MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, August 27, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin Bloom
Troy S. Bundy
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Margurite Weeks
Jeffrey S. Young

Members Absent:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Derek Larwick
Scott O'Donnell
Hon. Scott Shorr
Tina Stupasky
Stephen Voorhees

Guests:

Aja Holland, Oregon Judicial Department

Council Staff:

Shari C. Nilsson, Executive Assistant
Hon. Mark A. Peterson, Executive Director

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 35 (Vexatious Litigants) ORCP 57	ORCP 1 ORCP 4 ORCP 14 ORCP 15 ORCP 16 ORCP 17 ORCP 18 ORCP 21 ORCP 22 ORCP 23 ORCP 27 ORCP 32 ORCP 47 ORCP 52 ORCP 55 ORCP 57 ORCP 58 ORCP 60 ORCP 68 ORCP 69	ORCP 71 Abatement Affidaviting judges Arbitration/mediation Collaborative practice Expedited trial Family law rules Federalized rules Interpreters Lawyer Civility Lis pendens One set of rules Probate/trust litigation Quick hearings Self-represented litigants Standardized forms Statutory fees Trial judges UTCR	ORCP 7 ORCP 35 ORCP 39 ORCP 55 ORCP 57 ORCP 58 ORCP 69		ORCP 54/ORS 36.425

I. Call to Order

Mr. Crowley called the meeting to order at 9:33 a.m.

II. Administrative Matters

A. Setting September and December Meeting Dates

Ms. Nilsson reported that she had conducted polls regarding member availability on the second and third Saturdays of September and December. Three members had not yet responded to the polls. Fifteen members were committed to attending a meeting on September 17. Nineteen members were committed to attending a meeting on December 10. Judge Peterson reminded the Council that a quorum (twelve members) must be present at the publication meeting in September, with a simple majority needed to publish a rule, but that it is better to have as many Council members present as possible for the publication votes. A quorum plus a super majority vote (fifteen or more *votes*) is necessary, however, to promulgate a rule in December. The Council agreed to wait for the final responses to the poll before determining the final meeting dates. Ms. Nilsson stated that she would communicate the meeting date information by e-mail.

B. Article on Council in *The Verdict*

Judge Norby referred the Council to the copy of the article that she had written that appeared in the Oregon Association of Defense Counsel's (OADC) publication *The Verdict* (Appendix A). Ms. Holley stated that she would also be posting the article on the Oregon Trial Lawyers Association's listserv with attribution to the OADC's publication. Mr. Crowley and the Council thanked Judge Norby for her excellent contribution to making more people aware of the Council's work.

III. Old Business

A. Committee Reports

1. Rule 57 Committee

Ms. Holley referred to the committee's latest draft amendment of Rule 57 (Appendix B) and noted that the committee would like to make a last-minute change to the language in paragraph D(4)(c) that was not reflected in that draft. The language in the draft reads as follows:

> If there is an objection to the exercise of a peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not discriminatory. An objection to a peremptory challenge must be sustained if the court finds that it is more likely than not that a

protected status under ORS 659A.403 was a factor in invoking the peremptory challenge.

The committee's proposal was to change the paragraph to read:

> If there is an objection to the exercise of a peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not discriminatory. The objecting party may then provide argument and evidence that the given reason is discriminatory or a pretext for discrimination. An objection to a peremptory challenge must be sustained if the court finds that it is more likely than not that a protected status under ORS 659A.403 was a factor in invoking the peremptory challenge.

Ms. Holley explained that the language in the draft intimated that the person making the challenge had to prove ahead of time that their reason for making the challenge was not pretextual, instead of saying that they needed to articulate a non-discriminatory reason. The new language helps to clarify that intent.

Ms. Holley began to summarize the changes between the draft before the Council and the draft that was discussed at the June Council meeting. She explained that the definitions of bias that were included in section D of the previous draft had been removed. In paragraph D(4)(b), Ms. Holley changed the language that previously stated that an objection could be sustained if it was based on a protected status under Oregon or federal discrimination law to cite Oregon's public accommodation statute that lists Oregon's protected characteristics. She stated that this was a change she had made on her own, feeling that it would make things more clear based on conversations that the Council had, but that she was open to changing it back if the Council felt strongly about it. There is also language that states that an objection to a peremptory challenge must be sustained if the court finds it more likely than not that a protected status was a factor in invoking the peremptory challenge. Instead of separating out the types of bias and going into detail about them, the current draft simplifies it into a factor that still allows flexibility.

Ms. Holley stated that she, Judge Norm Hill, and Judge Oden-Orr had spent a lot of time working on adding factors to paragraph D(4)(d) that the court can consider in evaluating the totality of the circumstances. These include the nature of the questions, whether the non-discriminatory reason could arguably be a proxy for a protected status or could be disproportionately associated with a protected status, and whether the party had challenged the same juror for cause. The factors give some guidance but also leave it open. The important thing is to eliminate the presumption of non discrimination, which is the key problem with the existing rule.

Judge Norm Hill reiterated that the primary objection to the existing rule that started this discussion was, as Ms. Holley mentioned, the requirement under *Batson v. Kentucky*, 476 U.S. 79 (1986), that one start with the presumption of non discrimination. He stated that *Batson* also requires a "but for" connection between a discriminatory motive and the challenge. The workgroup had wrestled with how to encompass and address unconscious bias and do it in a way that allows for meaningful review. Judge Norm Hill explained that one of his concerns was that the language that came out of the workgroup appeared to establish a standard but, when he tried to imagine it in practice, it became apparent to him that there was no standard. His fear was that whichever judge heard the case and reviewed it would apply their own view. He stated that, when the committee reviewed the latest draft, he had tried to strip out everything that was not essential and just tried to get to the heart of what was trying to be accomplished.

Judge Norm Hill opined that the new language does three things that are critical. Number one, it says that any time someone objects to a peremptory challenge on the basis that it is discriminatory, the party exercising the peremptory is going to immediately be required to come up with a justification that addresses it. He stated that this is the best way to address the problem of unconscious bias. While there is no rule the Council can create that will account for overtly discriminatory, intentional, racist, cynical attempts to get people off of a jury, it can create a structure that forces people to confront their own biases and to actually ask questions as part of their decision-making process on the ground. Creating a structure where, if someone tries to strike a juror that is in a protected class, they have an expectation that they may have to address it, forces that person to have an internal dialogue and confront their own potential implicit biases. And it gives the court an opportunity to do something about it if those biases indeed exist. Judge Norm Hill stated that he feels that the amendment strikes the right balance in that regard. He opined that the second thing that the new language does is to get judges out of the posture of trying to decide whether or not the exercise of the challenge would be harmful to the community at large, because that takes the rule outside of the scope of the private litigation between the parties. The third thing that the new language does is to remove the "but for" concept and to allow the question to simply be whether discrimination was a factor, and give the court the ability to determine that and sustain the challenge. The new language is simpler and gets to the heart of what the folks that wrote the law review article were looking for, and it raises the profile of the issue that the Council is trying to address.

Ms. Holley thanked Judge Norm Hill for the excellent summary. She asked Mr. Hood if he had a chance to look over the final modifications that had been made to the draft based on their conversation the previous day. Mr. Hood stated that he had and that the changes were acceptable to him. Judge Jon Hill opined that changing the language in paragraph D(4)(d) from paragraph form to list form makes it easier to read. Mr. Goehler suggested that the language in subparagraph

D(4)(d)(iv) could be changed to read "other factors, information, or circumstances considered by the court" to make it read more clearly. Ms. Holley stated that the intent was just to say that the judge is not limited, and that she was not wedded to the current language in that subparagraph.

Judge Leith thanked the committee for its excellent work. He stated he has only two concerns. The first is that he is not a big fan of incorporating substantive discrimination liability statutes into the ORCP. He also expressed concern about whether all of those factors under paragraph D(4)(d) were necessary, and suggested going through them all and ensuring that the Council wanted to include each one. He stated that, if the Council does like all of them, they could be lifted out into a definition, and that definition could be used each time the protected statuses were referred to. He stated that he was not sure that it was bad to consider a prospective juror's age, which is a protected status under the statute. Sometimes a good lawyer will be looking either for a person with a lot or a little life experience, depending on the perspective they are looking for in the case. Marital status may also not be an invidious thing to consider when a party is posing a peremptory challenge. His preference would be to list the statuses that the Council wants to list, and not refer to the statute.

Ms. Holley stated that, arguably, the statute does apply, although perhaps not in the same way that is being discussed at the beginning of the rule, that a juror does not have a right to be on a particular jury. However, because the statute is a public accommodation statute, she believes that it applies to the court system, and she wondered whether it invites a problem to particularly carve out certain protections.

Judge Oden-Orr asked whether OJD's general counsel had weighed in on this issue at some point. Ms. Holland stated that some of the workgroup's previous drafts used the undue hardship standard, which is from part of the Americans with Disabilities Act (ADA), but the ADA does not apply to those systems, so the preference was to use another standard. Ms. Holley stated that the language in the previous draft was "Oregon or federal discrimination law," which is quite broad. She pointed out that disability is addressed in other areas. She also stated that ORS 659A.403 does not include disability protections around medical leave and workers compensation claims, which arguably could be within the catch-all of discrimination law; however, she believes that issue was resolved earlier in the rule.

Mr. Bundy stated that he does not like the idea that the other attorney does not have to voice some sort of reasonable basis to make the objection in the first place, especially since one or more of the statuses cited in the statute apply to literally every juror that is sitting on the panel: race, color, religion, sex, sexual orientation, national origin, and marital status. Ms. Holley pointed out that all of them apply to every juror. Mr. Bundy stated that, if the other side does not have

to form a reasonable basis for objecting to the opposing side's exercise of a peremptory challenge, there is really no barrier to someone trying to ascertain his thought process as to each and every juror on the panel. Judge Norby stated that the objector would have to identify on the basis of which protected status they are objecting. Mr. Bundy stated that he would like them to have to provide some reason, not just "I am challenging you because I think you are a racist or a misogynist," or whatever sort of broad, sweeping accusation that people seem to be making these days. He did not want someone to be able to say, "I object and I cite subsection D(4)."

Judge Norm Hill stated that he would like to help address Mr. Bundy's concern. He first agreed with Judge Leith that the language of the existing rule addresses race and sex, and all that the Council is trying to do is to make the rule more broad. He did not believe that anyone was disagreeing with that goal. Ms. Holley pointed out that this was the most consistent request from the participants in the workgroup. Judge Norm Hill stated that the only controversy seems to be how to express that broadening of categories. To Mr. Bundy's point, as a practical matter, the person making the objection to the peremptory challenge is not just going to be able to say "I object to the exercise of the peremptory challenge," and then just sit there. They will have to explain the ways in which they believe the peremptory challenge is discriminatory. What is different is, in the existing rule, the court could say that the attorney making the peremptory challenge did not even have to respond until a certain threshold was reached. The change in the draft amendment is to take away that threshold so that, if an objection is raised, the attorney who made the peremptory challenge will need to be ready to respond. The goal is to get people to start thinking about that ahead of time. Judge Norm Hill stated that Mr. Bundy's concern is taken care of in the rule, as that part of the rule has not changed. The difference is that the attorney making the peremptory challenge has to also be ready to make a response.

Ms. Holley wondered whether Mr. Bundy's concern arose from paragraph D(4)(b), which reads, "Any objection must be made by simple citation to this rule." She suggested language along the lines of, "Any objection must be made by simple citation to this rule and an articulated reason for the objection." Judge Oden-Orr suggested the language, "Any objection must be made by simple citation to the rule and by citing the objectionable basis." Ms. Holley asked if that would resolve the issue for Mr. Bundy. Mr. Bundy stated that it might. He noted that he has not done research to determine whether or not the public accommodation laws under ORS 659A.403 apply to a peremptory challenge issue. He stated that he has a problem with the breadth and the fact that anyone can essentially call a lawyer out for being discriminatory without an adequate basis. He stated that addressing those issues would help but, the way the draft is written, it eliminates the burden of establishing some sort of reasonable belief that opposing counsel would have to suggest that a lawyer is exercising a peremptory challenge for something other than a legitimate basis.

Judge Norm Hill stated that this is a policy change from the existing rule to the proposed rule, and that it is by design. Mr. Bundy stated that it might be the case that he just does not like the proposed rule, and that he may be an outlier. He noted that it may not be that much of a change if a reason must be articulated. Judge Norm Hill stated that the way the existing rule is worded was designed to create a space where the party objecting to a challenge must reach a threshold. He stated that the reason he likes the proposed change is that it accomplishes some of what article by Justice Paul DeMuniz and the other literature suggested. He noted that he got over his initial concerns, which were similar to those that Mr. Bundy is expressing because, in practicality, the burden shift is very small and the mechanics of it are not a big deal. He likes the suggested amendment because it puts all parties on notice to be thinking about peremptory challenges, and creates a mechanism for trial lawyers to have that quiet internal dialogue about unconscious bias before even making a peremptory challenge. The risk of having to articulate it at any time forces that thought process.

Judge Peterson stated that he was not sure that changing the language in paragraph D(4)(b) was necessary, although he did not object to it. He pointed out that, under the *Batson* process, one must show a pattern, so he did not believe that one could simply make an objection and cite the rule. He stated that the language in that paragraph simply refers to the need to make the argument outside of the presence of the jurors. He stated that there will definitely be a discussion, and *State v. McWoods*, 320 Or App 728 (2022) (Appendix C), makes it pretty clear that there will have to be consideration and a record so that the Court of Appeals and the Supreme Court can evaluate exactly what happened. He agreed that the amendment would be a huge burden shift and that both sides would be on a more level playing field than they have been in the past. If a party cannot defend their challenge, they may have a problem getting a judge to sustain it.

Mr. Crowley agreed with Judge Peterson that there is a significant burden shift, which changes the landscape. However, he also wondered whether ORS 659A.403 was the direction the Council wanted to take, because it is quite broad and could be applied to just about every juror on the panel. Judge Peterson stated that he and Ms. Holley had a discussion about citing to the statute. As to whether it is a good idea to cite to statutes in the ORCP, Judge Peterson stated that he is not generally in favor of citing to statutes, Uniform Trial Court Rules (UTCR), or other laws because, if they change, the ORCP must be updated. However, to quote, Justice Thurgood Marshall in *Batson*, these decisions are sort of "seat of the pants," so it seems like it might be helpful to have some sort of a standard that is understood in the rule so that people are not arguing that left-handed people ought to be a protected class because they found a case that kind of said that maybe they are.

Ms. Holley stated that her concern with not citing to the statute and pulling out

the categories individually is that, to her, it is more likely that there will be added protected classes to the statute that the Council will then have to consider individually whether to include every time there is an update to the statute. She stated that she feels that there is more of a danger of having the Council considering every biennium whether a new characteristic should be considered than whether there is a numbering problem in the rule. Judge Norm Hill stated that he had the exact opposite view. He felt that this is exactly what the Council should be doing. The mere fact that the Legislature has added a new category to the accommodation statute does not necessarily mean that it makes sense in the context of the ORCP. He stated that he is much more in favor using the statute as a template for the Council to arrive at a common understanding of which categories should be included, and then just list those categories.

Mr. Bundy stated that, in his opinion, it devalues the significance of the rule to include every single category. He opined that the purpose of subsection D(4) was always to protect race, ethnicity, and sex. Ms. Holley pointed out that this still includes every juror, because everyone has the characteristics of race, ethnicity, and sex. Mr. Bundy agreed, but stated that he believes that there are certain understandings about how those laws are applied. He stated that it would be difficult for him to claim that he was discriminated against because he is a white male. He believes that it devalues the significance of this special rule, which was designed for a particular purpose, to include every category. He also stated that one of the objectives of the Council has been to allow a layperson to read the rules and be able to understand them, and citing to a statute may not be as easily understandable and available the layperson.

