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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIRK RICARDO SAINTCALLE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ISSUE PRESENTED</u>	3
C. <u>STATEMENT OF THE CASE</u>	3
D. <u>ARGUMENT</u>	9
1. THE PROSECUTOR'S PEREMPTORY CHALLENGE WAS CONSISTENT WITH EQUAL PROTECTION PRINCIPLES AND DID NOT VIOLATE <u>BATSON</u>	9
2. THE DEFENDANT BEARS THE BURDEN OF PROVING THE TRIAL COURT'S RULING WAS CLEARLY ERRONEOUS	12
3. THIS COURT SHOULD DECLINE TO CREATE A RULE THAT PRESUMES PURPOSEFUL RACIAL DISCRIMINATION	14
4. THE SIXTH AMENDMENT, LEGISLATION, AND THE COURT RULE-MAKING AUTHORITY	22
E. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

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

Duren v. Missouri, 439 U.S. 357,
99 S. Ct. 664, 58 L. Ed. 2d 579 (1979) 23

Edmonson v. Leesville Concrete Co., 500 U.S. 614,
111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)..... 10

Georgia v. McCollum, 505 U.S. 42,
112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)..... 10

Hernandez v. New York, 500 U.S. 352,
111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)..... 12

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127,
114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)..... 11

Johnson v. California, 545 U.S. 162,
125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005)..... 11, 16, 19, 20, 21

Sims v. Georgia, 389 U.S. 404,
88 S. Ct. 523, 19 L. Ed. 2d 634 (1967) 23

Snyder v. Louisiana, 552 U.S. 472,
128 S. Ct. 1203, 170 L. Ed. 2d 174 (2008)..... 18

Swain v. Arizona, 380 U.S. 202,
85 S. Ct. 824, 13 L. Ed. 2d 759 (1965) 10

Taylor v. Louisiana, 419 U.S. 522,
95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) 23

United States v. Ochoa-Vasquez, 428 F.3d 1015
(11th Cir. 2005)..... 22

Washington State:

Madison v. State, 161 Wn.2d 85,
163 P.3d 757 (2007)..... 24

Pedersen v. Klinkert, 56 Wn.2d 313,
352 P.2d 1025 (1960)..... 15

State v. Cienfuegos, 144 Wn.2d 222,
25 P.3d 1011 (2001)..... 23

State v. Evans, 100 Wn. App. 757,
998 P.2d 373 (2000)..... 19, 22

State v. Luvene, 127 Wn.2d 690,
903 P.2d 960 (1995)..... 12

State v. Potter, 68 Wn. App. 134,
842 P.2d 481 (1992)..... 15

State v. Rhone, 168 Wn.2d 645,
229 P.3d 752 (2010)..... 1, 2, 13, 14, 16, 17, 19, 20, 24

State v. Saintcalle, 162 Wn. App. 1028
(Div. 1, 2011)..... 3, 4

State v. Templeton, 148 Wn.2d 193,
59 P.3d 632 (2002)..... 24

State v. Vreen, 99 Wn. App. 662,
994 P.2d 905 (2000), aff'd 143 Wn.2d 923 (2001)..... 9, 17

State v. Wright, 78 Wn. App. 93,
896 P.2d 713, rev. denied, 127 Wn.2d 1024 (1995)..... 21

Other Jurisdictions:

People v. Davis, 231 Ill.2d 349,
899 N.E.2d 238 (2008) 22

People v. Rivera, 221 Ill.2d 481,
852 N.E.2d 771 (2006) 22

Williams v. State, 669 N.E.2d 1372 (1996), cert. denied,
520 U.S. 1232 (1997) 22

Constitutional Provisions

Federal:

U.S. Const. amend. VI 2, 14, 15, 21, 22

Statutes

Washington State:

Laws of 1993, ch. 408, § 5 23

RCW 2.36.055..... 23

RCW 2.36.070..... 23

RCW 4.44.140 9

RCW 4.44.210 9

Rules and Regulations

Washington State:

CrR 3.1 24

GR 18 23

Other Authorities

14 Orland & Tegland, Washington Practice
§ 202 at 417 (4th ed. 1986)..... 9

Black's Law Dictionary 781 (7th ed. 1999) 10

A. INTRODUCTION

Two weeks prior to the defendant's murder trial, a friend of juror #34 was gunned down on the streets of Seattle. After the "very emotional" juror answered a number of questions about the effect this tragic event would have on her ability to be a juror, the State sought to exercise a peremptory challenge on her. Juror #34 happened to be the sole African American in the *venire*. While the defendant objected, he *never* alleged that the State was seeking to excuse the juror because of her race. Still, the State articulated its reasons for exercising a peremptory challenge on juror #34 and the trial court found that there were clearly sufficient race-neutral reasons supporting the use of a peremptory challenge.

