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NO. 51517-2-II (consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE PERSONAL RESTRAINT OF
THEODORE RHONE

Petitioner.

PERSONAL RESTRAINT PETITION FROM THE SUPERIOR
COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce Cause No.03-1-02581-1

The Honorable Linda Lee, Judge

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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A. IDENTITY OF PETITIONER

Theodore Rhone asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT DECISION ON REVIEW

Mr. Rhone seeks review of the portions of *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010) that address the *Batson*¹ issue.

A copy of the decision is attached (Appendix).

C. ISSUES PRESENTED FOR REVIEW

1. The United States Supreme Court has repeatedly recognized that the first prong of the *Batson's* test which requires the defense to establish a prima facie case of discrimination is satisfied when the prosecutor uses peremptory strikes to strike all or nearly all jurors who are members of a cognizable group, but the courts never created a bright-line rule where removing the only member of the cognizable group satisfies the first prong of the *Batson* test. *Miller-El v. Dretke*, 545 U.S. 231, 240-41, 270, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005); *Johnson v. California*, 543 U.S. 162, 163, 125 S.Ct. 1141, 160 L.Ed.2d (2005).

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

When Rhone pointed out in 2010 that the prosecutor used its peremptory strikes to eliminate the prospective black jurors, the court denied his appeal on the grounds that he had not made a prima facie case of purposeful discrimination under *Batson*.

In 2017, in *City of Seattle v. Erickson*, 188 Wn.2d 721, 732-36, 398 P.3d 1124 (2017), the state Supreme Court adopted a more protective equal protection analysis in jury selection where the defendant establishes prima facie evidence of purposeful discrimination when a prosecutor strikes the only black juror from a venire. This bright-line rule represents a significant change in law but is not a new rule because under the equal protection clause it has always been impermissible to make a race based strike of a person of color; under *Erickson*, the court added new facts to existing law. Under Washington standards, our state courts now grant Washington citizens greater protection in equal protection matters involving racial discrimination in jury selection.

Should this Court exercise its independent authority to reach the merits of Rhone's *Batson* issue without consideration of federal retroactivity analysis because *Erickson* overruling *Rhone*, represents a significant change in law that provides greater

protection to Washington citizens than the traditional analysis of equal protection provisions under the federal equal protection provisions embodied in the *Batson* analysis?

2. Should this Court exercise its independent authority to reach the merits of Rhone's *Batson* issue under RCW 10.73.100(6) because *Erickson* is not a new rule of law for federal retroactive application because racism in jury selection under the equal protection was prohibited before *Erickson* but new facts were added to the existing equal protection right?

3. The state Supreme Court in *State v. Jefferson*, ___ Wn.2d ___, 429 P.3d 467 (2018), lowered the burden of proof for establishing equal protection violations based on racial discrimination in jury selection. The state Supreme Court expressly embraced the current understanding of racism in jury selection to create a new test to invalidate a peremptory strike of a person of color based on implicit bias, when an objective observer could view race as a factor in the decision to remove that juror.

Should this court exercise its independent authority, to serve the ends of justice and fundamental fairness, to reach the merits of Rhone's *Batson* issue and apply the *Jefferson* test, because this

court's understanding of racism has evolved since Rhone requested a change to *Batson* in his 2010, and this court now recognizes that "unintentional, institutional, or unconscious"² bias, is a form of prohibited racism in jury selection?

4. Should this court exercise its independent authority to reach the merits of Rhone's *Batson* issue and apply *Jefferson*, a case that was decided under state not federal analysis?

D. STATEMENT OF THE CASE

In 2010, pre-trial, Rhone challenged the constitutionality of a race based peremptory strike to the only African American member of the jury venire. (Mr. Rhone is African-American). ³The trial court denied Rhone's challenge and the Court of Appeals on direct appeal affirmed the trial court. The Washington Supreme Court denied Rhone's Personal Restraint Petition, 168 Wn.2d 645, 229 P.3d 752 (2010), where he asked the court to adopt a bright line

² *Jefferson*, 429 P.3d at 477.

³ Rhone urges this court to adopt a bright-line rule that a prima facie case of discrimination is always established whenever a prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group. Alternatively, Rhone argues that under the facts of this case, the trial court's determination that Rhone had failed to establish a prima facie case of discrimination was clearly erroneous. The state argues that Washington case law does not support a bright-line rule and that the trial court acted within its discretion.

rule prohibiting removal of the last member of a cognizable group.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. SEATTLE V. ERICKSON, AND STATE V. JEFFERSON BOTH OF WHICH WERE ISSUED AFTER THE ONE YEAR TIME BAR FOR FILING A PRP REPRESENT SIGNIFICANT CHANGES IN LAW WHICH MEET THE EXCEPTION TO THE ONE YEAR TIME LIMIT UNDER RCW 10.73.100(6), AND BOTH SHOULD APPLY RETROACTIVELY

- a. Summary of Washington's Recent Changes to *Batson*

The U.S. Supreme Court recognized that the problem with *Batson* began when that opinion was issued. *Batson*, 479 U.S. at 102-03. “The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” *Batson*, 479 U.S. at 102-03.

Our state supreme court, like the United States Supreme Court wrestled with *Batson* over the years to finally address head on its understanding that “[l]ooking back over the last 50 years, it is clear that *Batson* has failed to eliminate race discrimination in jury selection.” *Jefferson*, 429 P.3d at 475 (citing *Miller-El*, 545

U.S. at 270 (Breyer, J., concurring).

In 2017, in *Erickson*, the state Supreme Court expressly overturned *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010), and adopted the dissenting opinion in *Rhone* to “hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury.” *Erickson*, 188 Wn.2d at 724, 732. “We now follow our signal in *Rhone* and adopt a bright-line rule.” *Erickson*, 188 Wn.2d at 732. This was a significant change in law.