Judge Leith agreed with Judge Norm Hill that it makes more sense to consciously pick and choose what is appropriate subject matter for a *Batson* challenge, rather than just adopting a statute that might change, resulting in the rule suddenly protecting things it was not protecting before without the Council having made that decision. He also opined that the factors in the statute may be overly broad. For example, if a lawyer were to argue that they were looking for jurors with a lot of life experience, he might be inclined to accept that as a non-invidious explanation for a peremptory challenge. He stated that he has not done the research on whether the public accommodation discrimination laws apply to jury service, but stated that it sounds like a an unnatural fit to him. He stated that, having now heard that it is actually a legal theory that could be presented and that someone might advocate for, it makes him feel even more strongly that the Council ought not to be implying in its rules that those statutes do apply. He stated that, if a bar member or the courts were to be sued for allegedly violating the public accommodation statutes in the way that they exercised or were allowed to exercise a peremptory challenge, the OJD would probably want to look into whether it wanted to argue that the statute does not apply, and it would be awkward in that circumstance to have the ORCP take a side on whether the statute is applicable.

Justice Garrett echoed Judge Leith's last point, and also agreed with Council members who stated that it would be better to list the factors rather than incorporate any statute by reference. With regard to Mr. Bundy's point about the burden shifting, his understanding is that the purpose is deliberately not to hold the person making the objection to a prima facie case standard. That is the language that is being removed from the existing rule. He agreed with that policy choice to not hold the objector to a certain burden of production. He wondered, however, if it would help Mr. Bundy to make it more clear that there is no preclusion of some initial explanation of what the objection is. He stated that he could not recall whether the language about objection being made by simple citation to the rule is a recent addition, but the phrase "simple citation" implies that the objector really is not expected to do anything other than say, "I object, your honor, based on this rule." He stated that he did not believe that it would frustrate the purpose of the rule change to elicit a little more information from the objector about why the objection is being made, and that goal is not assisted by the simple citation language.

Ms. Holley referred back to Judge Oden-Orr's suggested language and asked whether it would solve the problem. Justice Garrett suggested just referencing making an objection. He stated that he assumed that the trial judge would then try to elicit the problem. Ms. Holley stated that the reason for the simple citation to the rule is that the trial judge is then supposed to then take out the jury. The reason for the objection is not supposed to be articulated in front of the jury to avoid poisoning the jury. Justice Garrett stated that this makes sense; however, he reads that sentence to suggest discouraging the objector from having to say anything more, even after the jury is gone, about why the objection is being made. He stated that he did not feel that the citation to the rule was necessary. Ms. Holley suggested removing the language about simple citation to the rule and adding a sentence at the end of the paragraph that states something along the lines of, "outside of the presence of the jury, the objecting party must state the basis for the objection."

Mr. Bundy pointed out that the issue is complicated by the fact that so many judges have their own process for jury selection. He noted that, many times, he makes his peremptory challenges in chambers. Sometimes attorneys write their challenges on slips of paper and give them to the bailiff. Mr. Bundy suggested modifying the first sentence of paragraph D(4)(b) to read, "If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph D(4)(a) of this rule, that party may object to the exercise of the challenge, citing reasonable grounds, outside the presence of the jury." Mr. Goehler stated that he was not sure that he would agree with citing reasonable grounds. He stated that the trigger for the challenge ought to be identifying the protected status. In some cases it will be obvious if someone says they are objecting to this peremptory challenge based on the rule, but in some cases it may be less obvious. In the less obvious cases, he would think that, if the judge does

not know what the protected status is, the jury would be sent out and the judge would inquire further. Mr. Goehler reiterated that it is not a matter of a reasonable basis but, rather, it is identifying what the trigger is for the rule.

Ms. Holley suggested the phrase, "citing the basis for the objection." Mr. Goehler stated that he did not know that this language was needed. He suggested, "identifying the protected class, if necessary." Judge Norm Hill suggested "...that party may object to the exercise of the challenge. The basis for the objection must be made outside of the presence of the jury. The objecting party must articulate the protected status that forms the basis of the objection." After some wordsmithery, the Council agreed on, "If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph D(4)(a) of this rule, that party may object to the exercise of the challenge by citation to this rule. The basis for the objection must be stated outside of the presence of the jury and must identify the protected status that forms the basis of the objection. The court may also raise this objection on its own. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empaneled."

Mr. Bundy asked where the language about new information being discovered came from. Ms. Holley stated that it came from the Washington rule. Judge Norm Hill asked how this language would be practically applied. He posed the hypothetical situation of a juror having been excused after a peremptory challenge and, two hours later, someone discovering some new information and suddenly wanting to raise the issue again. He asked what, exactly, this language would do. Ms. Holley guessed that it would result in a mistrial. Judge Norm Hill agreed that this would be the likely outcome, and stated that it would perhaps be the desired outcome. He stated that, the more he thought about it, without that language, it may be too late if you discover something later that was a problem – the objection was not made beforehand, so now it has been waived.

Mr. Goehler asked again about the statutory list of statuses. He reiterated that he did not think it was a good idea to cite the statute, and suggested deliberately listing the protected statuses that the Council wants to have listed. His suggestion would be to include race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, and age. He pointed out that he does not think that age discrimination in jury selection is a good thing. While he may believe that an older jury panel may be perhaps more conservative and more favorable to his case, if he is striking a young juror, he ought to be able to have a reason for it that is not just their age. He stated that he believes that having a broader range of categories is good and makes lawyers think the way they ought to be thinking when exercising peremptory challenges.

Ms. Weeks asked, if the Council chooses to list out all of the protected statuses that are in the statute, and the statute is amended at a time when the Council is

not going to be amending the ORCP, whether that would potentially cause a problem. Ms. Holley agreed that the ORCP would not automatically change, but stated that some Council members seemed to favor the Council individually considering each potential new protected characteristic as it gets added to the statute. Ms. Weeks asked whether it does make sense to refer to the statute, since the Council is starting out with every characteristic being protected. She noted that it seems likely that the rule will continue to support every protected characteristic. Judge Norby wondered, along that same line, if the Council might be acting a bit too self important in wanting to have its own say about what is protected and what is not. She pointed out that the Council does not really have that say anyway, since the Council's work gets sent to the Legislature. By saying that the Council as a body is going to decide which pieces that the Legislature has enacted should apply to the rules may be overstepping the Council's bounds. Judge Norm Hill stated that he sees it as the opposite – that the Council's task is to take these questions as they relate to civil litigation (and, in this context, criminal litigation) and make sure that the rule makes sense for what goes on in courtrooms. Just because the Legislature changes a statute does not automatically mean that it was done in a context that makes sense for the courtroom. For that reason, Judge Norm Hill stated that he likes Mr. Goehler's list.

Mr. Crowley noted that people with disabilities were missing from the list of protected statuses. Ms. Holley stated that one of the reasons that she originally cited to the statute is that disability is handled by statute. She stated that she thought that there could be some reason to intentionally limit the rule to what is being protected under public accommodation laws, and handle disability under chapter 10 of the ORS. Mr. Crowley asked about the cases decided under *Batson* and how far they go. Ms. Holley stated that her understanding is that they only go as far as sex and race. She stated that disability can be handled in for-cause challenges, but it is also protected under chapter 10 of the ORS, so there might be a conflict.

Ms. Nilsson conducted a poll to see whether Council members preferred to cite the statute, use Mr. Goehler's list of statuses, or use Mr. Goehler's list without including marital status and age as Judge Leith proposed. Using the list without marital status and age prevailed with 8 out of fifteen votes. Judge Norm Hill made a motion to approve that language. Mr. Goehler seconded the motion, which passed unanimously by voice vote.

Ms. Holley reminded the Council that the last draft of the amendment had modified the language in subsection D(1) to state that an individual juror does not have a right to sit on any particular jury, that jurors have the right to be free from discrimination in jury services as provided by law, and that any juror may be excused for cause including a juror's inability to try the issue impartially. Judge Jon Hill stated that he thought that this language had been improved last time after discussion by the Council. Ms. Nilsson pointed out that the last draft had talked

about actual bias, but that language had been changed to the inability to try the issue impartially.

Ms. Holley directed the Council's attention to paragraph D(1)(g), which addresses the issue of excessive attempts by the court to rehabilitate jurors. She stated that the new language here is an attempt to remedy that problem, but pointed out that the definition of "actual bias" is also removed, along with the definition of "unconscious bias." She stated that she realized that defining actual bias was not really useful, and that "inability to try the issue impartially" was simpler than trying to parse bias into real and false. Another change is to remove the discretionary requirement that the court must be satisfied from all the circumstances, because it did not seem like a real standard. It is replaced by new language. Mr. Crowley stated that he did not believe that he has ever had a situation where both sides were in agreement that a juror should be removed for cause. Ms. Holley stated that she could envision it occurring in a situation she had been in where a judge had forced a juror over and over again to say that she thought that an attorney was a liar. In that case, both parties became uncomfortable with the juror.

Judge Norm Hill observed that the change being made in this paragraph deals with very small category of cases, and he was not sure that it truly gets at the issue that the Council is concerned with, which is the judge who is overly aggressive in attempts to rehabilitate a juror. He stated that his worry is that, by trying to make a change of this substance here, there is a risk of incurring more pushback on the rule change as a whole, including the important work on peremptory challenges. He suggested perhaps omitting this language, at least for this biennium. Ms. Holley stated that she was fine with that suggestion, but that she was trying to be responsive to the bar members who have raised the issue of excessive juror rehabilitation every time she has discussed amending Rule 57. She stated, however, that she did not want the juror rehabilitation issue to detract from the other issues. Judge Norm Hill stated that he would make a commitment, and asked the other trial judges on the Council to make a commitment, to asking OJD to work on judicial education to address that issue, because that is really where the problem lies. Mr. Bundy agreed that including this change could be distracting to the other important changes in the rule, and suggested that it might not be worth the battle that might result from leaving it in.

Judge Peterson stated that the Council has sometimes put two versions of a rule on the agenda for the publication meeting, giving Council members more time to think. He stated that it was even possible to publish two versions to determine whether pushback would be confined to one issue and to not risk losing the work of an entire biennium just because of one unpopular feature. Judge Jon Hill urged the Council to give judicial education a chance to address the problem of juror rehabilitation and, if that does not work, to take up the issue again at a later time. Mr. Crowley agreed and stated that including this secondary issue or publishing

two versions of the rule might unnecessarily complicate things. Judge Norm Hill suggested not making any changes to the existing language in paragraph D(1)(g). Judge Norby and Ms. Holley agreed.

Judge Jon Hill made a motion to approve the changes to section D(1) discussed by the Council, including not modifying the existing language in paragraph D(1)(g). Mr. Goehler seconded the motion, which was approved unanimously by voice vote.

Ms. Holland asked the status of the Council's recommendation to the Legislature for a change to ORS 10.030. Ms. Holley stated that the Council was no longer making such a recommendation but, rather, was supporting the OJD's proposed changes to ORS chapter 10.

Ms. Nilsson pointed out the few staff changes to punctuation and word choice throughout the draft. Mr. Crowley noted that the Council had only voted to approve changes to two sections of the draft and asked for a motion to approve the entire draft for the September publication agenda. Judge Jon Hill made a motion to approve the entire draft with the changes that the Council voted on. Judge Norby seconded the motion, which was approved unanimously by voice vote.

2. Vexatious Litigants Committee

Judge Norby reminded the Council that, at the June meeting, the significant issue of the need for the right to notice and an opportunity to be heard was raised, regardless of whether the vexatious litigant process is being initiated administratively outside of the presence of a case or whether it is brought up within the context of a case that has already been filed. She stated that she believes that the draft before the Council (Appendix D) solves that problem. The only exception to that would be if the vexatious litigant had already had notice and an opportunity to be heard because they had already been designated a vexatious litigant by another jurisdiction.

Judge Norby explained that a number of other changes had been made as well that are also outlined in a memo included with the draft. Many of these changes were made with collaboration with Ms. Holland and the OJD and were process driven. One such example is to make clear that there should not be a filing fee for an application for leave to file by a vexatious litigant. If leave is granted, there is a requirement for prompt filing of the case accompanied by a filing fee. There is also a clarification that there is no requirement for service under Rule 7, which the committee initially contemplated in order to ensure that relation back was covered. However, the committee feels confident now that service under Rule 7 is not necessary in order to accomplish relation back, since the language in the rule itself takes care of the problem. She noted that the committee was nervous that

including Rule 7 would create an expectation of 30 days to appear that would not fit into the streamlined application process, and might also cause confusion with parties who would want involvement in the administrative process after being served.

Judge Norby explained that another change was to require that applications for leave to file a new case by vexatious litigants need to be filed conventionally at ex parte. This was due to the challenge in trying to figure out how such an application could be filed electronically in the Odyssey system, and the conclusion was that, because there are already a few exceptions with matters that must be filed on paper in person, the easiest solution was to choose the same method. This would involve adding applications under this rule into the list of conventional filings allowed under UTCR 21.070(3), which she understands to be a simple matter. Judge Norby explained that section F of the rule was made to refer back to subsection B(1) of the rule to ensure that the business processes for both are the same. There were some other minor changes, such as that the presiding judge decision granting or denying leave to file does not have to be in the form of a decision letter as long as it is in writing and signed by the presiding judge so that it can be mandamused or appealed in whatever form someone thinks is appropriate.

Judge Leith asked whether the Council is adding this rule as a regular promulgation, or just as a suggestion to the Legislature. Judge Norby stated that it would be a regular promulgation. Judge Leith noted that his assumption would be that it would be a suggestion, since relation back seems to him like a substantive change to the statute of limitations. Ms. Holland stated that there are rules in the UTCR that say that, if a fee waiver is applied for and then granted, the statute of limitations date relates back to the date that the fee waiver was requested, even though the actual case was not filed on that date. She noted that the Supreme Court case, *Otnes v. PCC Structurals, Inc.*, 367 Or 787, 799-800 (2021), approved that relation back through the UTCR. She stated that there had been extensive discussion in the committee and that she thought that everyone had agreed that, based on that case and the fact that relation back has been done through a UCTR, that it is acceptable to do it in the ORCP. She stated that ORCP 23 also contains relation back for some other issues.

Judge Jon Hill reminded the Council that the committee had discussed at length the idea of submitting a recommendation to the Legislature. However, the committee had decided to try to draft a rule and, through that process, the committee found case law to support the rule. The factors in that case law are included in ORCP 35 as drafted by Judge Norby. He opined that it would be better to go forward with a rule. He stated that there had been legislation proposed in 2013, but this rule proposal is more detailed in his opinion.

Judge Norby stated that Judge Peterson had also found a Court of Appeals case

that addressed pretty concisely what is deemed to be substantive for the Council and what is not. Judge Peterson stated that the case is *Heritage Properties LLC v. Wells Fargo Bank*, 318 Or App 470 (2022). Judge Norby noted that the case supported that an administrative process like this would be something that the Council can pass and that it is not prohibited by an argument that there may be substance that was intended to be outside the Council's realm. Judge Peterson pointed out that the case is a bit different, in that it addresses the fact that some thought that the Council's dealing with extrinsic and intrinsic fraud in Rule 71 might be a bit of an overreach, and the Court of Appeals said that it was not. However, it seems to him that this is a little bit like a mini summary judgment. He stated that the Council is not taking away anyone's rights but, rather, giving them a better, faster process. If someone thinks that a litigant's case is without any merit whatsoever or is frivolous, that can be adjudicated rather quickly. If the vexatious litigant is not happy with the adjudication, they can have an appeal. If the vexatious litigant wins an adjudication, it does not impact the case – the case just goes forward. He opined that it does not seem like the Council is taking away anyone's rights, especially now that there is relation back language included, so much as giving people a streamlined process.

Ms. Holley asked for clarification about "conventional filing" of the application to file a case. She stated that a litigant having to go to the courthouse and appear in person could have a lot of impact. She opined that the draft rule is too broad. She expressed concern that filing a res judicata issue could cause someone to be deemed a vexatious litigant. She stated that she might be more supportive of the rule if it was a bit more concisely targeted at any litigant who engages in litigation tactics to harass people. She stated that the rule as drafted seems to specifically target plaintiffs, and its broadness could lead it to be easily weaponized if someone were so inclined. Judge Bloom expressed concerns with the rule as well, although he appreciated all of the work that the committee had done on it. He stated that it goes against fundamentally how he believes that courts should act, and also crosses into substantive changes. He opined that there are already tools to deal with situations like this, there are already ways to fast track cases such as anti-SLAPP statutes and res judicata. He expressed concern that the net is too broad here and that it will have a chilling effect.

