

SUPREME COURT NO. 80037-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THEODORE ROOSEVELT RHONE,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda Lee, Judge

SUPPLEMENTAL BRIEF OF APPELLANT/PETITIONER

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A. ISSUES ON REVIEW

1. Does the trial court err, as a matter of law, in ruling that the "mere fact that State exercised its preemptory [sic] on that [the only] African American, without more, is insufficient to establish a prima facie case of discrimination"?

2. Are the trial court's ruling and the decision of the Court of Appeals affirming the ruling in conflict with the standard articulated in State v. Wright, 78 Wn. App. 93, 896 P.2d 713 (1995), State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000), and State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996), as set forth in State v. Hicks 163 Wn.2d 477, 490, 181 P.3d 831 (2008), that "trial courts are not *required* to find a prima facie cases 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"? (emphasis in original).

3. Should this Court hold that the state's exercise of a peremptory challenge against the only African American on a jury panel where the defendant is African American makes a prima facie case of discrimination in all instances?

4. Is the ruling of the trial court and Court of Appeals in affirming the ruling in conflict with the decision of this Court in State v. Hicks, *supra*, that the Washington Constitution's greater protection for jury

trials supports a finding that excusing the sole African American in the venire makes out a prima facie case under Batson.

B. STATEMENT OF THE CASE

After voir dire but prior to trial, defense counsel told the trial court that Mr. Rhone wanted to address the Court about the jury. RP 438. Mr. Rhone then told the court that he wanted a jury of his peers and 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 improprieties and so forth, to understand what's going on and what could be happening in this trial.

RP 439. Defense counsel clarified that "Mr. Rhone is asking the Court to provide a new jury pool." RP 439.

The court responded as follows:

There is no Constitutional right to be tried by a jury containing at least one member of the defendant's 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 and thereby failed to be reasonably representative thereof.

Each party in the criminal trial may exercise its right to exclude jurors without providing a reason, but 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.

I took this as a Batson challenge.

.....

A Batson challenge involves a three-part test and would be the defendant challenging the State's use of a preemptory [sic] challenge and creating a prima facie case of racial discrimination; two, if a prima facie showing of discrimination is made, the burden shifts to the state to offer a race-neutral reason for its preemptory [sic] challenge; and three, if the Court then decides if the defendant has sustained that the State's use of the preemptory [sic] challenge was purposeful discrimination.

The defendant's initial burden in establishing a prima facie case of racial discrimination contains two prongs, the first being he must first show that the preemptory [sic] challenge was exercised against a member of a constitutional cognizable [sic] group; and second, he must show that the preemptory [sic] challenge and *other relevant circumstances* rise an inference of discrimination. If the defendant fails to make a prima facie case of discrimination, the State is not required to offer a race-neutral reason for exercising his preemptory [sic] challenge.

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 Court notes that there were only two African Americans in the entire venire [sic] panel. One was excused for cause based on agreement by the defense. Therefore, out of a panel of 41, there was only one African American in the pool. *The mere fact that 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.

RP 451-453 (emphasis added).

In ruling that Mr. Rhone had failed to make a prima facie case, the trial court made no findings, whether written or oral, explicit or implicit, based on its observation of the voir dire or independent knowledge of the particular prosecutor's actions in other cases. Instead, the court improperly placed the burden on Mr. Rhone to show more than the striking of the only African American on the panel to support his claim.

In spite of the absence of any indication that the trial court relied on the demeanor or questions of the prosecutor, the Court of Appeals held that:

Rhone showed no evidence of any circumstances, beyond the race of one of the jurors the State challenged, to show the prosecutor acted with discriminatory purpose. The trial court is in the best position to evaluate the prosecutor's questions and demeanor, and the trial court had no suspicion that the State acted with discriminatory purpose. Moreover, as the State points out, this is not a situation in which the State used a peremptory challenge on the only African American on the venire. . . . We hold that, on this record, the trial court did not abuse its discretion in ruling that Rhone failed to meet his prima facie burden. *In the absence of any other evidence indicating a discriminatory purpose, the trial court did not err.*

Slip op. at 13-14 (emphasis added).