In 2018, the state Supreme Court again made a significant change in law in *Jefferson*, by rejecting the first and third prongs of the *Batson* test in favor of a new test that adopts an implicit bias standard to determine race based peremptory challenges. The new test considers whether “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.’ If so, then the peremptory strike shall be denied.”⁴

In both *Erickson* and *Jefferson*, our state Supreme Court departed from the limitations under the federal equal protection analysis in *Batson*, to interpret the equal protection clause to

⁴ *Jefferson*, 429 P.3d at 480.

create broader protections in Washington state. *Jefferson*, 429 P.3d at 480-81; *Erickson*, 188 Wn.2d at 734.

b. RCW 10.73.100(6) Exceptions to One Year Time Bar for Filing Petitions for Review

This court may review a petition filed after the one year time limit for collateral review where: (1) there has been a significant change in the law, whether substantive or procedural, which is (2) material to the conviction, sentence, or other order, and is (3) retroactive. RCW 10.73.100(6); *In re Yung Cheng-Tsai*, 183 Wn.2d 91, 103, 351 P.3d 138 (2015).

The state Supreme Court emphasized the importance of the “[b]road exceptions” to the time bar, stating that the Legislature has specifically “expand[ed] the scope of collateral relief beyond that which is constitutionally required” to include “*situations which affect the continued validity and fairness of the petitioner’s incarceration.*” *In re Personal Restraint of Greening*, 141 Wn.2d 687, 679, 9 P.3d 206 (2000) (citation omitted) (emphasis in original).

This case presents one of those situations that affect the continued validity and fairness of Rhone’s incarcerations due to his

2010 denied request for a bright line rule establishing prima facie evidence of purposeful discrimination that would have been granted under *Erickson*.

i. Significant Change in Law

Our courts separately and distinctly define the phrases “significant change in law” under RCW 10.73.100(6), and the definition of “new rule” in *Teague v. Lane*, 48 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Yung-cheng Tsai*, 183 Wn.2d at 103-04.

A significant change in state law occurs “where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.” *Tsai*, 183 Wn.2d at 104 (*quoting Greening*, 141 Wn.2d at 697).

By contrast, “new rules” under *Teague* “are those that ‘break[] new ground or impose[] a new obligation on the States or the Federal government [or] if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.’ ” *Tsai*, 183 Wn.2d at 104 (*quoting State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (*alterations in original*) (*quoting Teague*, 48 U.S. at 301)).

The court in *Tsai* explained the value of using different definitions for significant change in state law” and a “new rule” by indicating that the “significant change” language was intended to *reduce* procedural barriers to collateral relief in the interests of fairness and justice. The Court explained that a defendant should not be penalized for failing to timely raise an argument that was not previously available. *Tsai*, 183 Wn.2d at 104.

By contrast, the “new rule” under *Teague*, is broader and “intended to *strengthen* procedural barriers to collateral relief in the interests of finality and comity.” In *In re Personal Restraint of Gentry*, 179 Wn.2d 614, 625, 316 P.3d 1020 (2014) (emphasis in original), our state supreme court refused to “conflate” the two definitions.

Here, *Jefferson* and *Erickson* represent significant changes in law under RCW 10.73.100(6) because *Erickson* overruled *Rhone* and *Jefferson* overruled *Erickson* – both to provide relief from racial discrimination in jury selection.

c. Federal Retroactive Analysis Does Not Apply because *Erickson* and *Jefferson* Were Decided Under Independent State Grounds

The federal courts do not consider state constitutional matters out of “[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, [which] have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.” *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 469, 77 L.Ed.2d 1201 (1983)).

If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. To preclude federal court review, even though citing federal precedent, a state court “need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result ...”

State v. Chrisman, 100 Wn.2d 814, 816-17, 676 P.2d 419 (1984) (quoting *Long*, 463 U.S. at 1040-41). A plain statement of independent state grounds fosters the development of state law free from federal interference.” *Chrisman*, 100 Wn.2d at 817.

In *Jefferson* the court expressly rejected the state's argument that the following U.S. Supreme Court cases provided adequate means to address the *Batson's* inadequacy. *Jefferson*, 429 P.3d at 467-77 (citing *Foster v. Chatman*, ___ U.S. ___, 136 S.Ct. 1737, 1748, 1754, 195 L.Ed.2d 1 (2016) (quoting *Snyder v Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); *Miller-El*, 545 U.S. at 241).

Our court in *Jefferson* recognized that these federal cases provided "some refinements. But they provide no guidance on how to evaluate juror responses to determine 'purposeful discrimination.' And they did not address the issue of 'unintentional, institutional, or unconscious' race bias." *Jefferson*, 429 P.3d at 467-77 (quoting *State v. Saintcalle*, 178 Wn.2d 34, 36, 309 P.3d 326 (2013) (abrogated on other grounds in *Erickson*)).

"Based on the history of inadequate protections against race discrimination under the current standard and our **own authority to strengthen those protections**, we hold that step three of the *Batson* inquiry must change.... to further the administration of justice." (Emphasis added) *Jefferson*, 429 P.3d at 476, 480 (citing *Saintcalle*, 178 Wn.2d at 41 (plurality and Justice Pro Tem

Chambers' dissent)). In both *Erickson* and *Jefferson* our courts departed from *Batson's* federal precedent to add state specific protections. *Erickson*, 188 Wn.2d at 732, 734; *Jefferson*, 429 P.3d at 475, 481.

In departing from *Batson's* federal equal protection rights analysis, neither court expressly cited the state equal protection clause, but both expressly rejected *Batson* as an inadequate test to protect against racial discrimination in jury selection. *Jefferson*, 429 P.3d at 481; *Erickson*, 188 Wn.2d at 734. However the language in *Jefferson* regarding **“using its own authority”** to afford Washington citizens greater protections, makes clear that the federal cases were being used as a reference to the minimum protections required under the federal equal protection clause and did not themselves compel the result. *Jefferson*, 429 P.3d at 481; *Chrisman*, 100 Wn.2d at 817.

Rhone is not arguing that the state equal protection clause differs significantly from the federal equal protection clause.⁵ Rather, *Jefferson* and *Erickson* were both decided based on our state supreme court's determination to provide enhanced equal

⁵ *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

rights protections not available under federal law.