Judge Jon Hill mentioned a Malheur County case, *Woodroffe v. State of Oregon*, 15CV1047, that basically stated that presiding judges already have the authority to declare a litigant vexatious. He stated that the committee used the criteria that the judge used in that case when drafting the rule. He explained that the intent was not only to formalize the existing authority, but to also put a little more structure to that inherent authority. Judge Jon Hill stated that he believed that Judge Peterson had already addressed the issue of whether the change was substantive. He asked Judge Bloom how he thought that the rule should be limited, or whether he thought that the idea inherently was substantive. Judge Bloom stated that the idea in its whole is substantive. He explained that he fully

understands that the court already has this power. He stated that his court has used it in family law cases where someone files a motion to modify every other week. However, he could only think of one case in 12 years in which it had been used. Judge Jon Hill pointed out that there are some places, like Clackamas County, where people are trying to re-litigate the same issue over and over again, or where groups of people keep bringing the same type of action against every governmental body they can, and where vexatious litigants are a bigger problem.

Mr. Crowley opined that the process envisioned under Rule 35 is probably not going to be used a lot. Obvious examples would be litigation used as harassment and unrepresented adults in state custody who file cases over and over again. He stated that the Department of Justice sees many of the latter cases, and they are expensive and time consuming to deal with. He pointed out that the federal courts have a well-defined process for dealing with repeat filers. However, there is not a uniform process across Oregon counties to deal with it in state courts.

Judge Norby stated that, if the rule is published, she suspects that the issues that Ms. Holley and Judge Bloom are articulating will be the type of comments that the Council will receive. She stated that there may be no way to really respond to those concerns, because it is a question of perspective. She stated that the concern may arise on the part of good plaintiffs' attorneys who file good cases and who have a hard time believing that there are people out there that are doing this kind of thing, or that judges would be very discriminating in their use of the proposed rule. She stated that she does not have that perspective, but that she could appreciate it. However, she is not sure how to respond to it. She stated that she did not think that those concerns would ever come to fruition if the rule were promulgated, but she could not say that it is an impossibility.

Ms. Holley stated that she understands that this is not the purpose of the rule but, conversely, there are vexatious defendants who want to bring every motion that is possible to bring. To her, the language in the draft limits the vexatious litigant designation to any re-litigation and seems to invites an additional opportunity for vexatious motions on the defense side, which is not covered as something prohibited by the rule. Judge Peterson stated that the rule was redrafted specifically not to be directed to plaintiffs. It is directed to litigants because it was understood early on that there are there are respondents and defendants who are also misbehaving. Judge Norby stated that the rule was redrafted to cover counterclaims or responsive pleadings that contain claims, but that Ms. Holley is talking about defendants who are being vexatious in ways that are not included in this rule. Ms. Holley stated that this is a fair summary of her position. She also stated that the language seems too broad for the intent of what the rule is meant to cover.

Judge Jon Hill stated that the goal is to assist a presiding judge in something that happens perhaps every couple of years, maybe yearly in larger counties. He asked

Ms. Holley if her concern is that someone could file a motion to designate someone to be a vexatious litigant to get back at the other side. Ms. Holley stated that she could see that happening. She also stated that she is currently representing a client who is still working for a public body and is experiencing harassment and discrimination. Ms. Holley sent a tort claims notice, as required while the client is still working. If the client gets fired, she will have to send a second tort claims notice about the same issue. She could envision that as potentially falling within the scope of this rule, but not being vexatious behavior. Judge Peterson stated that he could not imagine a judge buying that argument. He recalled that, when the Council made changes to Rule 27 because people were behaving badly by appointing guardians ad litem for nefarious purposes, the Council had to make the plaintiffs' side feel comfortable while giving a safety valve to give some protection from people who are abusing the process. Judge Peterson pointed out that the draft rule would confirm that the court has this authority and give a uniform process to deal with the very small number of people that create a lot of grief and take up a lot of the court's time and cost other parties a lot of money. Judge Peterson noted that most of the rules the Council creates are geared toward lawyers and their needs, but this rule is really geared toward judges and court staff to try to be able to manage things in a way that can be predictable and give relief to staff who are dealing with untenable situations.

Ms. Holley stated that she wanted to be respectful of that desire and of all of the work that had gone into drafting the rule. She stated that she does not disagree with that limited purpose, but feels that the language in the rule is broader than that. She asked about the federal process. Mr. Crowley stated that the federal process was outlined in the memo he had previously sent to the Council. Ms. Holley stated that she could not recall the exact process, but that her colleague who works in the federal court had stated that the process works well. Judge Norby stated that the federal situation is one in which the judges just do it, and people do not have notice of how or why they are going to do it or what rules apply. She noted that the Council tried to use the rules identified in case law in drafting Rule 35.

Mr. Hood suggested that Ms. Holley's concerns may be covered by Rule 17. Judge Peterson stated that he believes that they are. He opined that a vexatious litigant is a little bit like pornography – judges will know it when they see it. Judge Jon Hill reiterated that the criteria for judges to look at come from the *Woodroffe* case, and the draft rule is not a change from what the courts can already do now. Mr. Crowley stated that he believes that the draft rule would give a predictable framework for the different circuits to be able to handle the issues in the same way. Judge Norby stated that perhaps part of Ms. Holley's concern is that, by articulating the process in a rule, it is almost inviting people to avail themselves of the rule. She stated that she does not expect the draft rule to be universally embraced, but hopes that it will be sufficiently embraced that it will pass and courts will be able to start using it sometime soon. Judge Jon Hill stated that it

would be a real help to presiding judges to have a uniform framework across the state.

Judge Norby stated that she appreciated the collaboration with the OJD and their assistance with standardizing the process and establishing a way of recording it in the Odyssey system so that it is available for everyone to see. Ms. Holland stated that she viewed her role as facilitating the committee's vision for the rule and making sure that, if it is promulgated, it will work for OJD. She stated that Erin Pettigrew at the OJD could not attend today's meeting, but that Ms. Pettigrew had asked Ms. Holland to make it clear that OJD intentionally refrained from weighing in on any policy decisions, and is not taking a position on the policy at this point.

Ms. Holley stated that she had less problem with the language in subsection D(1) than she had with the definitions in section A, which she does not feel reflect her idea of a vexatious litigant as harassing, duplicative, and excessive. Judge Norby recalled the situation that caused her to be so invested in the creation of this draft rule in the first place. She stated that, in Clackamas County, there was a litigant who had filed about 16 cases against the same person over three years. Among other cases, there were two restraining orders in Clackamas County; one restraining order in another county claiming that the events had taken place there when they had, in fact, taken place in Clackamas County; two eviction cases; and one probate case. All of the cases involved the same foundational texts and the same basis, and all related to the same piece of property, with one party living on the upper floor and the other on the lower floor and the owner having passed away and left the property to someone else. There were allegations of elder abuse, attempts to evict, allegations of probate error, family law cases because the parties were distant relations, and basically anything the one party could think of to try to attack the other party. There were also multiple appeals on all of those cases. She stated that she feels that the rule must have some flexibility or it cannot encompass the creativity that people demonstrate when they are harassing each other in the courts. Ms. Holley stated that the important part is the word harassment, because Judge Norby's example is clearly harassment.

Ms. Dahab agreed with Ms. Holley. She stated that she is as concerned as Judge Norby about vexatious litigants, but the definitions in the draft rule are more broad than any sort of harassing litigation tactics that Judge Norby has described. She stated that it was not clear to her why it was so broad, and wondered why a rule could not be created that was a bit narrower. Judge Norby stated that the definitions came from an amalgamation of the definitions in other rules in other states and federal law. She asked whether someone was proposing a different definition, or if the rule was going to be allowed to rise and fall on the current definitions. Judge Jon Hill asked what the proposed change would be, because there are other reasons people bring frivolous suits besides harassment. Sometimes people will bring a suit and really believe that what they are doing is

correct, but they either may not understand or may not be capable of proceeding. He stated that this is why the definition needs to be a bit more broad. Ms. Holley asked whether it was possible to be more specific about the "other tactics" mentioned in paragraph A(1)(b). She stated that she would be open to another phrase, such as "excessively duplicative." Judge Norby suggested "For purposes of this rule, 'vexatious litigant' may include" instead of "includes" in subsection A(1).

Judge Norm Hill stated that there is a philosophical decision to be made – whether the Council publishes or does not publish this draft rule – because there has been a great deal of wordsmithery done already. He stated that he would suggest a poll to see where the Council is now, because there is no point in excessive discussion if the rule will not pass to the September publication agenda.

Justice Garrett noted that the concerns that have been expressed seem to relate to paragraph A(1)(a) and its subparagraphs, which focus on repeated filings or filing to re-litigate facts and claims. He stated that he has not heard much objection to the other parts of the definition that focus on frivolous filings. He wondered how important paragraph A(1)(a) is to the committee, and whether most of what is intended to be captured is captured with paragraphs A(1)(b) and A(1)(c). Mr. Bundy suggested that paragraph A(1)(a) could specifically refer to subsection D(1) by saying something like, "Subject to the factors enumerated in subsection D(1), for purposes of this rule, vexatious litigant includes situations..."

Ms. Nilsson suggested eliminating the language in paragraph A(1)(a) altogether, and moving up paragraph A(1)(b) with the language modified to read "A person who files frivolous or harassing cases, appeals, motions, pleadings or other documents." She stated, however, that this might not address Judge Jon Hill's concern about people who just do not know what they are doing. Justice Garrett stated that there could be a good faith disagreement about whether the first or second successive filing is really issue preclusion. However, if a person repeatedly files, would that not be captured by paragraph A(1)(b) because those filings have become frivolous after it has been established that these are res judicata? He again wondered how independently significant paragraph A(1)(a) is, or whether most of the people who are repeat filers would be swept up by paragraph A(1)(b). Judge Norby stated that paragraph A(1)(a) came from other states' definitions, and that she did not mind losing it, but that she was not sure that this change would convince Ms. Holley or Judge Bloom to support the rule. She stated that she is reluctant to make a change unless it gains support for the rule.

Mr. Hood thanked Judge Norby and the committee for all of their work on the rule. He stated that he appreciated her frustration with the current discussion. He stated that the information in section A is very important, and mentioned a divorce case he handled where the now ex husband on the other side is self represented and has continued to sue all of the lawyers who have represented him or his ex wife, as well as suing his wife in his daughter's name in a tort case

and at least one municipality and its police force. Mr. Hood stated that all of these cases have, essentially, the same facts at their core, but this litigant is very smart and modifies the complaints just enough that a judge would not say that res judicata applies and that the case must be at least decided on a motion for summary judgment. Judge Norby thanked Mr. Hood for his support. She stated that it is frustrating to know that these things are happening and the courts do not have an easy tool to deal with them. Mr. Hood again suggested that Rule 17 covers the motion issues, and that frivolous discovery is contained in paragraph A(1)(b) so that might address Ms. Holley's concerns about litigants filing cases and taking actions in the context of ongoing court processes.

Mr. Goehler made a motion to approve the draft of Rule 35 for inclusion on the September publication agenda. Judge Jon Hill seconded the motion. Ms. Holley stated for the record that she would probably be opposed to the rule, but that she did not necessarily mind if it went to publication. Judge Bloom stated that he is not comfortable with the rule philosophically. Ms. Dahab agreed. The motion passed by voice vote with three no votes.

IV. New Business

A. September Meeting Procedures

Judge Peterson reminded the Council that there are now seven rules on the agenda for the September publication meeting. He stated that his experience is that making on-the-fly modifications to the language in the rules during the September meeting is usually not a good idea, and the quality of the published rule may suffer as a consequence. He stated that Ms. Nilsson would send a copy of the rules on the agenda well in advance of the meeting, and asked every Council member to read them carefully and e-mail the entire Council with any concerns so that a discussion can take place prior to the publication meeting.

V. Adjournment

Mr. Crowley adjourned the meeting at 12:04 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

Ghostbusters Meets Guardians of the Galaxy: Giving Life to the Council on Court Procedures

Honorable Susie L. Norby
Clackamas County Circuit Court[1]

"If There's Something Strange… in Your Neighborhood…"

A long time ago, in a legal system far, far away, Oregon had a canon of laws so antiquated that it was aptly named "the Deady Code." This ghost of the past—compiled and annotated by Judge Matthew Deady 160 years ago—haunted civil procedure in Oregon from 1862 to 1977.

HONORABLE SUSIE L. NORBY

As early as the mid-1920s, Oregon's bench and bar resolved to exorcise that ghost and create a better civil procedure blueprint. But finding a ghostbuster squad to liquify the Deady Code was not easy. Legislators sidestepped the daunting rule renovation venture. A 1939 OSB Committee considered empowering the Supreme Court to enact new trial court rules, but bar members voted against it, wanting litigators and trial judges to influence rule reform. A 1962 proposal for a new state constitution again tried to shift rulemaking to the Supreme Court but failed.[2] The Deady Code remained undead.

"Who You Gonna McCall?"

Finally, in 1975, Governor McCall's visionary Commission on Judicial Reform, the Oregon State Bar, and the state's judiciary cooperatively deduced that an ideal ghostbuster squad must extend beyond the legislature and the Supreme Court to include trial judges and lawyers with broad perspectives. They jointly created the Council on Court Procedures with 23 volunteers: one Supreme Court Justice, one Court of Appeals Judge, eight trial court judges, six plaintiff litigation attorneys, six defense litigation attorneys, and one public member.[3] In 1977 these ghostbusters liquified the Deady Code with rule-reforming plasma guns and modernized Oregon's civil procedure. By 1979, the Council had created Rules 1-64 to guide civil procedure through trial completion. After publication, public comment and acceptance by the legislature, those rules were enacted, and buried the laws of yesteryear. By 1981, Rules 65 through 85 completed Oregon's new Code of Civil Procedure. The Deady *coda* came to life.

Interface—The Final Frontier

After the original ghostbuster Council vanquished the Deady Code and created a more evolved civil procedure process, it resolved that the new rules must not only live but thrive. So, the Ghostbuster Council members mutated into "Guardians of the Galaxy (of Civil Procedure Rules)." Their new mission: to continually study Oregon civil procedure laws, reexamine existing rules and seek out new ideas and viewpoints.

As egalitarian as the Council members are, even broader inclusion of trial lawyer ideas is key to its mission. Each biennium, the Council distributes surveys inviting Oregon attorneys to suggest ideas for rule improvement. Responses land on the desk of the Council's own Miss Moneypenny—an Executive Assistant with epic skills. Dozens of ideas are sent by lawyers, judges, and organizations that interact with civil courts. They are compiled into a chart for Council members to review and decide which to focus on in that biennium. Once choices are made, committees are formed, sleeves are rolled up, and debates and re-writing begin.

We Ain't Afraid of No Consensus!

Oregon's Council on Court Procedures is anomalously democratic compared to other courts' civil procedure rulemaking overlords. Most federal and state rulemaking power is held exclusively by the highest-ranking judges. Even states with rulemaking committees typically invite only judges to join. Oregon is different. By statute, there are more attorneys on the Council than judges. A quorum requires approval by plaintiff litigators, defense litigators, and judges.

Since today's civil procedure code is comparatively young, each new proposal for change is cautiously considered. The Council's Saturday morning monthly meetings last several hours, with some members zealously defending existing rule language while others champion the proposed change. Sometimes a single rule change debate spans many meetings, yet never reaches a point of consensus that advances it for publication to the bar and submission to the legislature. No Council member is immune to the consequences of rule changes, because Council members are not only volunteer Guardians of the Galaxy (of Civil Procedure Rules) but also inhabitants of the worlds affected by rule changes, who must live with Council decisions in their own professional lives.

Time-Space Continuum

Just as a superhero film takes years to produce, so does a rule change take two years to complete. The Council's own Steven Spielberg, Executive Director Mark Peterson, has harnessed enthusiasm and harmonized discord of ardent Council members for 17 years.

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The first step in the rule change process is action-packed. Its arc begins in August of odd-numbered years when committees are formed to configure and consider new projects. To approve a rule change proposal, a majority vote during a full Council meeting attended by a quorum of members must deem it worthy. Once a proposal is approved, which takes several months, Moneypenny converts it into final form for publication to all Oregon bar members to critique. The Council reviews every comment, then votes on whether to deliver final amendment proposals to the state legislature.

