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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY MEREDITH,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. INTRODUCTION

“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).¹ The lack of confidence in the assertion that our justice system is race neutral quite reasonably peaks whenever a prosecutor removes the sole remaining member of a minority group from the jury box. But whenever a *Batson* challenge is made to the removal of a minority person from the jury, regardless of whether or not some other minority person remains, the court considering the defendant’s *Batson* objection should take into account how the prosecutor’s challenge *appears* from the point of view of (1) the challenged juror; (2) the public; and (3) the defendant.

When analyzing how to respond to a *Batson* challenge, a court should always ask, “What is the best way of making sure that everyone has confidence in the fairness of the criminal justice system?” When answering this question, the court should recognize that (1) disclosure of the motive behind the exercise of a peremptory challenge that is suspected of being race-based is an inherently good thing; (2) the threshold that must

¹ “The effect of excluding minorities goes beyond the individual defendant, for such exclusion produces ‘injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.’” *McCray v. New York*, 461 U.S. 961, 968 (1983).

be met in order to be entitled to such disclosure is very low; (3) a very low threshold is easier for a trial judge to administer; (4) and easier for a fair and unbiased prosecutor to respond to. Moreover, in a state where the right to an appeal in a criminal case is of constitutional magnitude, (5) a low threshold serves to produce a record capable of meaningful appellate review; and (6) without meaningful disclosure by the prosecutor of his professed race-neutral reason for having exercised the peremptory challenge, none of the people involved – the juror, the defendant, or the public at large – are likely to have confidence in the fairness of the criminal justice system.

B. ARGUMENT

1. WHEN A TRIAL JUDGE PERMITS THE PROSECUTOR TO REMOVE THE ONLY AFRICAN-AMERICAN JUROR IN THE JURY BOX, WHERE NO OBVIOUS NONRACIAL EXPLANATION EXISTS AND THE TRIAL JUDGE DOES NOT REQUIRE THE PROSECUTOR TO GIVE ONE, IT CAUSES INJURY TO THE EXCLUDED JUROR, TO THE PUBLIC AS A WHOLE, TO THE COURT SYSTEM, AND TO THE DEFENDANT.

a. The Juror Is Likely to Believe That She Was Removed Just Because She Was African-American. This Will Only Exacerbate the Problem of Minority Distrust of the Courts.

“For more than a century,” the U.S. Supreme Court has “consistently and repeatedly reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.” *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). “As long ago as *Strauder*,² [the Supreme] Court

² In *Strauder v. West Virginia*, 100 U.S. 303 (1880), a statute barred all African-Americans from jury service. Thus, the Court noted that one race of people was “singled

recognized that denying a person participation in a jury service on account of his race unconstitutionally discriminates against the excluded juror.” *Id.* at 48.³ “*Batson* recognized that a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors . . .” *Powers v. Ohio*, 499 U.S. 400, 406 (1991).⁴ The practice also violates equal protection when it is employed by criminal *defendants*, or by *litigants in civil cases*:

Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same in all cases, *the juror is subjected to open and public racial discrimination.*

McCollum, 505 U.S. at 49 (italics added).⁵

When African-Americans are excluded from juries because of their race, whether the exclusion is accomplished by means of a wholesale statutory exclusion, or by the use of peremptory challenges, that exclusion constitutes “‘an impermissible injury’ to the excluded juror.” *McCollum*,

out and expressly *denied by a statute all right to participate in the administration of the law, as jurors*, because of their color,” thereby depriving them of the “equal justice” to which they were constitutionally entitled. *Id.* at 308 (italics added).

³ See B. Underwood, “Ending Race Discrimination by Jury Selection: Whose Right Is It Anyway?” 92 *Columbia L. Rev.* 725, 726-27 (1992) (“[I]n a pair of 1991 decisions the rights of jurors took center stage.” “The fundamental injury inflicted by race discrimination in jury selection is its effect on the excluded jurors . . .”).

