

NO. 86825-5

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 03, 2012, 2:03 pm
BY RONALD R. CARPENTER
CLERK

SUPREME COURT OF THE
STATE OF WASHINGTON

RECEIVED BY E-MAIL

STATE OF WASHINGTON, RESPONDENT

v.

GARY DANIEL MEREDITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 95-1-04949-6

Supplemental Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

ORIGINAL

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Whether this Court should affirm the trial court's ruling and defendant's convictions where it is unclear whether *Rhone* adopted the bright-line rule it discussed. 1

2. Whether, assuming *arguendo*, that the bright-line rule was adopted, this Court should affirm the trial court's ruling and the defendant's convictions where that rule is prospective in application, and therefore not applicable to the present case, which was tried before *Rhone* was decided. 1

3. Whether, assuming *arguendo*, the bright-line rule was adopted and is applicable to the present case, this Court should affirm the trial court's ruling and the defendant's convictions where the defendant has failed to establish a prima facie case of discrimination under that rule. 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 4

C. ARGUMENT. 5

1. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RULING AND DEFENDANT'S CONVICTIONS BECAUSE IT IS UNCLEAR WHETHER *RHONE* ADOPTED THE BRIGHT-LINE RULE IT DISCUSSED. 5

2. ASSUMING *ARGUENDO* THAT THE BRIGHT-LINE RULE WAS ADOPTED, THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RULING AND THE DEFENDANT'S CONVICTIONS BECAUSE THAT RULE IS PROSPECTIVE IN APPLICATION AND THEREFORE, NOT APPLICABLE TO THE PRESENT CASE, WHICH WAS TRIED BEFORE *RHONE* WAS DECIDED. 9

3. ASSUMING *ARGUENDO* THAT THE BRIGHT-LINE
RULE WAS ADOPTED AND IS APPLICABLE TO THE
PRESENT CASE, THIS COURT SHOULD AFFIRM THE
TRIAL COURT'S RULING AND THE DEFENDANT'S
CONVICTIONS BECAUSE THE DEFENDANT HAS
FAILED TO ESTABLISH A PRIMA FACIE CASE OF
DISCRIMINATION UNDER THAT RULE. 13

D. CONCLUSION. 17-18

Table of Authorities

State Cases

<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 74, 830 P.2d 318, 341 (1992).....	9, 10, 11, 12
<i>State v. Cheatam</i> , 150 Wn.2d 626, 639-40, 666, 81 P.3d 830 (2003).....	8
<i>State v. Hicks</i> , 163 Wn.2d 477, 486, 181 P.3d 831 (2008)	6, 7
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	6
<i>State v. Meredith</i> , 163 Wn. App. 75, 259 P.3d 324 (2011).....	4
<i>State v. Meredith</i> , 173 Wn.2d 1031, 275 P.3d 303 (2012).....	4
<i>State v. Rhone</i> , 168 Wn.2d 645, 229 P.3d 752, <i>cert. denied</i> , 131 S. Ct. 522 (2010).....	1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 17
<i>State v. Thomas</i> , 166 Wn.2d 380, 397, 208 P.3d 11078 (2009)	7

Federal and Other Jurisdictions

<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).....	3, 4, 5, 6, 7, 13, 14, 15, 16
<i>Beam Distilling Co. v. Georgia</i> , 501 U.S. 529, 111 S. Ct. 2439, 2443 (1991).....	9, 10, 11, 12, 13
<i>Georgia v. McCollum</i> , 505 U.S. 42, 58, 112 S. Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).....	5
<i>Hernandez v. New York</i> , 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991).....	6
<i>Highler v. State of Indiana</i> , 854 N.E.2d 823, 826-27 (Ind. 2006).....	16
<i>Hollamon v. State of Arkansas</i> , 312 Ark. 48, 846 S.W.2d 663 (1993) ...	15
<i>People v. Portley</i> , 857 P.2d 459, 464 (Colo. Ct. App. 1992).....	16