Since the federal courts do not consider our decisions based on state grounds, this court should apply *Jefferson* and *Erickson* retroactively to exercise its independent authority to address the merits of Rhone's case.

d. *Jefferson* and *Erickson* Should Apply Retroactively

Even if this Court applies the federal analysis of retroactivity under *Teague*, *Jefferson* and *Erickson* should apply retroactively under *Tsai*. In *Tsai*, our state supreme court held that the United States Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) represented a significant change in law that would apply retroactively despite the United States Supreme Court decision that *Padilla* announced a new rule of law that would not apply retroactively. *Tsai*, 183 Wn.2d at 106-07 (citing *Chaidez v. United States*, 568 US, 342, 348, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013)) (Chaidez's case was a federal habeas petition, the United States Supreme Court was required to apply the *Teague* "new rule" analysis).

The court in *Tsai*, correctly held that *Padilla* represented a

significant change in law rather than a new rule because prior to *Padilla*, counsel was required to provide effective assistance of counsel, including a duty to research and understand the law. But the decision in *Padilla* changed the law by specifically requiring counsel to specifically advise of the immigration consequences of a plea in addition to not misadvising of those consequences. *Tsai*, 183 Wn.2d at 101-02 (citing *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) and RCW 10.40.200)).⁶

Prior to *Padilla*, despite the right to effective assistance of counsel under the law, counsel could not be deemed ineffective for failing to advise of the immigration consequences of pleading guilty, but rather only if counsel misinformed of those consequences. *Tsai*, 183 Wn.2d at 106-07.

Jagana was the companion case to *Tsai's* case. *Tsai*, 183 Wn.2d at 107. In Jagana's case, counsel did not advise him of the immigration consequence of pleading guilty, whereas in *Tsai's* case, counsel misinformed him of the immigration consequences of pleading guilty. *Id.*

⁶ Unequivocal right to advice regarding immigration consequences that necessarily imposes a correlative duty on defense counsel to ensure that advice is provided.

The Court applied the significant change of law to reach the merits in Jagana's personal restraint petition to reverse and remanded for a new hearing on the merits, even though the PRP was filed many years after Jagana's conviction, because *Padilla* was an intervening opinion that effectively overturned a prior appellate decision that was originally determinative of a material issue. *Tsai*, 183 Wn.2d at 104, 106-07. 7

Procedurally, Mr. Rhone's case is similar to Jagana's case. The decision in *Erickson* changed the law by specifically requiring application of a bright-line rule for determining the first prong of the *Batson* test. Prior to *Erickson* *Batson*, prohibited "racial discrimination" in jury selection under the equal protection clause, but defendants could not prevail on a claim of racial discrimination without making a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 79, 86-87; *Rhone*, 168 Wn.2d at 654.

After *Erickson*, if the only or remaining person of color was removed from the jury pool, the defendant met the first prong of the *Batson* test: a presumption of purposeful discrimination. *Erickson*,

7 The Court ruled that the issue was time barred for *Tsai*, because he could have appealed the issue directly in his case based on counsel misadvising of the immigration consequences of a plea. *Id.*

188 Wn.2d at 724, 732. This change represents a significant change in law similar to *Tsai*, where the right to effective assistance of counsel existed but *Padilla* expressly provided a new avenue to establish ineffective assistance of counsel *Tsai*, 183 Wn.2d at 106.

Prior to *Jefferson*, the right to a jury selection free from racial discrimination existed, similar to the right to effective assistance of counsel prior to *Padilla*, but *Jefferson* presented a significant change in law where, for the first time, a defendant could successfully establish an equal protection violation in jury selection by establishing an appearance of racial discrimination based on implicit bias rather than proving purposeful discrimination.

Analytically, this change in law is like *Padilla* where the right to effective assistance of counsel existed, but prior to *Padilla* a defendant could not establish ineffective assistance of counsel by counsel's failure to inform of immigration consequences of a guilty plea. The decision in *Jefferson*, provided a previously unavailable method for establishing racial discrimination in jury selection. This broader understanding of racism applied new facts to the equal protection analysis to include implicit bias. *Jefferson* like *Padilla* did not announce a new rule of law but rather expanded the pre-

existing constitutional commitment to protect against all forms of racism in jury selection: both purposeful and implicit. *Jefferson*, 429 P.3d 467; *Tsai*, 183 Wn.2d at 102-03.

Under the legal analysis for a significant change in law, this Court should permit review under RCW 10.73.100(6) to further the goal of reducing procedural barriers to collateral relief and apply both *Jefferson* and *Erickson* to provide relief for Mr. Rhone. *Tsai*, 183 Wn.2d at 104.

- e. To Serve the Ends of Justice and Fundamental Fairness this Court Should Apply *Erickson* and *Jefferson* Retroactively to Rhone's Case

“[O]ur court has inherent authority to adopt such procedures to further the administration of justice.” *Jefferson*, 429 P.3d at 476 (citing *Saintcalle*, 178 Wn.2d at 41(plurality and Justice Pro Tem Chambers’ dissent)). Our courts do not have an independent test for determining retroactive application of significant changes in law and understand that they are not bound by the federal retroactive rules under *Teague*, 489 U.S. 288; *Danforth v. Minnesota*, 552 U.S. 264, 280-81. 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). *Danforth*,

552 U.S. at 280-81.

Teague was expressly created to apply to federal habeas cases.

it is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.

Gentry, 179 Wn.2d at 626.

Our courts have never issued an in-depth analysis justifying reliance of *Teague*, but rather have stated that our courts “generally” use *Teague*, (Id.), or explained the court “stays in step with federal analysis”. *In re Personal restraint of Markel*, 154 Wn.2d 262, 268, n1, 111 P.3d 249 (2005). Despite not applying an independent analysis in *Markel*, the court expressly identified its independent authority to decide retroactivity questions without consideration of the federal analysis.

While we have long looked to the federal retroactivity analysis for guidance, our use of this analysis does not necessarily define the full scope of RCW 10.73.100(6). We do not foreclose the possibility that there may be a case where a petitioner would not be entitled to relief under the

federal analysis as it exists today, or as it may develop, but where sufficient reason would exist to depart from that analysis.

Markel, 154 Wn.2d at 268.

Rhone's case is the right case to depart from the federal analysis because in 2010 implicit bias and racism existed but it was not until *Erickson* and *Jefferson*, that our courts afforded our citizens protection against this long standing form of racism. Rhone should not be penalized for our collective inability to recognize earlier the more subtle forms of racism – racism that existed when Rhone made his *Batson* challenge. *Jefferson*, 429 P.3d at 481.

