewide. Reached out to trial attorney friends and feedback – rule is good because it makes prosecutors more thoughtful about why we make challenges and preconceived notions about who want on jury. Think it has been kind of neutral in its limited history – but it cannot help but increase diversity on who sits on a jury.

Recap: Overwhelmingly positive, a little clunky until you figure out the procedures. Thinks that " has it impacted outcomes of convictions" is wrong question, because if outcomes of conviction change, that is probably for the better because the racial diversity of the jury reached a better decision.

Q: has rule put more blacks on jury? If you could re-do would you?

Hugh: Yes has increased jury diversity. I would not take it back if I could take it back. Believe GR 37 to be a net positive because it makes us more aware of implicit bias. Sends a message that the justice system cannot discriminate. I don't see any negative but even if did I think positive impact would outweigh the negative.

Roger: Has increased diversity, don't think it has yet impacted number of jurors of color on venires (showing up for jury duty). Sample size is small and haven't yet had an opportunity to see how it will work over time. Biggest impact on prosecutor – has changed what questions are asked, how jurors of color are treated. Acceptance that jurors of color should be serving and should be seated based on what they say not how they look.

Q: did rule negatively impact morale or outcomes for prosecutors?

Hugh: not a negative impact. This is not necessarily a negative, but if you have a juror who you have objectively reasonable reasons to get them off but they are a person of color, you have to be very conscious about questioning because of concern about GR 37. This is not necessarily a negative though.

Q: How difficult is it for judges?

Roger: Procedurally it is like a *Batson* challenge – you figure out a way to do it. Not any more difficult than *Batson.*

Hugh: From prosecutor's perspective there is a difference in what we have to establish when a challenge is made.

Roger: One thing that is nice about rule is that it's more of an objective test than Batson – nice for judge because judge doesn't have to call the DA racist

Q: has this changed cause challenges:

Roger: denied challenge for cause, then had to consider GR37 – might have been better to grant cause challenge. This rule may help court focus on cause challenges rather than prosecution making half-ass decisions on peremptory challenges.

Q: anything you would change about rule

Hugh: Might change squishy language "if an objective observer could conclude that race could be a factor..." could result in disparate outcomes because subject to interpretation – but not sure how you fix that without going back to watered-down *Batson.*

Roger: One thing to improve is throwing in language that helps establish procedure for dealing with hearing on challenge, e.g. take a break, do this, then do this...

Q; GR 37 has 7 presumptively invalid reasons for challenge, feelings about them? Helpful or not?

Hugh: It's a weird list. Don't like it, is it inclusive? To the extent that it instructs prosecutors that these things are not okay maybe it is a good thing, but they should know that already.

Roger: Trial lawyers rely on a lot of unsaid stuff, much of which is impacted by implicit bias. So it is really uncomfortable for lawyers who have been around for a long time – I am watching and can see this person does not like me – so it is uncomfortable but it's completely legit to do this. Lawyers should be uncomfortable – that is a reason for the rule.

Q: GR 37 has a demeanor component : the preference for a 3rd person witness to verify a challenge based on demeanor. How does this play out in the courtroom?

Roger: Have not heard prosecutors use demeanor as a basis for challenge since rule came in to play

Hugh: still may base exercise of preemptory challenge on demeanor. But have never used demeanor alone as a reason. It requires prosecutors to follow-up, and ask juror to express response, and not just rely on demeanor that could be misinterpreted.

Q: Why race and not other suspect classes?

Roger: Race historically is the problem and we did not want to mess around with other classes. If that's the harm you want to fix, fix that problem

Hugh Barber: gender and sexual id were on the table but there has not been the same historical exclusion of these groups

Bob Russel Question: is bad experience with law enforcement presumptively invalid reason? How does this work – if prosecutor is honestly trying to exclude someone who can't be fair to cops?

Hugh: I think a prosecutor has to follow up and cannot just assume juror will be unfair, even before GR37. We would expect jurors, particularly jurors of color, to have bad experiences with law enforcement.

Roger : if you follow up further you learn that there's a challenge for cause or you find out that the juror can be fair. Compare to jurors who indicate that they like/trust cops and can still be fair. Ultimately you may be able to overcome the presumption that it is a fair use of a peremptory challenge, but it is a harder hill to climb.

Sheryl Uhlmann Question: Is rule used against defense and how does that play out?

Roger: Yes. Prosecutors can and have used it against the defense, and it plays out by going through the process. Sometimes it is a prosecutor that wants to make a point, bias on both sides. Historically the problem has been with prosecutors making peremptory challenges. Has seen it with defense excluding jurors of color but not white jurors.