


Better than *Batson*: Washington's General Rule 37

REDUCING RACIAL BIAS IN JURY SELECTION AND BEYOND

“Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.”



The image is a screenshot of the Equal Justice Initiative (EJI) website. At the top left is the EJI logo. To its right is a navigation bar with buttons for 'Donate', 'Sign Up', and links for 'About EJI', 'News', 'Reports', and 'Videos'. Below this is a secondary navigation bar with categories: 'RACIAL JUSTICE', 'CHILDREN IN PRISON', 'MASS INCARCERATION', 'DEATH PENALTY', and 'JUST MERCY'. Underneath is a teal header with links for 'Bryan Stevenson', 'Stories of Just Mercy', 'Discussion Guide', and 'Get Involved The Book'. The main content area features a photograph of an older Black man and woman. Below the photo is a caption: "A Dallas County, Alabama, prosecutor struck Edith Ferguson and five other black prospective jurors because, he asserted, they were of 'low intelligence.' She is pictured with her son, Charles Morton, a veteran who served 27 years in the United States Army." Below the caption is the title of the article: "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy".

State v. Saintcalle (Wash. 2013)

“Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection.”

State v. Saintcalle (Wash. 2013)

“In part, this is because *Batson* recognizes only ‘purposeful discrimination,’ whereas racism is often unintentional, institutional, or unconscious.”

State v. Saintcalle (Wash. 2013)

“We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.”

General Rule 37

If “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.” **GR 37(e)**.

General Rule 37

“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.” **GR 37(f).**

General Rule 37

- The presumptively invalid justifications: those historically used to discriminate in jury selection:
 - **GR 37(h)**: having been stopped by police, distrusting police, having a relative or friend in prison, etc.
 - **GR 37(i)**: demeanor-based justifications, e.g. bad attitude, inattentive, unintelligent, etc.

Why the “objective observer could view” standard?

State v. Saintcalle:

- *Batson* requires proof of purposeful discrimination but discrimination is often unconscious
- No one wants to call fellow member of the bar racist
- Too easy to come up with race-neutral justifications for exclusion

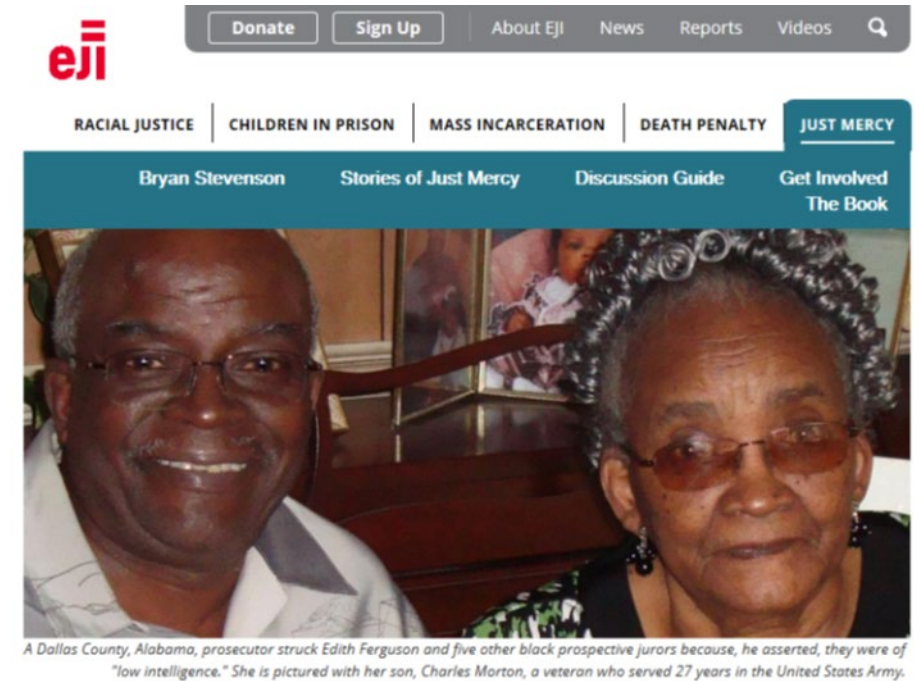
Why the “objective observer could view” standard?

