THE OBJECTIVE OBSERVER STRIKES OUT: A COMPARATIVE ANALYSIS OF *BATSON* REFORM IN WASHINGTON STATE

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I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory strikes against potential jurors, also known as veniremen, based solely on their race.[1] Yet, the practice remains pervasive in American courts.[2] Indeed, there are few areas of American life where racial discrimination is as blatant, commonplace, and tolerated as in the jury selection process.[3]

Racial bias in the jury selection process affects all citizens and the fairness of our justice system. For one, trying a Black defendant before a mostly or all-white jury deprives the defendant of her constitutional right to trial by an impartial jury.[4] Studies also show that racially diverse juries return fairer and more credible verdicts than racially homogenous juries.[5] People of different races and ethnicities approach, question, and evaluate information

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1. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986); *see also* Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.").

2. *See generally* Emmanuel Felton, *Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection*, WASH. POST. (Dec. 23, 2021, 3:00 PM), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html (echoing the ongoing discussion of eliminating racial discrimination in jury selection).

3. *See generally id.*

4. *See* Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1615–16 (1985); *see also* Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 848 (1976).

5. Samuel Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 609–610 (2006).

differently, forcing diverse juries to consider a wider range of perspectives.[6] In turn, a racially and ethnically diverse jury will generally spend more time deliberating, make fewer errors, and perform its fact-finding duties more effectively.[7] And it's not just criminal defendants whose rights are affected when racial and ethnic minorities are kept out of the jury box—minority citizens have a right to serve their communities as members of a jury.[8]

In 1986, the Supreme Court in *Batson v. Kentucky* sought to cure the unconstitutional practice of race-based peremptory strikes in jury selection through a three-part framework, ultimately requiring a judicial finding of purposeful discrimination as the motivation for the strike for it to be unconstitutional.[9] But over thirty years later, the practice remains a prominent feature of jury selection in America.[10] In 2018, Washington became the first state to substantially alter the *Batson* framework with General Rule 37 ("GR 37").[11] Under GR 37, a court must deny a peremptory strike if it determines that an objective observer aware of implicit, institutional, and unconscious biases could view race or ethnicity as a motivating factor for the challenge.[12]

This Comment explores the implications, impact, and success of GR 37 four years after its enactment. Part II explains the traditional *Batson* framework and its critiques. Part III introduces GR 37 and explains key differences between the rule and *Batson*. Part IV conducts a comparative analysis of pre- and post- GR 37 case law in Washington to evaluate GR 37's success at eliminating the unfair exclusion of veniremen based on their race or ethnicity.

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6. Edward S. Adams, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 709 (June 1998).

7. Sommers, *supra* note 5, at 608–609; *see also id.*

8. Powers v. Ohio, 499 U.S. 400, 409 (1991).

9. *See* Batson v. Kentucky, 476 U.S. 79, 85–86 (1986) (describing the efforts of the Court to "eradicate racial discrimination" from the jury selection process).

10. *See generally* Jeffery S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 583–589 (1994) (examining judicial decisions and concluding that few Batson challenges succeed); *see also* Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html.

11. *See* Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37 (2018)); *see also Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, AM. C.L. UNION (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury.

12. WASH. CT. GEN. R. 37(d), (f) (2018).

Finally, Part V argues that GR 37 is not the most effective tool for curing racial discrimination in jury selection but rather, the most effective, beneficial, and meaningful solution is the outright elimination of peremptory strikes.

II. *BATSON*: AN OVERVIEW

In 1880, the Supreme Court first held that purposeful exclusion of Black citizens from jury service violates the Equal Protection Clause of the Fourteenth Amendment.[13] In the decades that followed, the Court engaged in "unceasing efforts to eradicate racial discrimination" in the selection of juries.[14] Yet, nearly 100 years later, the Court had made little progress in achieving this goal.[15] In 1986, in *Batson v. Kentucky*, the Court addressed a considerable source of discrimination in jury selection—race-based peremptory strikes, establishing a three-part procedural framework premised on a finding of purposeful discrimination.[16]

A. Traditional Batson *Framework*

In step one, *Batson* requires a criminal defendant to make a prima facie showing of racial discrimination.[17] This includes proving that the defendant is a member of a cognizable racial group and that the prosecutor has exercised a peremptory strike to remove members of her race from the venire.[18] If the defendant meets her burden in step one, the burden shifts to the State at step two to provide a race-neutral reason for the strike.[19] Finally, step three shifts the burden back to the defendant to show that the

13. Strauder v. West Virginia, 100 U.S. 303, 305 (1880) (while also holding that a criminal defendant has no right to a "petit jury composed in whole or in part of persons of his own race").

14. *Batson*, 476 U.S. at 85.

15. *See id.* (noting the span of time between 1880, when the court first held that purposeful exclusion of Black citizens from jury service violates the Equal Protection Clause, and 1986, when the court sought to cure the unconstitutional practice of race-based peremptory challenges).

16. *Id.* at 94–97.

17. *Id.* at 96.

18. *Id.*; *see also id.* at 97 (The trial court then decides "if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination").

19. *Id.* at 97.

offered justification is pretextual and the true purpose or intent behind the strike was racial discrimination.[20]

B. Why Batson *Fails*

From *Batson*'s inception, Justice Marshall expressed disbelief that the Court's decision would "end the racial discrimination that peremptories inject into the jury-selection process."[21] History has proved him correct. *Batson* is largely regarded as a "toothless" failure, and rightfully so.[22] In fact, some jurists argue that post-*Batson*, racially motivated peremptory strikes are easier to perpetrate, describing the process as "better organized and more systematized than ever before."[23] This appears to be at least partially true. For example, at a statewide prosecutor training conducted by the North Carolina Conference of District Attorneys, prosecutors in the state received a *Batson* "cheat sheet" of race-neutral reasons to offer if challenged.[24] It included reasons like "leaning away from questioner," "arms folded," and "monosyllabic" responses.[25]

Batson fails for several reasons. For one, its purposeful discrimination standard is relatively easy to evade. Pretextual questions are easy to invent and hard to disprove.[26] Indeed, only those attorneys who are "unapologetically bigoted" or "painfully unimaginative" are unable to circumvent *Batson*'s purposeful

20. *Id.* at 94 (Notably, if the State offers a race-neutral justification that the court accepts, whether the defendant has made a prima facie case becomes irrelevant.); *see* Hernandez v. New York, 500 U.S. 352, 360 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made prima facie showing becomes moot.").