Six months after the defendant's trial, this Court issued an opinion in State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010). Four justices reaffirmed that Washington follows Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) in analyzing arguments that a peremptory challenge was discriminatory. The dissent, however, proposed the adoption of a bright-line rule that would presume purposeful racial discrimination based solely on the exercise of a single peremptory challenge to a juror of the same race as the defendant, essentially holding that such a challenge would *per se* satisfy the *prima facie* requirement of showing purposeful discrimination for purposes of the three-part Batson

test. Chief Justice Madsen agreed with the majority that a bright-line rule did not exist, but stated, "going forward, I agree with the rule advocated by the dissent." Rhone, at 658 (Madsen, C.J. concurring).

The racial composition of Washington juries is an extremely important issue for our courts, lawyers, and society, especially given the underrepresentation of some minority groups in jury *venires*. However, for several reasons, the State respectfully urges this Court not to adopt a bright-line rule by judicial opinion in this case.

First, whether a lawyer must always give race-neutral reasons for a peremptory challenge is not squarely present here because nobody ever asserted that the prosecutor's challenge was racially based and, in any event, the prosecutor gave race-neutral reasons on her own accord. Thus, whether the Batson procedure should be followed is moot because it was not followed in this case.

Second, the State respectfully suggests that presuming discrimination by a member of the Bar -- where discrimination has not been shown -- is unfair to the lawyer and unnecessary to meet the requirements of the Equal Protection Clause or to thwart true discrimination.

Moreover, the underrepresentation of minorities on jury *venires* is a problem best addressed under traditional Sixth Amendment

jurisprudence, which establishes procedures to ensure fair representation on juries. If new procedures are needed to deal with the legally distinct problem of intentional discrimination in the exercise of peremptory challenges, those procedures should be created by statute or this Court's rule-making process.

B. ISSUES PRESENTED

1. Whether the defendant can show that the trial court's ruling that the State provided race-neutral reasons for exercising a peremptory challenge against juror #34 was clearly erroneous.

2. Whether the laudable goals of the dissent in Rhone are more appropriately addressed through Sixth Amendment jurisprudence, new legislation or court rule, rather than the Equal Protection Clause and a rule that presumes racial discrimination where none may exist.

C. STATEMENT OF THE CASE

On February 9, 2007, the defendant and three other armed men entered an Auburn apartment, held three people at gunpoint, and gunned down 35-year-old Anthony Johnson. One shot was fired at close range into Johnson's face.¹ In March of 2009, the defendant was convicted of first-degree felony murder and three counts of second-degree assault. CP 88-95. The Court of Appeals affirmed the convictions. State v. Saintcalle,

162 Wn. App. 1028 (Div. 1, 2011). This Court accepted review on a single issue, the jury selection Batson issue.

Eighty-five prospective jurors were called into the courtroom for jury selection. 3RP² 34. Juror #34, a Seattle middle school counselor, was the only African American in the *venire*. 4RP 65-66.³ During *voir dire*, jurors shared their thoughts on whether social status was or should be a factor in adjudicating cases. Juror #34 said that she believed money could buy you freedom in the criminal justice system, unless you were a person of color. 4RP 66-67.

After expressing this view, juror #34 was asked if she could sit in judgment of another person. She first said that because she was a Christian, she felt that she could be fair. However, she added,

[b]ut also it's kind of hard and I haven't mentioned this before...but I lost a friend two weeks ago to a murder, so it's kind of difficult sitting here. Even though I don't know the facts of this particular case, and I would like to think that I can be fair because I'm a Christian. I did lose someone two weeks ago.

4RP 67-68. Both lawyers were aware of the case and knew that it involved an African American man murdered in Seattle's Central District. 4RP 68; 5RP 101.

¹ See the State's Brief of Respondent below for a detailed description of the crimes.