When the next long legislative session begins, neither the Senate nor the House vote on the Council's proposals. The law requires that they be published with the Oregon Revised Statutes the following January. The legislature retains the option to enact other rules, modify a change, or reject a recommendation, and remains the entity that rulemaking power would revert to if the Council is disbanded. But for 45 years, the legislature has welcomed nearly all Council creations. The Guardians of the (Civil Procedure Rules) Galaxy continue to find favor with lawmakers the Council was created to help.

Rulemaking Kryptonite

Though the Council's superpowers may seem limitless, there are two forms of kryptonite that unfailingly repel a rule amendment proposal. The first arises from ORS 1.735(1), which authorizes the Council to make rules "governing pleading, practice and procedure … in all courts of the state **which shall not abridge, enlarge, or modify the substantive rights of any litigant.**" When a rule change proposal may affect a litigant's substantive rights, the Council is powerless to approve it. Many biennial survey comments lament the Council's inaction on substantive issues, urging it to be bolder. Alas, only the legislature has the superpower to alter substantive law.

The second form of kryptonite arises from ORCP 1B, which requires: "These rules shall be construed **to secure the just, speedy, and inexpensive determination of every action.**" Other biennial survey comments question whether the Council purposely alters rules to make litigants' lives more difficult. It does not. On the contrary, whenever a proposal threatens the just, speedy, and inexpensive determination of any action, it is in jeopardy. The Council members retreat unless there is no other way to craft a necessary rule improvement.

Edge of Tomorrow

The Council on Court Procedures busted the ghosts of the past, guards civil procedure in the present, and shapes Oregon's court processes for the future, a mission of galactic proportions. There were only four Ghostbusters, and only five Guardians of the Galaxy. Even if Agent 007 and Superman vote, too, the Council would not reach a quorum. A dozen more volunteers comprise our 23-member Civil Justice League. Council member identities shift continuously; each is appointed for four years and must pass their cape to a new crusader after eight years. Leadership power is balanced by rotating plaintiffs' attorneys and defense attorneys as Chairperson in each new biennium.

Every Council on Court Procedures volunteer knows that Oregon's Rules of Civil Procedure are imperfect. It is a perpetual challenge to protect, revise, and harmonize rules while modernizing parts that no longer function well, and balancing interests of all who work for civil justice. Serving on the Council is a privilege and a unifying pursuit, akin to jury service. Unlikely collaborators unite—people from divergent legal standpoints and dissimilar communities. These protectors, critics, and visionaries clash and collaborate over the rules in a cacophony of voices, rising and falling for hours as members passionately debate whether rule changes would bring clarity or calamity. Then, at meeting's end, dissonance resolves into conviviality, as combatants retreat into friendships forged in the verbal fire.

Oregon civil procedure has come a long way since the exorcism of the Deady Code 45 years ago. Council on Court Procedure volunteers are not cinematic action heroes unifying to protect people from mythic threats. But they are steadfast allies bound by a shared mission to protect Oregon's procedural code from the threat of obsolescence. No one need buy a ticket to see the Council or pay money to read stories of the Council's adventures. Council meetings are open to the public and meeting minutes are posted on its website.[4] You don't need a superpower to be a potential future Council member either—just litigation experience, a collaborative nature, and a love of law. For Council on Court Procedure members, a sense of duty is mandatory, but capes and intergalactic ancestry are, surprisingly, optional.

Endnotes

1 NOTE ABOUT THE AUTHOR: Hon. Susie L. Norby has served as a trial judge in Clackamas County since 2006 and on the Council on Court Procedures since 2017. She spearheaded the Council's recent overhaul of ORCP 55, in response to a survey comment that simply read: "ORCP 55 is a mess. Can you do something about that?" Other biennial survey notes sometimes criticize the Council based on misconceptions about why the Council exists, how it works, and who is on it. This article is an explanatory response, unanimously approved by all Council members. The Council thanks OADC for its support of the Council and enthusiastic willingness to publish this to its members.

2 For a more in-depth account of the history leading up to the creation of the Council on Court Procedures, see Frederic R. Merrill, The Oregon Rules of Civil Procedure – History and Background, Basic Application, and The "Merger" of Law and Equity, 65 Or L Rev 527 (1986).

3 ORS 1.730

4 https://counciloncourtprocedures.org.

JURORS

RULE 57

A Challenging compliance with selection procedures.

A(1) Motion. Within 7 days after the moving party discovered, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) Stay of proceedings. [*Upon motion filed*] **A party may file a motion** under subsection [*(1) of this section*] **A(1) of this rule** containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the [*jury, the*] **jury. The** moving party is entitled to present in support of the motion[*:*] the testimony of the clerk or court administrator[*;*]**,** any relevant records and papers not public or otherwise available used by the clerk or court administrator[*;*]**,** and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court [*shall*] **must** stay the proceedings pending the selection of a jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial, the clerk [*shall*] **must** draw names at random from the names of jurors in attendance [*upon the court*] until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, [*shall*] **must** summon from the bystanders, or from the body of the county, so many qualified

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persons as may be necessary to complete the jury. Whenever the sheriff [*shall summon*] **summons** more than one person at a time from the bystanders, or from the body of the county, the sheriff [*shall*] **must** return a list of the persons so summoned to the clerk. The clerk [*shall*] **must** draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they [*shall*] **will** be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court [*shall*] **may** regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Challenges for cause; grounds. **An individual juror does not have a right to sit on any particular jury. Jurors have the right to be free from discrimination in jury service as provided by law. Any juror may be excused for cause, including for a juror's inability to try the issue impartially as provided herein.** Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualification prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical [*defect which*] **impairment that** satisfies the court that the challenged person is incapable of performing the [*duties*] **essential functions** of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D(1)(c) Consanguinity or affinity within the fourth degree to any party.

D(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, [*upon*] **on** substantially the same facts or transaction.

D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D(1)(g) [*Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially.*] **Inability to try the issue impartially. A juror may be unable to try the issue impartially because of perceptions about the action, a party to the action, the party's attorney, a victim, or a witness. If a juror has formed an opinion, but can set that opinion aside, that opinion alone does not create inability to try the issue. If the parties agree that a juror is unable to try the issue impartially, the court must excuse that juror without further inquiry. A judge may defer ruling on challenges for cause until the end of voir dire.**

D(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but [*upon*] **on** which the court [*shall*] **must** exclude [*such*] **the** juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury

consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) Conduct of peremptory challenges. After the full number of jurors has been passed for cause, peremptory challenges [*shall*] **must** be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges [*shall be*] **are** exhausted. After each challenge, the panel [*shall*] **must** be filled and the additional juror passed for cause before another peremptory challenge [*shall*] **may** be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in the order of alternation [*shall*] **will** not defeat the adverse party of [*such*] **the** adverse party's full number of challenges, [*and such*] **but the** refusal by a party to exercise a challenge in proper turn [*shall*] **will** conclude that party as to the jurors once accepted by that party and, if that party's right of peremptory challenge is not exhausted, that party's further challenges [*shall*] **will** be confined, in that party's proper turn, to [*such*] **any** additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror challenged may have been previously accepted, but nothing in this subsection [*shall*] **will** be construed to increase the number of peremptory challenges allowed.

D(4) [*Challenge of*] **Objection to** peremptory challenge exercised on the **basis of [*race, ethnicity, or sex.*] protected status.**

D(4)(a) A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] **a status protected by ORS 659A.403.** [*Courts shall presume that a peremptory*

challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.]

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph [*(a) of this subsection*] **D(4)(a) of this rule, that** party may object to the exercise of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Any objection must be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empaneled. Discussion of the objection must be made outside of the presence of the jurors.**

D(4)(c) [*If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.*] **If there is an objection to the exercise of a peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not discriminatory. An objection to a peremptory challenge must be sustained if the court finds that it is more likely than not that a protected status under ORS 659A.403 was a factor in invoking the peremptory challenge.**

D(4)(d) [*D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **In making the determination under paragraph D(4)(c) of this rule, the court must consider the totality**

of the circumstances. The totality of the circumstances may include:

D(4)(d)(i) whether the challenged prospective juror was questioned and the nature of those questions;

D(4)(d)(ii) the extent to which the nondiscriminatory reason given could arguably be considered a proxy for a protected status or might be disproportionately associated with a protected status;

D(4)(d)(iii) whether the party challenged the same juror for cause; and

D(4)(d)(iv) Any other factors considered by the court.

D(4)(e) The court must explain on the record the reasons for its determination under paragraph D(4)(c) of this rule.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation [*shall*] **must** be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors.

F(1) Definition. Alternate jurors are prospective replacement jurors empanelled at the court's discretion to serve in the event that the number of jurors required under Rule 56 is decreased by illness, incapacitation, or disqualification of one or more jurors selected.

F(2) Decision to allow alternate jurors. The court has discretion over whether alternate jurors [*may*] **will** be empanelled. If the court allows, not more than six alternate jurors may be empanelled.

F(3) Peremptory challenges; number. In addition to challenges otherwise allowed by these rules or **by** any other rule or statute, each party is entitled to[*:*] one peremptory challenge if one or two alternate jurors are to be empanelled[*;*]**,** two peremptory challenges if three or four alternate jurors are to be empanelled[*;*]**,** and three peremptory challenges if five or six alternate jurors are to be empanelled. The court [*shall*] **will** have discretion as to when

and how additional peremptory challenges may be used and when and how alternate jurors are selected.

F(4) Duties and responsibilities. Alternate jurors [*shall*] **will** be drawn in the same manner; [*shall*] **will** have the same qualifications; [*shall*] **will** be subject to the same examination and challenge rules; [*shall*] **will** take the same oath; and [*shall*] **will** have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror [*shall*] **may** not attend or otherwise participate in deliberations.

F(5) Installation and discharge. Alternate jurors [*shall*] **will** be installed to replace any jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury [*shall*] **must** be instructed to begin deliberations anew.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
DARIAN LEE McWOODS,
Defendant-Appellant.

Multnomah County Circuit Court
16CR78185; A169710

Christopher J. Marshall, Judge.

Argued and submitted December 2, 2021.

Marc D. Brown, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jonathan N. Schildt, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Mooney, Presiding Judge, and Pagán, Judge, and DeVore, Senior Judge.*

MOONEY, P. J.

Reversed and remanded.

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* Pagán, J., *vice* DeHoog, J. pro tempore.

MOONEY, P. J.

Defendant, a Black man, was charged with crimes related to the death of his 15-month-old daughter. Following a trial, the jury returned its verdict finding defendant guilty of murder by abuse, first-degree criminal mistreatment, and witness tampering. Defendant appeals from the resulting judgment of conviction. Relying on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and a series of cases beginning with *Batson v. Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986), defendant assigns error to the trial court's decision to excuse the only two black persons on the panel of prospective jurors, jurors number 6 and number 9, upon the state's use of two of its peremptory strikes against those jurors. Defendant also assigns error to the court's giving of a nonunanimous jury instruction and to the court's receipt of a nonunanimous verdict on the witness tampering count. We reject without discussion the state's argument that defendant did not adequately preserve his *Batson* challenges, and we conclude that the trial court committed reversible error when it excused juror number 6 and juror number 9, upon the state's peremptory strikes. Our conclusion on that assignment of error obviates the need for us to address the remaining two assignments.

We begin with the axiom, no longer subject to reasonable debate, that racial discrimination in the selection of jurors is harmful. Racial discrimination harms litigants because it carries with it the risk that "prejudice *** will infect the entire proceeding[.]" *J. E. B. v. Alabama*, 511 US 127, 140, 114 S Ct 1419, 128 L Ed 2d 89 (1994). Racial discrimination harms the individuals who are excluded from serving as jurors because it prevents them from participating in our justice system. *Id.* And racial discrimination harms the community "by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence" in the justice system that follows. *Id.*

American jurisprudence has developed slowly to combat racial discrimination in criminal proceedings, including jury (grand and petit) selection processes, and is based in large part on the constitutional right to an

"impartial jury"[1] and the requirement that every defendant be afforded "equal protection of the laws."[2] Under the Sixth Amendment, a person who has been charged with a serious offense has a fundamental right to trial by a jury that is drawn from "a fair cross-section of the community." *State v. Compton*, 333 Or 274, 288, 39 P3d 833 (2002). Defendant does not raise a "fair cross-section" challenge to the jury pool itself. He does, however, argue that he is entitled to a jury of his "peers." The federal constitution does not use the word "peers." The Oregon constitution likewise does not use the word "peers." Instead, both documents use the word "impartial" to describe the type of jury to which a criminal defendant is entitled. We do not understand defendant to argue that he was entitled to have his race represented on the trial jury. We understand his argument to instead focus on the state's use of peremptory strikes to exclude the only two black persons from the jury panel after having already concluded that they were qualified to serve on the jury in this case and having, thus, passed those jurors for cause. Those challenges are examined using the framework established by *Batson*, as developed through subsequent caselaw.

As we have explained, "[t]o bring a *Batson* challenge," defendant must first "make a *prima facie* showing that a peremptory strike was based on race or gender." *State v. Curry*, 298 Or App 377, 381, 447 P3d 7 (2019), *adh'd to on recons*, 302 Or App 640, 461 P3d 1106 (2020). "'Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging *** jurors within an arguably targeted class.'"

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[1] The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"

Article I, section 11, of the Oregon Constitution similarly provides:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed[.]"

[2] The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall *** deny to any person within its jurisdiction the equal protection of the laws."

Id. at 382 (quoting *Batson*, 476 US at 97). If the state offers such an explanation, "then the trial court must, after consulting 'all of the circumstances that bear on racial animosity,' determine whether the defendant has shown purposeful racial discrimination by the state." *Id.* (quoting *Snyder v. Louisiana*, 552 US 472, 478, 128 S Ct 1203, 170 L Ed 2nd 175 (2008). We are to assess *the plausibility* of the state's race-neutral explanation as we consider all the circumstances present and discern whether the defendant has shown purposeful discrimination. *Miller-El v. Dretke*, 545 US 231, 252, 125 S Ct 2317, 162 L Ed 2d 196 (2005) ("[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

The state does not dispute that defendant made a *prima facie* showing that the peremptory challenges in question were race-based. And defendant does not dispute that the reasons given by the state for using those peremptory challenges are race-neutral. We are likewise satisfied that those first two showings under *Batson* were made. We, thus, turn our attention to the key issue, the third *Batson* step: whether the state's use of two of its peremptory strikes to remove the only two black persons on the panel of prospective jurors was the product of purposeful racial discrimination. We review the trial court's ruling that a peremptory challenge was not the product of purposeful discrimination as a question of fact. *Curry*, 298 Or App at 389. A court reviewing a *Batson* challenge is to consider "all relevant circumstances," *id.* at 382, which may include a comparative juror analysis where the record allows for it, *State v. Vandyke*, 318 Or App 235, 238, 507 P3d 339 (2022).[3] We remain mindful

[3] The comparative juror analysis is a tool to identify pretext through circumstantial evidence of differential treatment. When a Black juror gives the same answers as a non-black juror but is struck for those answers, then it gives rise to the inference of pretext because similarly situated persons have been treated differently. But it is important to remember that the analysis is just a tool and, even more importantly, that it does not stand for the proposition that striking a Black juror who answers questions differently from non-black jurors necessarily is a race-neutral strike. Indeed, striking a Black juror for answers that differ from those of non-black jurors could, itself, be evidence that the strike is based on

that, at *Batson*'s third step, defendant bears the burden of persuasion. We are to affirm the trial court's ruling unless it is "clearly erroneous." *Snyder*, 552 US at 477.

We look to the record to determine whether the trial court's rejection of defendant's *Batson* challenges was clearly in error. *Vandyke*, 318 Or App at 238. We begin by noting that the usual process of jury selection pursuant to ORS 136.210 through 136.270 was followed. The prospective jurors completed written questionnaires containing 174 questions, and they participated in the oral process of *voir dire* that spanned a period of four to five hours in the courtroom. A number of prospective jurors were excused by the court, for cause—that is to say, for reasons ranging from inadequate qualifications to conflicts to bias. The state did not challenge juror number 6 or juror number 9 for cause and, in fact, affirmatively passed each for cause. Both jurors were, thus, seated in the jury box when the state's prosecutor used two of her available peremptory challenges to strike them from the jury as provided in ORS 136.230 and ORCP 57 D.