21. *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

22. Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (1999) ("Only the most overtly discriminatory or impolitic lawyer can be caught in Batson's toothless bite and, even then, the wound will be only superficial.").

23. Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.").

24. State v. Clegg, 867 S.E.2d. 885, 907 (N.C. 2022).

25. Order Granting Motions for Appropriate Relief at 4–5, State v. Golphin, 97 CRS 47314–15 (N.C. Super. Ct. Dec. 13, 2012).

26. *See* Jonathan Abel, Batson's *Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 720 (2018) ("The prosecutor has so much freedom that she practically cannot get caught unless she picks a demonstrably false or explicitly race-based justification.").

discrimination standard.[27] This is because "stupid" race-neutral reasons are acceptable under *Batson*, which does not require that the offered reason for the strike be persuasive or even logical so long as it is honestly held.[28]

Moreover, *Batson*'s purposeful discrimination standard does nothing to protect against unconscious bias, which poses perhaps the biggest threat to the constitutionality and legitimacy of the jury selection process.[29] It also does nothing to encourage prosecutors to reexamine their own possible biases.[30] Under *Batson*, the State carries its burden in step two even when the justification "results in a racially disproportionate impact" so long as there is no "proof of racially discriminatory intent or purpose."[31] This framework does not account for the reality that due to systemic racism, Black Americans are more likely to distrust law enforcement and experience negative interactions with police.[32] Indeed, participation in the jury selection process may even facilitate these negative opinions about the judicial process in minority communities, which in turn can be used as a reason for striking a minority venireman.

Further, *Batson* challenges are traditionally reviewed for clear error or abuse of discretion.[33] When reviewing for clear error

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27. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011) (describing *Batson* as "ineffective as a lone chopstick").

28. *See* Johnson v. California, 545 U.S. 162, 171 (2005) (describing how "even if the State produces only a frivolous or utterly nonsensical justification for its strike [,]" the *Batson* objection may still be denied).

29. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor'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 acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.").

30. Order Granting Motions for Appropriate Relief at 4–5, State v. Golphin, 97 CRS 47314–15 (N.C. Super. Ct. Dec. 13, 2012) ("[T]rainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.").

31. Hernandez v. New York, 500 U.S. 352, 359–60 (1991) (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).

32. *See* Lauren McLane, *Our Lower Courts Must Get in "Good Trouble, Necessary Trouble," and Desert Two Pillars of Racial Injustice*—Whren v. United States *and* Batson v. Kentucky, 20 CONN. PUB. INT. L.J. 181, 204–05, (2021) (stating that Black Americans distrust law enforcement more than white Americans because of the history of racism within law enforcement and the criminal legal system).

33. *See Hernandez*, 500 U.S. at 364 ("*Batson's* treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases.").

or abuse of discretion, an appellate court must defer to the conclusions of the lower court—even if it disagrees—so long as the conclusion is not clear, manifest error.[34] Such a deferential standard of review makes it very difficult for appellate courts to provide defendants with any meaningful remedy.

Finally, the on-the-spot nature of a *Batson* challenge is awkward and uncomfortable for judges.[35] Granting a defendant's *Batson* challenge requires a judge to publicly conclude as a matter of law that the strike-opponent (1) has racist motivations, and (2) is lying about those motivations in open court. Naturally, judges are reluctant to make these accusations about their professional colleagues, which results in fewer successful *Batson* challenges.[36]

For these reasons, commentators have long been calling for the elimination of peremptory strikes.[37] Others, however, feel that peremptory challenges are too valuable to abandon, noting that peremptory challenges serve as an important check against biased jurors and allow counsel to create the most favorable jury for their client.[38] In turn, these commenters advocate for a modification of the *Batson* framework through blind voir dire or by limiting the

34. *See* Ulysses Gene Thibodeaux, *The Changing Face of Jury Selection:* Batson *and Its Practical Implications*, 56 LA. B.J. 408, 410 (2009) ("A trial court ruling on discriminatory intent, however, must be sustained unless it is clearly erroneous. Given the propensity for affirmance under this standard or an abuse of discretion standard, a trial court's ruling is virtually immune to reversal.").

35. *See* Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir. 2010) ("No judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges based on forbidden racial considerations."); *see also* Miller-El v. Dretke, 545 U.S. 231, 267–68 (2005) (describing a *Batson* challenge as "awkward" for the trial judge).

36. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1085 (2009) ("[R]epeated contact may lead to a close relationship and bond between the judge and the prosecutor. It therefore makes sense that the trial judges they appear in front of day after day would be reluctant to take prosecutors to task publicly.").

37. *See* Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, U. ILL. L. REV. 1407, 1415 (2018) (discussing the persistent call for the abolition of peremptory strikes); Batson v. Kentucky, 476 U.S. 79, 107 (1986) ("The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.").

38. *See* Richard Fausset & Tariro Mzezewa, *Nearly All-White Jury in Arbery Killing Draws Scrutiny*, N.Y. TIMES (last updated Nov. 24, 2021), https://www.nytimes.com/2021/11/04/us/ahmaud-arbery-killing-trial-jury.html ("Some legal scholars critical of *Batson* believe that peremptory strikes still have their place, serving as an important check against biased jurors.").

number of peremptory challenges each side may exercise.[39] Washington, however, chose to implement general rule 37 (GR 37), a race-conscious, affirmative rule designed to eliminate intentional and unintentional racial bias from the jury selection system.[40]

III. *BATSON*, BE GONE: GR 37

A. Background

GR 37 evolved from decades of demand for judicial reform in Washington State. The Washington judiciary has been embroiled by public concern and outcry over its disparate treatment of minority citizens since a 1980 study revealed an alarmingly disproportionate racial makeup of the state's incarcerated population.[41] In response to public criticism, the judiciary engaged in passive conversations about reform for the next few decades. This did little to improve the public perception of the judiciary in Washington State. In fact, in 2011, two then-justices suggested that Black citizens were disproportionally incarcerated by the state simply because Black citizens committed a disproportionate number of crimes.[42]

In the years since, the somewhat disgraced judiciary has employed task forces, legal scholars, and committee reports to root out the cause of disparate treatment and recommend ways it could improve its treatment of minority citizens.[43] In 2013, in *State v.*

39. *See* Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL'Y 323, 338 (2003); Fausset & Mzezewa, *supra* note 38.

40. *See* Order No. 25700-A-1221, *In re Proposed New Rule General Rule 37 —Jury Selection* (Wash. Apr. 5, 2018).