² The report of proceedings is cited as in the Court of Appeals. See Br. of Resp. at 4.

³ The deceased and the defendant are both African American. The defendant was represented by longtime defense attorney James Womack, also an African American.

The prosecutor followed up on juror #34's somewhat equivocal answer about her ability to serve as a juror:

Prosecutor: [W]e don't put people in a position where it's going to cause them a lot of emotional pain. At this point, do you think you can sit in this case and listen to the facts and make a decision based solely on the evidence presented in trial here and be fair to both sides?

Juror 34: I'd like to think that I could be, but kind of what you just mentioned, just the freshness and the rawness of the death of a friend, I am wondering if that would kind of go through my mind. I like to think that I am fair and can listen, be impartial, but I don't know. I have never been on a murder trial and I have just lost a friend two weeks prior to a murder.

4RP 69-70. The next round of *voir dire* belonged to defense counsel and he chose not to ask juror #34 a single question. 4RP 80-88; 5RP 4-27.

The next day the prosecutor checked in with juror #34:

Prosecutor: Juror number 34, sorry to focus on you again after yesterday, but I just want to try and go back and touch base with you. I know you mentioned yesterday that you had some recent events in your life that may make it difficult for you to serve a juror in [this case]. Have you done any more thinking about that? How are you feeling today?

Juror 34:⁴ Yes. I thought about it last night as well as this morning. And, you know, my thought is I don't want to be a part of this jury because of the situation and the circumstances that I just went through. But I'm thinking if ever I was put in a situation where I needed twelve people who could be honest and look through all the facts or I guess I'm saying who could be like me, I would want me. So sometimes you have to do things that you don't want to do.

⁴ The transcript refers to juror #66 but the parties agree that the prosecutor was actually speaking to juror #34.

.....
Prosecutor: So is that something you can set aside or [are you] worried at all about the emotions kind of clouding in? I mean, it's just so new in terms of your life?

Juror 34: I mean, I have never been in this situation where I have lost somebody. You just went to the funeral. He is young. Only 24. And to be called to jury duty to perhaps be on a jury of a murder suspect. I don't know how I'm going to react. You know, I don't know. I'm -- I'm not an emotional person, but I'm thinking as we go through it, and I hear the testimony, and I see the pictures, I don't know. I mean, I'm just being honest. I don't know how I'm going to feel.

Prosecutor: Ma'am, thank you for your honesty and candor. I just want to make sure that we have the best jurors for the case.

4RP 41-43.

At the next break, three jurors were excused for cause at the defendant's request: juror #11 because she was too emotional, juror #65 because he had previously been assaulted and said he could not be fair, and juror #70 because of her bizarre nonsensical answers. 5RP 59-65. The State moved to excuse two jurors for cause. 5RP 65. Juror #66 was excused because her religious beliefs prevented her from following the court's instructions. 5RP 65-66. The State then provided two reasons for excusing juror #34 for cause.

First, because juror #34 stated she did not know how she would react to testimony and photographs of a murder when her friend had been so recently murdered, the prosecutor was afraid they might lose her as a

juror during trial. 5RP 66. Second, the State expressed concern over juror #34's apparent inability to focus on the proceedings. 5RP 67. The State noted, for example, that juror #34 did not respond to some of the questions posed early in *voir dire*, such as whether she knew anyone who had been the victim of violence, but then much later she informed the parties that her friend had been murdered.⁵ 5RP 67. Defense counsel objected because juror #34 did not say she could not follow the court's instructions --although this was not the basis of the State's challenge. 5RP 66.

The court recognized that juror #34 was "very emotional about the death of her friend" and that she did not know how she would react to viewing the evidence. 5RP 67. The court indicated that this "may lead to me to decide that I agree with the State." 5RP 68. The court then raised an issue that neither party had raised, stating, "[i]t's a difficult decision because although no one's actually said it on the record, I will...[Juror #34] is the only African-American juror in the jury panel." 5RP 67. The court decided to take the issue under advisement and *voir dire* continued with defense counsel taking its last round of questions. 5RP 67, 70. Defense counsel asked juror #34 but a single question. 5RP 94.

⁵ There were also questions asking the jurors about firearms, the difficulty of serving on a murder case with gruesome evidence, and possible difficulties following the law--all questions to which juror #34 did not respond. 4RP 16-19, 49-50.

