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No. 86825-5

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY MEREDITH,

Petitioner.

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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SUPREME COURT
STATE OF WASHINGTON
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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to the constitutional principles of liberty and equality. The ACLU has long been dedicated to protecting the constitutional right to trial by a jury selected free of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). It has submitted amicus briefs in numerous cases where that right is at stake, including *State v. Rhone*, 168 Wn. 2d 645, 229 P.3d 752, *cert. denied*, *Rhone v. Washington*, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

II. INTRODUCTION

In April 2010, this Court adopted a bright-line rule that requires the State to articulate a race-neutral reason to peremptorily strike the only remaining minority from a particular constitutionally cognizable racial group. *Rhone*, 168 Wn. 2d at 658 (Madsen, C.J., concurring); *id.* at 659 (Alexander, J., dissenting). Now, less than two years later, a divided panel from Division Two of the Court of Appeals has questioned whether *Rhone* governs, because a new Justice has joined this Court, even though *Rhone*'s bright-line rule was endorsed by a five Justice majority. *See State v. Meredith*, 163 Wn. App. 75, 82, 259 P.3d 324 (2011), *review granted*, 173 Wn. 2d 1031 (2012). Following well-established principles of *stare decisis*, this Court should put to rest any suggestion that the bright-line rule adopted in *Rhone* is unsettled.

The *Rhone* bright-line rule is and remains appropriate and just given the significance of the constitutional interests at stake. It effectuates the Washington Constitution's elevated protection of the right to a fair jury trial without imposing more than a minimal burden on the State. *See* Wash. Const. Art. I, sec. 22.

Finally, the Court should clarify that a party cannot defeat a *Rhone* or *Batson* objection by merely speculating that an additional member of the venire may be a minority. The State incorrectly relied on such speculation at trial, in an attempt to avoid the *Batson* requirements. Division Two erred by allowing that rationale to stand. This Court should correct the error and reverse.

III. STATEMENT OF THE CASE

The following facts are taken from the parties' briefs. During Gary Meredith's criminal trial, the Pierce County Prosecutor peremptorily challenged Juror No. 4, the sole African American on the venire. The State had charged Meredith with one count each of second degree child rape and communication with a minor for immoral reasons. *See Meredith,* 163 Wn. App. at 78. Because the State alleged that Meredith provided the victim with alcohol, the prosecutor asked the venire members whether they had any children and, if so, whether their children had ever consumed alcohol. *See* Voir Dire RP 37-46. Juror No. 4 acknowledged that she had children and that her teenager had consumed alcohol on at least one occasion. *Id.* at 37. The State then peremptorily challenged Juror No. 4. Three other jurors—all white—who ultimately served on the panel,

provided similar answers about their children having consumed alcohol in the past. *Id.* at 41-46.

After pointing out that Juror No. 4's answers were neither evasive nor distinguishable from the white jurors' answers, defense counsel argued that the State should provide a race-neutral explanation for exercising its peremptory challenge to strike the only racial minority in the venire. *Meredith*, 163 Wn. App. at 78. Instead of articulating a contemporaneous race-neutral explanation for the strike, the State argued that Meredith had failed to meet his burden under *Batson* to establish a prima facie case of discrimination (step one of the *Batson* test). *Id.* Additionally, the prosecutor claimed that at least one racial minority remained because one of the jurors looked "'Southern European . . . or perhaps even Middle Eastern.'" *Id.* (citation omitted). The trial court agreed:

> "At this point in time, the Court finds that the burden of proof is on the Defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason. Defense has failed in that proof, one, as to whether or not the Prosecuting Attorney's Office here in Pierce County exercises challenges in a racially biased or discriminatory manner, or two, that . . . [the] prosecutor in this case has done so. There is no evidence of racial bias in challenging Juror No. 4 on either of those two bas[es]."

Id. at 79 (quoting trial court decision).

Division Two affirmed. The Court of Appeals declined to apply the bright-line rule articulated in *Rhone* because it was "uncertain" about

the case's precedential value "now that a new justice has joined our Supreme Court." *Id.* at 82.