41. *See* Rsch. Working Grp., Task Force on Race and the Crim. Just. Sys., *Preliminary Report on Race and Washington's Criminal Justice System,* 87 WASH. L. REV. 1, 4 (2012) ("In 1980, of all states, Washington had the highest rate of disproportionate minority representation in its prisons.").

42. *See generally* Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 22, 2010, 5:11 PM), https://www.seattletimes.com/seattle-news/two-state-supreme-court-justices-stun-some-listeners-with-race-comments ("State Supreme Court justices Richard Sanders and James Johnson stunned some participants at a recent court meeting when they said African Americans are overrepresented in the prison population because they commit a disproportionate number of crimes.").

43. *See* Annie Sloan, *"What to Do about* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 242–43 (2020) (describing the Washington State Legislature commissioning a study to examine racial disparity, and finding that "bias pervaded the state legal system.").

Saintcalle, the Washington Supreme Court declared that it would begin "formulating a new, functional method to prevent racial bias in jury selection" and "find the best alternative to the *Batson* analysis."[44] Five years after the Court's declaration in *Saintcalle*, Washington became the first to substantially alter the *Batson* framework with GR 37.[45] The historic new rule has spurred *Batson* reform efforts in other parts of the country as well. While California recently adopted a rule similar to GR 37, Arizona went even further, becoming the first state to eliminate the exercise of peremptory strikes outright.[46]

B. Framework: An Objective Inquiry

The most notable difference between GR 37 and *Batson* is the elimination of the purposeful discrimination requirement.[47] That is, where *Batson* requires a finding of purposeful discrimination, GR 37 explicitly does not. Instead, the Rule instructs trial courts to deny a peremptory challenge "if an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge[.]"[48] The Rule goes on to provide that, for its purposes, "an objective observer is aware that implicit, institutional, and unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[49]

The Rule also lists a set of non-exhaustive factors that a court should take into consideration when making its determination. Such factors include whether a reason might be disproportionately

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44. Saint v. Saintcalle, 309 P.3d 326, 338 (Wash. 2013).

45. Note that the court had previously modified the first prong of *Batson*. *See* City of Seattle v. Erikson, 398 P.3d 1124, 1131 (Wash. 2017) ("We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury.").

46. *See New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of* Batson, NAT'L. L. REV. (Dec. 2, 2020), https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson; Paul Davenport, *Arizona Supreme Court Will Be the First State to End Peremptory Challenges to Potential Jurors*, THE ARIZ. REPUBLIC (Aug. 29, 2021, 2:52 PM.), https://www.azcentral.com/story/news/local/arizona/2021/08/29/arizona-supreme-court-first-state-end-peremptory-challenges/5644533001.

47. GR 37 only alters the third prong of *Batson*. The other two steps remain in place. *See* WASH. CT. GEN. R. 37(c) (2018) ("A party [or the court] may object to the use of a peremptory challenge to raise the issue of improper bias."); WASH. CT. GEN. R. 37(d) ("Once raised, the objecting party must articulate reasons for the challenge.").

48. WASH. CT. GEN. R. 37(e) (2018).

49. WASH. CT. GEN. R. 37(f) (2018).

associated with a particular race or ethnicity, or whether other prospective jurors provided similar answers but were not the subject of a peremptory strike.[50] Similarly, GR 37 provides a list of presumptively invalid reasons that cannot justify a peremptory challenge because these reasons have historically been "associated with improper discrimination in jury selection in the State of Washington."[51]

The crux of GR 37 is its "objective inquiry" standard.[52] Under *Batson*, much of the court's ruling relied on the credibility and demeanor of the parties during voir dire.[53] However, under GR 37, the court is not required to scrutinize the credibility and demeanor of the parties.[54] It does not matter if the prosecutor has a reputation as being very credible or if her demeanor is proper. The objective observer aware of purposeful, implicit, institutional, and unconscious bias is simply uninterested in these observations when concluding whether race could have been a motivating factor in the exercise of the peremptory. Similar to *Batson*, however, GR 37's objective observer is also uninterested in the logic or persuasiveness of the prosecutor's offered justification for exercising the strike.

IV. A COMPARATIVE ANALYSIS

Comparing pre- and post-GR 37 case law, the difference in the number of successful challenges is stark. From 1995 to 2017, the Washington state appellate courts reversed a peremptory challenge only once.[55] Applying GR 37, the court of appeals has reversed peremptory challenges on racial or ethnic grounds six times, while the supreme court has reversed twice.[56] The court of appeals has

50. WASH. CT. GEN. R. 37(g)(i)(ii) (2018).

51. WASH. CT. GEN. R. 37(h) (2018).

52. *See* State v. Briggs, 776 P.2d 1347, 1361 (1989) (citing Gardner v. Malone, 376 P.2d 651, 654 (1962)).

53. State v. Hicks, 181 P.3d 831, 839 (Wash. 2008) (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1984)) ("As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'").

54. *See* WASH. CT. GEN. R. 37(e), (g) (2018) (listing no formal requirement under determinations and circumstances considered for the court to analyze a party's credibility and behavior).

55. State v. Cook, 312 P.3d 653 (Wash. Ct. App. 2013).

56. *See* State v. Lahman, 488 P.3d 881 (Wash. Ct. App. 2021); State v. Omar, 460 P.3d 225 (Wash. Ct. App. 2020); State v. McCrea, No. 37416-5-III, 2021 WL 1550839 (Wash. Ct.

affirmed a trial court's grant of a peremptory challenge four times.[57] Interestingly, the judiciary chose to publish only the "successful" applications of GR 37, publishing all but one opinion where it found a violation of GR 37 but not a single opinion where it failed to find a violation.[58]

A. Applying the Objective Inquiry Standard

This change in tune is attributable to the design of GR 37, which prohibits much of what *Batson* allowed. For example, in *Saintcalle*, Juror 34—a Black woman—indicated during voir dire that she may have difficulty serving on a jury for a murder trial, as she knew someone who had recently been murdered.[59] Relying on these statements as justification, the State moved to peremptorily strike the venireman.[60] The trial court allowed the strike, finding the justification to be race-neutral and supported by the credibility and demeanor of the venireman and prosecutor—despite the State questioning Juror 34 at approximately three times the rate it questioned the rest of the venire. [61]

Although the supreme court in *Saintcalle* ruled that the trial court's decision was not clearly erroneous, it was concerned with the unilateral degree to which the State questioned Juror 34 in comparison to the rest of the jury pool.[62] The court noted that disparate questioning of a minority venireman can, in some circumstances, provide evidence of discriminatory purpose.[63] But, applying a *Batson* analysis, it reasoned that asking follow-up questions, even in a disparate amount, was not enough to support

App. Apr. 20, 2021); State v. Pierce, 455 P.3d 647 (Wash. 2020); State v. Orozco, 496 P.3d 1215 (Wash. Ct. App. 2021).