State of Missouri v. Parker, 836 S.W.2d 930, 937 (1992)..... 16
State v. Holloway, 209 Conn, 636, 645, 553 A.2d 166 (1989)..... 16
State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 247 (2006)..... 17
Stauder v. West Virginia, 100 U.S. (10 Otto) 303, 25 L. Ed. 664 (1879)... 5
United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987)..... 15

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether this Court should affirm the trial court's ruling and defendant's convictions where it is unclear whether *Rhone* adopted the bright-line rule it discussed.
2. Whether, assuming *arguendo*, that the bright-line rule was adopted, this Court should affirm the trial court's ruling and the defendant's convictions where that rule is prospective in application, and therefore not applicable to the present case, which was tried before *Rhone* was decided.
3. Whether, assuming *arguendo*, the bright-line rule was adopted and is applicable to the present case, this Court should affirm the trial court's ruling and the defendant's convictions where the defendant has failed to establish a prima facie case of discrimination under that rule.

B. STATEMENT OF THE CASE.

1. Procedure

On November 3, 1995, Gary Daniel Meredith, hereinafter referred to as the defendant, was charged by information with one count of second degree rape of a child. CP 1. On February 27, 1996, the State filed an amended information, which added one count of communicating with a minor for immoral purposes. CP 108-111

The case was called for trial before the Honorable Vicki Hogan on May 1, 1996. RP 3. The court heard motions, including a *Knapstad* motion and a motion to sever. RP 11-96. See CP 2-7, 133-49

The parties selected a jury on May 6, 1996. RP 96-100; CP 169-72. Afterwards, the defendant made a motion for mistrial, arguing that the prosecutor's use of a peremptory challenge against prospective juror number four, who appeared to be the only venire member of African descent, was improper because it "eliminated a cross section of the jury panel of [Defendant's] peers in this county." RP 106-08, 110-11.

In response, the prosecutor noted that

we don't have any information on the jury questionnaire as to the race of any of the jurors, so it's difficult to know who is and is not a racial minority.

RP 109. He stated that, although prospective juror number four "appear[ed] to be African American," and "appear[ed] to be the only African American in the panel," she did not appear to be the only minority in the venire. RP 109. There was at least one member of apparent "Southern European" or Middle Eastern descent. RP 109. Moreover, the prosecutor argued that the defendant was "a white male," and that most of the State's peremptory challenges were to venire members of apparent European descent. RP 109-10. The prosecutor thus argued that the defendant failed to carry his burden of showing that the prosecutor had "exercised a peremptory challenge in a racially biased manner." RP 108.

The court found "that the burden of proof is on the Defendant to demonstrate the use of a peremptory challenge based on a discriminatory

reason,” that the defendant failed to establish a *prima facie* case of discrimination, and thus, denied the defendant’s motion. RP 111.

After trial, the jury returned verdicts of guilty to both charges. CP 30-31.

The court scheduled a sentencing hearing for July 2, 1996, but the defendant failed to appear. CP 184.

After being arrested pursuant to a bench warrant, CP 195, the court sentenced defendant on November 21, 2008, to 198 months in total confinement for the second degree child rape count, and 60 months in total confinement for the communicating with a minor for immoral purposes count. CP 70-80. The court ordered that the time to be served concurrently for a total of 198 months in total confinement. CP 70-80.

Defendant filed a timely notice of appeal., CP 103, and then an appeal, arguing (1) that the State’s peremptory challenge of the sole venire member of apparent African descent constituted a *prima facie* case of purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), (2) that the trial court violated his rights to confrontation and cross-examination, (3) that insufficient evidence supported his conviction of communication with a minor for immoral purposes, and (4) that the trial court improperly prohibited him from arguing about the absence of DNA evidence during closing

argument. *State v. Meredith*, 163 Wn. App. 75, 259 P.3d 324 (2011).