When the state exercised one of its available peremptory strikes on juror number 6, this dialogue took place:

> "[PROSECUTOR]: So Number 6, ***.
>
> "THE COURT: Okay.
>
> "[DEFENSE COUNSEL]: We would make a Batson objection to that, Your Honor.
>
> "THE COURT: Okay. Is there any further argument on that?
>
> "*****
>
> "[DEFENSE COUNSEL]: Just that he's entitled to a jury of his peers. We only have a total of two black individuals, potentially, on this jury, and we believe that it would be a Batson violation to eliminate him.
>
> "THE COURT: And for the State?

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race. Here, defendant does not argue that any of the reasons given by the state were not race-neutral.

"[PROSECUTOR]: Judge, so there are numerous concerns that the State has regarding this individual's ability to be fair and impartial in this case. Referencing just his questionnaire, he indicated on the very last page that, 'Being a father with two daughters myself, I can't imagine what he's going through,' in reference to [defendant]. He didn't believe police officers to be honest. In fact, he agreed, rated it a two, that police officers often lie. He indicated agreement with the notion that he will be uncomfortable deciding guilt or innocence—or guilt or not guilt [sic]. He agreed that doctors often get it wrong. He indicated that he would be more likely to require evidence of motive, for needing to know all the facts or circumstances surrounding a murder before being able to make a determination. And he indicated agreement that DNA evidence is not reliable.

"Here in court, he indicated that he would need more information or more evidence given that this is a murder case rather than if this were some sort of other trial, which of course, the Court knows, is not the—does not comport with the burden of proof. There's no higher burden of proof in a murder case than in a theft case, for example. And, frankly, he—he showed up to jury service wearing a shirt that says I have issues. I don't know what that means, but that, in and of itself, is also concerning to the State.

"So, for all of those reasons, we believe that he would be bias[ed] to the State, and a Batson challenge—no showing has been made to support a Batson challenge.

"[DEFENSE COUNSEL]: I think that it mischaracterizes both what's in the questionnaire and what he testified—or what he said here. He indicated that he was beaten as a child. That's no longer socially acceptable. He indicated that he would have to know all of the facts, but that he would follow the standard of proof that was provided. He also indicated that it would be very difficult to presume my client innocent given that he's a father. So he indicated, very clearly, issues for both sides. And again, given all of the answers that he did give, I don't think that you can judge somebody.

"He wasn't brought back down for additional questioning by the Prosecution about these concerns. And they didn't make a for-cause challenge for him. My client is entitled to a jury of his peers, and we believe it is clearly—comes under Batson.

> "THE COURT: Okay. All right. So, based on the entire record that we have here, the Court is going to allow the State's challenge. There's no Batson violation, then."

The trial court made no findings beyond those quoted above when it overruled defendant's *Batson* objection, accepted the state's peremptory challenge to juror number 6, and excused that juror from further service. But that lack of findings does not render review impossible. If it is clear from the "entire record" that the trial court's rejection of defendant's *Batson* objections was in error, then it is our obligation to say so and to correct that error.

Defendant argues that the prosecutor misinterpreted the record when it described for the trial court the answers given by juror number 6 and that, in doing so, she misrepresented the record to the court, a factor that we should consider, citing *Flowers v. Mississippi*, ___ US ___, 139 S Ct 2228, 2243, 204 L Ed 2d 638 (2019). The state agrees that under *Flowers*, a "series of factually inaccurate explanations for striking black prospective jurors" can supply evidence of "discriminatory intent," *Flowers*, 139 S Ct at 2250, but it does not agree that such a series of inaccuracies exists here. We agree with defendant that there were, in fact, discrepancies between the state's characterization of juror number 6's answers to certain questions and the answers actually given by that juror. For example, the state advised the court that in the questionnaire, "[juror number 6] didn't believe police officers to be honest. In fact, he agreed, rated it a two, that police officers often lie." In fact, juror number 6 rated police officers at a "4" for honesty on a scale of "1" (dishonest) to "5" (honest). He also rated his belief that police officers are more likely to testify truthfully than other witnesses with a "2," on a scale of "1" (strongly agree) to "4" (strongly disagree). There are other discrepancies between the answers given by juror number 6 and how the state characterized those answers for the court, none of which, separately, or together, clearly establish purposeful racial discrimination. And yet, those discrepancies are circumstances relevant to the overall *Batson* analysis.

Defendant also argues that other jurors "provided the same or, in the prosecutor's perspective, worse answers

to the questions relied on by the prosecutor," to strike juror number 6 and that that is evidence of purposeful discrimination. The state responds that "to the extent the record is even adequate for a comparative-juror analysis, defendant fails to identify any comparison that reveals purposeful discrimination." Defendant did not ask the trial court to engage in a comparative-juror analysis, but where, as here, the record allows us to do so, we will undertake such an analysis. *Vandyke*, 318 Or App at 238; *Curry*, 298 Or App at 382. In doing so, we begin by focusing on the questions and the two "main areas of concern" that the state identified about juror number 6. *See* Appendix A, Juror Comparison Table for Juror Number 6.

First, the state points to the prosecutor's concern that juror number 6 might expect the state to prove motive in order to convict the defendant of murder. Juror number 6 "strongly agreed" that the state must prove motive to convict someone of murder. He also "strongly disagreed" that, if convinced by the evidence that someone is guilty of murder, he could find them guilty even if he does not know all the facts that led to the murder, and he "strongly disagreed" that "murder is murder, and understanding motives and circumstances are not necessary in determining guilt." A review of the questionnaires completed by the non-black jurors who were not stricken from the jury reveals that three also strongly agreed that the state must prove motive to convict someone of murder. Four non-black jurors strongly disagreed that, if convinced by the evidence that someone is guilty of murder, they could find him guilty even if they do not know all of the facts that led to the murder. Six non-black jurors "strongly disagreed" that "murder is murder, and understanding motives and circumstances are not necessary in determining guilt." While none of the non-black jurors answered each of those three questions exactly the same as juror number 6, two of them answered two of the three questions just as juror number 6 did. Juror number 6 and thirteen other non-black jurors who were not excluded "strongly agreed" that a defendant is innocent unless the state proves otherwise; one non-black juror "agreed" with that statement; and one non-black juror "disagreed."

Next, the state was concerned that juror number 6 did not regard police officers to be honest. As noted earlier, there were some discrepancies between the juror's responses to questions bearing on his view of police officers and the way in which those answers were characterized for the trial court. Juror number 6 agreed that police officers are honest, and six non-black jurors who were not excused from the jury also rated their view of police officer honesty at a "4"—meaning that they agreed that police officers are honest. Juror number 6 and seven non-black jurors who were not excused from the jury agreed that police officers are more likely to testify truthfully than other witnesses. More important to our *Batson* analysis, two of those seven non-black jurors who remained on the jury agreed, along with juror number 6, that police officers often lie.

Finally, the state expressed concern about juror number 6's "skepticism regarding scientific evidence." In particular, the state noted that juror number 6 agreed that "DNA evidence is not reliable," and he agreed that "doctors often get it wrong." It is accurate that no non-black juror agreed that DNA evidence is unreliable, but this was not a case that involved DNA as evidence of identity or any other key issue. And one non-black juror also agreed that doctors often get it wrong. Defendant points out that juror number 6 and six other jurors who were not removed from the jury strongly agreed with the statements that doctors are honest, and that forensic evidence is more persuasive than eyewitness testimony. Three jurors who rated DNA evidence as reliable also disagreed with the statement that forensic evidence is more persuasive than eyewitness testimony. Three others strongly disagreed with that statement. Thus, juror number 6 gave answers that reflect both skepticism and trust regarding scientific evidence as did some non-black jurors who were not stricken by the state through use of its peremptories.

The answers relied on by the state as race-neutral reasons for using one of its peremptory strikes against juror number 6 reflect that the juror's personal views on police officers and doctors, and his views on the type of evidence and level of proof needed for a conviction in a murder case

are similar to the answers given by non-black jurors who were not stricken from the jury. It is certainly challenging to understand why the state would strike juror number 6 but not, for example, juror number 32, who strongly agreed that the state must prove motive in a murder case, and who strongly disagreed that he would be able to find someone guilty of murder without knowing the facts that led up to the murder—even with convincing evidence of murder. It is likewise difficult to understand why juror number 6 was stricken but juror number 31 was not stricken even though juror number 31 agreed that the state had to prove motive, disagreed that he could find someone guilty of murder despite convincing evidence if he did not know all the facts leading up to the murder, disagreed that forensic evidence is more persuasive than eyewitness testimony, and agreed that doctors often "get it wrong."

To summarize, when consulting the record before it at the point when the *Batson* challenge to juror number 6 was made, the following basic information had been brought to the attention of, and was available to, the trial court:

- Defendant is black;
- Juror number 6 is black;
- There are two jury panel members who are black;
- The state passed juror number 6 for cause;
- Of the ten questions and answers highlighted by the state as providing race-neutral reasons to remove juror number 6 from the jury, there were other jurors who were not black and who were not stricken from the jury who had answered eight of those questions the same way as juror number 6;
- Juror number 6 was the only juror to agree with the statement that DNA evidence is unreliable;
- Juror number 6 answered questions relating generally to forensic and medical evidence the same as some non-black jurors who were not stricken from the jury;

- The exhibit list included photos, medical records, an autopsy report, and forensic lab reports; DNA evidence is not mentioned;
- Juror number 6 "strongly agreed" that every defendant is innocent unless the state proves otherwise, while one non-black juror disagreed with that statement and one non-black juror strongly disagreed with it;
- Juror number 6 was the only juror to answer "very difficult" to the question about how difficult it would be to presume a person is innocent who is charged with killing his daughter;
- The state mischaracterized some of the answers given by juror number 6 in its argument to the trial court;
- Juror number 6 acknowledged during *voir dire* that it was "possible" he might "self-impose" a higher standard in a case like this; and
- Juror number 6 wore a shirt with the words "I have issues" written on it.

On answers for which the state criticized juror number 6, other jurors gave similar answers. And as to the two questions on which juror number 6 gave unique answers—(1) DNA evidence was not material and other answers that reflected views more generally about scientific evidence were similar to answers given by non-black jurors, and (2) this juror's difficulty in presuming the innocence of a father accused of killing his daughter would seem to favor the state. To be sure, the state could have objected that a juror biased toward conviction is still improperly biased, but that was not a reason the state offered to explain its challenge to the juror, so we do not consider it. Given that the state characterized some of the answers of juror number 6 inaccurately and given that the state criticizes answers given by juror number 6 that are the very same answers given by some other non-black jurors, we are not persuaded that the record is sufficient to support the plausibility of the state's justification for its challenge to juror number 6. And

in this instance, "all the circumstances" as to juror number 6 includes the state's challenge to juror number 9. Ultimately, the "plausibility" of the state's justifications as to both jurors determines the issue of purposeful discrimination.

We move to the state's use of an available peremptory challenge to strike juror number 9 from the jury. *See* Appendix B, Juror Comparison Table for Juror Number 9.

This is the dialogue that took place with respect to defendant's *Batson* challenge:

> "[PROSECUTOR]: Thank you, Judge. The State would move to excuse Number 9, ***.
>
> "THE COURT: Okay. And then for the Defense?
>
> "[DEFENSE COUNSEL]: Again, we're making a Batson challenge. [Juror number 9] is the only other black person on this jury, Your Honor.
>
> "[PROSECUTOR]: So, Judge, I think there has to be more of a showing from the Defense. But regardless, [juror number 9], in his jury questionnaire indicated he had no experience with children. He leaned towards strongly agreeing that he believes that in our criminal justice system that innocent people are routinely being found guilty. He indicated yesterday that he would have concerns about police investigation if there were the notion that they just simply didn't do their job, or they were too busy to do their job. He indicated he would, on the questionnaire, need to know about particular facts or circumstances leading up to a murder in order to find someone guilty. Or if he otherwise believes them to be guilty, he would still want to know the facts or circumstances leading up to that.
>
> "And then yesterday, he indicated that he was more likely to excuse behavior if the child was injured due to reckless conduct as opposed to intentional. There was quite a long discussion about that issue. And he was one of the few that actually volunteered and commented on a distinction in his mind between looking more—less concerned about conduct that's—that occurred recklessly versus intentionally to injuring this child.
>
> "The Court's aware that the State—the State believes a juror could be bias[ed] one way or another. The State's not obligated to make a for-cause challenge. I don't think

> anything he said would rise to the level of a for-cause challenge, which is why we did not make that motion for [juror number 9] or for [juror number 6]. But, nonetheless, given those reasons, the State has concerns about his ability to be fair and impartial on this particular case, given the information the Court knows about the nature of this case.
>
> "[DEFENSE COUNSEL]: I think that the selection by the State to eliminate the only two black potential jurors in the jury pool is clearly a Batson issue for this Court. It does violate my client's constitutional right to have a jury of his peers. There was nothing in his answers to indicate that he would not follow the law or that he had a particular bias one way or the other.
>
> "With regards to his specific answers on the questionnaire, he works for the U.S. Postal Service, has trust for both the police and for the justice system. He did indicate that sometimes innocent people can be found guilty, but it is not okay to use corporal punishment. He indicated, very clearly, that he would understand the reasonable doubt that has to be shown by the Court—or by the Prosecution. And it would eliminate the only other black juror.
>
> "THE COURT: Okay. So based on the entire record that we have here, again, the State has articulated reasons for their challenges to the particular juror that indicate there is not a Batson violation here. And so we'll allow the State's challenge here."

Of the non-black jurors who had been passed for cause, five answered that they had no experience with children. One other juror indicated that they agreed that innocent people are frequently found guilty in our justice system, and one wrote that "[i]t does happen, but I don't know how frequently." Juror number 9 and three non-black jurors "disagreed" that if they are convinced by the evidence that someone is guilty of murder, they could find that person guilty if they did not know all of the facts that led to the murder; and four non-black jurors "strongly disagreed" with that statement. With respect to concerns about statements made by juror number 9 during the *voir dire* process in the courtroom, we cannot conclude based on the record that juror number 9 responded as the prosecutor argued he did. The record does reflect discussion among counsel and various jurors about differences between accidents and

intentional acts and about whether police sometimes get too busy to conduct adequate investigations.

To summarize, when consulting the record before it at the point when the *Batson* challenge to juror number 9 was made, the following basic information had been brought to the attention of, and was available to, the trial court:

- Defendant is black;
- Juror number 9 is black;
- Juror number 6, who is black, had been excused on the state's peremptory strike, leaving juror number 9 as the only black panel member left;
- The state passed juror number 9 for cause; and
- At least one non-black juror answered each of the questions highlighted by the state the same way as juror number 9 did.

Like juror number 6, some non-black jurors gave answers that were the same or similar to answers given by juror number 9. And, as the state correctly notes, no "single answer can[] be viewed in isolation." The answers to some questions provide context for the answers to other questions; sometimes answers appear to be consistent with other answers and yet some seem to be in direct conflict with others. But that was predictable just given the sheer volume of questions included in the questionnaire. Considering, as we must, the race-neutral reasons given by the state in support of its use of a peremptory strike against juror number 9, there were two important factors present at that point in the jury selection process that had not been present when the state explained its use of a peremptory strike against juror number 6: (1) no answer given by juror number 9 was his alone—in other words, no one answer caused him to stand out from the other jurors, and (2) the state had already stricken the only other black juror from the panel. And while one might debate whether it takes two, three, or more of anything to create a pattern, the use of a peremptory challenge to strike the second and only remaining black juror from the jury completes the pattern here.

Peremptory strikes are a tool entrusted to trial lawyers by statute; they are not a matter of constitutional right. Chief Justice Rehnquist agreed that "prosecutors' peremptories are based on their 'seat-of-the-pants instincts' as to how particular jurors will vote"; instincts that Justice Thurgood Marshall warned "may often be just another term for racial prejudice." *Batson*, 476 US at 106 (Marshall, J., concurring). As Justice O'Connor described it,

> "In both criminal and civil trials, the peremptory challenge is a mechanism for the exercise of *private* choice in the pursuit of fairness. The peremptory is, by design, an enclave of private action in a government-managed proceeding."