⁴ “The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. [Citation]. In *Balzac v. Porto Rico*, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922), Chief Justice Taft wrote for the Court: ‘The jury system postulates a conscious duty of participation in the machinery of justice . . . One of the greatest benefits is in the security it gives the people that they, as jurors actual or possible being part of the judicial system of the country can prevent its arbitrary use or abuse.’ *Id.* at 310, 42 S.Ct. at 347.”

⁵ *Accord Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618 (1991) (when peremptories are exercised in a racially discriminatory manner it doesn’t matter whether it is a criminal or civil case, because “[i]n either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.”).

505 U.S. at 46. “While ‘[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race.’” *McCollum*, at 48, quoting *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

In this case, what is Ms. Alice Curie, the juror who was removed by the prosecutor, likely to think about her removal? There was no obvious or readily apparent reason why she could not be fair to the prosecution. She never said she distrusted the State or law enforcement. She never said she harbored any sympathy for, or felt any affinity with, the defendant. She didn’t disclose any potentially bias-causing event, such as having had a relative, whom she believed to be innocent, charged and convicted of a criminal offense. Common sense suggests that her initial reaction to hearing the prosecutor, the “quintessential state actor” exercise a peremptory challenge against her was something like: “Here we go again. Same old, same old. It’s been this way for over a hundred years in this country and nothing ever changes.”

Moreover, the prosecutor’s immediate assertion that he didn’t have to give any explanation for challenging Ms. Curie (RP III, 108), was likely only to *increase* her suspicions. Finally, the prosecutor’s assertion that his striking the only African-American juror didn’t matter because there was still someone on the jury who “may be of Southern European descent, or perhaps even Middle Eastern” (RP III, 109), was not likely to restore her

confidence in a race-neutral court system.⁶ Instead, the prosecutor's remark was more likely to *strengthen* her belief that his peremptory challenge against her was racially motivating.

b. The Defendant Is Likely to Think That The Criminal Justice System is Unfair, and that Judges Are Willing to Tolerate Racially Discriminatory Trial Practices by Prosecutors.

In *Powers*, the Court rejected the contention that a white person had no standing to complain if a black person was removed from his jury by means of a racially motivated peremptory challenge. While one justification for this ruling was to make it easier to protect the equal protection rights of the excluded juror, the Court also recognized that the defendant's own rights were at stake and were vindicated by allowing him to raise the issue of discrimination.

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Powers, 499 U.S. at 413.

c. Public Confidence in The Criminal Justice System Will be Eroded Because People Will Perceive the Courts As Willing to Tolerate Racially Motivated "Laundering" of the Jury Box.

It doesn't matter who does it; if any party appears to be exercising

⁶ It strains all credulity to think that her reaction was something like this: "Oh yeah, sure, silly me for suspecting racism. Now that I see that there's still an Italian person or a Greek person in the jury box, I feel reassured that my removal has nothing to do with the fact that I am black."

peremptories in a racially discriminatory manner, it undermines public confidence in our justice system:

“[B]e it at the hands of the State or the defense,” if a court allows jurors to be excluded because of group bias, “[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens’ confidence in it.” Just as public confidence in criminal justice is undermined by a conviction in which a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.

McCollum, 505 U.S. at 49-50, quoting *State v. Alvarado*, 221 N.J. Super. 324, 328, 534 A.2d 440, 442 (1987).

The key phrase here is, “if a court allows” it. When the public perception is that the trial judges are turning a blind eye to race discrimination in the jury selection process, then this “overt wrong . . . casts doubt over the obligation of . . . the court to adhere to the law throughout the trial . . .” *Powers*, 499 U.S. at 412. In this manner, “the very integrity of the courts is jeopardized when a prosecutor’s discrimination ‘invites cynicism respecting the jury’s neutrality,’ [citation], and undermines public confidence in the adjudication.” *Miller-El v. Cockrell*, 545 U.S. 231, 238 (2005).