Federal habeas petitions have no bearing on state personnel restrained petitions. *Danforth*, 552 U.S. at 277. There is no reason in law or fact to deny Rhone relief as an African American man, whose case was one of the springboards for this court's ultimate rejection of *Batson*, simply because the federal government chooses one analysis for federal habeas that our state court need apply. Certainly the historic effort to "stay in step" is meaningless, in the face of prevalent, unchecked, implicit racial discrimination. *Matter of St. Pierre*, 118 Wn.2d 321, 324, 823 P.2d 492 (1992).

Racism is an historic problem that this court has endeavored to address in the context of jury selection. The courts cannot apologize for past racist practice but can apply *Jefferson* to Rhone in acknowledgment of the court's almost decade long process in approving the propriety of the relief Rhone requested in 2010. This court should grant review to reach the merits of Rhone's case. *Markel*, 154 Wn.2d at 268.

i. Reaching the Merits to Serve the Ends of Justice

Gentry provides an example of the state Supreme Court partially following its own path despite *Teague*. In *Gentry*, the state Supreme Court did not use its own retroactivity analysis but instead cited *Teague* as the test this state has "generally" used for retroactivity questions. *Id.*

Even though the court in *Gentry* applied *Teague* for its retroactivity analysis, it nonetheless, in the interests of justice examined the substance of *Gentry*'s racially discriminatory prosecutorial misconduct claim based on *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), because Washington Courts' are committed to "justice in substance, not merely name" to determine

despite *Teague*, whether the misconduct at Gentry's trial resulted in actual and substantial prejudice from racially charged prosecutorial misconduct. *Gentry*, 179 Wn.2d at 629.

Substantively, the court held that notwithstanding the prosecutor's offensive racially discriminatory comments, the fact that they were made outside the presence of jury did not enable Gentry to establish prejudice under the harmless error standard. *Gentry*, 179 Wn.2d at 640-42.

Rhone, *Erickson* and *Jefferson* are different because the racism was directed at Rhone and the jurors themselves rather than to the court. A clear error standard applies to this case. *Saintcalle*, 178 Wn.2d at 41. Clear error is established when the court is left with a definite and firm conviction that a mistake has been committed. *Saintcalle*, 178 Wn.2d at 41. Rhone meets this burden because, unlike in *Gentry*, Rhone would be granted relief under both *Erickson* and *Jefferson*.

To serve the ends of justice and fundamental fairness offered Washington citizens, this Court should grant review, and reverse and remand for a new trial.

F. CONCLUSION

Mr. Rhone is being unlawfully restrained based on the significant changes in law in *Erickson and Jefferson* which overruled Rhone's 2010 case, decisions based on state expansions of limited federal rights that do not limit retroactive application. This court should grant review, reverse and remand for a new trial to serve the ends of justice and fundamental fairness.

DATED this 29th day of January 2019.

Respectfully submitted,



LISE ELLNER
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Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Theodore Rhone/DOC#708234, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on January 25, 2019. Service was made by electronically to the prosecutor and Theodore Rhone by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

APPENDIX



KeyCite Red Flag - Severe Negative Treatment
Abrogated by [City of Seattle v. Erickson](#), Wash., July 6, 2017

168 Wash.2d 645
Supreme Court of Washington,
En Banc.

STATE of Washington, Respondent,
v.
Theodore R. RHONE, Petitioner.

No. 80037-5.
|
Argued Oct. 13, 2009.
|
Decided April 1, 2010.

Synopsis

Background: Defendant was convicted in the Superior Court, Pierce County, Linda C.J. Lee, J., of robbery in the first degree, unlawful possession of a controlled substance with intent to deliver, unlawful possession of a firearm in the first degree and bail jumping. Defendant appealed. The Court of Appeals, [137 Wash.App. 1046, 2007 WL 831725](#), affirmed, and defendant petitioned for review.

Holdings: The Supreme Court, [C. Johnson](#), J., held that:

^[1] a prima facie case of discrimination is not established under [Batson](#) whenever the State uses a peremptory against a member of a racially cognizable group, and

^[2] trial court did not abuse its discretion by finding that defendant did not establish a prima facie case that State's use of peremptory challenge to strike the sole remaining African-American member of jury panel was discriminatory under [Batson](#).

Court of Appeals affirmed.

[Madsen](#), C.J., agreed and filed opinion.

[Alexander](#), J. dissented and filed opinion, in which [Mary E. Fairhurst](#), [Richard B. Sanders](#) and [Tom Chambers](#), JJ., joined.

Attorneys and Law Firms

**753 [Rita Joan Griffith](#), Attorney at Law, Seattle, WA, for Petitioner.

[Karen Anne Watson](#), Pierce County Prosecutor's Office, Tacoma, WA, for Respondent.

[Charles Christian Sipos](#), [Lisa Marshall Manheim](#), Perkins Coie L.L.P., [Sarah A. Dunne](#), [Nancy Lynn Talner](#), ACLU, Seattle, WA, for amicus curiae American Civil Liberties Union.

Opinion

[C. JOHNSON](#), J.

*648 ¶ 1 This case involves the question of whether a prosecutor’s peremptory challenge of the only African–American venire member in a trial of an African–American defendant amounts to a prima facie case of discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court concluded that defendant Theodore Rhone failed to establish a prima facie case of discrimination under *Batson*, did not require the prosecutor to provide a race-neutral explanation for his challenge, and denied Rhone’s challenge. Rhone’s conviction was affirmed by the Court of Appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 Rhone, an African–American, was charged with robbery in the first degree, unlawful possession of a controlled substance with intent to deliver, unlawful possession of a firearm in the first degree, and bail jumping. There were two African–Americans in the 41–member venire pool, one of whom was challenged for cause per agreement by the parties. The other, juror 19, was removed by one of the prosecutor’s peremptory challenges. Neither Rhone nor his counsel objected when juror 19 was removed.

¶ 3 After the jury was sworn in, but prior to trial, defense counsel informed the trial court that Rhone wished to make a statement. Rhone stated the following:

*649 I don’t mean to be facetious or disrespectful or a burden to the Court. However, I do want a jury of my peers. And I notice that [the prosecutor] took away the black, African–American, man off the jury.