Edmonson v. Leesville Concrete Co., 500 US 614, 633-34, 111 S Ct 2077, 114 L Ed 2d 660 (1991) (O'Connor, J., dissenting). That "private choice" may just as certainly be based upon the color of a juror's skin when it is the product of a "seat-of-the-pants" judgment call as when it is the product of a deliberate thought process. In either case, and in the absence of an admission to racial discrimination by the prosecutor, proof that the state's race-neutral explanation is pretextual is a matter of "circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Miller-El*, 545 US at 241 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 147, 120 S Ct 2097, 147 L Ed 2d 105 (2005) (internal quotation marks omitted). In fact, circumstantial evidence that is probative of the lawyer's intent may well be the best evidence of the lawyer's purpose that we have.

By the time the trial court was considering defendant's *Batson* objection to the state's peremptory strike against juror number 9, juror number 6—the only other black juror on the panel—had been excused at the state's request. And although the state articulated legitimate, race-neutral reasons for striking juror number 9, those reasons were not "plausible" because there were other non-black jurors that the state did not seek to strike who gave the same answers that the state relied on to strike juror number 9. And under *Miller-El*, it is the plausibility of the state's reasons that provides insight into whether those reasons are a pretext for race. This case is like *Curry*, where

we engaged in a comparative-juror analysis and concluded that the state's stated reasons for using a peremptory challenge against the only black juror on the panel were a pretext for race because the state did not also seek to strike similarly situated jurors who were not black. As we have already described, there were non-black jurors who provided the same answers that the state offered as reasons to excuse juror number 9. That was true of juror number 6 as well. The plausibility of the state's race-neutral reasons for excusing an otherwise qualified black juror decreased with the second strike. That implausibility is evidence of purposeful discrimination which, in light of "all of the circumstances that bear on racial animosity," leads us to the conclusion that the trial court clearly erred in excusing jurors number 6 and number 9 from the trial jury.

Reversed and remanded.

APPENDIX A

	Question 90: Opinion as to the honesty of these groups - Scale of 1 (dishonest) to 5 (honest)	Question 117: State should be required to prove motive in order for someone to be convicted of murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 119: If convinced by evidence that someone is guilty of murder, I could find them guilty even if I don't know all the facts that led to the murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 120: Every Defendant is innocent unless state proves otherwise Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 122: Police Officers more likely to testify truthfully than other witnesses Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 137: DNA evidence is not reliable Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 139: Doctors often get it wrong Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 162: Police officers often lie Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 167: Not comfortable deciding if person is guilty or not guilty of murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 174: How difficult would it be for you to presume a person is innocent who is charged with killing his daughter? Very Difficult Somewhat difficult Not too difficult Not difficult at all
Juror 6	Doctors: "5" Police officers: "4" Judges: "4" DA: "4" Defense lawyer: "4"	"1"	"4"	"1"	"2"	"2"	"2"	"2"	"2"	"very difficult" "Being a father with 2 daughters myself, I can't imagine what he's going through."

Juror 31	Doctors: "3" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "3"	"2"	"4"	"1"	"3"	"4"	"2"	"3"	"4"	"not difficult at all"
Juror 32	Doctors: "5" Police officers: "5" Judges: "5" DA: "5" Defense lawyer: "5"	"1"	"4"	"1"	"3"	"3"	"3"	"4"	"4"	"not too difficult"
Juror 33	Doctors: "5" Police officers: "4" Judges: "5" DA: "3" Defense lawyer: "3"	"2"	"2"	"1"	"2"	"4"	"4"	"3"	"1"	"not difficult" "If a person actually committed a crime, he or she will be imposed based on the evidence presented at trial."

Juror 1	Doctors: "4" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"3"	"3"	"1"	"3" and wrote "I don't believe or agree with a sweeping statement about a group of people being more truthful than another group based solely upon profession."	"4"	"3"	"3" and wrote "Like #153 - some do, but I can't say how often" On #153 wrote for lawyers frequently lie to get the result they want "Some do, I'm sure, but I wouldn't agree it frequently happens."	"3"	"not too difficult" "I understand the need to make a decision based on the case alone. I am rational and able to pay attention to the evidence and arguments made."
Juror 2	Doctors: "5" Police officers: "4" Judges: "5" DA: "4" Defense lawyer: "4"	"3"	"1"	"1"	"2"	"4"	"3"	"2"	"3"	"not too difficult"
Juror 3	Doctors: "4" Police officers: "4" Judges: "4" DA: "4" Defense lawyer: "4"	"3"	"2"	"2"	"2"	"4"	"3"	"3"	"3"	"not too difficult"

Juror 36	Doctors: "5" Police officers: "5" Judges: "5" DA: "5" Defense lawyer: "5"	"1"	"1"	"1"	"4"	"4"	"4"	"3"	"not difficult at all" "I believe in the concept of innocent until proven guilty."
Juror 46	Doctors: "5" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"2"	"4"	"1"	"3"	"4"	"4"	"3"	"somewhat difficult" "A parent should make a huge effort to protect a child under their care. There can be no excuse for killing a child."
Juror 44	Doctors: "4" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"3"	"3"	"1"	"2"	"4"	"3"	"3" and underlined "often".	"3"	"somewhat difficult" "I feel if charges were brought against someone for killing a young child, there must be some evidence that will tell the

											story. So unfortunately I probably do go into it w/ some expectancy of guilt."
Juror 35	Did not circle any numbers and wrote "This question is silly. Honesty is dependent on the individual."	"2"	"2"	"1"	"4"	"4"	"3"	"3"	"1"	"3"	"not too difficult" "I believe myself to be an impartial person; however, the death of a child is emotional so I cannot answer absolutely. Children that are in the care of their parents should be protected by them."
Juror 7	Doctors: "4" Police officers: "4" Judges: "4" DA: "4" Defense lawyer: "4"	"2" and wrote a "?" next to the number and also wrote "not totally sure what this means"	"3" and "4" and wrote "these are tough questions"	"1"	"3" and wrote "I would hope everyone respects the law enough to testify honestly"	"3"	"3"	"3"	"4"	"somewhat difficult"	"It's challenging and an emotional case, but I would try my best to be as

										necessary to provide a fair trial."
Juror 10	Doctors: "4" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"1"	"3"	"1"	"3"	"3"	"3"	"3"	"3"	"not too difficult"
Juror 15	Doctors: "4" Police officers: "4" Judges: "5" DA: "5" Defense lawyer: "4"	"2"	"1"	"1"	"2"	"4"	"3"	"4"	"3"	"not difficult at all" "Until all of the facts are presented by both the prosecutor and defense, one has to keep an open mind regarding the guilt or innocence of that person charged in the crime."

Juror 25	Doctors: "5" Police officers: "4" Judges: "5" DA: "5" Defense lawyer: "4"	"2"	"4"	"1"	"2"	"4"	"3"	"2"	"2"	"not difficult at all"
Juror 26	Doctors: "4" Police officers: "3" Judges: "4" DA: "4" Defense lawyer: "3"	"2"	"2"	"3"	"2"	"4"	"3"	"3"	"1"	"somewhat difficult" "I imagine that someone did indeed hurt that baby girl. I feel curious why there are no cases against other individuals in the child's life."

APPENDIX B

	Question 7: Have you, or has anyone close to you, ever worked with children or volunteered to work with children? "Yes, I worked with children" "Yes, I volunteered to work with children" "Yes, someone close worked with children"	Question 119: If convinced by evidence that someone is guilty of murder, I could find them guilty even if I don't know all the facts that led to the murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 124: Innocent people are frequently found guilty in our system of justice Scale of 1 (strongly agree) to 4 (strongly disagree)
Juror 9	Circled "someone close worked with children"	"3"	"2"
Juror 31	Circled "worked with children"	"4"	"3"
Juror 32	Circled all three "yes" answers	"4"	"4"
Juror 33	"no"	"2"	"4"
Juror 1	Circled "worked with children" and "volunteered to work with children"	"3"	"3" and Hand wrote "It does happen, but I don't know how frequently."
Juror 2	Circled "worked with children" and "volunteered to work with children"	"1"	"3"
Juror 3	Circled "volunteered to work with children"	"2"	"3"
Juror 36	Circled "someone close worked with children"	"1"	"4"
Juror 46	Circled "no"	"4"	"4"
Juror 44	Circled "someone close worked with children"	"3"	"3"
Juror 35	Circled "no"	"2"	"3"
Juror 7	Circled "worked with children" and "someone close worked with children"	"3" and "4" and wrote "these are tough questions"	Hand wrote "I don't know enough about court cases to know this"
Juror 10	Circled "no"	"3"	"3"
Juror 15	Circled "someone close worked with children"	"1"	"3"
Juror 25	Circled "no"	"4"	"2"
Juror 26	Circled "worked with children", "volunteered to work with children", and "someone close worked with children"	"2"	"3"

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
DARIAN LEE McWOODS,
Defendant-Appellant.

Multnomah County Circuit Court
16CR78185; A169710

Christopher J. Marshall, Judge.

Argued and submitted December 2, 2021.

Marc D. Brown, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jonathan N. Schildt, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Mooney, Presiding Judge, and Pagán, Judge, and DeVore, Senior Judge.*

MOONEY, P. J.

Reversed and remanded.

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* Pagán, J., *vice* DeHoog, J. pro tempore.

MOONEY, P. J.

Defendant, a Black man, was charged with crimes related to the death of his 15-month-old daughter. Following a trial, the jury returned its verdict finding defendant guilty of murder by abuse, first-degree criminal mistreatment, and witness tampering. Defendant appeals from the resulting judgment of conviction. Relying on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and a series of cases beginning with *Batson v. Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986), defendant assigns error to the trial court's decision to excuse the only two black persons on the panel of prospective jurors, jurors number 6 and number 9, upon the state's use of two of its peremptory strikes against those jurors. Defendant also assigns error to the court's giving of a nonunanimous jury instruction and to the court's receipt of a nonunanimous verdict on the witness tampering count. We reject without discussion the state's argument that defendant did not adequately preserve his *Batson* challenges, and we conclude that the trial court committed reversible error when it excused juror number 6 and juror number 9, upon the state's peremptory strikes. Our conclusion on that assignment of error obviates the need for us to address the remaining two assignments.

We begin with the axiom, no longer subject to reasonable debate, that racial discrimination in the selection of jurors is harmful. Racial discrimination harms litigants because it carries with it the risk that "prejudice *** will infect the entire proceeding[.]" *J. E. B. v. Alabama*, 511 US 127, 140, 114 S Ct 1419, 128 L Ed 2d 89 (1994). Racial discrimination harms the individuals who are excluded from serving as jurors because it prevents them from participating in our justice system. *Id.* And racial discrimination harms the community "by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence" in the justice system that follows. *Id.*

American jurisprudence has developed slowly to combat racial discrimination in criminal proceedings, including jury (grand and petit) selection processes, and is based in large part on the constitutional right to an

"impartial jury"[1] and the requirement that every defendant be afforded "equal protection of the laws."[2] Under the Sixth Amendment, a person who has been charged with a serious offense has a fundamental right to trial by a jury that is drawn from "a fair cross-section of the community." *State v. Compton*, 333 Or 274, 288, 39 P3d 833 (2002). Defendant does not raise a "fair cross-section" challenge to the jury pool itself. He does, however, argue that he is entitled to a jury of his "peers." The federal constitution does not use the word "peers." The Oregon constitution likewise does not use the word "peers." Instead, both documents use the word "impartial" to describe the type of jury to which a criminal defendant is entitled. We do not understand defendant to argue that he was entitled to have his race represented on the trial jury. We understand his argument to instead focus on the state's use of peremptory strikes to exclude the only two black persons from the jury panel after having already concluded that they were qualified to serve on the jury in this case and having, thus, passed those jurors for cause. Those challenges are examined using the framework established by *Batson*, as developed through subsequent caselaw.

As we have explained, "[t]o bring a *Batson* challenge," defendant must first "make a *prima facie* showing that a peremptory strike was based on race or gender." *State v. Curry*, 298 Or App 377, 381, 447 P3d 7 (2019), *adh'd to on recons*, 302 Or App 640, 461 P3d 1106 (2020). "'Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging *** jurors within an arguably targeted class.'"

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[1] The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"

Article I, section 11, of the Oregon Constitution similarly provides:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed[.]"

[2] The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall *** deny to any person within its jurisdiction the equal protection of the laws."

Id. at 382 (quoting *Batson*, 476 US at 97). If the state offers such an explanation, "then the trial court must, after consulting 'all of the circumstances that bear on racial animosity,' determine whether the defendant has shown purposeful racial discrimination by the state." *Id.* (quoting *Snyder v. Louisiana*, 552 US 472, 478, 128 S Ct 1203, 170 L Ed 2nd 175 (2008). We are to assess *the plausibility* of the state's race-neutral explanation as we consider all the circumstances present and discern whether the defendant has shown purposeful discrimination. *Miller-El v. Dretke*, 545 US 231, 252, 125 S Ct 2317, 162 L Ed 2d 196 (2005) ("[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

The state does not dispute that defendant made a *prima facie* showing that the peremptory challenges in question were race-based. And defendant does not dispute that the reasons given by the state for using those peremptory challenges are race-neutral. We are likewise satisfied that those first two showings under *Batson* were made. We, thus, turn our attention to the key issue, the third *Batson* step: whether the state's use of two of its peremptory strikes to remove the only two black persons on the panel of prospective jurors was the product of purposeful racial discrimination. We review the trial court's ruling that a peremptory challenge was not the product of purposeful discrimination as a question of fact. *Curry*, 298 Or App at 389. A court reviewing a *Batson* challenge is to consider "all relevant circumstances," *id.* at 382, which may include a comparative juror analysis where the record allows for it, *State v. Vandyke*, 318 Or App 235, 238, 507 P3d 339 (2022).[3] We remain mindful

[3] The comparative juror analysis is a tool to identify pretext through circumstantial evidence of differential treatment. When a Black juror gives the same answers as a non-black juror but is struck for those answers, then it gives rise to the inference of pretext because similarly situated persons have been treated differently. But it is important to remember that the analysis is just a tool and, even more importantly, that it does not stand for the proposition that striking a Black juror who answers questions differently from non-black jurors necessarily is a race-neutral strike. Indeed, striking a Black juror for answers that differ from those of non-black jurors could, itself, be evidence that the strike is based on

that, at *Batson*'s third step, defendant bears the burden of persuasion. We are to affirm the trial court's ruling unless it is "clearly erroneous." *Snyder*, 552 US at 477.

We look to the record to determine whether the trial court's rejection of defendant's *Batson* challenges was clearly in error. *Vandyke*, 318 Or App at 238. We begin by noting that the usual process of jury selection pursuant to ORS 136.210 through 136.270 was followed. The prospective jurors completed written questionnaires containing 174 questions, and they participated in the oral process of *voir dire* that spanned a period of four to five hours in the courtroom. A number of prospective jurors were excused by the court, for cause—that is to say, for reasons ranging from inadequate qualifications to conflicts to bias. The state did not challenge juror number 6 or juror number 9 for cause and, in fact, affirmatively passed each for cause. Both jurors were, thus, seated in the jury box when the state's prosecutor used two of her available peremptory challenges to strike them from the jury as provided in ORS 136.230 and ORCP 57 D.

When the state exercised one of its available peremptory strikes on juror number 6, this dialogue took place:

> "[PROSECUTOR]: So Number 6, ***.
>
> "THE COURT: Okay.
>
> "[DEFENSE COUNSEL]: We would make a Batson objection to that, Your Honor.
>
> "THE COURT: Okay. Is there any further argument on that?
>
> "*****
>
> "[DEFENSE COUNSEL]: Just that he's entitled to a jury of his peers. We only have a total of two black individuals, potentially, on this jury, and we believe that it would be a Batson violation to eliminate him.
>
> "THE COURT: And for the State?

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race. Here, defendant does not argue that any of the reasons given by the state were not race-neutral.

