

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KIRK SAINTCALLE,

Petitioner.

NO. 86257-5

REPLY TO RESPONSE TO
MOTION TO STRIKE
ARGUMENT ON "ISSUE 2,"
RAISED FOR THE FIRST
TIME IN RESPONDENT'S
SUPPLEMENTAL BRIEF

A. INTRODUCTION

This Court granted Kirk Saintcalle's petition for review on the question of whether the State's exclusion of an African-American juror violated the Equal Protection Clause – in other words, whether the facially race neutral reasons the prosecutor provided for the strike were actually pretext for race discrimination. In its supplemental brief, the State raised a new issue: whether the State was required to provide race neutral reasons at all. Mr. Saintcalle moved to strike the argument on "Issue 2" for two independent reasons: (1) the record below does not present the issue, and (2) the State did not file an Answer asking the Court to review this issue as required under RAP 13.4(d).

Reply to Response to Motion to Strike

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The State's response is largely an additional brief on the merits and therefore should not be considered by the Court.¹ To the extent it responds to the motion to strike, it is wrong.

B. ARGUMENT IN REPLY

The State first claims, "This Court's order accepting review did not limit review to any particular facet of the three-part Batson test." Response at 2. What the State fails to acknowledge is that this Court's order granted Mr. Saintcalle's petition for review and the Batson issue raised therein. Order at 1 ("It is ordered that the Petition for Review is granted..."). Mr. Saintcalle's petition raised only the issue of whether the trial court's decision at the third step of the Batson analysis was erroneous, and made clear that the first two steps of the analysis were not at issue. Petition at 11.

Second, the State misunderstands the use of the word "moot" in State v. Hicks, 163 Wn.2d 477, 492, 181 P.3d 831 (2008). There, this Court stated, "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." Id. This Court cited the U.S. Supreme Court case of Hernandez

¹ For example, the State erroneously claims, "at the trial level, [Mr.] Saintcalle never made a claim of racial discrimination." Response at 3. Not only is this claim dead wrong (see 3/10/09 RP 100-05), it is ironically made for the first time in this Court.

for the proposition. Id. (citing Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). In Hernandez, the U.S. Supreme Court explained that once a prosecutor offers facially race-neutral reasons for a strike, the first step of the Batson analysis becomes irrelevant:

The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that “[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.” The same principle applies under Batson. 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.

Hernandez, 500 U.S. at 359 (internal citation omitted); see also State v. Thomas, 166 Wn.2d 380, 398, 208 P.3d 1107 (2009) (“a prima facie determination need not be had where the State has offered a race-neutral reason for the exclusion of a juror from the venire”).

As in Hernandez, the prosecutor here offered facially race-neutral reasons for the exclusion of the African-American juror. 3/10/09 RP 100-02. Indeed, the trial court asked the State to do so – as was its prerogative under Hicks. 3/10/09 RP 101. In response, Mr. Saintcalle’s attorney objected to the exclusion, argued

the prosecutor's reasons were insufficient, and cited Batson at least five times. 3/10/09 RP 102-04. The court ruled on the ultimate issue of discrimination, and rejected Mr. Saintcalle's Batson challenge. 3/10/09 RP 105-06. It is that ruling which is before this court; the first two steps are not at issue because "[o]nce 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." Hicks, 163 Wn.2d at 492.

The State ignores this rule and discusses decisions involving moot appeals – cases in which the Court can no longer provide effective relief to the petitioning party. Response at 4-5. These cases are completely inapposite. This Court can provide effective relief in Mr. Saintcalle's case, by reversing and remanding for a new trial free from race discrimination. The word "moot" in Hicks and Hernandez simply means "irrelevant." Hernandez, 500 U.S. at 359. The first step of the Batson analysis is irrelevant in this case because the prosecutor provided facially race neutral reasons for the strike. See id. The issue is therefore whether the facially race neutral reason was actually pretext for impermissible race discrimination. Because the prima facie step of the analysis "is no longer relevant," id., this Court should strike the State's argument on "Issue 2."

Third and finally, the State chastises this Court for granting review in this case, arguing the Court could not possibly have meant to grant Mr. Saintcalle's petition on the issue presented and must instead have wanted to revisit Rhone. Response at 7-8. What the State fails to recognize is that this Court has already addressed the issue of what showing is required at Batson's first step, and has done so three times in the last four years. See State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010); State v. Thomas, 166 Wn.2d 380, 397-98, 208 P.3d 1107 (2009); Hicks, 163 Wn.2d at 490-92. It makes sense that this Court would not want to do so yet again, and instead granted review in order to ensure compliance with the Equal Protection Clause.

If the State thinks review is improper in this case, it must think the same of the U.S. Supreme Court's review grants in Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) and Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). In both cases, the Court performed a searching inquiry of the record and determined that the lower courts' findings that no purposeful discrimination occurred were clearly erroneous. No new rule of law was announced; the Court reviewed the cases in order to enforce the guarantees of the Equal Protection Clause under Batson. It is important for appellate courts to perform this task lest Batson become an empty promise.

This Court properly granted review of the issue presented in the Petition. This Court should strike the second issue raised by the State in its supplemental brief. The State did not file an Answer, and in any event its proposed issue is not presented by this record.

C. CONCLUSION

For the reasons stated above and in his original motion, Kirk Saintcalle requests that this Court strike "Issue 2" from the Respondent's Supplemental Brief, including the argument at pages 14-25.

DATED this 2nd day of March, 2012.

Respectfully submitted,

/s/ Lila J. Silverstein
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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


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Date: March 2, 2012