

Feb 06, 2017, 2:55 pm

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No. 93408-8

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,  
Respondent,

v.

MATTHEW ALEX ERICKSON,  
Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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## A. INTRODUCTION AND SUMMARY OF ARGUMENT

Racial discrimination that occurs during jury selection in criminal proceedings violates the constitutional rights of defendants and prospective jurors and undermines public confidence in the criminal justice system. Our criminal justice system should be able to state confidently to the public that it has in place rules and procedures that ensure that race did not play an improper role in jury selection. Despite this goal, this Court has acknowledged that the current approach fails. *State v. Saintcalle*, 178 Wn.2d 34, 35-36, 309 P.3d 326 (2013). Given this failure, this Court should fashion a rule and provide guidance to trial courts that allow for more transparency when race may be playing an impermissible role.

Here, in a criminal trial of an African American defendant, a strike of the only African American in the venire,<sup>1</sup> who but for the peremptory strike would have been seated, created a plausible inference that race played an impermissible role. Defendant timely raised a valid challenge to discriminatory use of the strike. VRP 180. Because a plausible inference of discrimination existed, the trial court erred when it concluded that Step 1 of the *Batson* analysis had not been satisfied, which foreclosed further

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<sup>1</sup> In Part III, *infra*, we address the City's argument that there may have been a second African American in the venire that was not peremptorily struck by the City.

factual development as to whether race played an impermissible role when the prosecutor struck the juror. Further, the court below weakened *Batson* when it did not reverse the trial court, when it required a pattern of strikes to establish a prima facie case and when it considered the overall diversity of the venire, assuming mistakenly that people of different racial minorities are fungible.

This Court should declare that a prima facie case has been established whenever a plausible inference exists that race played an impermissible role when a juror is struck. Specifically with regard to this case, this Court should declare that a plausible inference exists when the last venireperson of the same race of the defendant is struck. In this case, Step 1 is satisfied and the inquiry then moves to Step 2 where evidence is adduced.

#### **B. ISSUE PRESENTED FOR REVIEW**

Did the trial court err in holding that, due to the overall diversity of the jury, Mr. Erickson had not presented a prima facie case that the City of Seattle used a racially discriminatory peremptory strike against the only African American member of the venire who had discussed a prior incident of being racially profiled by police in violation of *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986)?

### C. STATEMENT OF THE CASE

The statement of the case is set forward in the Motion for Discretionary Review at pages 3-6. Additional relevant facts are included in the supplemental argument below.

### D. ARGUMENT

This Court has acknowledged that racial discrimination occurs during jury selection in criminal proceedings and that the existing doctrinal framework as set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and its progeny as it has been applied do not provide an adequate remedy for this violation of both the U.S. Constitution and the Washington Constitution. *See Saintcalle*, 178 Wn.2d at 35-36 (concluding that *Batson* does not effectively combat race discrimination in jury selection and that “we must strengthen *Batson*” but not changing the standard because the “issue has not been raised, briefed, or argued”). Instead of strengthening *Batson*, the court below erred when it left intact the trial court’s misapplication of *Batson*<sup>2</sup>. This is structural error, requiring reversal. *Batson*, 476 U.S. at 100.

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<sup>2</sup> While *Batson* challenges are generally reviewed for clear error, *Saintcalle*, 178 Wn. 2d at 41, in this case the issue centers on whether the trial court applied the correct legal standard. Questions of law are generally reviewed de novo. *State v. Kipp*, 179 Wn.2d 718, 726, 317 P.3d 1029 (2014). Accordingly, de novo review is appropriate here.

I. The Court Below Weakened *Batson* When It Upheld the Trial Court's Determination that Step 1 in *Batson* Requires a Pattern of Improper Strikes Which Was Not Established Because the Prosecutor Did Not Strike All Racial Minorities.

The trial court erred in relying solely upon the overall diversity of the jury to find that Mr. Erickson had not made a prima facie case sufficient to satisfy the first step of the *Batson* test. Based on the nature of the *Batson* challenge, the overall diversity of the jury is simply not relevant to the question of whether Juror 5 was struck because of his race. Though racial minorities are sometimes referred to collectively as “people of color,” this designation should not be taken to mean that members of different racial groups are fungible.