57. *See* State v. Tesfasilasye, No. 81247-5-I, 2021 WL 3287706 (Wash. Ct. App. Aug. 2, 2021); State v. Cobbs, No. 80802-8-I, 2021 WL 2420136 (Wash. Ct. App. June 14, 2021); State v. Bongo, No. 81045-6-I, 2021 WL 1091506 (Wash. Ct. App. Mar. 22, 2021); State v. Pieler, No. 80244-5-I, 2021 WL 778095 (Wash. Ct. App. Mar. 1, 2021).

58. *See Lahman,* 448 P.3d 881; *Omar*, 460 P.3d 225; *Pierce*, 455 P.3d 647; *Orozco*, 496 P.3d 1215; *but see McCrea*, 2021 WL 1550839; *Tesfasilasye*, 2021 WL 3287706; *Cobbs*, 2021 WL 2420136; *Bongo*, 2021 WL 1091506; *Pieler*, 2021 WL 778095.

59. State v. Saintcalle, 309 P.3d 326, 330–31 (Wash. 2013).

60. *Id.* at 332.

61. *See id.* at 340.

62. *Id.* at app. A (showing statistics that the State asked each venireman an average of 4.5 questions, while it asked Juror 34 a total of 17 questions).

63. *Id.* at 340 ("[D]isparate questioning of minority jurors can provide evidence of discriminatory purpose because it can suggest that an attorney is 'fishing' for a race-neutral reason to exercise a strike.").

a finding of purposeful discrimination.[64] Under GR 37, evidence that the State exercised a peremptory challenge against a more rigorously questioned minority juror is likely to lead the objective observer to conclude that the peremptory challenge was motivated by race.[65] Thus, if *Saintcalle* had been decided post-GR 37, the court likely would have reached a different holding.

Further, unlike in *Batson*, GR 37 severely limits the ability of counsel to rely on a venireman's general tone or attitude as justification for a peremptory challenge, as "such characterizations ha[ve] been historically associated with improper jury discrimination in jury selection."[66] These provisions allow appellate courts in Washington State to reverse under circumstances not permitted under *Batson*. For example, in *State v. Thomas*, decided nine years before the implementation of GR 37, the Washington Supreme Court upheld a peremptory exercised against Juror 33, the only Black member of the venire.[67] In *Thomas*, the court accepted as valid justification the State's characterization of Juror 33 as "clearly [ ] hostile toward the State."[68]

Only two years after the implementation of GR 37, the court of appeals reached the opposite conclusion under remarkably similar circumstances. In *State v. Omar*, the defendant justified his peremptory strike against Juror 16, who "appeared to be of Asian descent," because he "didn't like some of [Juror 16's] responses" and "felt uncomfortable about the way she was responding."[69] Unlike in *Thomas*, the *Omar* court rejected this characterization of a juror's demeanor as "at best, nebulous" and insufficient to support a peremptory strike.[70]

Under GR 37, the objective observer is also likely to conclude the strike was race-based if "a reason might be disproportionately associated with a race or ethnicity."[71] For instance, in *State v. Bowman*, the State peremptorily struck Juror 5, a Black woman, from the venire.[72] The State's proffered reason for

64. *Id.*

65. WASH. CT. GEN. R. 37(g)(ii) (2018).

66. State v. Omar, 460 P.3d 225, 228 (Wash. Ct. App. 2020); *see also* WASH. CT. GEN. R. 37(i) (2018).

67. State v. Thomas, 208 P.3d 1107, 1115–16 (Wash. 2009).

68. *Id.* at 1115.

69. *Omar*, 460 P.3d at 228.

70. *Id.*

71. WASH. CT. GEN. R. 37(g)(iv) (2018).

72. *See* State v. Bowman, No. 73069-0-I, slip op. at 4 (Wash. Ct. App. Jan. 23, 2017).

the strike was concern "about her perspective on the world and criminal justice system."[73] The State was primarily concerned with statements Juror 5 made about having a nephew in prison for murder, whom she "would like to believe was innocent" and about a self-perceived inability to render a guilty verdict.[74] The trial court and the court of appeals were convinced by the State's justification and upheld the strike.[75]

If *Bowman* had been decided under the GR 37 framework rather than the traditional *Batson* framework, a different outcome may have been reached on appeal. For example, in *State v. Pierce*, the supreme court rejected the State's exercise of a peremptory challenge against Juror 6, potentially the only Black member of the venire.[76] Juror 6 had a brother who was convicted of attempted murder, and she expressed during voir dire that his conviction and sentencing "left a bad taste in her mouth."[77] The State cited these statements in support of peremptorily striking her from the venire.[78] The State also relied on statements made by Juror 6 regarding her "strong opinion[ ]" that "the system, or at least parts of the system, did not treat her brother fairly."[79] As all these reasons are invalid under GR 37, the court reversed the peremptory strike.[80] While under *Batson* the court of appeals upheld a peremptory strike justified by the venireman's potentially negative view of the legal system, the supreme court reversed on those same grounds under GR 37.

B. "Possibilities, not Actualities."[81]

However, the objective inquiry standard under GR 37 does not always yield a different result from the *Batson* framework. For example, in *State v. Tesfasilasye*, which was decided a year after *Pierce*

73. *Id.* (The State offered four race-neutral reasons for striking Juror 5: she had a nephew in prison for murder, whom she "would like to believe" was innocent; she "would not be able to sit in judgment of others;" her answers were "hard to track;" and it did not feel as though she was "completely forthcoming about her job.").

74. *Id.* at 5.

75. *See id.* at 8.

76. State v. Pierce, 455 P.3d 647, 654 (Wash. 2020).

77. *Id.*

78. *Id.* at 653–54.