2. THE RACE OF THE LITIGANT RAISING A BATSON CHALLENGE IS IRRELEVANT.

The majority judges in the Court below expressed some doubt as to whether a white defendant could take advantage of the *Rhone*⁷ bright-line

⁷ *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010).

rule, advocated by Chief Justice Alexander in his plurality opinion, that removal of the only remaining minority juror per se establishes a prima facie case. *State v. Meredith*, 163 Wn. App. 75, 259 P.3d 324 (2011). But it goes against all precedent to suggest that if the defendant is white, that a prosecutor then has a green light to exercise his peremptory challenges in an intentional effort to purge the jury box of African-Americans.⁸ As the *Powers* Court noted:

In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), Justice WHITE spoke of “the strong statutory policy of [18 U.S.C.] § 243, which reflects the central concern of the Fourteenth Amendment.” [Citation]. The Court permitted a white defendant to challenge the systematic exclusion of black persons from grand and petit juries. While *Peters* did not produce a single majority opinion, six of the Justices agreed that racial discrimination in the jury selection process cannot be tolerated and that ***the race of the defendant has no relevance to his standing to raise the claim.***

Powers, 499 U.S. at 408 (emphasis added).

Powers held that the *Peters* rule, which is applicable to challenges to the systematic exclusion of minority jurors in all trials, was also applicable in the context of an individual trial. *Id.* at 409. In both cases the defendant’s race is irrelevant because in both cases the equal protection rights of prospective black jurors are at stake. *Id.*

Thus, a white litigant has third-party standing to raise a *Batson*

⁸ It is unlikely that Ms. Curie – or any other black juror – would find the defendant’s race an adequate justification for removing her from the jury on the grounds that she isn’t a white person. Imagine her reaction if she were to be told that although it is constitutionally tolerable for a prosecutor to remove her from a jury charged with deciding the guilt (or civil liability) of a white man because she is black; but if, in the future, she should ever be called for jury duty again, and wind up on a jury deciding the guilt (or civil liability) of a black man, then the prosecutor won’t be allowed to remove her because of her race.

challenge on behalf of an injured minority juror:

Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objection cannot be heard. *This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror.*

Powers, 499 U.S. at 413-14 (emphasis added).⁹

Powers also explicitly held that white defendants are also harmed by the use of race-based peremptory challenges:

The discriminatory use of peremptory challenges by the prosecution *causes a criminal defendant cognizable injury*, and the defendant has a concrete interest in challenging the practice. [Citation]. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors “casts doubt on the integrity of the judicial process,” [citation], and “places the fairness of the criminal proceeding in doubt.”

Powers, 499 U.S. at 411 (emphasis added). Accordingly, *Powers* holds “that race is irrelevant to a defendant’s standing to object to the discriminatory use of peremptory challenges.” *Id.* at 416.

If any further illustration of the irrelevance of race is necessary, Petitioner notes that *the prosecution* has third party standing to raise a

⁹ The Court also recognized that “the barriers to suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor’s exercise of peremptory challenges. . . . We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.” *Powers*, 499 U.S. at 414-15.

Batson challenge whenever it believes that the *defendant* is violating the Equal Protection Clause. *McCullum*, 505 U.S. at 56.¹⁰ The political entity of the State of Washington has no race at all, and yet it can raise *Batson* claims because of the grave injuries that such discrimination inflicts upon the public, the courts, and the excluded jurors.¹¹

3. **IN *BATSON* THE SUPREME COURT DELIBERATELY CHOSE A RELATIVELY LOW THRESHOLD STANDARD FOR TRIGGERING A JUDICIAL INQUIRY INTO THE PROSECUTOR'S MOTIVES.**

a. **The Court Overruled *Swain v. Alabama* Because The *Swain* Standard Imposed a "Crippling Burden" on Defendants and Thereby Rendered Prosecutors Effectively Immune from Constitutional Scrutiny.**

Before *Batson* the Supreme Court gave the country *Swain v. Alabama*, 380 U.S. 202 (1965). But in *Batson* the Court acknowledged that because the lower courts' application of the *Swain* standard had "placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93. Accordingly, the Court replaced the *Swain* standard with the much lower "suspicion" or "inference" standard. Under the *Batson* standard the defendant need only identify facts and circumstances

¹⁰ "[T]he *Powers* Court found that a criminal defendant suffered cognizable injury 'because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt.' . . . *Surely, a State suffers a similar injury* when the fairness and integrity of its own judicial process is undermined." (Citation omitted) (italics added).