The Court of Appeals affirmed, holding that the defendant “failed to establish a prima facie case of purposeful discrimination under both the *Rhone* majority’s ‘something more’ standard and the *Rhone* minority’s bright-line rule,” and hence, that the trial court’s denial of the defendant’s *Batson* challenge “was not clearly erroneous.” *Meredith*, 163 Wn. App. at 715.

Defendant filed a motion for reconsideration, which was granted in part.

Defendant then filed a petition for Review with this Court, which was “granted only on the issue of the scope of the bright line rule articulated in *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752, *cert. denied*, 131 S. Ct. 522 (2010), in establishing a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).” *State v. Meredith*, 173 Wn.2d 1031, 275 P.3d 303 (2012).

2. Facts

The relevant facts are set forth in the State’s Brief of Respondent.

C. ARGUMENT.

1. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RULING AND DEFENDANT'S CONVICTIONS BECAUSE IT IS UNCLEAR WHETHER *RHONE* ADOPTED THE BRIGHT-LINE RULE IT DISCUSSED.

In *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 69 (1986), “the United States Supreme Court recognized that, although a defendant has no right to a “jury composed in whole or in part of persons of his own race,” “the equal protection clause requires defendants to be ‘tried by a jury whose members are selected pursuant to nondiscriminatory criteria.’” *State v. Rhone*, 168 Wn.2d 645, 650-51, 229 P.3d 752 (2010)(quoting *Batson* 476 U.S. at 85-86 (quoting *Stauder v. West Virginia*, 100 U.S. (10 Otto) 303, 25 L. Ed. 664 (1879))). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S. Ct. 2348, 2358–59, 120 L.Ed.2d 33 (1992).

“*Batson* established a three-part analysis to determine whether a venire member was peremptorily challenged pursuant to discriminatory criteria.” *Rhone*, 168 Wn.2d at 651.

First, a defendant challenging a prosecutor’s peremptory challenge of a venire member must “establish a prima facie case of purposeful discrimination,” *Batson*, 476 U.S. at 96, by “provid[ing] evidence of any

relevant circumstances that ‘raise an inference’ that a peremptory challenge was used to exclude a venire member from the jury on account of the venire member’s race.” *Rhone*, 168 Wn.2d at 651.

Second, if a defendant established a prima facie case of purposeful discrimination, “the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member.” *Id.*; *Batson*, 476 U.S. at 97.

“Finally, the trial court determines whether the defendant has established purposeful discrimination.” *Rhone*, 168 Wn.2d at 651; *Batson*, 476 U.S. at 98.

“In reviewing a trial court’s ruling on a *Batson* challenge, ‘[t]he determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous.’” *Rhone*, 168 Wn.2d at 651 (quoting *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (quoting *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995))); *Hernandez v. New York*, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991).

With respect to the first part of the *Batson* analysis, “a trial court is ‘not required to find a prima facie case [of discriminatory purpose] based on the dismissal of the only venire person from a constitutionally cognizable group, but they may, in their discretion, recognize a prima facie

case in such instances.” *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.3d 11078 (2009) (quoting *Hicks*, 163 Wn.2d at 490).

In *Rhone*, the defendant appealed the prosecutor’s peremptory challenge of the sole African-American venire member by arguing that such challenge necessarily established a prima facie case of discrimination in violation of *Batson*. *Rhone*, 168 Wn.2d at 650-52. Specifically, Rhone urged the Court “to adopt a bright-line rule that a prima facie case of discrimination is always established whenever a prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group.” *Id.* at 652. The majority opinion, which was authored by Justice C. Johnson and signed by three other justices, declined to do so. *Id.* at 653-54.

However, the dissenting opinion, authored by Justice Alexander, and signed by three other justices, urged the adoption of

a bright line rule that 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.

Id. at 661 (emphasis added).

In her concurrence, Chief Justice Madsen wrote:

I agree with the lead opinion in this case. However, *going forward*, I agree with the rule advocated by the dissent.