79. *Id.*

80. *Id.*

81. State v. Lahman, 488 P.3d 881, 886 (Wash. Ct. App. 2021) ("GR 37 was written in terms of possibilities, not actualities.").

and is unpublished, the State exercised a peremptory challenge against Juror 25—a racial or ethnic minority—because of her belief that a relative was unfairly convicted of sexual assault.[82] The prosecutor also expressed concerns regarding "her ability to truly be fair and impartial in this case" based on her personal experiences.[83] Tesfasilasye objected to the strike, arguing that the State's justification was invalid under GR 37.[84] The State disagreed, contending that it did not strike Juror 25 because her son had been convicted of a crime, but because Juror 25 had "taken a position in that case about what happened in that case without being fully informed" and the State was concerned that her perceptions of injustice would spill over into this case.[85] The trial court accepted the State's reasoning and granted the peremptory challenge.[86]

The appellate court affirmed the lower court's grant of the peremptory challenge, reasoning that the "record here is sufficient to dispel any concern that an objective observer could view race as a factor" in the exclusion of the minority venireman.[87] The holding in *Tesfasilasye* contradicts the analysis set forth by the supreme court in *Pierce*.[88] It fails to consider that distrust or skepticism in the judicial system might be disproportionately associated with race or ethnicity, which the text of GR 37 mandates, and instead characterized the situation as "easily distinguishable from the more

82. State v. Tesfasilasye, No. 81247-5-I, 2021 WL 3287706 at *4 (Wash. Ct. App. Aug. 2, 2021) ("The challenge was based on Juror 25's belief that her son had not committed the alleged sexual assault of which he was convicted and was unduly punished for it, that the victim's version of events was significantly different than her son's story of what had occurred, and that the circumstances of her son's crime were similar to this case.").

83. *Id.* at *3 (emphasis added) ("So in my personal opinion, I mean, *not just from this experience but just overall*, you know, there are definitely circumstances where laws get in the way to having a fair outcome or justice being done, if you will, so."); *see also id.* at *6 (The State also struck Juror 3, a Hispanic man, because he expressed a need for the State to present concrete evidence of the defendant's guilt before he would feel comfortable to vote guilty. The prosecutor felt that such evidence "would be frankly impossible to find in most legitimate otherwise strong sex offense cases.").

84. *Id.* at *3.

85. *Id.* at *4.

86. *See id.*

87. *Id.* at *8.

88. *See also* State v. Pierce, 455 P.3d 647, 654 (Wash. 2020) (illustrating that the *Pierce* court did not discuss or even mention criminal convictions and/or distrust of law enforcement being disproportionately associated with racial and ethnic minority communities).

general contact with the criminal justice system referenced in GR 37(h)(iii)."[89]

It is difficult to reconcile the distinctly different outcomes in *Pierce* and *Tesfasilasye*. In both cases, the challenged veniremen were racial or ethnic minorities who expressed concerns about the fairness of the legal system, based on their personal experiences. In *Pierce*, GR 37's objective observer recognized that racial or ethnic minorities are more likely to experience negative encounters with law enforcement and in turn are more likely to hold negative beliefs about the legal system. But that same objective observer in *Tesfasilasye* did not.[90] Perhaps this is because the objective observer in *Tesfasilasye* was more concerned with the existence of discrimination rather than the appearance of discrimination. So, who is the objective observer, and what problem is she trying to solve?

The purpose of GR 37 seems to have evolved in the four years since its enactment. From its text, the purpose of the rule appears quite clear: to eliminate the unfair exclusion of veniremen based on their race or ethnicity. In application, the purpose is blurred. As the court of appeals explains in *State v. Latham*, "GR 37 was written in terms of possibilities, not actualities. The rule recognizes the trial process must be free from the appearance of discrimination, regardless of actual motives or intent."[91]

So, what is the purpose of the new rule? Is its purpose to eliminate racial bias in the jury selection process? Or is it to eliminate the *appearance* of racial bias in the jury selection process? The latter is consistent with the court's prior reasoning in *Saintcalle*, where it describes *Batson*'s corrosive effect on the public's confidence in the fairness of the judicial system as "perhaps the most damaging" of its failures.[92] It's also consistent with the text of

89. State v. Tesfasilasye, No. 81247-5-I, 2021 WL 3287706 at *4 (Wash. Ct. App. Aug. 2, 2021).

90. Notably, the Washington Supreme Court agreed and reversed the appellate court's holding in *Tesfasilasye* in October of 2022. State v. Tesfasilasye, No. 100166-5, 2022 WL 5237738, at *1 (Wash. Oct. 6, 2022) ("One of the State's proffered reasons for the strike—that the juror might be biased because her son had, in her view, been treated unfairly by the criminal legal system—is presumptively invalid."). *Id.* at *7.

91. State v. Lahman, 488 P.3d 881, 886 (Wash. Ct. App. 2021); *See also* State v. Listoe, 475 P.3d 534, 546 (Wash. Ct. App. 2020) (Melnick, J., concurring) (describing GR 37 as requiring "the peremptory challenge to be denied if an objective observer *could* view race or ethnicity as a factor in the exercise of the peremptory challenge, not whether we *would* or do view race or ethnicity as a factor.").

92. State v. Saintcalle, 309 P.3d 326, 333 (Wash. 2013).

GR 37, which requires the peremptory challenge to be denied when based on pure speculation, an objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge, not whether a judge *would* or *does* view race or ethnicity as a factor.

The Washington Supreme Court reversed *Tesfasilasye* on October 6, 2022, and remanded the case for a new trial.[93] In reversing the opinion of the appellate court, the supreme court addressed the distinction between "could view" and "would view" in GR 37.[94] "If the standard was 'could view,' of course many more peremptory challenges would need to be denied than if the standard was 'would view[,]'" the court explained.[95] It worried that a "would view" standard "would not be meaningfully different" than *Batson*'s "purposeful discrimination" standard.[96]

The court further explained that the "would view" standard "would have required judges to endorse 'an accusation of deceit or racism' in order to sustain a challenge to a peremptory strike."[97] Under the "could view" standard, however, "a judge is required to deny a peremptory challenge when the effect is discriminatory regardless of whether there was discriminatory purpose."[98] Thus, the court takes a dichotomous approach to the two standards. The court describes the objective observer as the average reasonable person.[99] In practice, this rigid dichotomy needlessly strips the objective observer of her sense of reasonableness. Requiring a judge to deny a peremptory strike if an objective observer would reasonably view the exercise of the strike as race-based does not necessarily require the judge to "endorse an accusation or deceit or racism."

It is important to understand the difference between aiming to eliminate the unfair exclusion of minority veniremen from the jury box and aiming to eliminate the appearance of the unfair exclusion of minority veniremen from the jury box. Both succeed in reducing racial discrimination in jury selection, but the latter

93. *Tesfasilasye*, 2022 WL 5237738, at *8. Notably, *Tesfasilasye* was the first GR 37 case to reach the supreme court since the rule was adopted by the court in 2018.