¹¹ This Court has also held that the race of the defendant is irrelevant. *See, e.g., Tukwila v. Garrett*, 165 Wn.2d 152, 166, 196 P.3d 681 (2008) ("the *Powers* Court held that under the equal protection clause a criminal defendant may object to race-based exclusions . . . regardless of whether he or she and the excluded jurors share the same race.").

which “raise an inference that the prosecutor used that practice [of exercising peremptory challenges] to exclude the veniremen from the petit jury on account of their race.” *Id.* at 96.

b. The Inference Standard Is, and Should Be, Easy To Meet.

But lower courts continued to set the bar too high for establishing a prima facie case, and thus the Court was obliged in *Johnson v. California*, 545 U.S. 162 (2005) to correct this erroneous practice by reaffirming the inference standard: “[In *Batson*], we held that a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose.” *Johnson*, at 169. The Court explained why it had set the threshold for establishing a prima facie case so low:

We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination.

Johnson, at 170.

c. A Low Standard Serves to Produce An Immediate Explanation, and That In Turn Serves the Purpose of Preserving Confidence in the Judicial System.

In accord with Justice Alexander’s observations in his *Rhone* opinion,¹² the Supreme Court noted that a low threshold produces answers

¹² *State v. Rhone*, 168 Wn.2d at 662 (Opinion of Alexander, C.J.): “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.”

in place of speculation, and thus serves to preserve public confidence in the fairness of the jury selection process:

The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. [Citation]. The 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.* [Citations]. The three step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages “prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.”

Johnson, at 172-73, quoting *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991)(Opinion of Kennedy, J.).

d. Here, as in *Johnson*, the Threshold Inference Was Satisfied Because There was “No Apparent Reason” Other Than Alice Curie’s Race For The Prosecution to Remove Her.

In *Johnson* the defendant based his *Batson* challenge on the assertion “that the prosecutor had no apparent reason to challenge the prospective juror other than [her] racial identity.” *Id.* at 165 (internal quotations omitted). The *absence* of any apparent race-neutral reason *was itself sufficient* because it raised an inference of purposeful discrimination.

In this case, Petitioner’s attorney said the same thing. He noted that Ms. Curie “was the only African-American on this particular jury panel,” and there was nothing in her voir dire answers to indicate “that she was in any way confused, evasive, or said anything that might lead one to believe that there would be a proper basis for removing the juror.” RP III, 107.¹³

¹³ Most of the voir dire questioning centered around the jurors’ life experience raising children and dealing with children who were breaking rules and drinking alcohol. The

“The only belief can be that she was removed because of her minority status . . .” RP III, 107. Here, as in *Johnson*, that should be sufficient “to produce [an] actual answer[] to suspicions and inferences that discrimination may have infected the jury selection process.” *Id.* at 172.

e. **The Prosecution Suffers No Harm By Being Directed to Supply An Explanation. As the *Johnson* Court Noted, A Prosecutorial Refusal to Supply an Explanation Is Itself Suspicious.**

The State has speculated that it was “likely” that the prosecutor used a peremptory challenge to remove Ms. Curie from the jury “because she worked as a licensed practical nurse.” *Brief of Respondent*, at 17.¹⁴ If this

