No. 92968-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TEREZ LEJUAN BARDWELL,

Petitioner.

AMICUS CURIAE MEMORANDUM OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, LATINA/O BAR ASSOCIATION OF WASHINGTON, SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON, LOREN MILLER BAR ASSOCIATION, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT WHY REVIEW SHOULD BE GRANTED 2

A. This Case Illustrates the Ease with Which Juror Demeanor can Be Used as a Cloak for Racial Discrimination 2

B. This Court's Guidance Is Needed Because Washington Courts Have Been Using the Wrong Appellate Review Standard for Decades 6

C. Unsupported Claims About a Minority Juror's Demeanor Should Be Ruled Inadequate to Withstand a *Batson* Challenge, and the Court Should Adopt a New or Clarified Rule to Effectively Prohibit Race-based Peremptory Challenges 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

State Cases

Holland v. Boeing Co.,
90 Wn.2d 384, 583 P.2d 621 (1978) 7

State v. Lewis,
78 Wn. App. 739, 898 P.2d 874 (1995) 7

State v. Luvene,
127 Wn.2d 690, 903 P.2d 960 (1995) 6

State v. Meredith,
178 Wn.2d 180, 306 P.3d 942 (2013) 2

State v. Rhone,
168 Wn.2d 645, 229 P.3d 752 (2010) 2

State v. Saintcalle,
178 Wn.2d 34, 309 P.3d 326 (2013) 1, 2, 5, 10

Federal Cases

Batson v. Kentucky,
476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) ..... *passim*

Hernandez v. New York,
500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) 6, 7, 8

Thaler v. Haynes,
559 U.S. 43, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010) 8, 9

United States v. Sherrills,
929 F.2d 393 (8th Cir. 1991) 1, 3

United States v. U.S. Gypsum Co.,
333 U.S. 364, 68 S. Ct. 525, 92 L .Ed. 746 (1948) 7

Cases from Other State Jurisdictions

Chew v. State,
317 Md. 233, 562 A.2d 1270 (Md. 1989) 9

Daniels v. State,
768 S.W.2d 314 (Tex. Ct. App. 1988) 3

Hill v. State,
547 So.2d 175 (Fla. Ct. App. 1989) 9

People v. Avila,
38 Cal.4th 491, 133 P.3d 1076 (2006) 8

People v. Randall,
283 Ill. App. 3d 1019, 671 N.E.2d 60 (Ill. App. Ct. 1996) 4

Statutes

28 U.S.C. §2254 ..... 8, 9

Rules

CR 52 7

Fed. R. Civ. P. 52 6

RAP 13.4 ..... 1, 6

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Jean Montoya,
The Future of the Post-Batson Peremptory Challenge: Voir Dire Questionnaire and the "Blind" Peremptory, 29 U. MICH. J. L. REFORM 981 (1996) 1

Kenneth J. Melilli,
Batson in Practice: What We Have Learned About Batson and Peremptory Challenges, 71 NOTRE DAME L. REV. 447 (1996) 3

Melissa Swindle,
Note, Retreating from Batson, 29 TEX. TECH. L. REV. 925 (1998) .. 3

Mimi Samuel,
Focus on Batson: Let the Cameras Roll, 74 BROOKLYN L. REV. 95 (2008) 3

I. INTRODUCTION

Although the Supreme Court attempted to end racially based peremptory challenges thirty years ago by adopting the *Batson*[1] test, attorneys have continued to make race-based peremptory challenges by claiming their challenge was based on the demeanor of the challenged juror:

> *Batson* . . . motions are difficult to win because lawyers rebutting a prima facie case of discrimination may not tell the truth, and the rebutting lawyer can too easily come up with a race-neutral reason for the challenge (i.e., counsel can use the most subjective justifications for excusing a juror, such as body language or poor eye contact – basically the attorney who discriminates by exercising the challenge has to be an idiot to get caught).

Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J. L. REFORM 981, 1007 (1996). As noted below by the *Sherills* Court, demeanor claims "are particularly susceptible to the kind of abuse prohibited by *Batson*," *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991), and this case gives the Court an opportunity to put an end to this practice by granting review and finding a *Batson* violation. RAP 13.4(b)(1), (3), (4).