94. *Id.* at *6.

95. *Id.*

96. *Id.*

97. *Id.* (internal quotations omitted) (quoting Proposed New GR 37—Jury Selection Workgroup, Final Report, app. 2 (2018) (quoting State v. Saintcalle, 309 P.3d 326, 338 (Wash. 2019))).

98. *Id.*

99. *See* State v. Jefferson, 429 P.3d 467, 480 (Wash. 2018) (explaining an objective inquiry is not a question of fact but rather based on the average reasonable person).

seems to do so at the expense of creating the fairest jury for the defendant.[100] As *Tesfasilasye* illustrates, there is a risk that reasonableness is lost when the primary objective is to rid the process of the appearance of racial bias. By focusing on could instead of would, the objective observer's discretion is limited. She is effectively unable to balance her newfound knowledge of implicit, institutional, and unconscious bias with the circumstances and rationale behind each exercise of a peremptory strike. Criminal defendants and taxpayers may end up paying the price.

C. De Novo Review

While the text of GR 37 itself does not instruct the courts to apply a particular standard of review, GR 37 challenges are reviewed de novo by appellate courts.[101] This is a drastic departure from the highly deferential clear error standard of review the court applied under *Batson*.[102] In establishing de novo review for GR 37 appeals, the supreme court reasoned that the question posed to the objective observer—could she conclude that race or ethnicity was a factor—is not one of fact but of law.[103] It is "an objective inquiry based on the average reasonable person," which does not require the appellate court to defer to the lower court.[104] In reviewing GR 37 challenges de novo, the appellate court stands "in the same position as does the trial court."[105] It makes its own determinations about what an objective observer could conclude based on the totality of circumstances from the record.

De novo review is clear improvement from clear error review.[106] It allows for judicial remedy to flow more freely through Washington's appellate courts, which are no longer required to

100. *See* Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1938 (2015) ("When jury verdicts become an exercise in popular sovereignty, we lose sight of whether the verdicts are correct. We celebrate the process without focusing on the results.").

101. *See Jefferson*, 429 P.3d at 480 (describing de novo review as "a change from *Batson*'s deferential, 'clearly erroneous' standard of review").

102. *See Saintcalle*, 309 P.3d at 332 (deciding the trial court did not clearly err through application of the *Batson* decision).

103. *See Jefferson*, 429 P.3d at 480.

104. *Id.*

105. *Id.*

106. *See* Purkett v. Elem, 514 U.S. 765, 776 (1995) (Stevens, J., and Breyer, J., dissenting) ("In many cases, a state trial court or a federal district court will be in a better position to evaluate the facts surrounding peremptory strikes than a federal appeals court. But I would favor a rule giving the appeals court discretion, based on the sufficiency of the record, to evaluate a prosecutor's explanation of his strikes.").

accept unsatisfactory rationale as legitimate grounds for peremptory strikes. For example, in *State v. Bennett*, decided pre-GR 37, the court of appeals disagreed with the trial court's factual finding that the State engaged in purposeful discrimination but was unable to reverse on appeal.[107] The appellate court believed that the justification offered by the State did appear to be race-neutral but, nevertheless, it could not say that the trial court's contrary conclusion was clearly erroneous.[108] Accordingly, it affirmed.[109] If the *Bennett* court had applied a GR 37 analysis rather than the *Batson* analysis, it likely would have reached a different result.

For example, in *State v. McCrea*, the court of appeals found—contrary to the determinations of the trial court—that at least two of the peremptory challenges exercised by the State violated GR 37.[110] In *McCrea*, the trial court expressed its concerns sua sponte regarding the validity of three of the State's seven exercised peremptory challenges.[111] The prosecutor responded by telling the court that he was strategically striking from the back as he noticed defense counsel was striking from the front.[112] He also pointed to a previous conviction and a scheduling conflict regarding two racial or ethnic minority veniremen whom he sought to strike.[113] The trial court accepted this puzzling justification and granted the peremptory challenges.[114] Reviewing the record de novo, the appellate court reversed and remanded, concluding that an

107. *See* State v. Bennett, 322 P.3d 815 (Wash. Ct. App. 2014) ("[W]e do not substitute our judgment for that of the trier of fact. Whether the facts are as the parties allege is for the trial judge to determine, not this court.").

108. *Id.* at 818 ("Although we agree that his proffered explanations appear race-neutral and would have supported a conclusion that they were race-neutral, we cannot overturn the trial court's contrary evaluation . . . .[A]n appellate court simply is not in a position to find persuasive that evidence which the trier of fact found to be unpersuasive.").

109. *Id.*

110. State v. McCrea, No. 37416-5-III, 2021 WL 1550839, at *1 (Wash. Ct. App. 2021).

111. *Id.* at *1–*2 (Jurors 13, 35, 44, and 46 all appeared to the court to be members of a minority group. However, there was some debate between the court and the prosecutor as to the race or ethnicity of Jurors 35, Mr. Rojas, and 46, Mr. Castro. The court argued those were "Hispanic or Spanish" sounding surnames, while the prosecutor argued he didn't notice the juror's races or ethnicity's and "would not presume anyone is any race." The prosecutor also disagreed with the court's characterization of Juror 13, Ms. Vargas, as being Native American, arguing he "wouldn't presume she's Native, with a Spanish last name. If I were to make any presumption, I would have assumed she was of Spanish descent, possibly Caribbean, Dominican, Puerto Rican, or Cuban[.]").

112. *Id.* at *1–*2.

113. *Id.* at *2–*3.

114. *Id.* at *3.

objective observer "could view race or ethnicity" as a factor in "at least the striking of Jurors 44 and 35."[115]

But de novo review presents challenges as well. As a practical matter, the appellate court is not standing in the same position as the trial court. Many provisions of GR 37 rely heavily on the physical observations of attorneys and the court. Notably, appellate judges are not present to make these necessary physical observations. This significantly complicates the application of GR 37 and undercuts the power of de novo review.[116] Put simply, a *Batson* challenge is not a pure question of law. Ruling on a *Batson* challenge necessarily requires the court to make determinations about race or ethnicity of veniremen. These factual findings are based on the perceptions and visual observations of the parties and the court. Thus, an appellate court is necessarily forced to rely upon the conclusions of the lower court.[117]

In *State v. Listoe*, the State peremptorily struck Juror 17—the only Black man in the venire.[118] Reversing the lower court, the court of appeals held that, under GR 37, the State could not strike a venireman for answering a question differently than any other member of the venire when that venireman is the only racial or ethnic minority on the venire.[119] It reasoned that "implicit bias and disparate experience might still be a factor when the only member of a racially cognizable group on the venire provides a different response to a hypothetical scenario from almost all the other prospective jurors."[120]

In *Listoe*, the appellate court relied entirely on the lower court's findings regarding the races and ethnicities of the entire

115. *Id.* at *4–*5 (as the court found two violations of GR-37, it declined to reach the question of whether the State continued to violate GR-37 in striking Jurors 44 and 46).

116. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (describing the "inevitably clumsy fit between any objectively measurable standard and the subjective decision making at issue" in a *Batson* challenge).

117. *See* State v. Orozco, 496 P.3d 1215, 1220 (Wash. Ct. App. 2021) ("GR 37 is not about self-identification; it is evaluated from the viewpoint of an objective observer."); State v. Lahman, 488 P.3d 881, 885, n.6 (Wash. Ct. App. 2021) ("We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group. In many cases, a trial judge will need to make a record about the apparent racial and ethnic makeup of a jury panel in order to facilitate review on appeal.");.

118. State v. Listoe, 475 P.3d 534 (Wash. Ct. App. 2020).

119. *Id.* at 541; *but see* State v. Cobbs, No. 80802-8-I, 2021 WL 2420136, at *8 (Wash. Ct. App. 2021) (the court of appeals upheld a peremptory challenge of a minority venireman even though she was the sole juror who responded in the affirmative to a question the State asked all the jurors: "Does anyone here think they wouldn't be a good juror?").

120. *Listoe*, 475 P.3d at 541.

venire in holding that the objective observer could view the exercise of the strike as racially motivated. Crucial to the holding was Juror 17's status as the only member of a cognizable minority group in the venire. The appellate court, however, was not present to make this observation itself, and the record on appeal is not clear about Juror 17's race. The trial court stated that Juror 17 was "an *apparent* minority member of our jury panel."[121] Listoe stated that the challenged juror "was the only African American on the jury panel," and the court agreed that it "*appears* to be the case."[122] Nevertheless, de novo review allowed the appellate court to reach a different legal conclusion from the facts in the record.

The text of the rule itself also requires courts to be aware of the racial makeup of the venire to consider provisions like "whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge."[123] In *State v. Pieler*, the State exercised a peremptory challenge against Juror 17, who "appear[ed] to be 'potentially East Asian.'"[124] The State's offered justification for the strike was "that Juror 17 refrained from alcohol use and was too young to drink legally."[125] However, as the defendant argued, Juror 17 was not unique in these regards. Two other 18-year-old jurors in the same row as Juror 17 also indicated that they did not drink and given their age, were not legally permitted to.[126] Of these three veniremen, Juror 17 was the only apparent person of color.[127]

The "could view" standard, however, acts as a saving grace in this regard. Whether the objective observer would view race or ethnicity as a motivation for the strike depends on the race and ethnicity of the veniremen. Under the "could view" standard, the actual race or ethnicity of the venire is not as important, or as *Pieler* and *Listoe* evince, important at all in the GR 37 analysis, which operates on appearances rather than actualities.[128] As the court of

121. *Id.* at 545 (Melnick, J., concurring).

122. *Id.*

123. WASH. CT. GEN. R. 37 (g) (iii).

124. State v. Pieler, No. 80244-5-I, 2021 WL 778095, at *2 (Mar. 1, 2021) (The trial court noted on record that "it did not know Juror 17's race or ethnicity and stated 'He may be a person of minority status or color, I can't tell.'").

125. *Id.* at *4.

126. *Id.* at *4.

127. *Id.*

128. State v. Lahman, 488 P.3d 881, 885 n.6 (Wash. Ct. App. 2021) ("We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group.").

appeals explained, "GR 37 teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution."[129]

Although the courts describe the GR 37 analysis as "purely objective,"[130] the Rule is premised on visual observations, which are inherently subjective. These observations are not generally, if ever, observable from a cold record.[131] As Judge Rich Melnick explains in his concurrence in *Listoe*, this makes de novo review difficult to apply on appeal.[132] Practically speaking, an appellate court cannot determine for itself whether a juror indeed "appears" to be Black or Native American from the record alone.[133] And as a matter of public policy, determinations about the race and ethnicity of the venire should not be made by lawyers and trial courts. It is, after all, "hard to imagine that any judge or lawyer would be able to determine every potential juror's race solely through visual observation."[134]

D. Does That Woman Look Black to You?

At both the trial and appellate court levels, the determination about a juror's race or ethnicity is based on the perceptions and visual observations of the parties and the court.[135] It is not based on self-identification by the veniremen themselves.[136] In one instance, the Washington Court of Appeals even decided

129. *Id.* at 885.

130. *Id.*

131. State v. Listoe, 475 P.3d 534, 546 (Wash. Ct. App. 2020) (Melnick, J., concurring).

132. *Id.* ("A de novo review of the record poses many problems. Although we are supposed to put ourselves in the same position of the trial court, we are unable to view the jury panel. We are unable to determine the racial and ethnic makeup of the potential jurors de novo."); *see also Lahman*, at 885 ("As an appellate court, we are unable to physically observe any juror's appearance. In some circumstances, this might hamper our de novo GR 37 analysis.").

142. *Listoe*, 475 P.3d at 546 (Melnick, J., concurring).

134. *Id.*

135. *See* State v. Orozco, 496 P.3d 1215, 1220 (Wash. Ct. App. 2021) ("GR 37 is not about self-identification; it is evaluated from the viewpoint of an objective observer."); *Lahman*, 488 P.3d at 885, n.6 ("We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group. In many cases, a trial judge will need to make a record about the apparent racial and ethnic makeup of a jury panel in order to facilitate review on appeal.").