Also, if I can’t have—I would like to have someone that represents my culture as well as your culture. To have this the way it is to me seems unfair to me. It’s not a jury of my peers. I’m—I mean, I am an African–American black male, 48 years old. I would like someone of culture, of color, that has—perhaps may have had to deal with improperties [sic] and so forth, to understand what’s going on and what could be happening in this trial.

**754 Verbatim Report of Proceedings (VRP), Vol. 6 (Apr. 28, 2005) at 439. Defense counsel informed the court that Rhone was requesting a new jury pool.¹ The trial court understood Rhone’s statement to be a *Batson* challenge. The prosecutor offered to respond to Rhone’s *Batson* challenge, but the trial court declined the offer, stating that “the Court is prepared to rule on the issue.” VRP, Vol. 7 (Apr. 28, 2005) at 450–51.

¹ Rhone’s challenge was made after juror 19 was dismissed and the jury panel was sworn in. Accordingly, had the trial court concluded

that the prosecutor's peremptory challenge of juror 19 was discriminatory, juror 19 would be unable to be reinstated into the jury pool. Rather, the trial court would be required to dismiss the entire jury, declare a mistrial, and reopen voir dire with a new jury pool.

¶ 4 In making its ruling, the court twice mentioned that a defendant is entitled to protection from systematic exclusion of jurors based on race:

The only right the criminal defendant has is that the selection process which produced the jury did not offer it to *systematically exclude* distinctive groups in the community ... this right is subject to the commands of the Equal Protection clause of the 14th Amendment which prohibits *systematic exclusion* of otherwise qualified jurors based solely on race.

VRP, Vol. 7 (Apr. 28, 2005) at 451 (emphasis added). The court then treated Rhone's comments as a *Batson* objection and applied the factors relevant to prove a prima facie case *650 of discrimination under the first part of the analysis. The court stated:

Here the defendant has not provided this Court with any evidence of circumstances raising an inference of discrimination by the prosecution. The defendant merely makes a bare assertion that there are no African-Americans on this jury.... The mere fact that [sic] State exercised its preemptory [sic] on that African-American, without more, is insufficient to establish a prima facie case of discrimination. Defense's request is denied.

VRP, Vol. 7 (Apr. 28, 2005) at 452-53.

¶ 5 The jury found Rhone guilty of all charges. Rhone timely appealed. The Court of Appeals affirmed the trial court in an unpublished opinion, holding, in part, that "numbers alone" were insufficient to establish a prima facie case of discrimination under *Batson* and that Rhone failed to provide other evidence indicating a discriminatory purpose. *State v. Rhone*, noted at 137 Wash.App. 1046, 2007 WL 831725, at *7. The Court of Appeals also noted that the trial court was in the best position to evaluate the prosecutor's demeanor, and in this case the trial court was not suspicious that the State had acted with a discriminatory purpose.

ISSUE

¶ 6 Did the trial court err by ruling that the prosecutor's removal of the only African-American venire member did not establish a prima facie case of discrimination in violation of *Batson* ?

ANALYSIS

¶ 7 In *Batson*, the United States Supreme Court recognized that, although a defendant has no right to a " 'jury composed in whole or in part of persons of his own race,' " the equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to *651 nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86, 106 S.Ct. 1712, (quoting *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1879)). *Batson* established a three-part analysis to determine whether a venire member was peremptorily challenged pursuant to discriminatory criteria.² A defendant challenging **755 a prosecutor's peremptory challenge of a venire member must first establish a prima facie case of purposeful discrimination. To establish this prima facie case, the court held that the defendant must provide evidence of any relevant circumstances that "raise an inference" that a peremptory challenge was used to exclude a venire member from the jury on account of the venire member's race. *Batson*, 476 U.S. at 96, 106 S.Ct. 1712. Second, if a prima facie case is established, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member. Finally, the trial court determines whether the defendant has established purposeful discrimination.³

² The United States Supreme Court has expanded the scope of *Batson's* basic constitutional rule: It has applied *Batson's* antidiscrimination test to the use of peremptories by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), by private litigants in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), and by prosecutors where the defendant and the excluded juror are of different races, *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). It has recognized that the Constitution protects not just defendants, but the jurors themselves. [*Powers*, 499 U.S. at 409, 111 S.Ct. 1364.] And it has held that equal protection principles prohibit excusing jurors on account of gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).
Miller-El v. Dretke, 545 U.S. 231, 269–70, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Breyer, J., concurring).

³ The issue before us pertains to only the first part of the *Batson* analysis, i.e., whether a prima facie case was established.

^[1] ¶ 8 “In reviewing a trial court’s ruling on a *Batson* challenge, “[t]he determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous.” *State v. Hicks*, 163 Wash.2d 477, 486, 181 P.3d 831 (2008) (internal quotation marks omitted) (quoting *State v. Luvene*, 127 Wash.2d 690, 903 P.2d 960 (1995)).

*652 ¶ 9 Rhone argues that the trial court’s reference to a “systematic exclusion of jurors” was an error warranting automatic reversal.⁴ The State argues that the trial court corrected the error when the court applied *Batson's* “inference of discriminatory purpose” standard and correctly ruled that Rhone failed to establish a prima facie case of discrimination.⁵ Because the trial court applied the correct standard under *Batson*, its prior reference to an incorrect standard does not establish error.

⁴ In adopting the *Batson* analysis, the United States Supreme Court replaced the previous “threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant’s jury sufficed to establish the constitutional violation.” *Miller-El*, 545 U.S. at 236, 125 S.Ct. 2317 (referring to the decision in *Batson* to overrule the systematic discrimination test in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)).

⁵ The State also argues that Rhone’s *Batson* challenge was untimely and should not be considered. The State, however, did not object to the timeliness of Rhone’s *Batson* challenge at the trial court, and the Court of Appeals did not address this issue. We therefore proceed to the merits of Rhone’s claims.

¶ 10 Rhone urges this court to adopt a bright-line rule that a prima facie case of discrimination is always established whenever a prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group. Alternatively, Rhone argues that under the facts of this case, the trial court’s determination that Rhone had failed to establish a prima facie case of discrimination was clearly erroneous. The State argues that Washington case law does not support a bright-line rule and that the trial court acted within its discretion.