removed juror, Ms. Curie, gave answers indicating that she raised children and that she had a teenager who got drunk on one occasion. Voir Dire RP 37. In this respect her answers were not meaningfully different from those given by several other jurors, such as Nos. 13, 20, and 32, who were not minority members, were not challenged by the prosecutor, and who wound up serving on the jury. For example, No. 13 said that on one occasion when her daughter was 17, she went camping and drank alcohol with other kids, and that she later learned her daughter had an alcoholism problem. Voir Dire RP 41-43. She said she caught her daughter coming home drunk on one occasion. Voir Dire RP 13. No. 20 said his eldest son went to a kegger when he was 14 and when he found out his son got in trouble. Voir Dire RP 46. No. 32 said “My boys did drinking” when they were underage. Voir Dire RP 46. He said he knew his boys did some drinking when they were away from the home. Voir Dire RP 116. This type of comparative analysis of the voir dire testimony of black and white jurors to test the validity of the prosecution’s asserted non-racial reasons for exercising a challenge was approved of and applied in *Miller-El*: “If the proffered reason for striking a black juror applies just as well to an otherwise similar nonblack who is permitted to serve, *that is evidence tending to prove purposeful discrimination.*” 545 U.S. at 241 (emphasis added).

¹⁴ “The prosecutor had a nurse testifying in his case and [sic] chief and *it is reasonable to assume* he did not want a juror applying their [sic] own expertise to the nurse’s testimony.” *Id.* (italics added). But *Miller-El* prohibits this kind of speculation: “[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade away because a trial judge, or an appellate judge, can imagine a reason that might not have been shown up as false.” 545 U.S. at 252. And yet here the Respondent urges this Court to engage in just such an exercise in imagination.

actually was the motivating factor behind the peremptory challenge, it would not have harmed the prosecution if the trial prosecutor had disclosed that fact.¹⁵ Indeed, how could it ever harm the prosecution to disclose its race-neutral reason? For example, if the trial prosecutor's true reason was that the juror was a social worker, then how would the State be harmed by disclosing that fact?¹⁶

It wouldn't. And that is why the Supreme Court recognized that a prosecutor's refusal to respond to a trial judge's request that he voluntarily identify his race-neutral reason for exercising a peremptory *is itself a suspicious* circumstance which creates a basis for an inference that purposeful race discrimination was really what motivated the peremptory challenge. In such a case,

the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. ***Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case.***

Johnson, 545 U.S. at 171 n.6 (emphasis added).

In the present case, the prosecutor didn't even wait for the judge to make any request or ruling. Instead he *immediately* said he didn't have to disclose his race-neutral reason because the defendant had "completely

¹⁵ See *Reply Brief of Appellant*, at 8, footnote 7.

¹⁶ As the trial judge in *State v. Hicks*, 163 Wn.2d 477, 485, 181 P.3d 831 (2008) stated on the record, he had a book on jury selection on his shelf that endorsed the view expressed by the prosecutor that educators and social workers made bad jurors for the prosecution. It is not as if these views are closely held "trade secrets" of the prosecutor's office which the State has some vital interest in protecting from disclosure to the defense bar.

failed to satisfy their burden of proof in a challenge.” RP III, 108.¹⁷ “I urge the Court not to require me to state for the record what my reasons are for excluding Ms. Curie . . .” RP III, 110. Why he urged that, or what it would cost him to simply state his reason, he did not say.

4. TRIAL JUDGES ARE RELUCTANT TO DIRECT PROSECUTORS TO DISCLOSE THEIR RACE-NEUTRAL REASON BECAUSE DOING SO CREATES THE APPEARANCE THEY ARE ACCUSING THE PROSECUTOR OF BEING A RACIST. THE *RHONE* PER SE RULE WOULD HELP TO ALLEVIATE THIS SOCIAL PRESSURE TO AVOID ENFORCING *BATSON*.

“Although *Batson* was decided more than twenty years ago, some lower courts still resist its command.” S. Johnson, “Race and Recalcitrance: The *Miller-El* Remands,” 5 *Ohio St. J. Crim. Law* 131, 131 (2007).¹⁸ One of the main reasons why *trial court judges* are reluctant to enforce *Batson* is that they mistakenly feel that in order to stop prosecutors

¹⁷ He then proceeded to misstate the defendant’s “burden of proof” as follows: “In my review of the case law, what they are required to prove is either A, that my office, the Pierce County Prosecutor’s Office, exercises peremptory challenges in a racially biased manner. Or B, that I, as a prosecutor have exercised a peremptory challenge in a racially biased manner. They, therefore, have failed to show on either count where that’s the case. That is over and apart of the second inquiry as to whether I have reasons for excusing the juror over and apart from her race, and that’s the second half of the inquiry.” RP III, 108.