In considering whether the defendant has raised an inference of discrimination sufficient to make a prima facie case under *Batson*, the court must look to the basis upon which the strike was made. 476 U.S. at 96 (challenge may be made on basis of race); *see also J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (extending application of *Batson* to challenges based on gender); *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (upholding prima facie showing on basis of ethnicity); *People v. Bridgeforth*, --- N.E.3d ----, 2016 WL 7389277 (N.Y. Dec. 22, 2016) (holding a *Batson* challenge may be properly made on the basis of color,

rather than race, where “defendant's challenge was specific to the People's use of peremptory strikes to exclude dark-skinned women—a color classification”).

Here, the defense asserted a *Batson* challenge to the dismissal of Juror 5 on the grounds that he was the only African American in the jury pool and was the same race as the defendant.<sup>3</sup> VRP 193. Even so, the trial court relied on the fact that other jurors of color were not dismissed to conclude that defendant had not established a prima facie case of discrimination. VRP 205-207. The court’s reliance on other jurors of color being seated, or not struck, is misplaced.

Whether other jurors of color were seated is not the relevant question because a single act of discrimination may be sufficient to establish a *Batson* violation. 476 U.S. at 95 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 429 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). While consideration of whether there is a disparate impact in the prosecution’s use of all or most peremptory challenges to remove

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<sup>3</sup> The record indicates some confusion as to whether there was a second African American potential juror. Even if there was, as we note below, the fact that this strike was not made is irrelevant for purposes of establishing a prima facie case with regard to the struck juror when the method of jury selection is such that the struck juror would have, but for the strike, been seated; and when the juror who was not peremptorily struck would not have been seated in any case because of where that juror was in the order that venirepersons were to be seated.

minorities from the jury is valid in determining whether a prima facie case has been made, *State v. Rhone*, 168 Wn.2d 645, 656, 229 P.3d 752 (2010), it does not make the converse true – that if minorities are seated, no *Batson* violation has occurred. Furthermore, this is just one among many considerations for the court in determining whether an inference of discrimination has been shown. *Id.*

It is flawed to assume that the seating of jurors from racial or ethnic groups different than that of the struck juror cancels out the alleged discrimination, or proves that discrimination did not occur in the use of a peremptory strike. There is a long history in the United States of bias among and between racial and ethnic minority groups.<sup>4</sup> There is also a long history where the racism directed against different racial groups

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<sup>4</sup> See generally, Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821 (1997) (discussing the history and prevalence of interracial conflicts and the negative impacts on building interracial coalitions); see also Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 Harv. C.R.-C.L. L. Rev. 259, 260-66 (2007) (examining employment discrimination between groups of color, particularly by Latinos against African American employees, and discussing history of racial animus among minority groups); Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 Asian L. J. 7, 10-11 (1998) (discussing history of racial animus between African Americans and Asians); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 Stan. L. Rev. 819, 829-31 (1995) (examining racial prejudice among and between racially-subordinated groups); Aylon M. Schulte, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. Ill. L. Rev. 441, 462 (1995) (discussing litigation in which court found that historic differences in voting patterns between Latino and African American voters was evidence that they were not a politically cohesive group).

results in certain minority groups being treated more favorably than other racial groups.<sup>5</sup>

The trial court's error in focusing only on the diversity of the jury is apparent when one considers the issues that *Batson* seeks to address. Racial discrimination in jury selection has often been framed in terms of all-white juries convicting black defendants. *See, e.g., Batson*, 476 U.S. at 83; *Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2317, 152 L. Ed. 2d 129 (2005). While considering a jury's diversity may be instructive in cases involving all-white juries, the call of *Batson* is not satisfied simply by a diverse jury. Rather, the central inquiry is still whether a potential juror was struck on the basis of his or her race. *Batson*, 476 U.S. at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we

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<sup>5</sup> Examples of differential treatment of different racial minority groups abound. For example, Virginia's anti-miscegenation statute, the Racial Integrity Act of 1924, applied a rule of hypodescent (one drop rule) to define blacks who could not intermarry with whites but had what has been called the "Pocahontas exception" that included as white those with "one-sixteenth or less of the blood of the American Indian and hav[ing] no other non-Caucasic blood." Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 Mich. J. Race & L. 351, 354 (2007) (quoting Virginia's Act to Preserve Racial Integrity of 1924, ch. 271, §5099a, 1924 Va. Acts 534 (repealed 1975)). Differential treatment of different racial minority groups in our immigration laws has also been common. *Compare* Naturalization Act of 1870, 16 Stat. 254, 256 (1870) (extending naturalization to "aliens of African nativity and to persons of African descent.") with *Osawa v. United States*, 260 U.S. 178, 195-98, 43 S. Ct. 65, 67 L. Ed. 2d 199 (denying citizenship to Japanese applicant because naturalization was limited to "free white person[s]" and people of African nativity or descent by statute).

ensure that no citizen is disqualified from jury service because of his race.”); *Saintcalle*, 178 Wn.2d at 42 (“[r]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in *judging a citizen by the color of his or her skin.*”) (emphasis added).