Id. at 658 (emphasis added).

The second sentence of this concurrence, that which expresses the Chief Justice's agreement with the bright-line rule, was unnecessary to the resolution of the matter before the Court in *Rhone*. This is so because the first sentence plainly stated that the Chief Justice "agree[d] with the lead opinion in th[at] case," thus rendering the second sentence unnecessary to the resolution of the matter.

Moreover, the second sentence made clear that the Chief Justice would only apply a bright-line rule "going forward," which necessarily meant that she did not apply that rule to resolve *Rhone* itself. Therefore, the second sentence was *dictum*.

As a result, although five justices in *Rhone* expressed support for the notion of the bright-line rule, no clear decision was made to adopt that rule. See, e.g., *State v. Cheatam*, 150 Wn.2d 626, 639-40, 666, 81 P.3d 830 (2003)(there was no "majority analysis under the state constitution," where the lead opinion, "which garnered four votes, concluded that the seizure of [a] VIN violated both federal and state constitutions," but the Chief Justice's "concurring opinion was expressly based only on the Fourth Amendment.").

2. ASSUMING *ARGUENDO* THAT THE BRIGHT-LINE RULE WAS ADOPTED, THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RULING AND THE DEFENDANT'S CONVICTIONS BECAUSE THAT RULE IS PROSPECTIVE IN APPLICATION AND THEREFORE, NOT APPLICABLE TO THE PRESENT CASE, WHICH WAS TRIED BEFORE **RHONE** WAS DECIDED.

Assuming that the rule proposed by the dissenting opinion in **Rhone** is law, it should not be applied to the present case.

Chief Justice Madsen's concurrence noted that the rule would be applied "going forward." **Rhone**, 168 Wn.2d at 658. Because, without her opinion, there would be no majority for the rule, if that rule is law, it must be, as the concurrence plainly states, applied purely prospectively.

Earlier, this Court cited the United States Supreme Court for the proposition that "the question of whether a newly-announced rule of an appellate decision should apply retroactively is a choice of law question for which there are three possible answers." **Robinson v. City of Seattle**, 119 Wn.2d 34, 74, 830 P.2d 318, 341 (1992) (citing **Beam Distilling Co. v. Georgia**, 501 U.S. 529, 111 S. Ct. 2439, 2443 (1991)).

"First, a decision may be made **fully retroactive**, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations." **Robinson**, 119 Wn.2d at 74 (quoting **Beam**

Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 2443 (1991)).

Second, there is the *purely prospective* method,

under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision.

Id. (quoting *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 2443-44 (1991)).

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call *modified, or selective, prospectivity*, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused

Id. (quoting *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 2445-46 (1991)).

Both the United States and Washington State Supreme Courts have abolished selective prospectivity because it “breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally.” *Robinson*, 119 Wn.2d at 75 (quoting *Beam Distilling*, 501 U.S. 529, 111 S. Ct. 2439, 2443-44 (1991)).

Moreover, both Courts have found that “the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others.” *Robinson*, 119 Wn.2d at 76 (quoting *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 2447-48 (1991)). Thus,

[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. *The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of “new” rules.*

Id. (emphasis added).

The bright-line rule urged by the dissent in *Rhone* was not applied in *Rhone* itself because the opinion affirming Rhone’s conviction rejected the use of that rule, *Rhone*, 168 Wn.2d at 653-54, and Chief Justice Madsen’s concurrence stated only that she agreed with such a rule “going forward.” *Id.* at 658. Because “the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others,” *Robinson*, 119 Wn.2d at 76, the bright line rule cannot now be applied retroactively.

Therefore, the new bright-line rule of *Rhone* must be, as Chief Justice Madsen indicated in her concurrence, purely prospective.