But as noted above, at step one the *Batson* test does not require the defendant to “prove” racial discrimination. It only requires him to identify facts and circumstances that give rise to “suspicions and inferences that discrimination may have infected the jury selection process.” *Johnson*, 545 U.S. at 172. *Johnson* held that the California courts had *erred* by requiring proof on a more likely than not basis that the prosecutor’s actions were racially motivated: “California’s ‘more-likely-than-not’ standard is at odds with the prima facie inquiry mandated by *Batson*.” *Id.* at 173.

¹⁸ In *Miller-El v. Cockrell*, the Supreme Court sharply criticized the lower courts for failing to find a *Batson* violation where the record so clearly showed that the stated reasons for exercising peremptory challenges were pretextual. *Accord Snyder v. Louisiana*, 128 S.Ct. 1203 (2008).

from making racially discriminatory peremptory challenges, they have to accuse prosecutors of being racists and liars. This task is particularly unpleasant when the judge is personally acquainted with the prosecutor, and is likely to see that same prosecutor over and over. “Often judges are themselves former prosecutors or defense attorneys who, consequently, are likely to be part of the same professional and social networks as the attorneys whose strikes they evaluate.” J. Bellin & J. Semitsu, “Widening *Batson*’s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney,” 96 *Cornell Law Review* 1075, 1114-15 (2011). Rather than appear to endorse, even slightly, what may seem like an accusation of racism, a trial judge is likely to avoid the unpleasant task of even asking the prosecutor to identify his race-neutral reason.¹⁹

But if trial judges would only realize (and here this Court can be of great assistance) that merely reasonable “suspicions” and inferences that discrimination *may . . .* [be] infect[ing] the jury selection process,” (*Johnson*, at 172) are sufficient to establish a *prima facie* case – then the reticence to proceed to step two will be lessened. Similarly, if prosecutors understood that it only takes a reasonable suspicion to trigger the

¹⁹ Depending upon the plausibility of the prosecutor’s articulated reason, the trial judge’s job may get even tougher at step three of the *Batson* analysis. At that last stage, in order to ultimately rule in favor of the defendant raising a *Batson* challenge, the judge must find that the prosecutor’s proffered reason is pretextual. “In other words, the court must find that the attorney has made a misrepresentation to the court of a material fact – a serious breach of the attorney’s ethical duty of candor.” J. Bellin, *supra*, at 1114. But even at the earliest stage of the *Batson* process, the judge must first find the defense has made a “*prima facie*” showing of race discrimination before he even begins the process of determining whether a *Batson* violation is being committed.

requirement of disclosure of his motive for exercising a peremptory, then they would be less likely to be insulted by the fact that disclosure is being ordered.²⁰ And here is where the *Rhone* bright-line rule could really help maintain or restore public confidence in the fairness of the courts, while simultaneously cooling tempers.

The *Rhone* bright-line rule provides an “automatic” trigger that justifies going to step two. Precisely because it is automatic, whenever the State removes the sole African-American juror from the jury panel, the judge will find asking for disclosure a less awkward task.²¹ Prosecutors would be less likely to find the inquiry insulting, because it’s an automatic inquiry that will *always* be asked no matter who the prosecutor is.

Batson was “designed to ferret out the unconstitutional use of race in jury selection,”²² so that it could be stopped, thereby restoring everyone’s confidence in the fairness of the jury selection process. But bringing to light evidence that the real reason behind a peremptory challenge is *not* a race-based reason *also* helps to restore public confidence. Whenever a

²⁰ It would also help if all lawyers were made aware of the fact that race-based stereotyping often happens *unconsciously*, and thus peremptory challenges are often made for racially discriminatory reasons without the lawyer even being aware of his or her own race-based thinking. See A. Page, “*Batson*’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge,” 85 *Boston Univ. L. Rev.* 155, 160 (2005). Forcing an attorney to articulate the reason behind a challenge will lead to analysis of that reason, and, at least in some cases, to a dawning realization that the reason was not race-neutral.