¶ 11 Amicus Brief of the American Civil Liberties Union (ACLU) supports Rhone in urging this court to adopt a bright-line rule. ACLU argues that such a rule would not impose any undue additional burden on the State, but would instead (1) ensure

an adequate record for appellate review, (2) account for the realities of the demographic composition of Washington venire, and (3) effectuate the Washington Constitution's elevated protection of the right to a fair jury trial.

*653 ¶ 12 We recently reaffirmed the rule that “a trial court is ‘not *required* to find a prima facie case [of discriminatory purpose] based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in their discretion, recognize a prima facie case in such instances.’ ” *State v. Thomas*, 166 Wash.2d 380, 397, 208 P.3d 1107 (2009) (quoting *Hicks*, 163 Wash.2d at 490, 181 P.3d 831). *Hicks* involved the issue of whether a trial court erred by denying the *Batson* challenge made by Phillip Hicks and Rashad Babbs, both African–Americans, to the exclusion of the only African–American venire member. There, defense counsel argued that, because the prosecutor had not asked the African–American venire member any questions during voir dire, race must have been the reason for removing her. The trial court ruled: **756 “[O]ut of an abundance of caution, I find a prima facie case [of discrimination].” *Hicks*, 163 Wash.2d at 484, 181 P.3d 831 (alterations in original) (quoting court proceedings). On review, we held that the trial court’s determination that the defendants *had* established a prima facie of discrimination was not clearly erroneous due to the presence of circumstances evincing “something more” than a peremptory challenge of a member of a racially cognizable group, i.e., the questions the prosecutor asked of the African–American venire member and of other venire members. In the case at hand, we consider the other side of the coin, i.e., where the trial court determined that the defendant *had not* established a prima facie case of discrimination. However, the same “clearly erroneous” standard applies under these circumstances.

[2] [3] ¶ 13 In this case, we conclude that a bright-line rule superseding a trial court’s discretion in determining whether a defendant has established a prima facie case of discrimination is inconsistent with *Batson*. *Batson* provided for a *three*-part analysis, the first part directing the trial court to determine whether “something more” exists than a peremptory challenge of a member of a racially cognizable group. Adopting a bright-line rule would negate this first part of the analysis and require a prosecutor to provide an *654 explanation every time a member of a racially cognizable group is peremptorily challenged. Such a rule is beyond the intended scope of *Batson*, transforming a shield against discrimination into a sword cutting against the purpose of a peremptory challenge:

The peremptory challenge ... exists to give the task of sorting out the biases most relevant in the given case to those most competent of determining it, i.e., the parties, and to give the parties a degree of flexibility and control over the constitution of the jury panel through their implementation of the challenge mechanism.

Peter J. Richards, *The Discreet Charm of the Mixed Jury: The Epistemology of Jury Selection and the Perils of Post–Modernism*, 26 *Seattle U.L.Rev.* 445, 459 (2003). Such an approach would also be inconsistent with what we stated in *Hicks* and what other courts have held.

¶ 14 Cases from other states support this holding, attesting to the imperative to require “something more” than a peremptory challenge against a member of a racially cognizable group. *See, e.g., People v. Carasi*, 44 Cal.4th 1263, 1292, 190 P.3d 616, 82 Cal.Rptr.3d 265 (2008) (“In this first stage of any [*Batson*] inquiry, the burden rests on the defendant to ‘show [] that the totality of the relevant facts gives rise to an inference of discriminatory purpose’ [The prosecutor] was not obliged to disclose such reasons [for his peremptory challenge of a member of a racially cognizable group], and the trial court was not required to evaluate them, unless and until a prima facie case was made” (internal citations omitted)); *People v. Davis*, 231 Ill.2d 349, 361, 899 N.E.2d 238, 326 Ill.Dec. 21 (2008) (“[T]he mere fact of a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination.... [T]he number of persons struck takes on meaning only when coupled with other information such as the *voir dire* answers *655 of those who were struck compared to the answers of those who were not struck” (internal citations omitted)); *People v. MacShane*, 11 N.Y.3d 841, 842, 901 N.E.2d 186, 872 N.Y.S.2d 695 (2008) (“[Defendant] failed to meet his burden of establishing a prima facie case of discrimination under step one of the three-step protocol in [*Batson*] He did not articulate facts and circumstances that raised an inference that the prosecutor excused these jurors for a discriminatory reason; instead, defense counsel merely identified a general motive to discriminate untethered to the particular jurors at issue.”). These cases support our view that the defendant must establish “something more” than the venire member’s removal and that the trial court possesses broad discretion in making its findings.

¶ 15 The narrow issue remaining before us is whether the trial court’s conclusion that there was not “something more” evincing an inference of discrimination in this case was clearly erroneous. Certainly, Rhone’s objection **757 at trial was insufficient. But Rhone argues that an inference of discrimination is established in this case because the only African–American venire

member, juror 19, was stricken from the jury pool even though his background and answers to voir dire questions were similar to those of a non-African-American venire member, juror 33, who was seated as an alternate. The State argues that the similarity of the venire members failed to raise an inference of discrimination.

^[4] ¶ 16 As we have already noted, “a defendant satisfies the requirements of *Batson’s* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *Johnson v. California*, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). But before the trial court, Rhone failed to supply any evidence of circumstances raising an inference of discrimination by the prosecution, but only acknowledged that an African–American venire member had been removed by the prosecutor’s peremptory challenge. VRP, Vol. 7 (Apr. 28, 2005) at 439. The similarity between jurors *656 19 and 33 was raised only by amicus ACLU and in the State’s response to the ACLU; Rhone’s briefing is silent on the similarity between jurors 19 and 33, and Rhone’s counsel did not raise the issue until oral argument before this court.⁶ The trial court therefore did not err when it stated that the “defendant has not provided this Court with any evidence of circumstances raising an inference of discrimination by the prosecution. The defendant merely makes a bare assertion that there are no African–Americans on this jury.” VRP, Vol. 7 (Apr. 28, 2005) at 452.

⁶ Rhone did not supplement the record with a transcript of the voir dire proceedings until after we granted review.