This Court has recognized "that racial discrimination remains rampant in jury selection" and that Washington's *Batson* procedures do not "effectively combat race discrimination in the selection of juries." *State v. Saintcalle*, 178 Wn.2d 34, 35, 309 P.3d 326 (2013); *see also id.* at

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

49 (same). Prior rulings interpreting *Batson* have given a free pass to prosecutors who assert that their peremptory challenges are based upon alleged observations of nonverbal juror behavior, such as inattentiveness or a hostile stare. This Court has never addressed the subject of how trial judges should evaluate these claims to determine whether they are pretextual. Moreover, as discussed below, Washington courts have been applying a standard of review that allows *Batson* violations to continue unchecked.

On three occasions this Court has considered adopting a new and stricter test to eradicate race-based peremptory challenges, but each time it has viewed the case before it as an inappropriate vehicle in which to take that step.[2] This case presents a highly suitable vehicle for mandating stricter enforcement of *Batson* and for adopting a new rule. It is time to enforce *Batson*, and to adopt a revised legal standard under which unsupported claims about a minority juror's demeanor fail to overcome a *Batson* objection, to put an end to the most common type of race-based peremptory challenges that *Batson* was intended to prohibit.

II. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. This Case Illustrates the Ease with Which Juror Demeanor can Be Used as a Cloak for Racial Discrimination

Commentators and courts have long recognized that peremptory

[2] *State v. Saintcalle*, 178 Wn.2d 34, 55, 309 P.3d 326 (2013); *State v. Meredith*, 178 Wn.2d 180, 186-87, 306 P.3d 942 (2013) (Madsen, C.J., concurring); *State v. Rhone*, 168 Wn.2d 645, 658, 229 P.3d 752 (2010) (Madsen, C.J., concurring).

challenges allegedly based upon a juror's observed demeanor are the hardest to evaluate. Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 BROOKLYN L. REV. 95, 105 (2008); *Sherrills*, 929 F.2d at 394-95 (in case where African American jurors struck for "inattentiveness" appellate court warns that "determining who is and is not attentive requires subjective judgments that are particularly susceptible to the type of abuse prohibited by *Batson*"). One study of 3,898 cases found that the second most frequently proffered reason offered to justify a peremptory challenge against a minority juror was some allegedly observed nonverbal behavior, and within this category, juror "inattentive[ness]" was the most frequently accepted reason. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 485, 488 (1996). *Accord* Melissa Swindle, *Note, Retreating from Batson*, 29 TEX. TECH. L. REV. 925, 949 (1998) ("Explanations based on subjective characteristics or observations can easily disguise racially motivated challenges.").

Many courts have made the same observations. *See, e.g., Daniels v. State*, 768 S.W.2d 314, 317 (Tex. Ct. App. 1988) ("Although we are unwilling to say that a juror's demeanor cannot ever be a racially neutral motive for a prosecutor's peremptory challenge, the protection of the constitutional guarantees that *Batson* recognizes requires the court to scrutinize such elusive, intangible, and easily contrived explanations with a healthy skepticism. Otherwise, 'inattentiveness' will inevitably serve as a convenient talisman for transforming *Batson*'s protection against racial

discrimination into an illusion and the *Batson* hearing into an empty ceremony."); *People v. Randall*, 283 Ill. App. 3d 1019, 1025-26, 671 N.E.2d 60 (Ill. App. Ct. 1996) (denouncing the "charade that has become the *Batson* process").

Moreover, pointing to a prosecutor's assertion that he used a peremptory challenge to remove a minority juror because he "never cracked a smile and therefore, did not possess the sensitivities necessary to . . . decide the facts in this case," Justice Marshall commented:

> If such easily generated explanations are sufficient to discharge the prosecutor's obligations to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Batson, 476 U.S. at 106 (Marshall, J., concurring). Sadly, Justice Marshall's fears have been realized. Today, *Batson* offers only the illusion of protection.

The record in this case underscores the importance of this Court's granting review here. Over the defendant's *Batson* objection, the trial judge permitted the prosecution to remove African American Juror No. 25 with a peremptory challenge that the prosecutor claimed was based on her uncle having been accused of a crime; her body language, which allegedly showed she was concerned about that fact; and that she appeared to have been sleeping. *Petition for Review* ("*PFR*") at 1. These together form a trifecta of reasons commonly used to cloak racial bias: (1) the juror has a relative who was involved with the criminal justice system (*PFR* at 7-8); (2) claimed problematic "body language"; and (3) a subjective and

unverified claim that the juror was, or appeared to be, "sleeping." No one else saw the juror sleeping and the trial judge said she didn't either but had no reason to believe that the prosecutor was lying. RP 184.