Working Group Proposed Rules

- Supreme Court rejected counterproposal that suggested “*would view*” instead of “*could view.*”
- “Would view” is too much like having to prove purposeful discrimination.

Why subsection (i), prohibiting post hoc demeanor-based justifications for exclusion?

Prosecutors “frequently justify [peremptory] strikes by making unverifiable assertions about African-American potential jurors’ appearance and demeanor.”



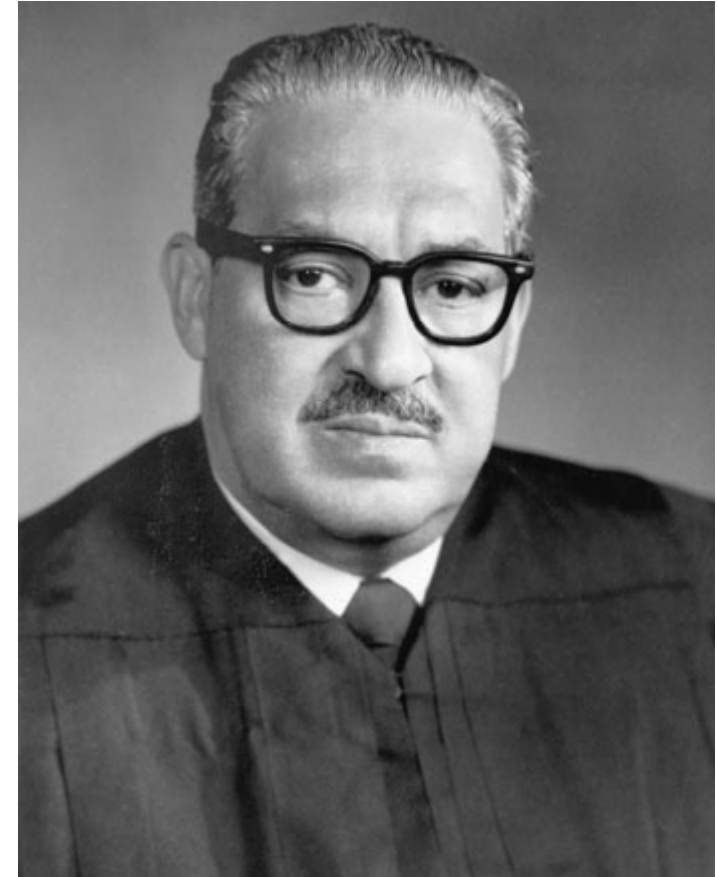
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Illegal Racial Discrimination in Jury Selection: A Continuing Legacy

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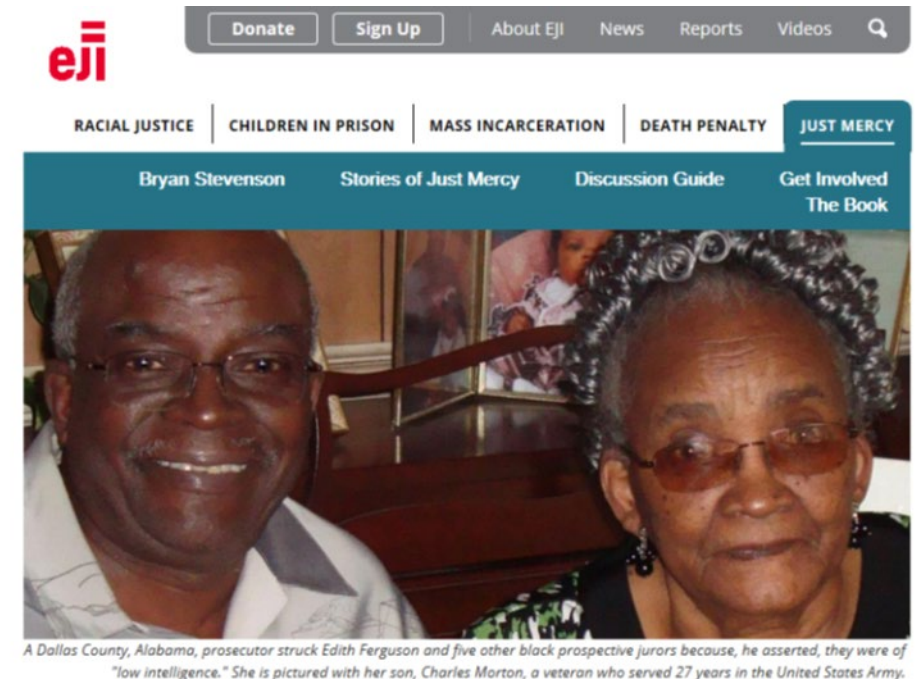
A party's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is sullen, or distant, a characterization that would not have come to his mind if a white juror had acted identically."