IV. ARGUMENT

A clear majority of this Court ruled in *Rhone* that its bright-line rule applies "going forward." The Court of Appeals nonetheless concluded that *Rhone* may no longer be binding in Washington due to a slight change in the composition of this Court. The panel also found that a party can evade a prima facie case of discrimination under *Batson*'s step one by opining that another juror who was not excluded may be a minority

Division Two's opinion offends *stare decisis*. This Court's decisions are not placed in question whenever a new Justice joins the Court. The opinion can and should be reversed on this basis alone. Moreover, this opinion contravenes this Court's rationale in *Rhone*—namely, to ensure an adequate record on appeal and to effectuate the elevated protection of the right to a fair jury trial under the Washington Constitution. Having accepted review, this Court should make clear that *Rhone* is, and remains, binding precedent.

A. In *Rhone* This Court Adopted a Bright-Line Rule That Peremptorily Striking the Only Remaining Minority in a Venire Establishes a Prima Facie Case of Discrimination Under *Batson*.

In *Batson*, the United States Supreme Court established a three-step framework for evaluating claims of racial discrimination in the exercise of peremptory challenges. First, the defendant must establish a prima facie case of purposeful discrimination. To do so, the defendant

must provide "facts and any other relevant circumstances [that] raise an inference" of racial discrimination. 476 U.S. at 96. Second, once a prima facie case is established, "the burden shifts to the State to come forward with a neutral explanation for challenging" the juror. *Id.* at 97. Third, the court must evaluate this explanation to determine "if the defendant has established purposeful discrimination." *Id.* at 98.

In *Rhone*, this Court adopted a bright-line rule to implement the first step in the *Batson* analysis: "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." *Rhone*, 168 Wn. 2d at 661 (Alexander, J., dissenting); *see also id.* at 658 ("[G]oing forward, I agree with the rule advocated by the dissent.") (Madsen, C.J., concurring). This Court concluded that "the benefits of such a rule far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge during venire." *Id.* Among other things, these benefits include "ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venires, and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial." *Id.*

Despite the clear mandate issued in *Rhone*, the majority panel in *Meredith* suggested that the future of this bright-line rule is "uncertain now that a new justice has joined our Supreme Court." *Meredith*, 163 Wn. App. at 82. The lower courts cannot avoid this Court's decisions in this

manner. "[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court." *State v. Gore*, 101 Wn. 2d 481, 487, 681 P.2d 227 (1984); *see also Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995) (characterizing arguments based on the changing composition of the court as "inappropriate" and stating that "[e]ach case must be reviewed on its merits in light of precedent, not on speculation about what the Supreme Court might or might not do in the future, as a result of personnel shifts"). A change in the composition of the Court is not a basis for refusing to follow this Court's precedent. Because five justices agreed that the *Rhone* rule would govern *Batson*'s step one from this point forward, *Rhone* is binding and controlling precedent.

B. This Court Should Reaffirm the Bright-Line Rule That Striking the Only Remaining Venire Person of a Particular Minority Carries the *Batson* Prima Facie Burden.

This Court adopted, prospectively, the bright-line rule announced in *Rhone*. The grant of review in this case is an opportunity for this Court to make clear that *Rhone* is binding precedent. Under *Rhone*, a defendant establishes a prima facie case of discrimination if a peremptory challenge is exercised against the sole remaining member of a particular minority from the venire.

The *Rhone* bright-line rule is consistent with the modest prima facie showing that step one of the *Batson* test requires. The burden of establishing a prima facie case under *Batson*'s first step is not "onerous," and may be satisfied by significantly less than the preponderance of the

evidence. *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). A defendant satisfies this step "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* The threshold to satisfy the first step, and thereby move on to the second step—the State's explanation—is deliberately low because the first two *Batson* steps were designed to facilitate "the production of evidence [to] allow[ ] the trial court to determine the persuasiveness of the defendant's constitutional claim. 'It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.'" *Id.* at 171 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)).

Ultimately, "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172. Once a defendant properly invokes the bright-line rule, the first step is satisfied, and the parties move on to the second step, where the "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons" proffered. *Miller–El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). So long as the State's reason is race-neutral, "it will be permitted to exercise its challenge and the purpose of the peremptory challenge will not be undermined." *Rhone*,

168 Wn. 2d at 662 (Alexander, J., dissenting).[1] Requiring the State to explain why, out of all the members in the venire, it chose to peremptorily strike the only remaining minority, facilitates the production of evidence that *Batson* intended the trial court to consider. *See Johnson*, 545 U.S. at 173. ("[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.").