"[PROSECUTOR]: Judge, so there are numerous concerns that the State has regarding this individual's ability to be fair and impartial in this case. Referencing just his questionnaire, he indicated on the very last page that, 'Being a father with two daughters myself, I can't imagine what he's going through,' in reference to [defendant]. He didn't believe police officers to be honest. In fact, he agreed, rated it a two, that police officers often lie. He indicated agreement with the notion that he will be uncomfortable deciding guilt or innocence—or guilt or not guilt [sic]. He agreed that doctors often get it wrong. He indicated that he would be more likely to require evidence of motive, for needing to know all the facts or circumstances surrounding a murder before being able to make a determination. And he indicated agreement that DNA evidence is not reliable.

"Here in court, he indicated that he would need more information or more evidence given that this is a murder case rather than if this were some sort of other trial, which of course, the Court knows, is not the—does not comport with the burden of proof. There's no higher burden of proof in a murder case than in a theft case, for example. And, frankly, he—he showed up to jury service wearing a shirt that says I have issues. I don't know what that means, but that, in and of itself, is also concerning to the State.

"So, for all of those reasons, we believe that he would be bias[ed] to the State, and a Batson challenge—no showing has been made to support a Batson challenge.

"[DEFENSE COUNSEL]: I think that it mischaracterizes both what's in the questionnaire and what he testified—or what he said here. He indicated that he was beaten as a child. That's no longer socially acceptable. He indicated that he would have to know all of the facts, but that he would follow the standard of proof that was provided. He also indicated that it would be very difficult to presume my client innocent given that he's a father. So he indicated, very clearly, issues for both sides. And again, given all of the answers that he did give, I don't think that you can judge somebody.

"He wasn't brought back down for additional questioning by the Prosecution about these concerns. And they didn't make a for-cause challenge for him. My client is entitled to a jury of his peers, and we believe it is clearly—comes under Batson.

> "THE COURT: Okay. All right. So, based on the entire record that we have here, the Court is going to allow the State's challenge. There's no Batson violation, then."

The trial court made no findings beyond those quoted above when it overruled defendant's *Batson* objection, accepted the state's peremptory challenge to juror number 6, and excused that juror from further service. But that lack of findings does not render review impossible. If it is clear from the "entire record" that the trial court's rejection of defendant's *Batson* objections was in error, then it is our obligation to say so and to correct that error.

Defendant argues that the prosecutor misinterpreted the record when it described for the trial court the answers given by juror number 6 and that, in doing so, she misrepresented the record to the court, a factor that we should consider, citing *Flowers v. Mississippi*, ___ US ___, 139 S Ct 2228, 2243, 204 L Ed 2d 638 (2019). The state agrees that under *Flowers*, a "series of factually inaccurate explanations for striking black prospective jurors" can supply evidence of "discriminatory intent," *Flowers*, 139 S Ct at 2250, but it does not agree that such a series of inaccuracies exists here. We agree with defendant that there were, in fact, discrepancies between the state's characterization of juror number 6's answers to certain questions and the answers actually given by that juror. For example, the state advised the court that in the questionnaire, "[juror number 6] didn't believe police officers to be honest. In fact, he agreed, rated it a two, that police officers often lie." In fact, juror number 6 rated police officers at a "4" for honesty on a scale of "1" (dishonest) to "5" (honest). He also rated his belief that police officers are more likely to testify truthfully than other witnesses with a "2," on a scale of "1" (strongly agree) to "4" (strongly disagree). There are other discrepancies between the answers given by juror number 6 and how the state characterized those answers for the court, none of which, separately, or together, clearly establish purposeful racial discrimination. And yet, those discrepancies are circumstances relevant to the overall *Batson* analysis.

Defendant also argues that other jurors "provided the same or, in the prosecutor's perspective, worse answers

to the questions relied on by the prosecutor," to strike juror number 6 and that that is evidence of purposeful discrimination. The state responds that "to the extent the record is even adequate for a comparative-juror analysis, defendant fails to identify any comparison that reveals purposeful discrimination." Defendant did not ask the trial court to engage in a comparative-juror analysis, but where, as here, the record allows us to do so, we will undertake such an analysis. *Vandyke*, 318 Or App at 238; *Curry*, 298 Or App at 382. In doing so, we begin by focusing on the questions and the two "main areas of concern" that the state identified about juror number 6. *See* Appendix A, Juror Comparison Table for Juror Number 6.

First, the state points to the prosecutor's concern that juror number 6 might expect the state to prove motive in order to convict the defendant of murder. Juror number 6 "strongly agreed" that the state must prove motive to convict someone of murder. He also "strongly disagreed" that, if convinced by the evidence that someone is guilty of murder, he could find them guilty even if he does not know all the facts that led to the murder, and he "strongly disagreed" that "murder is murder, and understanding motives and circumstances are not necessary in determining guilt." A review of the questionnaires completed by the non-black jurors who were not stricken from the jury reveals that three also strongly agreed that the state must prove motive to convict someone of murder. Four non-black jurors strongly disagreed that, if convinced by the evidence that someone is guilty of murder, they could find him guilty even if they do not know all of the facts that led to the murder. Six non-black jurors "strongly disagreed" that "murder is murder, and understanding motives and circumstances are not necessary in determining guilt." While none of the non-black jurors answered each of those three questions exactly the same as juror number 6, two of them answered two of the three questions just as juror number 6 did. Juror number 6 and thirteen other non-black jurors who were not excluded "strongly agreed" that a defendant is innocent unless the state proves otherwise; one non-black juror "agreed" with that statement; and one non-black juror "disagreed."

Next, the state was concerned that juror number 6 did not regard police officers to be honest. As noted earlier, there were some discrepancies between the juror's responses to questions bearing on his view of police officers and the way in which those answers were characterized for the trial court. Juror number 6 agreed that police officers are honest, and six non-black jurors who were not excused from the jury also rated their view of police officer honesty at a "4"—meaning that they agreed that police officers are honest. Juror number 6 and seven non-black jurors who were not excused from the jury agreed that police officers are more likely to testify truthfully than other witnesses. More important to our *Batson* analysis, two of those seven non-black jurors who remained on the jury agreed, along with juror number 6, that police officers often lie.

Finally, the state expressed concern about juror number 6's "skepticism regarding scientific evidence." In particular, the state noted that juror number 6 agreed that "DNA evidence is not reliable," and he agreed that "doctors often get it wrong." It is accurate that no non-black juror agreed that DNA evidence is unreliable, but this was not a case that involved DNA as evidence of identity or any other key issue. And one non-black juror also agreed that doctors often get it wrong. Defendant points out that juror number 6 and six other jurors who were not removed from the jury strongly agreed with the statements that doctors are honest, and that forensic evidence is more persuasive than eyewitness testimony. Three jurors who rated DNA evidence as reliable also disagreed with the statement that forensic evidence is more persuasive than eyewitness testimony. Three others strongly disagreed with that statement. Thus, juror number 6 gave answers that reflect both skepticism and trust regarding scientific evidence as did some non-black jurors who were not stricken by the state through use of its peremptories.

The answers relied on by the state as race-neutral reasons for using one of its peremptory strikes against juror number 6 reflect that the juror's personal views on police officers and doctors, and his views on the type of evidence and level of proof needed for a conviction in a murder case

are similar to the answers given by non-black jurors who were not stricken from the jury. It is certainly challenging to understand why the state would strike juror number 6 but not, for example, juror number 32, who strongly agreed that the state must prove motive in a murder case, and who strongly disagreed that he would be able to find someone guilty of murder without knowing the facts that led up to the murder—even with convincing evidence of murder. It is likewise difficult to understand why juror number 6 was stricken but juror number 31 was not stricken even though juror number 31 agreed that the state had to prove motive, disagreed that he could find someone guilty of murder despite convincing evidence if he did not know all the facts leading up to the murder, disagreed that forensic evidence is more persuasive than eyewitness testimony, and agreed that doctors often "get it wrong."

To summarize, when consulting the record before it at the point when the *Batson* challenge to juror number 6 was made, the following basic information had been brought to the attention of, and was available to, the trial court:

- Defendant is black;
- Juror number 6 is black;
- There are two jury panel members who are black;
- The state passed juror number 6 for cause;
- Of the ten questions and answers highlighted by the state as providing race-neutral reasons to remove juror number 6 from the jury, there were other jurors who were not black and who were not stricken from the jury who had answered eight of those questions the same way as juror number 6;
- Juror number 6 was the only juror to agree with the statement that DNA evidence is unreliable;
- Juror number 6 answered questions relating generally to forensic and medical evidence the same as some non-black jurors who were not stricken from the jury;

- The exhibit list included photos, medical records, an autopsy report, and forensic lab reports; DNA evidence is not mentioned;
- Juror number 6 "strongly agreed" that every defendant is innocent unless the state proves otherwise, while one non-black juror disagreed with that statement and one non-black juror strongly disagreed with it;
- Juror number 6 was the only juror to answer "very difficult" to the question about how difficult it would be to presume a person is innocent who is charged with killing his daughter;
- The state mischaracterized some of the answers given by juror number 6 in its argument to the trial court;
- Juror number 6 acknowledged during *voir dire* that it was "possible" he might "self-impose" a higher standard in a case like this; and
- Juror number 6 wore a shirt with the words "I have issues" written on it.

On answers for which the state criticized juror number 6, other jurors gave similar answers. And as to the two questions on which juror number 6 gave unique answers—(1) DNA evidence was not material and other answers that reflected views more generally about scientific evidence were similar to answers given by non-black jurors, and (2) this juror's difficulty in presuming the innocence of a father accused of killing his daughter would seem to favor the state. To be sure, the state could have objected that a juror biased toward conviction is still improperly biased, but that was not a reason the state offered to explain its challenge to the juror, so we do not consider it. Given that the state characterized some of the answers of juror number 6 inaccurately and given that the state criticizes answers given by juror number 6 that are the very same answers given by some other non-black jurors, we are not persuaded that the record is sufficient to support the plausibility of the state's justification for its challenge to juror number 6. And

in this instance, "all the circumstances" as to juror number 6 includes the state's challenge to juror number 9. Ultimately, the "plausibility" of the state's justifications as to both jurors determines the issue of purposeful discrimination.

We move to the state's use of an available peremptory challenge to strike juror number 9 from the jury. *See* Appendix B, Juror Comparison Table for Juror Number 9.

This is the dialogue that took place with respect to defendant's *Batson* challenge:

> "[PROSECUTOR]: Thank you, Judge. The State would move to excuse Number 9, ***.
>
> "THE COURT: Okay. And then for the Defense?
>
> "[DEFENSE COUNSEL]: Again, we're making a Batson challenge. [Juror number 9] is the only other black person on this jury, Your Honor.
>
> "[PROSECUTOR]: So, Judge, I think there has to be more of a showing from the Defense. But regardless, [juror number 9], in his jury questionnaire indicated he had no experience with children. He leaned towards strongly agreeing that he believes that in our criminal justice system that innocent people are routinely being found guilty. He indicated yesterday that he would have concerns about police investigation if there were the notion that they just simply didn't do their job, or they were too busy to do their job. He indicated he would, on the questionnaire, need to know about particular facts or circumstances leading up to a murder in order to find someone guilty. Or if he otherwise believes them to be guilty, he would still want to know the facts or circumstances leading up to that.
>
> "And then yesterday, he indicated that he was more likely to excuse behavior if the child was injured due to reckless conduct as opposed to intentional. There was quite a long discussion about that issue. And he was one of the few that actually volunteered and commented on a distinction in his mind between looking more—less concerned about conduct that's—that occurred recklessly versus intentionally to injuring this child.
>
> "The Court's aware that the State—the State believes a juror could be bias[ed] one way or another. The State's not obligated to make a for-cause challenge. I don't think

> anything he said would rise to the level of a for-cause challenge, which is why we did not make that motion for [juror number 9] or for [juror number 6]. But, nonetheless, given those reasons, the State has concerns about his ability to be fair and impartial on this particular case, given the information the Court knows about the nature of this case.
>
> "[DEFENSE COUNSEL]: I think that the selection by the State to eliminate the only two black potential jurors in the jury pool is clearly a Batson issue for this Court. It does violate my client's constitutional right to have a jury of his peers. There was nothing in his answers to indicate that he would not follow the law or that he had a particular bias one way or the other.
>
> "With regards to his specific answers on the questionnaire, he works for the U.S. Postal Service, has trust for both the police and for the justice system. He did indicate that sometimes innocent people can be found guilty, but it is not okay to use corporal punishment. He indicated, very clearly, that he would understand the reasonable doubt that has to be shown by the Court—or by the Prosecution. And it would eliminate the only other black juror.
>
> "THE COURT: Okay. So based on the entire record that we have here, again, the State has articulated reasons for their challenges to the particular juror that indicate there is not a Batson violation here. And so we'll allow the State's challenge here."

Of the non-black jurors who had been passed for cause, five answered that they had no experience with children. One other juror indicated that they agreed that innocent people are frequently found guilty in our justice system, and one wrote that "[i]t does happen, but I don't know how frequently." Juror number 9 and three non-black jurors "disagreed" that if they are convinced by the evidence that someone is guilty of murder, they could find that person guilty if they did not know all of the facts that led to the murder; and four non-black jurors "strongly disagreed" with that statement. With respect to concerns about statements made by juror number 9 during the *voir dire* process in the courtroom, we cannot conclude based on the record that juror number 9 responded as the prosecutor argued he did. The record does reflect discussion among counsel and various jurors about differences between accidents and

intentional acts and about whether police sometimes get too busy to conduct adequate investigations.

To summarize, when consulting the record before it at the point when the *Batson* challenge to juror number 9 was made, the following basic information had been brought to the attention of, and was available to, the trial court:

- Defendant is black;
- Juror number 9 is black;
- Juror number 6, who is black, had been excused on the state's peremptory strike, leaving juror number 9 as the only black panel member left;
- The state passed juror number 9 for cause; and
- At least one non-black juror answered each of the questions highlighted by the state the same way as juror number 9 did.

Like juror number 6, some non-black jurors gave answers that were the same or similar to answers given by juror number 9. And, as the state correctly notes, no "single answer can[] be viewed in isolation." The answers to some questions provide context for the answers to other questions; sometimes answers appear to be consistent with other answers and yet some seem to be in direct conflict with others. But that was predictable just given the sheer volume of questions included in the questionnaire. Considering, as we must, the race-neutral reasons given by the state in support of its use of a peremptory strike against juror number 9, there were two important factors present at that point in the jury selection process that had not been present when the state explained its use of a peremptory strike against juror number 6: (1) no answer given by juror number 9 was his alone—in other words, no one answer caused him to stand out from the other jurors, and (2) the state had already stricken the only other black juror from the panel. And while one might debate whether it takes two, three, or more of anything to create a pattern, the use of a peremptory challenge to strike the second and only remaining black juror from the jury completes the pattern here.

Peremptory strikes are a tool entrusted to trial lawyers by statute; they are not a matter of constitutional right. Chief Justice Rehnquist agreed that "prosecutors' peremptories are based on their 'seat-of-the-pants instincts' as to how particular jurors will vote"; instincts that Justice Thurgood Marshall warned "may often be just another term for racial prejudice." *Batson*, 476 US at 106 (Marshall, J., concurring). As Justice O'Connor described it,

> "In both criminal and civil trials, the peremptory challenge is a mechanism for the exercise of *private* choice in the pursuit of fairness. The peremptory is, by design, an enclave of private action in a government-managed proceeding."

Edmonson v. Leesville Concrete Co., 500 US 614, 633-34, 111 S Ct 2077, 114 L Ed 2d 660 (1991) (O'Connor, J., dissenting). That "private choice" may just as certainly be based upon the color of a juror's skin when it is the product of a "seat-of-the-pants" judgment call as when it is the product of a deliberate thought process. In either case, and in the absence of an admission to racial discrimination by the prosecutor, proof that the state's race-neutral explanation is pretextual is a matter of "circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Miller-El*, 545 US at 241 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 147, 120 S Ct 2097, 147 L Ed 2d 105 (2005) (internal quotation marks omitted). In fact, circumstantial evidence that is probative of the lawyer's intent may well be the best evidence of the lawyer's purpose that we have.