^[5] ^[6] ¶ 17 Although Rhone failed to raise any circumstances evincing an inference of discrimination before the trial court, a trial court must still consider whether such circumstances exist, i.e., “something more” than a peremptory challenge against a member of a racially cognizable group. Such circumstances include (1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against a group, (3) the level of a group’s representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney’s questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck. *State v. Wright*, 78 Wash.App. 93, 100–01, 896 P.2d 713 (1995) (holding, among other things, that a trial court “should not elicit the prosecutor’s race-neutral explanation *before* determining whether the defense has established a prima facie case. To do so would collapse the *Batson* two-part analysis. If the trial court concludes no prima facie case exists, the prosecutor is not required to offer a race-neutral explanation” (citation omitted)). We agree with *Wright’s* approach but note that these considerations are not exclusive and merely offer a guideline of what trial courts might, in a *657 given case, consider in determining whether a defendant has established “something more.”

¶ 18 In the present case, the lattermost circumstance is the most applicable, i.e., the similarity between African–American juror 19, who was struck from the jury, and non-African-American juror 33, who served on the jury as an alternate. But the record shows that juror 33 had experience as a juror on two separate criminal cases, both in Pierce County where Rhone’s trial was held, which reached a verdict; juror 19 had no prior experience as a juror. VRP, Voir Dire, Vol. 2 (Apr. 28, 2005) at 55–69. The record therefore shows that some differences between the venire members did exist.

^[7] ^[8] ¶ 19 Rhone may be correct that had these arguments been presented to the trial court, it could have inferred a discriminatory motive from the totality of circumstances **758 surrounding the prosecutor’s peremptory challenge of juror 19. Alternatively, it was just as reasonable for the trial court *not* to infer a discriminatory motive. On review, the defendant faces a heightened burden: where reasonable minds may differ in finding an inference of discrimination, an appellate court may not conclude that a trial court’s determination regarding that inference is clearly erroneous. See *Rice v. Collins*, 546 U.S. 333, 341–342, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (“Reasonable minds reviewing the record might disagree about the prosecutor’s credibility, but on habeas review that does not suffice to supersede the trial court’s credibility determination.”); *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (“[D]eterminations of credibility and demeanor lie ‘peculiarly within a trial judge’s province,’ [and] ‘in the absence of exceptional circumstances, we would defer to [the trial court].’” (third alteration in original) (internal quotation marks omitted) (quoting *Hernandez v. New York*, 500 U.S. 352, 365, 366, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion))); *Hicks*, 163 Wash.2d at 490, 181 P.3d 831 (“Lower courts have been entrusted with the task of determining the type and amount of proof necessary for a defendant to *658 establish a prima facie case of discrimination.”). In light of the differences between jurors 19 and 33 exhibited in the cold record before us and the deference appellate courts owe to a trial court’s discretionary decision, we cannot conclude that the trial court erred by not finding “something more” than a peremptory challenge against a member of a racially cognizable group. Rhone has failed to meet his

burden on review to show that the trial court's determination that he failed to raise an inference of discrimination was clearly erroneous.

CONCLUSION

¶ 20 We hold that the trial court applied the correct standard of review under *Batson* and that the trial court's determination that Rhone failed to establish a prima facie case of discrimination was not clearly erroneous. Accordingly, we affirm the Court of Appeals' decision and Rhone's conviction.

WE CONCUR: [SUSAN OWENS](#), JAMES M. JOHNSON, and [DEBRA L. STEPHENS](#), Justices.

[MADSEN](#), C.J. (concurring).

¶ 21 I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent.

[ALEXANDER](#), J. (dissenting).

¶ 22 I dissent because, in my view, the lead opinion wrongly concludes that Theodore Rhone failed to establish a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and is, therefore, not entitled to a new trial. In that regard, the lead opinion errs in putting its interpretation on the trial court's consideration of systemic¹ discrimination as part of its *Batson* analysis.

¹ As explained below, when the United States Supreme Court adopted *Batson*, it replaced the previous threshold requirement for a defendant to show "systemic discrimination" in proving that his Fourteenth Amendment rights were violated. See *Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (emphasis added). The trial court here, however, explained to Rhone that the Fourteenth Amendment prohibits "systematic" discrimination of jurors based on race. Verbatim Report of Proceedings at 451 (emphasis added).

*659 ¶ 23 I would have this court adopt a bright line rule that a defendant establishes a prima facie case of discrimination when, as here, the record shows that the State exercised a peremptory challenge against the sole remaining venire member of the defendant's constitutionally cognizable racial group. For these reasons, I advocate reversing the Court of Appeals' decision affirming Rhone's conviction and sentence and would remand for a new trial.

¶ 24 In *Batson*, the United States Supreme Court unequivocally recognized that the equal protection clause requires that defendants be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 86, 106 S.Ct. 1712 (citing *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497 (1906)). As the lead opinion observes, *Batson* outlines a three-part test to determine whether a venire **759 member was impermissibly excluded pursuant to discriminatory

criteria. Lead op. at 754–55. To meet the test, the defendant must first make out a prima facie case of discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *State v. Hicks*, 163 Wash.2d 477, 489, 181 P.3d 831 (citing *Batson*, 476 U.S. at 93–94, 106 S.Ct. 1712), cert. denied, — U.S. —, 129 S.Ct. 278, 172 L.Ed.2d 205 (2008). If the defendant does so, the burden shifts to the State to present a neutral explanation for challenging the juror. *Id.* (citing *Batson*, 476 U.S. at 97, 106 S.Ct. 1712). The trial court must then determine if the defendant has established purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98, 106 S.Ct. 1712). As the lead opinion notes, only the first factor of the *Batson* test is at issue here.

¶ 25 In *Batson*, the United States Supreme Court clearly determined that “ ‘a consistent pattern of official racial discrimination’ is not ‘a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable *660 decisions.’ ” *Batson*, 476 U.S. at 95, 106 S.Ct. 1712 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977)). In *Batson*, the United States Supreme Court replaced the previous “threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant’s jury sufficed to establish the constitutional violation.” *Miller–El v. Dretke*, 545 U.S. 231, 236, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

¶ 26 In my view, the trial court’s consideration of systematic discrimination in its analysis of whether Rhone established a prima facie case of discrimination under *Batson* was clearly erroneous. In support of its decision, the trial court stated:

The only right the criminal defendant has is that the selection process which produced the jury did not offer it to *systematically exclude* distinctive groups in the community....