After the State articulates its reasons, the court can then proceed to the third step, which involves evaluating "the persuasiveness of the justification" the prosecutor proffered. *Purkett*, 514 U.S. at 768. Within the *Batson* framework, the relevant step on appeal should be step *three*—where the trial court considers the State's reasons to determine whether the defendant has carried his burden of proving discrimination—not step one. *Johnson*, 545 U.S. at 171. Otherwise an appellate court is forced to weigh an inference against a speculative answer the state never provided. Put differently, step one is not so much a burden, but rather a trigger that activates step two: steps one and two represent the parties' respective "arguments" regarding the alleged discrimination, but it is the trial court's "prompt ruling" one way or another—step three—that should be the object on appeal.

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[1] A race-neutral explanation means "an explanation based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality).

With this framework in mind, many state courts have embraced the bright-line rule that this Court adopted in *Rhone*, or a variation of that rule. *See, e.g.*, *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244, 247 (2006) ("After a party objects to a jury strike, the proponent of the strike *must* offer a facially race-neutral explanation.") (emphasis added); *Highler v. State*, 854 N.E.2d 823, 827 (Ind. 2006) ("[T]he removal of 'the only . . . African American juror that could have served on the petit jury' does 'raise an inference that the juror was excluded on the basis of race.'") (citation omitted); *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004) ("[T]he State used a peremptory challenge to remove the only remaining African American venire person on the panel. Thus . . . it is clear that [the defendant] made at least a prima facie showing of purposeful discrimination in the jury selection process."); *Melbourne v. State*, 679 So. 2d 759, 764 n.2 (Fla. 1996) ("A simple objection and allegation of racial discrimination is sufficient, e.g., 'I object. The strike is racially motivated.'") (*citing State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984)); *Hollaman v. State*, 312 Ark. 48, 846 S.W.2d 663, 666 (1993) ("[T]he defendant must first establish a prima facie case of purposeful discrimination, which the appellant clearly did in this case when he pointed to a peremptory strike by the state dismissing the sole black person on the jury."); *Reynolds v. State*, 576 So. 2d 1300, 1302 (Fla. 1991) ("The act of eliminating all minority venire members, even if their number totals only one, shifts the burden to the state to justify the excusal upon a proper defense motion."); *see also State v. Edwards*, 384 S.C. 504, 682

S.E.2d 820, 822 (2009) ("When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one."); *Ashabraner v. Bowers*, 753 N.E.2d 662, 667 (Ind. 2001) (noting that the peremptory removal of the "only black member of the panel" standing alone "establishes a prima facie case" of discrimination); *State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992) (requiring "the state to come forward with reasonably specific and clear race-neutral explanations" if the defendant raises a *Batson* challenge to a peremptory strike against any minority venire person); *State v. Holloway*, 209 Conn. 636, 553 A.2d 166, 171-72 (1989); *Durham v. State*, 185 Ga. App. 163, 363 S.E.2d 607, 610 (Ga. App. 1987) ("[T]he State exercised a peremptory challenge against the sole black prospective juror. As this resulted in the total elimination of blacks from the venire, we view this as establishing a prima facie case of racial discrimination . . . .").

The reasoning in these cases is sound. First, the bright-line rule wards off discriminatory strikes by requiring the prosecutor to articulate a race-neutral justification and by creating a record on appeal. *See Rhone*, 168 Wn. 2d at 661 (Alexander, J., dissenting); *Holloway*, 553 A.2d at 172 (requiring the state to provide race-neutral reasons in the face of a *Batson* objection "provide[s] an adequate record for appellate review, [and] also aid[s] in expediting any appeal"). Washington law recognizes the need for an adequate record for appellate review as a consideration that weighs strongly in favor of requiring the prosecution to state its basis for excusal on the record. *State v. Wright*, 78 Wn. App. 93, 101, 896 P.2d 713 (1995)

("By [stating the race-neutral basis for exclusion on the record], the prosecutor would ensure an adequate record for review should an appellate court disagree with the trial court's ruling that no prima facie case was established.").