Under the purely prospective method, “a new rule is applied neither to the parties in the law-making decision *nor to those others against or by whom it might be applied to conduct or events occurring before that decision.*” *Robinson*, 119 Wn.2d at 74(quotng *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 2443-44 (1991)) (emphasis added).

In the present case, the peremptory challenge at issue was made on May 6, 1996, *see* RP 106-111, years before the bright-line rule of *Rhone* was proposed on April 1, 2010. *Rhone*, 168 Wn.2d 645. Thus, the conduct at issue occurred before the new rule at issue was announced. Because that rule must be applied prospectively, it cannot be applied to the present case.

Moreover, there may be a Constitutional problem in applying a new rule of decisional law purely prospectively. Justices Blackmun, Marshall, and Scalia argued in their concurring opinion in *Beam Distilling*, that they favored abandonment of any prospectivity approach on constitutional grounds:

Unlike a legislature, we do not promulgate new rules to ‘be applied prospectively only,’ ... We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.... [P]rospectivity, whether ‘selective’ or ‘pure,’ breaches our obligation to discharge our constitutional function.

Beam Distilling, 111 S. Ct. 2439, 2449-50 (Blackmun, J., concurring).

If this is true, then the bright-line rule of *Rhone* may better be conceived as dictum than a new rule of decisional law.

3. ASSUMING *ARGUENDO* THAT THE BRIGHT-LINE RULE WAS ADOPTED AND IS APPLICABLE TO THE PRESENT CASE, THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RULING AND THE DEFENDANT'S CONVICTIONS BECAUSE THE DEFENDANT HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION UNDER THAT RULE.

Even if *Rhone*'s bright line rule is law and is applied to the present case, Defendant has not "establish[ed] a prima facie case of purposeful discrimination," *Batson*, 476 U.S. at 96, under that rule.

That rule holds that "a prima facie case of discrimination is established under *Batson* when [1] the sole remaining venire member *of the defendant's constitutionally cognizable racial group or* [2] *the last remaining minority member* of the venire is peremptorily challenged." *Rhone*, 168 Wn.2d at 661 (emphasis added).

In the present case, the prosecutor exercised a peremptory challenge against prospective juror number four, who appeared to be of African descent, and the only African-American in the venire. RP 107. The defendant, however, is a "white" man. RP 110. As a result,

prospective juror number four could not have been “the sole remaining venire member *of the defendant’s constitutionally cognizable racial group.*” *Rhone*, 168 Wn.2d at 662 (emphasis added), and the defendant cannot establish a prima facie case of discrimination under the first prong of the bright-line rule proposed in *Rhone*.

The second prong of that rule requires that “the last remaining minority member of the venire is peremptorily challenged.” *Rhone*, 168 Wn.2d at 662. However, in this case, there was evidence that prospective juror number four was *not* the last remaining minority member of the venire. RP 109. Hence, the defendant cannot establish a prima facie case of discrimination under the second prong of the bright line rule proposed in *Rhone*.

Therefore, even if *Rhone*’s bright-line rule was adopted and is applied to the present case, Defendant has not “establish[ed] a prima facie case of purposeful discrimination,” *Batson*, 476 U.S. at 96, under that rule. As a result, the decision of the Court of Appeals to deny Defendant’s motion and the defendant’s convictions should be affirmed.

Nor is there any authority for expanding the scope of that rule to include cases in which the challenged venire member is *not* of the defendant’s constitutionally cognizable racial group or the last remaining minority.

When Justice Alexander proposed the bright-line rule, he articulated these requirements not just once, but three times, *Rhone*, 168 Wn.2d at 659, 661, 663.