At the conclusion of *voir dire*, the court returned to the challenge for cause issue. The court stated that "[d]espite my reservations," it was going to deny the motion to excuse juror #34 for cause. 5RP 100.

The State then indicated that it was going to exercise a peremptory challenge as to juror #34 and provided race-neutral reasons. 5RP 100. The prosecutor reiterated that juror #34 seemed "very checked out," that she did not appear able to focus on the proceeding, and that there was a concern that she would not be able to handle the stress and emotion of the case given her recent tragic experience. 5RP 101.

Our concern really is the fact that we are going to expose her to, in this case, the crime scene photographs are disturbing and they are relevant. They are very bloody. We are going to have to show them to the jury...The race of the victim in this case is the same race as her friend [who was murdered]. Tyrone Love is the individual who was murdered up on, I think it was 23rd and Cherry, a couple weeks ago. And I do know that she worked with Tyrone at the YWCA, and she did express today that she attended the funeral. So I would just say from her perspective, you know, we are in a pretty shaky situation with her that I don't believe that she is going to be in a good position to handle the evidence in this case. And that she seems to already be overwhelmed, from my perspective, in just the jury selection process without hearing the evidence, puts us in a position that we just don't want to risk losing her down the road.

5RP 101-02.

Defense counsel responded that he believed the juror's emotional state was not sufficient reason to excuse her. 5RP 103. He suggested that it was also insufficient to speculate that juror #34 could not handle the

case. 5RP 104. Defense counsel *never* suggested that the State's peremptory challenge was based on race. 5RP 103-04.

The court granted the peremptory challenge, basing its ruling on juror #34's answers and "how she appeared." 5RP 105. The court noted that juror #34 was clearly upset by the recent murder of her friend in a "well-known case to all counsel," and that she continues to express her concern over how she will react to viewing the graphic evidence in this case. Id. These concerns, the court held, were valid race-neutral reasons to allow the State to excuse the juror. Id.

D. ARGUMENT

1. THE PROSECUTOR'S PEREMPTORY CHALLENGE WAS CONSISTENT WITH EQUAL PROTECTION PRINCIPLES AND DID NOT VIOLATE BATSON.

In Batson v. Kentucky, the Supreme Court addressed the ability and limitations of the trial court in interjecting itself into the jury selection process where there is an allegation of purposeful racial discrimination. The Court recognized that the peremptory challenge system is a necessary and important part of trial by jury,⁶ and that peremptory challenges were

⁶ In part, "peremptory challenges are granted to parties so that they may remove jurors that parties believe should not serve. Our jury selection process recognizes that bias and partiality may not be so evident that these qualities can readily be demonstrated. For that reason, a party seeking to exercise a peremptory challenge is not required to give a reason for its use and may exercise the challenge without court approval." State v. Vreen, 99

historically exercised by the parties free from any judicial control and interference.⁷ Batson, 476 U.S. at 91 n.15, (citing Swain v. Arizona, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)). However, where there is evidence of purposeful discrimination in the jury selection process, the Court recognized that under the Equal Protection Clause, a trial court must intervene. Id. The Court announced a three-part test that sought to balance the "historical privilege of peremptory challenge free of judicial control," with the Equal Protection Clause that forbids either party from "challeng[ing] potential jurors solely on account of their race." Batson, at 89, 91. The Court started with the acknowledgement that "[a]s in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the *venire* to prove the existence of purposeful discrimination."⁸ Batson, at 93.

First, a party raising such a challenge must make a *prima facie* showing of purposeful discrimination. Id. at 96. To make such a

Wn. App. 662, 994 P.2d 905 (2000) (citing 14 Orland & Tegland, Washington Practice § 202 at 417 (4th ed. 1986)), aff'd, 143 Wn.2d 923 (2001).

⁷ In Washington, the right to exercise a peremptory challenge free from judicial control is also codified by statute. A peremptory challenge is defined as "an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror. RCW 4.44.140; see also RCW 4.44.210.