Second, the benefits of ensuring a complete record come at a very modest cost. If a defendant invokes the *Rhone* rule, all that is required is that the State articulate why it exercised its peremptory strike against the sole remaining minority on the venire. The trial judge then evaluates the State's reasoning and can issue "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Johnson*, 545 U.S. at 172-73 (internal quotation marks and citation omitted). This process "will entail no more than a minute or two of time. . . . The slight inconvenience of this procedure clearly and unmistakably is justified as a means of preventing the injustice that would result if the only minority venire member could be peremptorily excused without accountability." *Reynolds*, 576 So. 2d at 1301-02. With the prosecutor's reasons stated on the record, many appeals would be avoided altogether if the reasoning is plausible and non-racial. A one-time 90-second investment during trial could prevent a costly and time consuming appeals process. For those cases that are appealed, a fully-developed record would help ensure that the trial court's rationale is properly preserved and presented, expediting the appellate process. These efficiency gains can only be captured with a bright-line rule.

Meredith's case illustrates the importance of a record on appeal, the minimal cost involved to ensure one, and the efficiencies that would result. In response to Meredith's challenge, the prosecutor squarely refused to provide a race-neutral reason, using the time instead to argue that Meredith had failed to meet his burden under *Batson*. *Meredith*, 163 Wn. App. at 78. The prosecutor's refusal came at the cost of a potentially discriminatory strike, exercised against the sole remaining minority on the venire, and made for reasons unknown. Appellate courts must now speculate about whether the strike was discriminatory without actually knowing the State's reasons. Had the State provided a reason during voir dire, the record would have been preserved and any appellate court could have evaluated these reasons.

Finally, the bright-line rule remains appropriate for Washington State in particular, because statistical data indicates that minorities, but particularly African Americans, comprise a very small percentage of Washington venires. Hence, peremptorily striking one African American venire person may often have the effect of striking *all* African American venire persons. For instance, in Pierce County, where the African American population is over twice the State average, a randomly selected forty-person venire is likely to contain only three African American members. *See* U.S. Census Bureau, *Pierce County QuickFacts*, *available at* http://quickfacts.census.gov/qfd/states/53/53053.html (African Americans comprise 7.1% of population in Pierce County as of 2011) (last visited: Aug. 6, 2012). Statewide, a randomly selected forty-person venire

is likely to contain fewer than two African American members. *Id.* (African Americans comprise 3.8% of population in Washington State).

In short, the bright-line rule is both just and efficient.[2] Requiring the State to provide reasons for peremptorily challenging the only minority on a venire would decrease the possibility that peremptory strikes are used in a discriminatory fashion, and would minimize costly appeals based on speculation. Moreover, "[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." *Rhone*, 168 Wn. 2d at 662 (Alexander, J., dissenting).

This Court was correct to adopt the *Rhone* rule in 2010. That decision undoubtedly remains good law, and this Court should reaffirm it.

C. Speculation Regarding the Race of a Remaining Member of the Venire Does Not Justify a Refusal to Recognize a Prima Facie Case Under *Rhone*.

Defense counsel objected to the prosecutor's peremptory strike against the only African American venire member, arguing that the juror "'was removed because of her minority status.'" *Meredith*, 163 Wn. App. at 78 (citation omitted). The prosecutor responded that Meredith had failed to establish a prima facie case of discrimination, in part, because the

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[2] There is no constitutionally protected right to a peremptory challenge. *Rivera v. Illinois*, 556 U.S. 148, 157, 129 S. Ct.1446, 173 L. Ed. 2d 320 (2009) ("[T]his Court has consistently held that there is no freestanding constitutional right to preemptory challenges."). In contrast, the Equal Protection Clause *requires* race-neutral jury selection in order to protect the accused, the jury, and the very integrity of the judicial process. *Miller-El*, 545 U.S. at 237-38. The balance is therefore decidedly one-sided when weighing the State's limited right to peremptory challenges against the right to race-neutral jury selection jealously protected by the Equal Protection Clause.

prosecutor had not struck another venire member who may have been a minority, too. In particular, the prosecutor remarked that he had not removed "one woman who appeared to be of 'Southern European descent . . . or perhaps even Middle Eastern.'" *Id.* (citation omitted). The prosecutor went on to admit that "the juror questionnaires did not include information on the venire members' race, 'so it's difficult to know who is and is not a racial minority.'" *Id.* But both parties and the trial court agreed that the challenged venire member was the only African American.