136. State v. Listoe, 475 P.3d 534, 546 (Wash. Ct. App. 2020) (Melnick, J., concurring) ("The test for whether a person is of a particular race or ethnicity seems to be based on the visual observations of the court and the parties. It is not based on self-identification.").

that having an Asian surname "is enough to raise the concern that the objective observer could perceive" a juror as a racial or ethnic minority." [137]

The application of de novo review is even more problematic in circumstances where the challenged juror's race or ethnicity is in dispute. In *State v. Orozco*, the record failed to indicate and the parties disagreed about the race of the challenged juror.[138] Defense counsel argued the juror was Black.[139] The State argued that because venire Juror 25 did not self-identify as Black, and because neither party nor the court asked her race the court could not know or assume her race.[140] With no clarification in the record apart from defense counsel's statements that the juror "appeared to be an African American female," the appellate court was forced to substitute its best judgment.[141] Noting that "it would have been helpful for the trial court to make a record about the apparent racial and ethnic makeup of the jury panel to better facilitate review," the court gave the defense the benefit of the doubt and concluded "that an objective observer could have perceived venire juror 25 to be a person of color."[142] It subsequently reversed and remanded the case for a new trial.[143]

Reversing a criminal conviction and remanding for a new trial based solely on the word of defense counsel alone has serious implications. For one, remanding for a new trial is very expensive, although there is more at stake than money. *Orozco* demonstrates the potential for a particularly opportunistic defendant to exploit the rule and benefit at the expense of the court, the taxpayer, and racial- and ethnic-minority citizens.[144] To be sure, convictions obtained even in part on racial biases should be reversed. But given the costly remedy and difficulty of formulating an objective test to measure inherently subjective decision-making, it would be both

137. *Lahman*, 488 P.3d at 885.
138. *Orozco*, 496 P.3d at 1220.
139. *Id.* at 1218.
140. *Id.* at 1220.
141. *Id.*
142. *Id.*
143. *Id.* at 1221; *but see* State v. Cobbs, No. 80802-8-I, 2021 WL 2420136, at *9 (Wash. Ct. App. 2021) (where statements from defense counsel that the challenged veniremen was the only racial minority on the venire was *not* enough to support that statement where "nothing in the record indicates that juror number nine was the 'sole member of a racially cognizable group' on the jury").
144. *Orozco*, 496 P.3d 1215.

more efficient and effective to eliminate peremptory challenges outright.

It is extremely difficult, if not impossible, to determine someone's race or ethnicity based on their appearance alone. This difficulty merely underscores a larger problem within the rule: the observations themselves. GR 37's observational method collapses cultural and ethnic boundaries, rendering self-identity irrelevant. It has the power to reduce a venireman's entire cultural identity down to the color of their skin—a Dominican man becomes just "Black;" a Hawaiian woman, just "Asian."[145] Even if the goal of GR 37 is to rid the jury selection process of the appearance of racial bias rather than actual bias itself, a system that determines the race or ethnicity of a venireman based on the court's visual observations does not seem to get the job done. Yet, it seems to fit if the question GR 37 asks is, how could an objective observer view this person? As white? Black? Hispanic? Native American? Asian? Pacific Islander?

This procedure for determining race also implicates a web of social issues. For one, it facilitates cultural appropriation. This is an ongoing problem in America. Celebrities make themselves appear "blacker" through make-up and traditionally black hairstyles and invidiously profit off minority communities.[146] Another issue is white-passing, where Black people with light skin and straight hair are perceived as white and treated better as a result.[147]

Moreover, consider Hilaria (a.k.a. Hillary Baldwin), Alec Baldwin's wife, who spent years impersonating a Spanish immigrant.[148] Hillary told people she was born in Mallorca, Spain, spoke in a fake accent, and once even acted like she forgot the English word for "cucumber."[149] In reality, she is a white woman from Connecticut.[150] How could the objective observer characterize her race? And why would the judiciary rely on attorneys and judges

145. WASH. CT. GEN. R. 37(g)(iii) (2018).

146. *See* Cady Lang, *Keeping Up with the Kardashians Is Ending. But Their Exploitation of Black Women's Aesthetics Continues*, TIME (June 10, 2021, 5:28 PM), https://time.com/6072750/kardashians-blackfishing-appropriation; *see also* Brennan Carley, *A Very Recent History of Celebrity Cultural Appropriation*, VULTURE (June 5, 2014), https://www.vulture.com/2014/06/recent-history-of-celebrity-cultural-appropriation.html.

147. *See* Kelly McWilliams, *The Day I Passed for White*, TIME (Nov. 19, 2021, 8:43 AM), https://time.com/6116209/passing-for-white.

140. *See* Alex Abad-Santos, *Hilaria Baldwin's Accent and Suspect Origin Story, Explained*, VOX (Dec. 28, 2020, 5:40 PM), https://www.vox.com/22203597/hilaria-baldwin-spanish-accent-ancestry-explained.

149. *See id.*

150. *See id.*

to make identifications about race and ethnicity instead of asking members of the venire to identify their own race and ethnicity?

To be clear, there is no evidence or reason to think that anyone would represent themselves as a minority race to increase their chances of serving on a jury. Nevertheless, it seems perverse and antithetical for a rule that was created to combat decades of racial discrimination to entrust the very institutions that perpetuated that discrimination to decide who does and who does not get protected under GR 37.

Race and ethnicity are not always objectively discernible. Relying on pure speculation about a person's race or ethnicity—regardless of accuracy—to reverse convictions, remand new trials, and impanel objectively bad veniremen is not a legitimate method to cure racial bias in jury selection. It does not effectuate a fair and impartial jury that will reach the right outcome even though that is what the Constitution requires.[151]

V. CONCLUSION

Race-conscious affirmative rules like GR 37 seem to neither preserve the value of peremptory challenges, prioritize the defendant nor eliminate racial bias in jury selection in a meaningful way. The only way to actually eliminate the evil of racial discrimination in jury selection and impanel the fairest possible jury for defendants is the full elimination of peremptory strikes. Opponents argue that peremptory strikes as a tool to assemble the most favorable jury for a defendant are too valuable to get rid of; but in a way, GR 37 seems like the worst of both worlds. It does not go as far as to eliminate peremptory challenges outright but what is left is almost a shell of the once powerful tool. Under the Rule, an attorney is prohibited from peremptorily striking an objectively bad juror with an ambiguously ethnic last name or dark skin, even if that juror was sleeping, hostile, or biased. To be fair, in a world without peremptory challenges, bad jurors would still end up in the jury box, but GR 37 feels overly superficial.

While GR 37 is a vast improvement over the traditional *Batson* framework, it is not the most effective solution. On one hand, it has substantially increased the number of successful *Batson*-like challenges in Washington. On the other, its focus on

151. U.S. CONST. amend. VI.

appearances misses the mark. It is difficult to apply with consistency, does not prioritize the defendant's right to trial by an impartial jury, and makes problematic assumptions about veniremen's racial and ethnic identities by forcing lawyers and judges to hypothesize about the race or ethnicity of members of the venire based solely on looks and last names. So, what has GR 37 gained? Is it that judges can walk away saying they have taken a progressive and radical stance against racial discrimination? Is that really what they have done?