By the time the trial court was considering defendant's *Batson* objection to the state's peremptory strike against juror number 9, juror number 6—the only other black juror on the panel—had been excused at the state's request. And although the state articulated legitimate, race-neutral reasons for striking juror number 9, those reasons were not "plausible" because there were other non-black jurors that the state did not seek to strike who gave the same answers that the state relied on to strike juror number 9. And under *Miller-El*, it is the plausibility of the state's reasons that provides insight into whether those reasons are a pretext for race. This case is like *Curry*, where

we engaged in a comparative-juror analysis and concluded that the state's stated reasons for using a peremptory challenge against the only black juror on the panel were a pretext for race because the state did not also seek to strike similarly situated jurors who were not black. As we have already described, there were non-black jurors who provided the same answers that the state offered as reasons to excuse juror number 9. That was true of juror number 6 as well. The plausibility of the state's race-neutral reasons for excusing an otherwise qualified black juror decreased with the second strike. That implausibility is evidence of purposeful discrimination which, in light of "all of the circumstances that bear on racial animosity," leads us to the conclusion that the trial court clearly erred in excusing jurors number 6 and number 9 from the trial jury.

Reversed and remanded.

APPENDIX A

	Question 90: Opinion as to the honesty of these groups - Scale of 1 (dishonest) to 5 (honest)	Question 117: State should be required to prove motive in order for someone to be convicted of murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 119: If convinced by evidence that someone is guilty of murder, I could find them guilty even if I don't know all the facts that led to the murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 120: Every Defendant is innocent unless state proves otherwise Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 122: Police Officers more likely to testify truthfully than other witnesses Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 137: DNA evidence is not reliable Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 139: Doctors often get it wrong Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 162: Police officers often lie Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 167: Not comfortable deciding if person is guilty or not guilty of murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 174: How difficult would it be for you to presume a person is innocent who is charged with killing his daughter? Very Difficult Somewhat difficult Not too difficult Not difficult at all
Juror 6	Doctors: "5" Police officers: "4" Judges: "4" DA: "4" Defense lawyer: "4"	"1"	"4"	"1"	"2"	"2"	"2"	"2"	"2"	"very difficult" "Being a father with 2 daughters myself, I can't imagine what he's going through."

Juror 31	Doctors: "3" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "3"	"2"	"4"	"1"	"3"	"4"	"2"	"3"	"4"	"not difficult at all"
Juror 32	Doctors: "5" Police officers: "5" Judges: "5" DA: "5" Defense lawyer: "5"	"1"	"4"	"1"	"3"	"3"	"3"	"4"	"4"	"not too difficult"
Juror 33	Doctors: "5" Police officers: "4" Judges: "5" DA: "3" Defense lawyer: "3"	"2"	"2"	"1"	"2"	"4"	"4"	"3"	"1"	"not difficult" "If a person actually committed a crime, he or she will be imposed based on the evidence presented at trial."

Juror 1	Doctors: "4" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"3"	"3"	"1"	"3" and wrote "I don't believe or agree with a sweeping statement about a group of people being more truthful than another group based solely upon profession."	"4"	"3"	"3" and wrote "Like #153 - some do, but I can't say how often" On #153 wrote for lawyers frequently lie to get the result they want "Some do, I'm sure, but I wouldn't agree it frequently happens."	"3"	"not too difficult" "I understand the need to make a decision based on the case alone. I am rational and able to pay attention to the evidence and arguments made."
Juror 2	Doctors: "5" Police officers: "4" Judges: "5" DA: "4" Defense lawyer: "4"	"3"	"1"	"1"	"2"	"4"	"3"	"2"	"3"	"not too difficult"
Juror 3	Doctors: "4" Police officers: "4" Judges: "4" DA: "4" Defense lawyer: "4"	"3"	"2"	"2"	"2"	"4"	"3"	"3"	"3"	"not too difficult"

Juror 36	Doctors: "5" Police officers: "5" Judges: "5" DA: "5" Defense lawyer: "5"	"1"	"1"	"1"	"4"	"4"	"4"	"3"	"not difficult at all" "I believe in the concept of innocent until proven guilty."
Juror 46	Doctors: "5" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"2"	"4"	"1"	"3"	"4"	"4"	"3"	"somewhat difficult" "A parent should make a huge effort to protect a child under their care. There can be no excuse for killing a child."
Juror 44	Doctors: "4" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"3"	"3"	"1"	"2"	"4"	"3"	"3" and underlined "often".	"somewhat difficult" "I feel if charges were brought against someone for killing a young child, there must be some evidence that will tell the

												story. So unfortunately I probably do go into it w/ some expectancy of guilt."
Juror 35	Did not circle any numbers and wrote "This question is silly. Honesty is dependent on the individual."	"2"	"2"	"1"	"4"	"4"	"3"	"3"	"1"	"3"	"3"	"not too difficult" "I believe myself to be an impartial person; however, the death of a child is emotional so I cannot answer absolutely. Children that are in the care of their parents should be protected by them."
Juror 7	Doctors: "4" Police officers: "4" Judges: "4" DA: "4" Defense lawyer: "4"	"2" and wrote a "?" next to the number and also wrote "not totally sure what this means"	"3" and "4" and wrote "these are tough questions"	"1"	"3" and wrote "I would hope everyone respects the law enough to testify honestly"	"3"	"3"	"3"	"4"	"somewhat difficult" "It's challenging and an emotional case, but I would try my best to be as		

										necessary to provide a fair trial."
Juror 10	Doctors: "4" Police officers: "3" Judges: "5" DA: "4" Defense lawyer: "4"	"1"	"3"	"1"	"3"	"3"	"3"	"3"	"3"	"not too difficult"
Juror 15	Doctors: "4" Police officers: "4" Judges: "5" DA: "5" Defense lawyer: "4"	"2"	"1"	"1"	"2"	"4"	"3"	"4"	"3"	"not difficult at all" "Until all of the facts are presented by both the prosecutor and defense, one has to keep an open mind regarding the guilt or innocence of that person charged in the crime."

Juror 25	Doctors: "5" Police officers: "4" Judges: "5" DA: "5" Defense lawyer: "4"	"2"	"4"	"1"	"2"	"4"	"3"	"2"	"2"	"not difficult at all"
Juror 26	Doctors: "4" Police officers: "3" Judges: "4" DA: "4" Defense lawyer: "3"	"2"	"2"	"3"	"2"	"4"	"3"	"3"	"1"	"somewhat difficult" "I imagine that someone did indeed hurt that baby girl. I feel curious why there are no cases against other individuals in the child's life."

APPENDIX B

	Question 7: Have you, or has anyone close to you, ever worked with children or volunteered to work with children? "Yes, I worked with children" "Yes, I volunteered to work with children" "Yes, someone close worked with children"	Question 119: If convinced by evidence that someone is guilty of murder, I could find them guilty even if I don't know all the facts that led to the murder Scale of 1 (strongly agree) to 4 (strongly disagree)	Question 124: Innocent people are frequently found guilty in our system of justice Scale of 1 (strongly agree) to 4 (strongly disagree)
Juror 9	Circled "someone close worked with children"	"3"	"2"
Juror 31	Circled "worked with children"	"4"	"3"
Juror 32	Circled all three "yes" answers	"4"	"4"
Juror 33	"no"	"2"	"4"
Juror 1	Circled "worked with children" and "volunteered to work with children"	"3"	"3" and Hand wrote "It does happen, but I don't know how frequently."
Juror 2	Circled "worked with children" and "volunteered to work with children"	"1"	"3"
Juror 3	Circled "volunteered to work with children"	"2"	"3"
Juror 36	Circled "someone close worked with children"	"1"	"4"
Juror 46	Circled "no"	"4"	"4"
Juror 44	Circled "someone close worked with children"	"3"	"3"
Juror 35	Circled "no"	"2"	"3"
Juror 7	Circled "worked with children" and "someone close worked with children"	"3" and "4" and wrote "these are tough questions"	Hand wrote "I don't know enough about court cases to know this"
Juror 10	Circled "no"	"3"	"3"
Juror 15	Circled "someone close worked with children"	"1"	"3"
Juror 25	Circled "no"	"4"	"2"
Juror 26	Circled "worked with children", "volunteered to work with children", and "someone close worked with children"	"2"	"3"

VEXATIOUS LITIGANTS

RULE 35

A Definitions.

A(1) For purposes of this rule, "vexatious litigant" includes:

A(1)(a) A person who is a party to a civil action or proceeding who, after the litigation has been finally decided against the person, relitigates, or attempts to relitigate, either:

A(1)(a)(i) The validity of the decision against the same party or parties who prevailed in the litigation; or

A(1)(a)(ii) The cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final decision against the same party or parties who prevailed in the litigation;

A(1)(b) A person who files frivolous motions, pleadings, or other documents, or engages in discovery or other tactics that are intended to cause unnecessary expense or delay; or

A(1)(c) A person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction, or occurrence.

A(2) For purposes of this rule, an action is deemed to be "finally decided" or to have reached a "final decision" after all appeals conclude, or after the time to appeal has elapsed if no appeal is filed.

A(3) For purposes of this rule, "pre-filing order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

A(4) For purposes of this rule, "security" means an undertaking by a vexatious litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

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B Issuance of pre-filing order. The court in any judicial district may, on its own motion or on the petition of any interested person, initiate an expedited administrative process to determine whether to enter a pre-filing order prohibiting a vexatious litigant from commencing any new action or claim in the courts of that district without first obtaining leave of the presiding judge, as follows:

B(1) If the litigant meets the definition in paragraph A(1)(c) of this rule, then the process is limited to judicial notice of the existence of a prior state or federal court order designating the litigant to be vexatious.

B(2) If the litigant appears to meet the definition in paragraph A(1)(a) or paragraph A(1)(b) of this rule, then the process must include notice to the litigant and an opportunity for the litigant to be heard at an expedited hearing on the question of whether the litigant meets the definition. At the hearing, the presiding judge will consider the factors listed in subsection D(1) of this rule to determine whether the pre-filing order is just and proper. If the court concludes that the litigant is a vexatious litigant, the court will identify its reason or reasons in the pre-filing order.

B(3) On entry, a copy of the pre-filing order, signed by the presiding judge, will be sent by the court to the person designated to be a vexatious litigant at the last known address listed in court records, and to the opposing parties, if any, in any pending litigation in which the litigant is a party. Disobedience of such an order may be punished as a contempt of court.

B(4) A determination made by the presiding judge is not admissible on the merits of any subsequent action filed by the vexatious litigant, nor deemed to be a decision in any subsequent action that the vexatious litigant receives permission to file under section C of this rule.

C Applications to commence new actions. A vexatious litigant's request to commence a new action or claim may be made by an ex parte application accompanied by an affidavit or a declaration and must include as an exhibit a copy of the complaint or other case-initiating

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document that the litigant proposes to file. Applications are not subject to a filing fee.

C(1) The application for leave to file the action will only be granted on a showing that the proposed action or claim is not frivolous and is not for the purpose of unnecessary expense or delay, or harassment. A determination made by the presiding judge is not admissible on the merits of the action, nor deemed to be a decision in any issue in the action.

C(2) The presiding judge may condition the filing of the proposed action or claim on a deposit of security as provided in this rule.

C(3) If the application for leave to file the action is allowed, whether by the presiding judge or an appellate court, then the applicant must submit the complaint or other case-initiating document to the court anew with the appropriate filing fee. The filing date of the complaint or other case-initiating document relates back to the filing of the application requesting leave to file.

C(4) The pre-filing order granting or denying the application must be in writing, signed by the presiding judge.

D Designation and security hearing. In any case pending in any court of this state, including small claims cases, a litigant may move the court for an order to recognize an opposing party as a vexatious litigant and to require the posting of security. At the hearing on the motion, the court may consider any written or oral evidence that may be relevant to the motion, whether given by witness, affidavit, declaration, or through judicial notice.

D(1) Determining whether a litigant is vexatious. To determine whether a litigant is vexatious, the court may consider:

D(1)(a) the litigant's history of litigation and whether it entailed vexatious, harassing, or duplicative suits;

D(1)(b) the litigant's motive in pursuing the litigation;

D(1)(c) whether the litigant is represented by counsel;

D(1)(d) whether the litigant has caused unnecessary expense to opposing parties or

placed a needless burden on the courts;

D(1)(e) whether other sanctions would be adequate to protect the courts and other parties; and

D(1)(f) any other considerations that are relevant to the circumstances of the litigation.

D(2) If, after considering all of the evidence, the court determines that the litigant is vexatious and not reasonably likely to prevail on the merits against the moving party, then the court must enter an order designating the litigant to be vexatious and requiring the posting of security in an amount and within such time as the court deems appropriate. A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

E Failure to deposit security; judgment of dismissal. If the vexatious litigant fails to post security in the time required by an order of the court under section C of this rule, the court will promptly issue a judgment dismissing the action or claim as to any party for whose benefit the security was ordered.

F Motion for hearing stays pleading or response deadline. If a motion for an order to designate a vexatious litigant and to deposit security is filed in an action:

F(1) If the motion is denied, the moving party must plead or otherwise respond within the time remaining for response to the original pleading or within 10 days after service of the order that rules on the motion, whichever period may be longer, unless the court directs otherwise; or

F(2) If the motion is granted, the moving party must plead or otherwise respond within the time remaining for response to the original pleading or within 10 days after the required security has been deposited, whichever period may be longer, unless the court directs otherwise.

G Cases filed without leave of the presiding judge. A vexatious litigant may not file any new action or claim unless the vexatious litigant has obtained an order granting leave to file

the action or claim from the presiding judge. If the vexatious litigant files an action or claim without obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the vexatious litigant is subject to a pre-filing order. The notice must be served on all parties who have been served or who have appeared in the action or claim. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim within 10 days after the filing of such a notice unless the vexatious litigant files an application for leave to file under subsection C(1) of this rule. If the presiding judge issues an order granting leave to file, then the vexatious litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the original pleading or within 10 days after the date of service of that order, whichever period may be longer, unless the court directs otherwise. If the presiding judge issues an order denying the application for leave to file, then the case filed without leave will be promptly dismissed.

UPDATE ON EVOLUTION OF ORCP 35

I've conferred with Aja Holland for the past few weeks, to ensure that the business process folks at OJD are on board with ORCP 35. After many messages and conversations, some modifications are being recommended, which I support. I write to explain them in the hope that the committee members will approve.

Before I explain the modifications made, I should mention that the business process folks have expressed a preference to find a way to fit the rule into a "single case" model, comparable to a fee waiver application process. They consider the separation of "requests for administrative leave to file a case" from the subsequent actual case filing (if allowed) to be challenging, primarily because the process will be new and therefore, unfamiliar to court staff. I said that the Rule 35 administrative process needs its own real estate within Odyssey, for reasons including: (1) Whatever the result – whether granted or denied – judges in all counties should be able to search and find it as vexatious litigant information, not merely as a common case; (2) The administrative conclusion for VL applications will be a PJ decision that is subject to mandamus, not a clerk decision that can only be appealed "in house;" (3) Creation of a case raises the concern of application of the ORCP and UTCR to the administrative process, which is contemplated to be a streamlined process not involving all parties to the potential case.

Based on this, we proceeded to refine the rule as a "two case" model, where the first "case"(in Odyssey) is the administrative process where the VL applies for leave to file. After visualizing how this can work in Odyssey, the following things were important to the business process folks (and I agree):

1. There should be no filing fee for the Application for Leave to File, but if leave is granted, then there should be a requirement for prompt filing of the case accompanied by a filing fee.

2. There should be no requirement for service under Rule 7 for the Application process, because that would create a 30 day to appear expectation for the parties that does not fit in the streamlined application process, and it would likely trigger requests by confused parties for involvement in the administrative decision-making process, which would complicate things. Service under Rule 7 is not necessary to create authority for relation-back, it is only necessary to direct state the relation-back requirement.

3. Applications for Leave to File should be ex parte and should be required to be conventionally filed under UTCR 21.070(3), which the business process folks believe is no problem. The conventional filing requirement would eliminate the need for the business process folks to create an option in the drop-down filing menu for a process that would not otherwise be used, but that would likely create many mistakes and incorrect filings of other documents if chosen.

4. Section F of the Rule should refer back to section B(1) of the Rule to ensure that the business processes used for both are the same.

A few other modifications are suggested too. One is that the PJ decision granting or denying leave to file need not be a "Decision Letter" but must be in writing and signed by the PJ so that it can be mandamused. Another is that the PJ decision on filing should not be admissible if a case is later filed. The rest of the suggested modifications should be self-explanatory.