On appeal, Division Two affirmed the trial court's ruling by separating the *Rhone* bright-line rule into two parts. First, the court found Meredith failed to establish a prima facie case because "the peremptorily challenged juror was not a 'member of the defendant's constitutionally cognizable racial group.'" *Id.* at 83 (quoting *Rhone*, 168 Wn. 2d at 661) (emphasis omitted). Second, the court determined that the trial court properly denied Meredith's *Batson* objection "because the record does not clarify whether juror 4 was, in fact, the last remaining minority member of the venire." *Id.* (citing *Rhone*, 168 Wn. 2d at 661). The court pointed to the prosecutor's suggestion that one of the remaining venire members appeared to be a minority. *Id.* (citation omitted).

Such a cursory examination of the trial court's ruling eviscerates the increased protections against racial discrimination in the jury selection process that this Court adopted in *Rhone*. As this Court explained: "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." *Rhone*, 168 Wn. 2d at 661 (Alexander, J., dissenting). Here, the trial court declined to ask the prosecutor for such a short explanation, which may not have been sufficient to satisfy *Batson*. Instead, the Court of Appeals accepted at face value the prosecutor's suggestion that one other member of the venire may have been "'Southern European'" or "'Middle Eastern.'" *Meredith*, 163 Wn. App. at 78 (citation omitted).

As stated above, this Court established the *Rhone* rule, in part, to "ensur[e] an adequate record for appellate review" and to "effectuat[e] the Washington Constitution's elevated protection of the right to a fair jury trial." *Id.* at 82.[3] By accepting the prosecutor's bare assertion that another member of the venire may have been a minority, without further examination, the Court of Appeals failed to uphold either of these policies. If the State can bypass the increased protections of the bright-line rule by speculating as to the ethnicity of another individual on the venire—without any supporting information in the record—the rule cannot meaningfully further the policies behind its adoption. If this conclusion were to stand, the bright-line rule would be dead on arrival because the exception—allowing the prosecutor to avoid *Rhone* by speculating that a

[3] As this Court has previously held, the right to a fair jury trial in the Washington Constitution "supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group." *State v. Hicks*, 163 Wn. 2d 477, 492, 181 P.3d 831 (2008).

remaining venire member may be Portuguese, for instance—would swallow the rule.

This Court should hold that mere speculation as to the ethnicity of a member of the venire is not sufficient to rebut an objection that otherwise satisfies the bright-line rule announced in *Rhone*.

V. CONCLUSION

This Court adopted a bright line rule in *Rhone* that a defendant presents a prima facie case of discrimination under *Batson*'s step one when the State strikes the sole remaining minority venireperson. Division Two erred to suggest that this rule is in doubt. This Court should reverse and, in the process, reaffirm *Rhone* as controlling Washington law. The rule announced in *Rhone* ensures justice and integrity in juror selection, and is consistent with the Washington Constitution's requirement of a fair trial by jury.

DATED: August 13, 2012

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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CERTIFICATE OF SERVICE

I, Charles C. Sipos, attorney for Amicus Curiae American Civil Liberties Union of Washington, certify that on August 13, 2012, I personally served to each of the following persons a copy of the document on which this certification appears:

James E. Lobsenz (via email)	Counsel for Petitioner/Appellant
Brian Wasankari (via email)	Counsel for Respondent

Signed at Seattle, Washington, this 13th day of August, 2012.

/s/ Charles C. Sipos
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Rec. 8-13-12

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Dear Clerk,

Please accept for filing in *State v. Meredith*, Case No. 86825-5, the attached documents:

1. Motion for Leave to Participate as Amicus Curiae
2. Brief of Amicus Curiae American Civil Liberties Union of Washington
3. Certificate of Service showing service by email on both parties; counsel for both parties consented to email service.

Thank you.

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