Moreover, as Justice Alexander noted in his opinion, while there is persuasive authority from other jurisdictions which supports the bright-line rule, such authority holds only “that a prima facie case of discrimination is established” if either “the last remaining member of the defendant’s cognizable racial group is dismissed” *or* “the last remaining minority venire member is peremptorily challenged.” *Rhone*, 168 Wn.2d at 662. That authority does not support a bright-line rule in which the challenged venire member is *not* of defendant’s constitutionally cognizable racial group or the last remaining minority venire member. *See United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987)(while “[t]he striking of a single juror of defendant’s race may not always be sufficient to establish a prima facie case” of discrimination, under the facts of the case, “the Government’s peremptory challenge of “the last remaining juror of defendant’s race is sufficient to ‘raise an inference’ that the juror was excluded ‘on account of [his] race,’ thereby satisfying the final portion of the *Batson* test.”); *Hollamon v. State of Arkansas*, 312 Ark. 48, 51-54, 846 S.W.2d 663, 666 (1993)(defendant “establish[ed] a prima facie case of purposeful discrimination” where he was “black” and

the State, during jury selection, exercised a peremptory strike that excluded the sole black juror from the jury panel.”); *People v. Portley*, 857 P.2d 459, 464 (Colo. Ct. App. 1992) (holding that a defendant makes a prima facie showing of purposeful discrimination “if no members of a cognizable racial group are left on a jury as a result of the prosecutor's exercise of peremptory challenges” in a case where both the defendant and the challenged venire members were “black”); *State v. Holloway*, 209 Conn, 636, 645, 553 A.2d 166 (1989) (affirming the trial court’s denial of defendant’s *Batson* challenge, but following South Carolina’s lead in establishing a bright-line rule requiring “a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire.”); *Highler v. State of Indiana*, 854 N.E.2d 823, 826-27 (Ind. 2006) (holding that, where the defendant is an African American, “the 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.’”); *State of Missouri v. Parker*, 836 S.W.2d 930, 937 (1992) (approving of an analysis of *Batson* claims in which the trial court is to consider the State’s race-neutral explanations as part of its consideration of whether the defendant has made a prima facie case); *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d

244, 247 (2006) (“[a]fter a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation.”).

Thus, if *Rhone* establishes a bright-line rule, that rule must be limited, as Justice Alexander stressed, to situations where (1) “the sole remaining venire member of the defendant’s constitutionally cognizable racial group” or (2) “the last remaining minority member of the venire is peremptorily challenged.” *Rhone*, 168 Wn.2d at 661.

Because Defendant failed to show either situation in the present case, he failed to establish a prima facie case of discrimination. Therefore, the court’s ruling denying his motion was not clearly erroneous and the defendant’s convictions should be affirmed.

D. CONCLUSION.

Although five justices in *Rhone* expressed support for the notion of the bright line rule, no clear decision was made to adopt that rule.

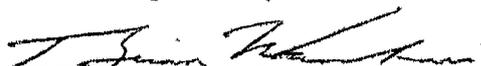
Assuming *arguendo* that the bright line rule proposed in *Rhone* is a new rule of law, it is prospective in application, and therefore not applicable to the present case, which was tried before *Rhone* was decided.

Finally, even assuming that this rule was adopted and is applicable to the instant case, the defendant has failed to establish a prima facie case of discrimination under that rule.

Therefore, the court's ruling and the defendant's convictions should be affirmed.

DATED: July 3, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S.~~ ^e mail of ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-3-12 Brian Wasankari
Date Signature

OFFICE RECEPTIONIST, CLERK

To: Therese Nicholson-Kahn
Cc: 'lobsenz@carneylaw.com'
Subject: RE: Supplemental Brief of Respondent and Supplemental Designation, No. 86825-5

Rec. 7-3-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Therese Nicholson-Kahn [<mailto:tnichol@co.pierce.wa.us>]
Sent: Tuesday, July 03, 2012 2:03 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'lobsenz@carneylaw.com'
Subject: Supplemental Brief of Respondent and Supplemental Designation, No. 86825-5

Please see attached the State's Supplemental Brief of Respondent regarding the below referenced matter:

St. v. Meredith
No. 86825-5
Submitted by: B. Wasankari
WSB # 28945

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to B. Wasankari