The record demonstrates how far the enforcement of *Batson* has strayed from being a viable remedy for rooting out racial bias from peremptory challenges, particularly when demeanor is alleged as the reason for the challenge. First, the *absence* of evidence to show that the prosecutor is lying has been converted into a presumption that the prosecutor is telling the truth. Second, even though *no one else saw what the prosecutor claimed to have seen* and the prosecutor never brought the juror's sleeping to the trial judge's attention, the reason for the peremptory challenge against a juror of color is accepted at face value. And third, this colloquy on the record confirms what this Court has already acknowledged in *Saintcalle* about the "especially disconcerting" feature of the *Batson* procedure:

> [I]t seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge. Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism. And if the judge chooses not to do so despite misgivings about possible race bias, the problem is compounded by the fact that we defer heavily to the judge's findings on appeal.

Saintcalle, 178 Wn.2d at 53 (internal citations omitted). The need for this Court's guidance is apparent, and review should be granted.

B. This Court's Guidance Is Needed Because Washington Courts Have Been Using the Wrong Appellate Review Standard for Decades

Washington courts have long applied the "clearly erroneous" standard of appellate review to trial judge denials of *Batson* challenges. See, for example, *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995), where the Court relied upon the U.S. Supreme Court's decision in *Hernandez v. New York*, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) for the proposition that a trial judge's rejection of a *Batson* challenge would be upheld unless clearly erroneous. *Luvene*, 127 Wn.2d at 699. However, the rationale used in *Hernandez* finds no justification in state law, and thus this Court's review is warranted under RAP 13.4(b).

In *Hernandez* the Court chose to apply a civil appellate review standard in a criminal case: "[A] federal appellate court reviews the finding of a district court on the question of intent to discriminate under Federal Rule of Civil Procedure 52(a), which permits factual findings to be set aside only if clearly erroneous." *Hernandez*, 500 U.S. at 365. Noting that "no comparable rule exists for federal criminal cases," the Court decided to fill the gap in the federal criminal rules by applying the same standard embodied in the civil rule, Fed. R. Civ. P. 52(a)(6), to the review of findings in criminal cases. *Id.* at 365-66. But while subsection (6) of the *federal* civil rule explicitly requires application of the clearly

erroneous appellate review standard,[3] *Washington State's* CR 52(a) has no such counterpart: Washington's civil rule fails to provide any justification for using the clearly erroneous standard that governs in federal courts.

Second, Washington appellate courts have never reviewed factual findings under the clearly erroneous test. Instead, Washington has steadfastly adhered to the substantial evidence test. *See, e.g., Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). This same standard of appellate review has been applied in criminal cases, even when the factual dispute concerns the prosecutor's state of mind.[4]

Third, the federalism concerns that led the Supreme Court to employ the clearly erroneous test in *Hernandez* do not exist when Washington appellate courts review the findings of Washington trial court judges. The *Hernandez* Court noted that the defendant's case "comes to us on direct review of [a] state court judgment," and that "[n]o statute governs our review of facts found by state courts in cases with this posture." *Hernandez*, 500 U.S. at 366. Mindful of the fact that a federal court should be respectful of a state court decision, the Court chose to employ "a deferential standard of review" for the assessment "of a state trial court's findings of fact made in connection with a federal

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[3] As the U.S. Supreme Court has noted, the language of Rule 52(a)(6) was intended to preserve the standard of review traditionally employed in courts of equity. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L .Ed. 746 (1948).