²¹ “*Batson* asks judges to engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor’s intuitive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge.” *Miller-El*, 545 U.S. at 267-68 (Breyer, J., concurring).

²² *Miller-El*, 545 U.S. at 266 (Breyer, J., concurring).

prima facie showing is made, that means that a race-neutral reason must then be articulated. In every such case where that happens, the public, the juror, and the defendant will all be given the opportunity to assess that reason. And frequently (one hopes most of the time) it *will* be a convincing reason.²³ Moreover, if nothing else, ordering disclosure of a race-neutral reason compels the prosecutor to act consistently with that disclosure thereafter. Thus, if the prosecutor removes a black juror “because” she’s a nurse, then he will also have to remove a white juror who is a nurse, either because (1) being a nurse *is* the real reason for removing the two jurors, or (2) because a failure to act consistently will unmask the fact that it is a pretextual reason. *Either way* the jury selection process will be perceived as being fairer than if the prosecutor refuses to give any reason and the judge declines to order him to provide one.

5. WITHOUT THE *RHONE* BRIGHT-LINE RULE A DEFENDANT’S ART. 1, § 22 RIGHT TO AN APPEAL IS FRUSTRATED BECAUSE THE APPELLATE COURT MUST SPECULATE AS TO WHETHER THE PROSECUTOR HAD A RACE-NEUTRAL REASON. THE *RHONE* RULE ALSO PROMOTES THE OPEN ADMINISTRATION OF JUSTICE.

“A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective review of his or her claims.” *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). This is an

²³ In the present case, if the prosecutor had been ordered to give his reason, and if he had said – because she is a nurse – Alice Curie would have had the opportunity to consider that. It may never have occurred to her that her nursing expertise might have been the reason for her removal, but once having heard that reason articulated, it might have convinced her.

independent state constitutional right guaranteed by Wash. Const., art. 1, § 22. The *Rhone* bright-line rule assists the appellate courts in enforcing this constitutional right. But it is not necessary to first find a violation of the equal protection clause before a court can find a violation of the state constitutional right. This Court should hold that the *Rhone* bright-line rule is constitutionally necessary in this State in order to prevent evisceration of a criminal defendant's art. 1, § 22 right.

In addition, the *Rhone* bright-line rule is necessitated by art. 1, § 10, which requires that justice be administered openly in all cases. The Respondent's position is essentially: "trust us – it wasn't a racially motivated peremptory." But historically there is good reason for everyone – and especially for a minority person kicked off a jury like Alice Curie – to distrust, and to reject, such assurance.

C. CONCLUSION

The *Batson* decision was an "historic first step toward eliminating the shameful practice of racial discrimination in the selection of juries." *Batson*, 476 U.S. at 102 (Marshall, J., concurring). At that time, it was noted that the "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant." *Id.* at 103. But as the *Miller-El* and *Snyder* cases demonstrate, despite *Batson* not a lot has changed.²⁴ Pretextual reasons are still being offered for the intentional

²⁴ "I am not surprised to find studies and anecdotal reports suggesting that despite *Batson*, the discriminatory use of peremptory challenges remains a problem." *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring).

removal of minorities from juries. “The *Batson* three-step procedure, . . . has changed little in the twenty-five years since *Batson* . . .” J. Bellin, *supra*, at 1088. “Unfortunately, any attorney smart enough to pass a bar exam can easily circumvent” *Batson* by cleverly “packaging” pretextual reasons so that he can get away with using peremptories to remove minority jurors without getting caught. *Id.* at 1104.