C. ARGUMENT

1. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT THE DEFENDANT MUST SHOW A SYSTEMATIC EXCLUSION OF MINORITY JURORS WHEN A SINGLE DISCRIMINATORY EXCLUSION MAY MAKE A PRIMA FACIE SHOWING UNDER BATSON.

The trial court erred in ruling that a successful challenge to the prosecution's exclusion of African American jurors under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), requires a defendant to establish proof of a systematic exclusion of such jurors from the jury. The court erroneously stated that "the only right the criminal defendant has is that the selection process . . . not . . . *systematically exclude* distinctive groups in the community," and that "the Equal Protection clause of the 14th Amendment . . . prohibits *systematic* exclusion of otherwise qualified jurors based solely on race." RP 451-452. This is in direct conflict with the decision in Batson and other decisions of the United States Supreme Court.

In Batson, the Court clearly held that "a consistent pattern of official race discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidious discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Batson, 476 U.S. at 95. "The exclusion of even

a single venire person on the basis of race is a violation of the Equal Protection Clause." Jones v. Ryan, 987 F.2d 960, 972 (3rd Cir. 1993); United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994); Powers v. Ohio, 499 U.S. 400, 409, 111 S. Ct. 1369, 113 L. Ed. 2d 4121 (1991).

In this case, the trial court, in setting out the relevant law under Batson, placed the burden on Mr. Rhone to establish systematic discrimination. This was error as a matter of law and a denial of equal protection to Mr. Rhone under the state and federal constitutions.

2. **UNDER STATE V. EVANS, STATE V. WRIGHT, STATE V. RHODES AND STATE V. HICKS, THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT MR. RHONE HAD NOT ESTABLISHED A PRIMA FACIE CASE UNDER BATSON.**

The trial court erred in ruling that as a matter of law Mr. Rhone had not established a prima facie case of discrimination under Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).

As this Court set out in State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008), the standard articulated in State v. Wright, 78 Wn. App. 93, 896 P.2d 713 (1995), State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000), and State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996), is that excusing the only African American in the venire *may*, in and of itself, make out a prima facie case under Batson. Hicks, 163 Wn.2d at

490. Because the trial court in Hicks found a prima facie showing had been established, this Court noted its interpretation of Wright, Evans, and Rhodes to "clear up confusion among the lower courts" that excusing the only African American could be considered sufficient to establish a prima facie case. Hicks at 49.

Here, the trial judge did not exercise any discretion, but ruled that excusing the person who the court recognized as the only African American available on the jury panel could not, as a matter of law, make a prima facie case. The trial judge ruled that Mr. Rhone, as a matter of law, had to make a greater showing than excusing the only African American on the jury panel to establish a prima facie case, "[h]ere 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." RP 452.

The Court of Appeals echoed the trial judge: "Rhone showed no evidence of any circumstances, beyond the race of one of the jurors the State challenged, to show the prosecutor acted with discriminatory purpose." Slip op. at 13-14.

Although the Court of Appeals held that the trial judge was in the best position to evaluate the questions and demeanor of the prosecutor, the record is clear that the trial court did not rely on any observation of the

voir dire or the demeanor of the prosecutor. The judge made absolutely no reference to the prosecutor's demeanor or questions and clearly ruled that something more than the "mere" exercise of a peremptory challenge against the sole African American was required to make a prima facie case. This is an incorrect standard under Wright, Evans, Rhodes and Hicks. And for that reason, Mr. Rhone's conviction should be reversed because the discriminatory use of a peremptory challenge is structural error which is not amenable to harmless error analysis. United States v. Annigoni, 96 F.3d 1132 (9th cir. 1996).

3. THIS COURT SHOULD HOLD THAT EXCUSING THE ONLY AFRICAN AMERICAN ON THE JURY PANEL ALWAYS MAKES A PRIMA FACIE CASE UNDER BATSON.

In Miller-El v. Dretke, 545 U.S. 231, 237-238, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005), the United States Supreme Court set out the harm that results to the individual defendant who is denied an impartial jury, to the wider community through the reinforcement of racial stereotypes by the government and to the very integrity of the courts when prosecutors use peremptory challenges to invidiously discriminate against African-American jurors:

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment

of the protection which others enjoy." Strauder v. West Virginia, 100 U.S. 303, 309, 25 L. Ed. 664 (1880); see also, Batson v. Kentucky, *supra*, at 86. Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by an impartial jury, Shrauder v. West Virginia, at 308, 25 L. Ed. at 664, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in and reflective of historical prejudice." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994).

Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt on the obligations of the parties, the jury and indeed the court to adhere to the law throughout the trial" Powers v. Ohio, 499 U.S. 400, 412, 113 L. Ed. 411, 11 S. Ct. 1364 (1991). That is, the very integrity of the courts is jeopardized when prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *ibid*, and undermines public confidence in adjudications." Georgia v. McCollum, 505 U.S. 42, 49, 120 L. Ed. 2d 33, 112 S. Ct. 2348 (1992).

As the Court clearly held in Batson v. Kentucky, a single peremptory challenge, if discriminatory, can establish a constitutional violation and, therefore, the harm to the defendant, the community and the integrity of the court. The Batson court held that "a consistent pattern of official race discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidious discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions."

Because of the importance of ensuring impartial juries and because a simple discriminatory act can establish a violation under Batson, appellate courts in other jurisdictions have held that exercising a peremptory challenge to excuse the sole African-American, Hispanic or Native-American juror establishes a prima facie case under Batson. See Parrish v. State, 540 S.2d 870 (Fla.2d DCA 1989); Pearson v. State, 514 S.2d 374, 375 (Fla. DCA 1987), United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987); United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir. 1989); United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989); Heard v. State, 910 S.W.2d 663 (Ark. 1995); Duram v. State, 363 S.E.2d 607 (Ga.App. 1987); McCormick v. State, 631 N.E.2d 1108 (Ind. 2004); State v. Katzorke, 810 P.2d 597 (Ariz.App.Div.2 1990); United States v. Shelby, 26 M.J. 921 (C.M.R. 1988)(excusal of sole minority member from court martial panel made a prima facie case). Other courts have articulated a consistent, but more general, principle that excusing all of the members of the race by peremptory challenge establishes a prima facie case. United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (challenge of two minorities, the only Hispanic juror and the only Hispanic alternate, is in and of itself not enough to establish a prima facie case, but it is a sufficient showing if these are the only Hispanics on the panel); United States v. Thompson, 827 F.2d 1254, 1256-1257 (9th Cir. 1987)(all four members

challenged); United States v. Alcantar, 832 F.2d 1175, 1177 (9th Cir. 1987)(challenge to all three members of the racial minority on the panel); People v. Crittenden, 885 P.2d 887 (Cal. 1994).

Other reported cases discuss the sufficiency of the prosecutor's reasons when the defendant raised a Batson challenge after the state used a peremptory challenge to exclude the sole black citizen on the panel. See e.g. McCurdy v. Montgomery County, 240 F.3d 512 (6th Cir. 2001); State v. Lopez, 544 N.W.2d 845 (Neb. 1996); State v. McDonough, 631 N.W.2d 373 (Minn. 2001); State v. Pink, 20 P.3d 31 (Kan. 2001); Woodall v. Com., 63 S.W.3d 104 (Ky. 2001).

This Court should adopt the view of a majority of courts considering the issue that excusion by peremptory challenge of all the members of a race, even where there is only one member on the venire, is not only sufficient to establish a prima facie case, but does establish a prima facie case. Any other rule cannot protect the rights of the defendant and the prospective jurors against invidious discrimination or protect the integrity of the court.

On a practical level, this rule will provide a more workable process than having the trial court evaluate the circumstances in advance of having the state provide race-neutral reasons.

As the court held in State v. Jones, 293 S.C. 54, 358 S.E.2d 701, 703 (1987) (modified by State v. Chapman, 317 S.C. 302, 454 S.E.2d 317, 319-320 (1995), and adopted by State v. Holloway, 209 Conn. 636, 553 A.2d 166, 171-172 & n.4 (1989), a bright-line rule ensures consistency and removes any doubt about when a Batson hearing should be held:

Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a prima facie showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court the better course to follow would be to hold a Batson hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire. This bright line test would ensure consistency by removing any doubt about when a Batson hearing should be conducted. Further, this procure would ensure a complete record for appellate review.