[4] *See, e.g., State v. Lewis*, 78 Wn. App. 739, 744, 898 P.2d 874 (1995), where the Court first noted that "[a] finding as to the intent of the prosecutor is factual," and then went on to affirm the trial court's factual finding that the prosecutor did not act with the intent of provoking a mistrial because that finding was supported by substantial evidence.

constitutional claim." *Id.* But where both the appellate court and the trial court are state courts, as in this case, there is no reason to employ a highly deferential review standard designed to accord federal respect to judgments of a separate sovereign.[5]

The Court of Appeals' reliance upon *Thaler v. Haynes*, 559 U.S. 43, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010) (per curiam) is similarly misplaced. Unlike *Thaler*, the instant case is not a federal habeas corpus case subject to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA (28 U.S.C. §2254(d)(1)), a state prisoner must show that the state court decision under review is contrary to clearly established Federal law as determined by the U.S. Supreme Court. Applying this habeas standard of review, *Thaler* held there was no established Supreme Court rule requiring a trial judge to reject a demeanor-based explanation for the exercise of a peremptory challenge unless the trial judge personally observed and recalled the aspect of the prospective juror's demeanor on which the peremptory was allegedly based.[6] Moreover, the *Thaler* Court went on to point out that on remand the state prisoner might still win his *Batson* claim and get his conviction

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[5] At least one State *does not* use the clearly erroneous test when reviewing a trial court's *Batson* findings of fact, and uses instead the substantial evidence test. *See People v. Avila*, 38 Cal.4th 491, 541, 133 P.3d 1076 (2006) ("We review the trial court's ruling on the question of purposeful racial discrimination for substantial evidence.")

[6] At the same time, the Supreme Court has never rejected that rule either; it simply has never addressed the issue, and that is enough to foreclose habeas relief under §2254(d)(1).

set aside under a different provision of AEDPA.[7]

C. Unsupported Claims About a Minority Juror's Demeanor Should Be Ruled Inadequate to Withstand a *Batson* Challenge, and the Court Should Adopt a New or Clarified Rule to Effectively Prohibit Race-based Peremptory Challenges

Attorney claims that a juror "never smiled once," displayed concern about a relative through "body language," or "seemed to be sleeping" cannot be sufficient to constitute "substantial evidence" of the "fact" that a peremptory challenge was not racially motivated. Conceding the validity of these reasons is tantamount to conceding the impossibility of ever attaining true juror diversity in Washington.

Courts in other jurisdictions have sensibly realized that uncorroborated reports of juror demeanor cannot be accepted as a sufficient evidentiary basis for a finding of no discriminatory intent. For example, in *Chew v. State*, 317 Md. 233, 562 A.2d 1270 (Md. 1989) the prosecutor struck an African American juror, claiming the juror appeared immobile, "stone-faced" and unsmiling. Confronted with a lack of evidence, the Maryland Court of Appeals found that the prosecution failed to carry its burden of rebutting the prima facie case of racial discrimination. The Florida Court of Appeals has ruled similarly. *Hill v. State*, 547 So.2d 175, 176 (Fla. Ct. App. 1989) (per curiam) ("Neither the judge nor defense counsel acknowledged that he observed such behavior

[7] *Thaler*, 559 U.S. at 49, pointing the habeas petitioner to subsection (2) of 28 U.S.C. §2254(d), which allows a court to grant habeas relief upon a showing that the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

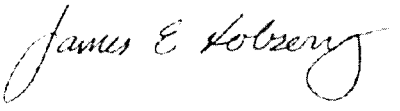
[yawning and seeming disinterested], and the juror was not questioned to substantiate the state's allegation. . . Accordingly, the trial court erred in permitting the State to excuse the juror.").

This Court has recognized that it has the authority "to pioneer new procedures" as well as the power to extend "greater-than-federal *Batson* protections to defendants under our state jury trial right . . . ." *Saintcalle*, 178 Wn.2d at 51. This case presents precisely the record and issues warranting review and reversal, plus it demonstrates the need for a new or clarified rule under which unsupported claims about a minority juror's demeanor would be recognized as insufficient to overcome a *Batson* objection.

III. CONCLUSION

For the foregoing reasons, there are ample grounds for granting review in this case.

Respectfully submitted this 29th day of April, 2016.



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I hereby certify that on April 29, 2016, I caused to be served the foregoing *Motion by American Civil Liberties Union of Washington, Fred T. Korematsu Center for Law and Equality, Latina/o Bar Association of Washington, South Asian Bar Association of Washington, Loren Miller Bar Association, Washington Association of Criminal Defense Lawyers, and Washington Defender Association for Leave to File Amici Curiae Memorandum in Support of Review* and the *Memorandum of Amici Curiae in Support of Review* along with this *Certificate of Service* to the parties below, in the manner noted:

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