But whatever reforms or changes might be needed to make the second and third steps of the *Batson* procedure reasonably effective in stopping racially discriminatory practices, nothing will change if trial judges are unwilling to even find that defendants have satisfied step one by establishing a prima facie case. *All* the appellate judges below agreed that the trial judge in this case failed to apply the correct standard when deciding whether a prima facie case was established.

Last year, the *Preliminary Report on Race and Washington’s Criminal Justice System* (2011) concluded that within our criminal justice system it continues to be a fact “that race matters in ways that are not fair . . . and that undermine public confidence in our legal system.” *Id.* at 21. Both the actual practice, and the perception of a practice, of removing jurors from the jury box because of their race, continues, and the problem is particularly serious in Pierce County where 7.1% of the population is African-American.²⁵ This case presents an opportunity to start restoring

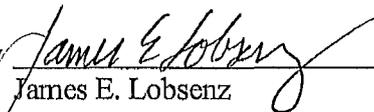
²⁵ <http://quickfacts.census.gov/qfd/states/53/53053.html>. No county has produced more appeals with *Batson* claims than Pierce County. *See Brief of Appellant*, at 20, n.1.

public confidence in the fairness of the criminal justice system.

Petitioner urges this Court to hold that the prospective *per se* rule of *Rhone* applies to this case, and that because Ms. Curie was the only remaining African-American juror, her removal by means of a peremptory automatically established a prima facie case of discrimination that required the prosecutor to state his race-neutral reason. But even if this Court is unwilling to reaffirm and apply *Rhone*'s bright-line rule, under the existing rules of *Batson* and *Hicks*, Petitioner *did* make out a prima facie case. It was error to require him to show a "pattern" of racially discriminatory peremptories.²⁶ The prosecutor should have been ordered to disclose his (claimed) race-neutral reason. But he wasn't, and it would be a meaningless "charade" to order him to do so now.²⁷ Petitioner asks this Court to reverse his conviction and remand for a new trial.

DATED this 2nd day of July, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz
Of Attorneys for Petitioner

²⁶ Both *Hicks* and *Batson* hold that a single racially motivated peremptory challenge violates the Equal Protection Clause. "A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Batson*, at 95, quoting *Arlington Heights v. Metro-Housing*, 429 U.S. 252, 266 n.4 (1977). *Accord Hicks*, 163 Wn.2d at 492.

²⁷ See *People v. Randall*, 671 N.E.2d 60, 65-66 (Ill. App. Ct. 1996). "We now consider the charade that had become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges . . . Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"

NO. 86825-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GARY MEREDITH,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

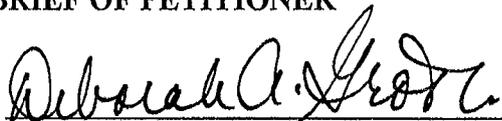
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On July 3, 2012, I caused to be served via E-MAIL and US MAIL, a true and correct copy of the following documents on:

Brian Wasankari
Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South Room 946
Tacoma WA 98402-2171
E-MAIL: bwasank@co.pierce.wa.us

Entitled exactly:

SUPPLEMENTAL BRIEF OF PETITIONER


DEBORAH A. GROTH

OFFICE RECEPTIONIST, CLERK

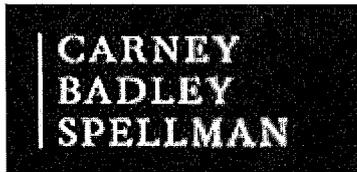
To: Groth, Debbie
Cc: Lobsenz, Jim; bwasank@co.pierce.wa.us; Laemmle, Lily
Subject: RE: No. 86825-5 State v. Gary Meredith

Rec. 7-3-12

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From: Groth, Debbie [<mailto:Groth@carneylaw.com>]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Lobsenz, Jim; bwasank@co.pierce.wa.us; Laemmle, Lily
Subject: No. 86825-5 State v. Gary Meredith

Attached for filing is Supplemental Brief of Petitioner and Certificate of Service filed in No. 86825-5 State v. Meredith filed by James E. Lobsenz WSBA #8787 206-622-8020 lobsenz@carneylaw.com



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