Batson, 476 U.S. at 106 (Marshall, J., concurring)



Why subsection (i), prohibiting post hoc demeanor-based justifications for exclusion?

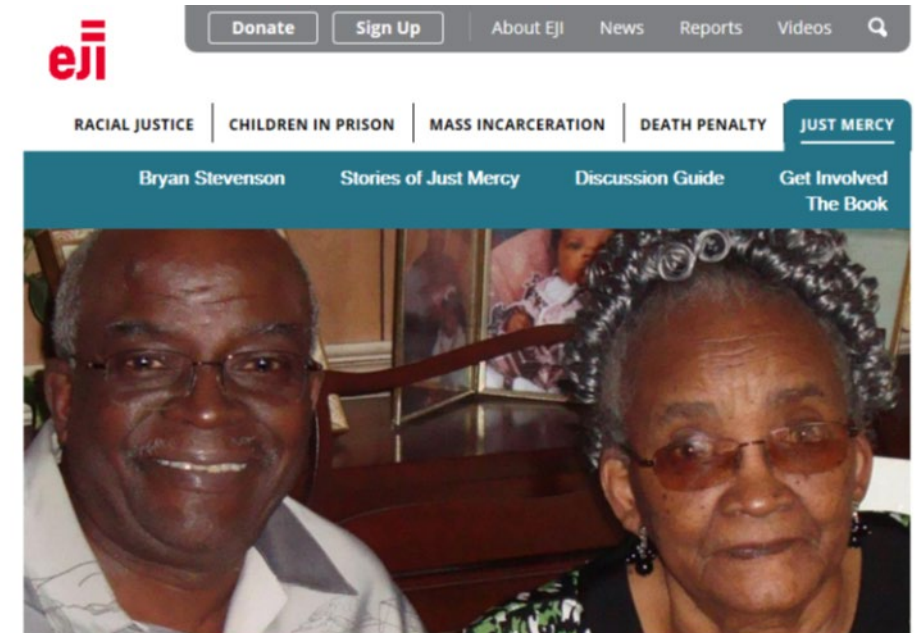
- Prosecutors “have countered *Batson* claims by describing African Americans in the jury pool as inattentive.”
- Described 43-year-old black juror as “somewhat aged”



Illegal Racial Discrimination in Jury Selection: A Continuing Legacy

Why subsection (i), prohibiting post hoc demeanor-based justifications for exclusion?

- “A startlingly common reason given by prosecutors for striking black prospective jurors is a juror’s alleged ‘low intelligence’”



A Dallas County, Alabama, prosecutor struck Edith Ferguson and five other black prospective jurors because, he asserted, they were of "low intelligence." She is pictured with her son, Charles Morton, a veteran who served 27 years in the United States Army.