⁸ Batson applies to all types of jury trials and situations beyond just prosecutors and race. For example, Batson applies to civil cases, a criminal defendant's use of peremptory challenges, and to challenges based on gender. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Georgia v. McCollum, 505

showing, a party must provide evidence that raises an "inference" that a peremptory challenge was used to exclude a *venire* member on account of the member's race. Id. An inference, the Court would later note, "is generally understood to be a conclusion reached by considering other facts and deducing a logical consequence from them." Johnson v. California, 545 U.S. 162, 168 n.4, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (citing Black's Law Dictionary 781 (7th ed. 1999)). An inference is not simply an allegation or a guess.

Second, if, and only if, a party raises an inference of purposeful discrimination, then the burden shifts to the opposing party to provide a race-neutral explanation for challenging the *venire* member. Batson, at 97. The reasons given need not rise to the level justifying the exercise of a challenge for cause. Id.

Third, the trial court must then determine whether the challenging party has established purposeful discrimination, that the exercise of the peremptory challenge was based on race. Id. at 98.

Under this standard, the defendant's Batson challenge on appeal would be rejected because there was no suggestion, allegation, proof or finding that the challenge was exercised because of the juror's race.

U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

2. THE DEFENDANT BEARS THE BURDEN OF PROVING THE TRIAL COURT'S RULING WAS CLEARLY ERRONEOUS.

In this case, even though the defendant never attempted to make a *prima facie* showing of purposeful discrimination, the prosecutor offered race-neutral reasons on her own accord, thus, the only issue necessary for this Court to decide pertains to step number three, the trial court's finding that there were race-neutral reasons to allow the State to exercise a peremptory challenge. See State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (if the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary *prima facie* case is unnecessary) (citing Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

A trial court's decision that a challenge is race-neutral is a factual determination based in part on the answers provided by the juror, as well as an assessment of the demeanor and credibility of the juror and the attorney. Batson, 476 U.S. at 98 n.21; Hernandez, 500 U.S. at 365. The defendant carries the burden of proving the existence of purposeful discrimination. Batson, at 93. The determination of the trial judge is "accorded great deference on appeal," and will be upheld unless proven "clearly erroneous." Hernandez, at 364.

The court's factual finding in this case was sound and should be affirmed. The State provided reasonable race-neutral reasons in support of using its peremptory challenge on juror #34. The juror was demonstrably having emotional difficulties, she was having trouble focusing on the proceedings, she admitted she did not know if she could handle viewing the evidence in the case, and there was a realistic possibility that she would be lost as a juror before the conclusion of the case. The trial court had the opportunity to observe the juror and agreed she was clearly having difficulties and concurred in the prosecutor's assessment. Trial counsel never challenged the prosecutor's assertions or the trial court's findings. Thus, the findings are uncontroverted by anyone who witnessed the proceedings.

On appeal, however, the defendant attempts to challenge the court's ruling based on a cold record, in part, by comparing juror #34 to other jurors. For example, he asserts that juror #33 was similarly situated to juror #34, but notes that the State did not attempt to excuse juror #33. This comparative argument--made for the first time on appeal--fails. While juror #33 stated he knew persons who had "been shot," these people had not been killed. SRP 15-16. Rather, they were "law enforcement personnel" presumably injured in performing their duties. *Id.* They were "not close personal friends" but were merely "acquaintances." SRP 15-16.

And when asked if this would affect his ability to be a juror, juror #33 responded "no." 5RP 16. Further, there was no indication that juror #33 was exhibiting emotional difficulties. In sum, no other juror had gone through a traumatic, tragic and recent event like juror #34, and no other juror was exhibiting emotional difficulties due to the nature of the case.

Losing jurors during a lengthy murder trial is always a possibility. Justice is not served when a mistrial must be declared or a juror is unable to view and process the evidence. Here, it was entirely reasonable for the court to conclude that this juror would struggle with photographic evidence in a case where the victim was shot in the face at close range. The court nearly struck juror #34 for cause. The defendant cannot show that the trial court's decision to allow the State to exercise a peremptory challenge was clearly erroneous.