Similarly, in State v. Parker, 836 S.W.2d 930, 937-938 (Mo. 1992), the court held that the prosecutor's race-neutral reasons should be considered as part of the defendant's prima facie showing. See also, Commonwealth v. Maldonado, 439 Mass. 460, 788 N.E.2d 968, 972 n. 4 (2003) (burden of establishing a prima facie case "ought not be a terribly weighty one"); Hayes v. State, 261 Ga. 439, 405 S.E.2d 660, 668-669 (1991) (Bentham J., concurring) (urging the court to follow other states in holding that a Batson hearing should be held whenever a party challenges

a peremptory strike of members of cognizable racial groups as discriminatory).

Most importantly, unless the excusing of the only African American on the panel is held to constitute a prima facie case, without requiring the state to articulate a race-neutral reason, there is simply no way to ensure against invidious discrimination. The same inference of discrimination does not arise from excusing one juror as arises from a pattern of peremptory challenges against potential African American jurors, and this fact may invite prosecutors to more freely challenge the only African American. And while admittedly the trial court is present during voir dire and able to assess whether there is obvious discrimination, most prosecutors are not going to be obvious. And absent the trial judge's setting forth in some detail its observations and reasons for finding the absence of discrimination, there is little in the record for appellate review. Requiring such detailed findings or requiring the defendant to make a case for discrimination in the absence of the prosecutor's race-neutral analysis, turns the Batson hearing process on its head.

Prosecutors do excuse African Americans from juries for discriminatory reasons. Justice Thurgood Marshall, in his concurring opinion in Batson, cited several studies demonstrating this, including a case in which prosecutors explained that they routinely struck black jurors (State

v. Washington, 375 S. 2d 1163 (LA 1979), and a prosecutor's instruction manual from Dallas County, Texas, advising prosecutors to stike all minority jurors. Batson, 7476 U.S. at 1727. While one might hope that things have improved since Batson or that matters are different in Washington State, this is not the case.

As the Brief of Amicus Curiae ACLU demonstrates in Hicks, there is compelling evidence of racial disparity and bias in Washington's criminal justice system. Amicus cited three studies reviewed by Professor Robert Crutchfield from the University of Washington which found (a) statistically significant difference in charging decisions between whites and blacks after legally relevant considerations such as offense seriousness and criminal histories were accounted for; (b) even after controlling for legal factors, 50% greater sentencing recommendations for blacks than whites, and (c) significant racial disparity in the likelihood of pre-trial release and the amount of bail requested after taking into account legal factors. Robert D. Crutchfield, Racial Disparity in the Washington State Criminal Justice System (Oct. 25, 2005) available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibitsstatementofaterialfactspart3.pdf>. pages 27, 28, 30.

Further, as this Court held in Hicks, 163 Wn.2d at 492, the Washington Constitution provides greater protection for jury trials and this

provides support for finding a prima facie case based on excusing the sole African-American juror. (citing City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982); Article 1, section 22).

When the state exercises a peremptory challenge to excuse the only African American on the jury panel, this should be sufficient to establish a prima facie case under Batson and require the prosecutor to provide a race-neutral reason for the challenge.¹ At that point the judge will be in a much better position to determine the legitimacy of that reason. Moreover, it will provide the prosecution with an opportunity to make clear on the record whether it has a non-discriminatory basis for exercising its peremptory against a racial minority.

D. CONCLUSION

Mr. Rhone respectfully requests that his judgement and sentence be reversed and his case be remanded because of the trial court's error in

¹ This danger is more pronounced in those counties in Washington which have a significantly low number of African-American citizens. Only 3.6% of Washington citizens are black, as compared to 12.8% in the United States as a whole. In some counties the percentage is even smaller. U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/53000.html>.

ruling that as a matter of law excusing the only remaining African African
on the entire panel could not make out a prima facie case under Batson.

DATED this 3rd day of October, 2008.

Respectfully submitted,



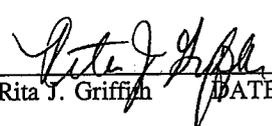
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CERTIFICATE OF SERVICE

I certify that on the 7th day of October, 2008, I caused a true and correct copy of Supplemental Brief of Appellant/Petitioner to be served on the following via prepaid first class mail:

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