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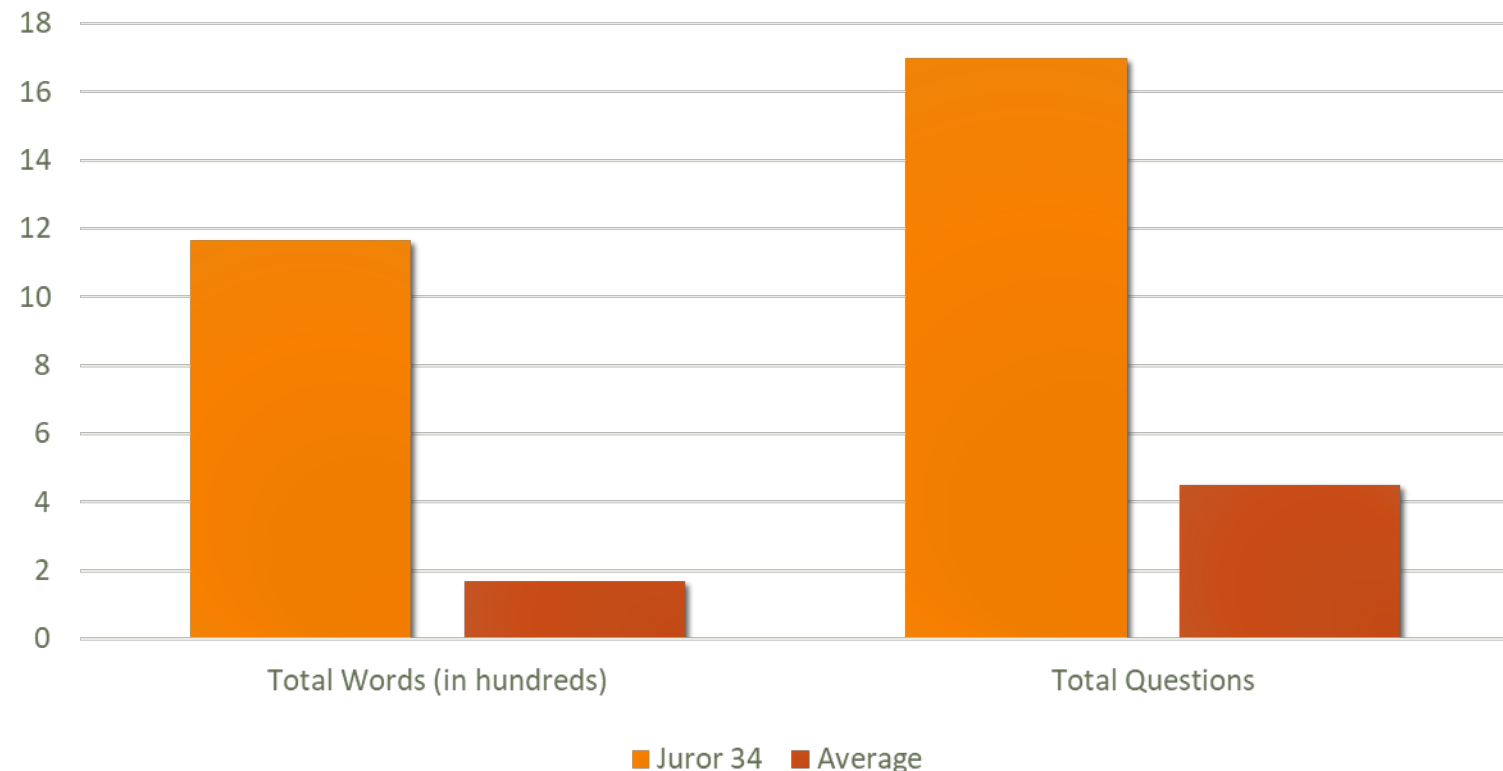
State v. Saintcalle prosecutor's justifications for exclusion:

- She's "too young." (Age: 39).
- "She's just not very intelligent. No offense."
- She's "checked out."

Why subsection (i), prohibiting post hoc demeanor-based justifications for exclusion?

Juror 34 is “checked out”