3. THIS COURT SHOULD DECLINE TO CREATE A RULE THAT PRESUMES PURPOSEFUL RACIAL DISCRIMINATION.

In Rhone, this Court was asked to decide "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" even if there is no inference or allegation of purposeful discrimination. Four justices of this Court answered no, and held that an inference of discrimination as set forth in

Batson was required to establish a *prima facie* case of an improper racial motivation in the exercise of a peremptory challenge. Four justices dissented, arguing that this Court should adopt a bright-line rule whereby a *prima facie* case of purposeful racial discrimination exists in every instance where the only member of the defendant's racial group is excluded from the venire. Rhone, at 659. Chief Justice Madsen stated, "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent." Rhone, at 658 (Madsen, C.J. concurring). Thus, Rhone did not establish a new rule of law because Chief Justice Madsen's statement about the possibility of a future rule is dicta.⁹

This Court should not adopt a bright-line rule by judicial decision under the Equal Protection Clause. There is no place for purposeful discrimination in selecting a jury. Equally, there is no place in the judicial system for the creation of a bright-line rule that presumes purposeful discrimination on a part of trial practitioners before there is even a *prima facie* showing of improper motivations. Such a rule is unfair, unworkable,

⁹ Dicta is language in an opinion that was not necessary to decide the case and is not binding on other courts. State v. Potter, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992); Pedersen v. Klinkert, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960). A majority of the court having decided that Rhone's conviction should be affirmed, any further discussion of a rule to be applied in a future case is unnecessary to the decision of the case. And as discussed below, a procedure that is not constitutionally mandated should be created through the rule-making procedure rather than simply announced by judicial decision.

harmful, and inconsistent with Batson and the Equal Protection Clause. The laudable goals discussed in Rhone fall wholly outside Batson and equal protection jurisprudence, and are more appropriately addressed under Sixth Amendment jurisprudence, by statute, or through this Court's rule-making authority.

To begin, in any equal protection case, the burden is always on the party who alleges discriminatory acts to prove the existence of purposeful discrimination. Batson, at 93; Johnson, at 171. A bright-line rule can eliminate this requirement and can lead to a finding of racism where none exists. This case serves as an example.

Here, defense counsel *never* alleged that the prosecutor's use of a peremptory challenge on juror #34 was based on race. Eliminating the requirement that there be a *prima facie* case of discrimination will result in the trial courts and appellate courts simply reviewing the prosecutor's reasons for excusing the juror. If a reviewing court subsequently rejects the prosecutor's reasons, then a conviction will be reversed with the conclusion that the challenge was based on race when this may not be the case at all. For example, lawyers commonly will excuse a particular juror, not because they do not like that particular juror, but because they like the next juror in line better. If a reviewing court were to decide this was not a valid reason to excuse a juror where that juror happens to be a minority,

the conviction (or civil case verdict) would be reversed even though there was no purposeful racial discrimination and the lawyer exercised a challenge allowed under the constitution, statutes and court rules. See CrR 6.4(e); CR 47(d); RCW 4.44.120 et. seq.¹⁰

A bright-line rule is also not required by the Equal Protection Clause, and in fact, it seems at odds with it. The dissent in Rhone appeared to acknowledge this but suggested that a bright-line rule should be adopted because "the benefits of such a rule far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge." Rhone, at 759-60. This is an oversimplification that ignores the reality of trial practice and the direct adverse consequences of enacting such a rule.

For example, there were 85 jurors called into the courtroom for jury selection in this case. 3RP 34. This is far more than a single jury room can hold. When a Batson challenge is raised, the jurors must be excused from the courtroom. With this many jurors, that means using the jury room attached to the courtroom and *at least* one other jury room attached to another courtroom--a courtroom that likely has ongoing proceedings of its own. Once the jurors have been removed from the

¹⁰ See e.g., Vreen, supra. Vreen, an African American, tried to exercise a peremptory challenge against the only African American on the venire. The prosecutor made no showing of purposeful discrimination but argued that Vreen should not be allowed to excuse the juror. The trial court denied Vreen's challenge. The Court of Appeals found

courtroom, the objecting party makes a record and argues that a *prima facie* case of racial discrimination has been made. If the court agrees, then the non-objecting party presents its race-neutral reasons for exercising its peremptory challenge. Both parties are then allowed to argue their positions. This can require a review of the court reporter's notes to determine the questions and answers of various jurors.¹¹ The court must then weigh the facts and make a decision on the record. This process is neither as simple nor as short as presumed by the dissent in Rhone, and it must be repeated for each Batson challenge.

