



IN THE SUPREME COURT OF THE STATE OF WASHINGTON RECEIVED BY E-MAIL

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STATE OF WASHINGTON,	)	NO. 86257-5
	)	
Respondent,	)	
	)	
v.	)	MOTION TO STRIKE
	)	ARGUMENT ON "ISSUE 2,"
KIRK SAINTCALLE,	)	RAISED FOR THE FIRST
	)	TIME IN RESPONDENT'S
	)	SUPPLEMENTAL BRIEF
Petitioner.	)	

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A. IDENTITY OF MOVING PARTY

The petitioner, Kirk Saintcalle, through his attorney, Lila J. Silverstein, requests the relief designated in Part B below.

B. STATEMENT OF RELIEF SOUGHT

Mr. Saintcalle requests that this Court strike the argument on "Issue 2" in the Respondent's Supplemental Brief, most of which is at pages 14-25, because the issue is not presented by the case and the State did not file an Answer seeking review of additional issues.

C. FACTS RELEVANT TO MOTION

Kirk Saintcalle appealed his convictions arguing, inter alia, that the exclusion of an African-American juror violated the Equal Protection Clause under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Motion to Strike

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Under that case, a trial court engages in a three-step analysis in evaluating a claim of race discrimination in jury selection: (1) the defendant must make a prima facie showing of discrimination; (2) the State must provide race neutral reasons for the strike; and (3) the court must determine whether the facially race neutral reasons are actually pretext for race discrimination. The trial court had accepted one of the State's facially race neutral reasons as valid and not pretextual, and Mr. Saintcalle appealed this ruling.

The Court of Appeals affirmed. It noted that the first two steps of the Batson analysis were moot because the trial court had considered the facially race neutral reasons presented by the prosecution and ruled that Mr. Saintcalle had not proven purposeful discrimination at Batson's third step. The Court of Appeals held that Mr. Saintcalle did not show the trial court's ruling at the third step was erroneous.

This Court granted Kirk Saintcalle's petition for review on the issue of whether the State's exclusion of the African-American juror violated the Equal Protection Clause under Batson. **The petition for review made clear that only the third step of the Batson analysis is at issue in this case.** (Petition at 11).

The State did not file an Answer to the petition. In its supplemental brief, the State nevertheless adds a second issue, asking the Court to reconsider the

holding of five justices in State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010) regarding the first step of the Batson analysis.

D. ARGUMENT

RAP 13.4(d) provides, in relevant part, “A party may file an answer to a petition for review. If the party wants to seek review of any issue that is not raised in the petition for review including any issues that were raised but not decided in the Court of Appeals, **the party must raise those new issues in an answer.**” (emphasis added). The State did not file an answer in this case. Therefore, its argument on its proposed “Issue 2” should be stricken.

Furthermore, the issue the State attempts to raise is not presented by this case. “Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.” State v. Hicks, 163 Wn.2d 477, 492, 181 P.3d 831 (2008).

If this Court is interested in revisiting Rhone, it may grant review in a case where the issue is presented by the record and where a party has properly sought review of the issue. For example, a petition for review has been filed in State v. Meredith, No. 86825-5, raising the precise issue the State improperly addresses

here. But the State should not be allowed to raise the issue here because the case does not present the issue and the State did not file an Answer.

E. CONCLUSION

For the reasons stated above, Kirk Saintcalle requests that this Court strike “Issue 2” from the Respondent’s Supplemental Brief, including the argument at pages 14-25.

DATED this 30th day of January, 2012.

Respectfully submitted,

/s/ Lila J. Silverstein  
Lila J. Silverstein – WSBA 38394  
Attorney for Petitioner

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 86257-5**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Dennis McCurdy, DPA,  
King County Prosecutor's Office – Appellate Unit
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: January 30, 2012

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State v. Kirk Saintcalle  
No. 86257-5

Please accept the attached documents for filing in the above-subject case:

**MOTION TO STRIKE**

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