... [T]his right is subject to the commands of the Equal Protection [C]lause of the 14th Amendment which prohibits *systematic exclusion* of otherwise qualified jurors based solely on race.

Verbatim Report of Proceedings at 451 (emphasis added). The lead opinion appears to concede that the trial court referred to an incorrect standard. It goes on to say, though, that it was not error because the trial court later applied the correct standard. I disagree. After *Batson*, it is clearly inappropriate for a trial court to consider whether the jury selection process involves *systemic exclusion* of venire members based on a discriminatory purpose. See *Batson*, 476 U.S. at 95, 106 S.Ct. 1712. As noted above, a “single invidiously discriminatory governmental act” is sufficient to warrant reversal of a conviction. *Id.* Here, the trial court did not appear to recognize that fact and, consequently, its ruling on Rhone’s *Batson* challenge was clearly erroneous having been based on a misinterpretation of the requirements to establish a prima facie case of discrimination.

*661 ¶ 27 It is my view, moreover, that we should adopt a bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant’s constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged. I recognize that we have previously held that “a trial court is ‘not required to find a prima facie case [of discriminatory purpose] based on the dismissal of the only venire person from a constitutionally cognizable group, but they may, in their discretion, recognize a prima facie case in such instances.’ ” *State v. Thomas*, 166 Wash.2d 380, 397, 208 P.3d 1107 (2009) (quoting *Hicks*, 163 Wash.2d at 490, 181 P.3d 831) (alteration in original). Nevertheless, I am convinced that it makes sense to adopt the bright line rule proposed by Rhone and amicus American Civil Liberties Union (ACLU).

¶ 28 One of the strongest reasons to adopt such a bright line rule is that the benefits of such a rule far outweigh the State’s minimal burden to provide a race-neutral explanation **760 for its challenge during venire. As the lead opinion notes, some of

these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venire,² and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial. Lead op. at 755.

² According to amicus ACLU, “ ‘African Americans comprise 3.36% of the state population in Washington but received 14.91% of all felony convictions and were the most over-represented racial group with a 4.44 [disproportionality] ratio.’ ” Amicus Br. of ACLU at 9 (alteration in original) (citing Wash. Sentencing Guidelines Comm'n, *Disproportionality in Adult Felony Sentencing* 1 (Apr.2008), available at http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionality_Disparity_FY07.pdf). Pierce County, where this case was tried, ranks 25th out of 30 counties analyzed in terms of overrepresentation of African-Americans in the criminal justice system. *Id.*

¶ 29 Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a *Batson* challenge. The United States Supreme Court noted in *Johnson v. *662 California*, 545 U.S. 162, 172, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005), that the *Batson* inquiry was designed to produce actual answers to suspicions that peremptory challenges are racially motivated, stating that “[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.” A bright line rule would provide clarity and certainty concerning the State's obligations in future cases and would simultaneously engender greater fidelity to *Batson* and its equal protection guaranty.

¶ 30 The lead opinion claims that adopting a bright line rule is beyond the intended scope of *Batson* and would transform “a shield against discrimination into a sword cutting against the purpose of a peremptory challenge.” Lead op. at 756. I disagree. A bright line rule would merely require the State to offer a race-neutral explanation for its peremptory challenge. So long as the State's purpose in excluding the venire member is nondiscriminatory, it will be permitted to exercise its challenge and the purpose of the peremptory challenge will not be undermined.

¶ 31 The lead opinion also claims that a bright line rule would be “inconsistent” with what other courts have held. *Id.* The fact is that there is a split among the jurisdictions. Some have held that a prima facie case of discrimination is established under *Batson* either when the last remaining member of the defendant's cognizable racial group is dismissed or when the last remaining minority venire member is peremptorily challenged. See, e.g., *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir.1987) (holding the government's exercise of a peremptory challenge to strike the last remaining juror of defendant's race is sufficient to raise an inference that the juror was excluded on account of his race); *Hollamon v. State*, 312 Ark. 48, 846 S.W.2d 663, 666 (1993) (“the defendant must first establish a prima facie case of purposeful discrimination, which the appellant clearly did ... when he pointed to a peremptory strike by the state dismissing the sole black person on the jury”); **663 People v. Portley*, 857 P.2d 459, 464 (Colo.Ct.App.1992) (holding a defendant establishes a prima facie case of discrimination if no members of a cognizable racial group are left on a jury as a result of the prosecutor's exercise of peremptory challenge, even when alternate jurors who remain on the venire are members of a cognizable racial group); *State v. Holloway*, 209 Conn. 636, 553 A.2d 166 (1989) (citing with approval the rule that after a party objects to a strike, the proponent of the strike must offer a racially neutral explanation); *Highler v. State*, 854 N.E.2d 823, 827 (Ind.2006) (stating the removal of the only African-American juror raises an inference that the strike was racially motivated); *State v. Parker*, 836 S.W.2d 930, 940 (Mo.1992) (holding that once a defendant raises a *Batson* challenge, the trial court must conduct an evidentiary hearing to determine whether the prosecutor's strike was racially motivated); *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244, 247 (2006) (“After a party objects to a jury strike, the ****761** proponent of the strike must offer a facially race-neutral explanation.”).

¶ 32 Adopting a bright line rule similar to that which has been adopted by the above jurisdictions would provide a significant benefit in that the voir dire process would remain fair and nondiscriminatory, while ensuring that parties are able to continue exercising legitimate peremptory challenges. This rule, additionally, would prevent speculation after the fact about the basis for potentially discriminatory peremptory strikes and safeguard the Fourteenth Amendment protections established in *Batson*. As such, I would hold that when the defendant objects, the State must provide a race-neutral reason

for exercising a peremptory challenge against the only remaining minority member of the defendant’s cognizable racial group or the only remaining minority in the venire. I would hold, in addition, that the trial court clearly erred in considering “systematic discrimination” as part of its *Batson* analysis. I would, therefore, reverse Rhone’s conviction and sentence and remand for a new trial.

*664 ¶ 33 For these reasons, I respectfully dissent.

WE CONCUR: [MARY E. FAIRHURST](#), [RICHARD B. SANDERS](#), and [TOM CHAMBERS](#), Justices.

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