Additionally, the parameters of the Rhone dissent's rule are unclear considering the logical basis for limiting the rule to situations where the single juror is of the same race as the defendant is highly suspect. First, Batson applies to gender, religion, national origin and other traits and factors. Second, there does not seem to be a logical reason to limit the rule to only situations wherein the defendant and juror share a common trait. Further, race and/or national origin is not always easily

the trial court should have allowed Vreen to exercise a peremptory challenge and reversed his conviction.

¹¹ For instance, a party alleging a Batson violation often argues that multiple jurors answered the same question similarly to the challenged juror, but the opposing party did not challenge the other jurors, thus raising an inference of racial motivation in striking the challenged juror. See Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 174 (2008) (discussing comparative juror analysis).

determined.¹² For example, if there are multiple jurors of Asian decent, must the court or parties delve into the jurors' personal history to more specifically determine ancestry. Must the parties argue about what constitutes the scope of a particular racial group to determine whether the bright-line rule applies or not. How does the court deal with mixed race individuals.

There are additional questions as well. The rule says that if there is a lone *venire* member of the defendant's race, racial discrimination is presumed if the juror is challenged. Yet, if there are two persons of the same cognizable racial group in the *venire*, but one is so far down the line they could not possibly be seated on the jury, the objecting party must make a *prima facie* case of discrimination when the practical situation is exactly the same--the opposing party is trying to excuse the only juror who could possibly sit on the case. These are just a few of the practical problematic consequences of enacting a bright-line rule by judicial decision.

Further, if there is an argument that a basis for the rule is that a racist motive exists when the excused juror is of the same race as the defendant, it fails here. In Johnson, *supra*, the defendant, an African

¹² See e.g., State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000) (court attempting to identify persons of "apparent color").

American, was accused of murdering his white girlfriend's 19-month-old child. The prosecutor proceeded to excuse the three African American prospective jurors. It is not difficult to recognize the issue in that case. Here, however, both the victim and the defendant are African American. The defendant's attorney, an African American, never argued that the exercise of a challenge to juror #34 was racially motivated. Yet, with no facts supporting a *prima facie* case of discrimination, no apparent racial motive, and no allegation of racial discrimination, a bright-line rule would still presume that the exercise of the peremptory challenge was made on the basis of purposeful racial discrimination.¹³

The State does not mean to suggest that the attempt to strike the sole member of a racially cognizable group can never form the basis of a *prima facie* case of purposeful discrimination (regardless of the race of the defendant); rather, the trial court must determine on a case-by-case basis whether a *prima facie* case has been established. As the Supreme Court noted, the threshold for making out a *prima facie* claim under Batson is not high; “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, 545 U.S. at 170.

¹³ Would the same presumption apply where the attorney exercising the challenge is of the same race as the juror?

"[A]ll relevant circumstances" should be considered. Batson, 476 U.S. at

93. These circumstances can include, among other factors, the following:

- (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.

Rhone, at 656 (citing State v. Wright, 78 Wn. App. 93, 100-01, 896 P.2d

713, rev. denied, 127 Wn.2d 1024 (1995)).

In Johnson v. California, supra, the Supreme Court reversed a conviction because California's standard for establishing a *prima facie* case of discrimination was too high. The Court reiterated that what is required is that the "sum of the proffered facts gives rise to an inference of discriminatory purpose." Johnson, 545 U.S. at 169. Just as the standard for establishing a *prima facie* showing should not be set too high, the standard should not be eliminated. The Court in Batson recognized the need for an open *voir dire* process with limited court intervention. All jurors should be treated equally unless there is a *prima facie* showing of purposeful discrimination. This minimal burden insures that trials run smoothly without gamesmanship, it removes the insidiousness of

presuming racism, and it appropriately leaves the parties free to conduct *voir dire* with court intervention only when appropriate.¹⁴

4. THE SIXTH AMENDMENT, LEGISLATION, AND THE COURT RULE-MAKING AUTHORITY.

The Rhone dissent cited as a reason to adopt a new rule that racial minorities are unrepresented on juries. Rhone, 168 Wn.2d at 661 n.2. This is, indeed, a pernicious and significant problem. Obtaining greater diversity in jury *venires* and achieving a jury composition that fairly represents the community are laudable goals that we should seek to achieve. However, a Batson claim is not the appropriate means to achieve these goals. A Batson claim is a claim of purposeful racial discrimination by a trial practitioner that violates the Equal Protection Clause. Underrepresentation does not equal purposeful discrimination. The Sixth Amendment, legislation, and this Court's rule-making authority are better-suited to address these issue.