Juror 34 Compared to Average

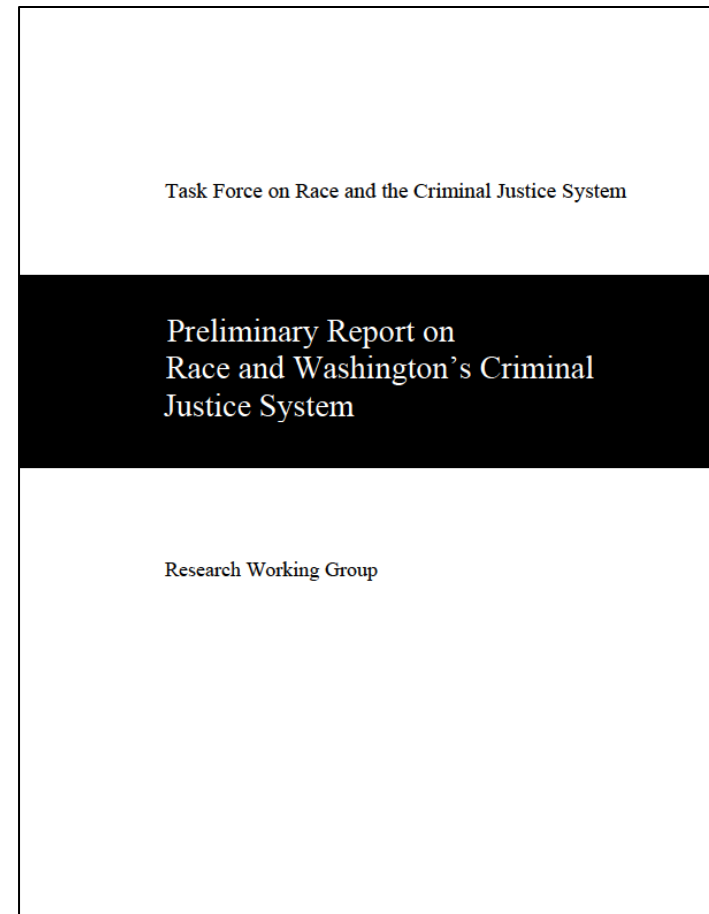


GR 37(i)

(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, 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.

Why subsection (h), rendering negative experiences with police a presumptively invalid justification for exclusion?

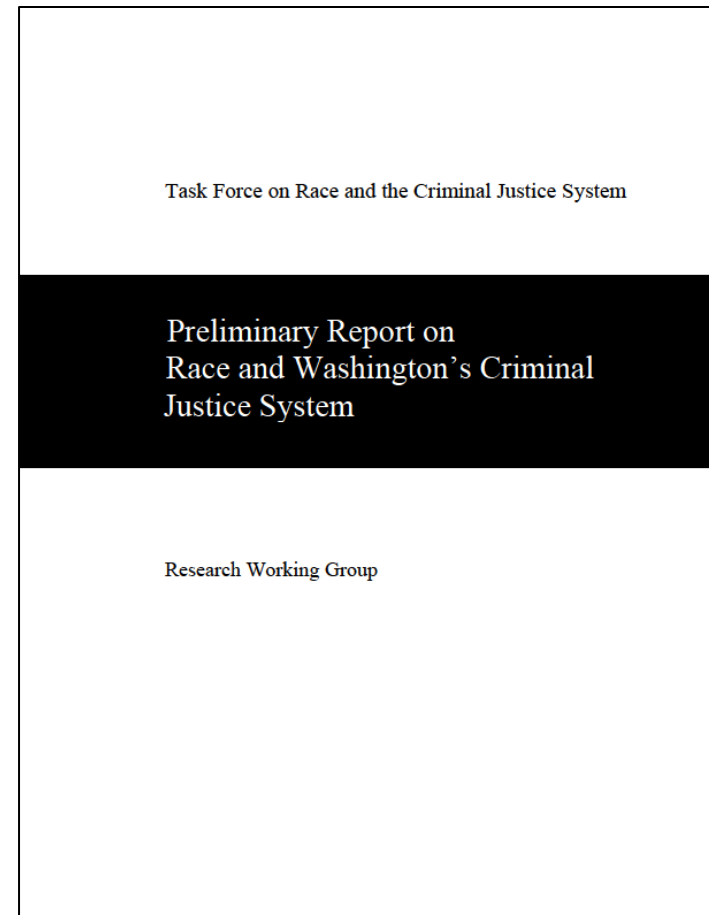
“Racial bias permeates Washington’s criminal justice system.”



Why subsection (h), rendering negative experiences with police a presumptively invalid justification for exclusion?

Yet, jurors are often excluded because of negative experiences with police or justice system.

(See Seattle v. Erickson)



Why subsection (h), rendering negative experiences with police a presumptively invalid justification for exclusion?