¹⁴ See People v. Davis, 231 Ill.2d 349, 360, 899 N.E.2d 238 (2008) ("the mere fact of a peremptory challenge of a black venire person who is the same race as defendant... without more, will not establish a *prima facie* case of discrimination"); People v. Rivera, 221 Ill.2d 481, 512, 852 N.E.2d 771 (2006) ("The number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the *voir dire* answers to those who were struck compared to the answers of those who were not struck"), accord, United States v. Ochoa-Vasquez, 428 F.3d 1015, 1044 (11th Cir. 2005); Evans; *supra* (recognizing the difficulties other states have had in adopting a similar rule) (citing Williams v. State, 669 N.E.2d 1372 (1996), *cert. denied*, 520 U.S. 1232 (1997)).

The Sixth Amendment contemplates a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 526-27, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). The exclusion from jury service of an identifiable class of citizens can violate the Sixth Amendment. Taylor, 419 U.S. at 527, 538. For example, while states are free to prescribe relevant qualifications for their jurors, jury lists must reasonably represent a cross-section of the community. Taylor, at 538. Thus, a claim of minority underrepresentation in the jury pool can be raised where the representation of a distinctive group is not fair and reasonable in relation to the number of such persons in the community. See Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), accord, State v. Cienfuegos, 144 Wn.2d 222, 231-32, 25 P.3d 1011 (2001).¹⁵ This is one avenue available to obtain the goals of diversity and fair representation of minorities in jury pools.

The issue can also be addressed through legislation. For example, in an attempt to increase diversity and the number of persons eligible for jury service, Washington has expanded the persons eligible for jury service from eligible voters to persons possessing a driver's license or

¹⁵ In Taylor, *supra*, a successful challenge was made to the underrepresentation of women on the "jury wheel." In Sims v. Georgia, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967), use of taxpayer jury lists was found to lead to unconstitutional underrepresentation of African Americans on the jury pool.

identification card. See RCW 2.36.055; Laws of 1993, ch. 408, § 5; GR 18. Legislation has been proposed in the past to enlarge the number of persons eligible for jury service, including changes to RCW 2.36.070(4) and (5), statutory provisions that make non-English speakers ineligible for jury service and felons who have not had their civil rights restored. Juror pay could be increased or parking vouchers offered to encourage greater citizen participation.

In Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007), indigent felons who could not get their civil rights restored due to financial obligations filed suit over their inability to exercise their constitutional right to vote. One of their arguments was that the law had a greater impact on the poor and minority groups. Legislation allowing persons falling into this category to serve as jurors would thus further the goal of juror diversity and fair representation.

Finally, this Court possesses certain rule-making authority granted to it by the Legislature and inherent in its power to prescribe rules of procedure and practice. State v. Templeton, 148 Wn.2d 193, 212-13, 59 P.3d 632 (2002). In enacting CrR 3.1, this Court created a procedural rule regarding when Miranda rights must be read to a suspect in police custody. Templeton, 148 Wn.2d at 212-13. Proceeding by way of this Court's rule-making authority, a rule could be adopted that would address in a

comprehensive way the many issues raised above, including, but not limited to, should the rule apply only to the striking of the sole member of a defendant's race, whether the race of the victim, witnesses or practitioner should be considered, when should the rule be applied, and how the trial court should determine the race, ethnicity or other relevant factors of the jurors. These considerations can be factored into a rule-making process, but are ill-suited for case-by-case adjudication. In re Carlstad, 150 Wn.2d 583, 592 n.2, 80 P.3d 587 (2003).

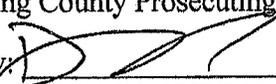
E. **CONCLUSION**

This Court should affirm the defendant's conviction because the trial court's ruling was not clearly erroneous. The State also respectfully asks this Court to reject the bright-line rule proposed by the Rhone dissent.

DATED this 27 day of January, 2012.

Respectfully submitted,

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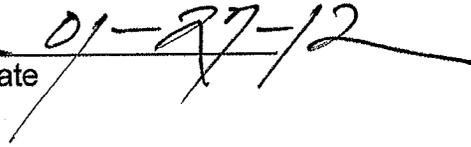
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. SAINTCALLE, Cause No. 86257-5, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date