The trial court was apparently concerned with avoiding an all-white or otherwise homogenous jury, and in doing so applied a flawed understanding of equal protection analysis that conflates all racial minorities and treats every non-white person, for equal protection purposes, as equivalent to any other non-white person. For the reasons described above, this flies in the face of the protections that *Batson* promises. Accordingly, the trial court’s focus on the overall diversity of the jury, to the exclusion of other relevant factors, is clearly erroneous.

II. The Trial Court Erred When It Determined that Step 1 Was Not Established Even Though the Prosecutor’s Sole Peremptory Strike Removed the Only African American in the Venire in a Criminal Trial of an African American Defendant.

Unlike in *Saintcalle*, the issue about what is required under *Batson* and its progeny has been raised, briefed, and argued in this case. *Batson*, as applied, is not working because judges have created too high a bar with

regard to what is required to establish a prima facie case, misperceiving what is required under *Batson*, as clarified in *Johnson v. California*, 545 U.S. at 169-70. Because this Court knows, as it declared in *Saintcalle*, that *Batson* as currently applied is not working to prevent racial discrimination in the selection of jurors in criminal cases, then, when presented squarely with the issue in this case, it should declare a rule and guidance that makes clear that what is required under Step 1 is not overly onerous so that the inquiry progresses to Step 2, when the prosecutor has the opportunity to present a race-neutral reason for the strike. Without the evidence adduced in Step 2, no court has the evidentiary basis to declare that race did not play an improper role in jury selection when a juror that is the same race as the defendant is struck. No evidentiary basis exists because without Step 2, the prosecutor is not required to proffer her or his race neutral reason for the challenge. *Id.* at 171.

Our criminal justice system should be able to state confidently to the public that it has in place rules and procedures that ensure that race did not play an improper role in jury selection. Here, a strike of the only African American in the venire in a criminal trial with an African American defendant, who but for the peremptory strike would have been seated, creates a plausible inference that race played an impermissible role. When a plausible inference exists, a trial court commits clear error

when it concludes that Step 1 has not been satisfied, which forecloses all further factual development as to the reasons the prosecutor struck the juror.

This Court should declare that a prima facie case has been established whenever a plausible inference exists that race played an impermissible role when a juror is struck. Specifically with regard to this case, this Court should declare that a plausible inference exists when the last venireperson of the same race as the defendant is struck. Step 1 is satisfied and the inquiry should move to Step 2 where evidence is adduced. None of this mandates a finding that *Batson* has been violated. *E.g., Saintcalle*, 178 Wn.2d at 56 (though prima facie case established, lower court did not abuse its discretion when it decided that proffered reason was not pretextual). Instead, it ensures that courts will engage in appropriate inquiries and fact finding so that a criminal defendant's right to trial by jury under Art I, § 21, Const. Art. I, § 21, remains inviolate and that the defendant and jurors are afforded equal protection under the Fourteenth Amendment to the U.S. Constitution, U.S. Const. amend. XIV.

III. The Trial Court Erred When It Speculated About a Possible Second African American in the Venire Who Was Not Struck Because, Even If Such a Person Existed, No Strike Was Necessary to Keep that Person Off the Jury Because of that Person's Place in the Venire and the Method of Jury Selection.

In conducting a *Batson* inquiry, the trial court and appellate courts should pay careful attention to the method of jury selection, which varies dramatically from courtroom to courtroom. Four common methods are as follows:

“jury-box method” – whereby venire persons are seated in the jury box and voir dire is conducted and challenges for cause and peremptories are exercised and excused persons are replaced until each side has used or waived their allotted challenges;

“struck-jury method” –after voir dire has been conducted with persons excused for cause or hardship, an initial panel is drawn that consists of the number of petit jurors who will hear the case (and alternates if applicable) plus the combined number of allotted peremptories, which are then exercised until exhausted and the petit jury that will be seated remains;

“serial-strike method” –after venire persons are excused for cause and hardship, the parties proceed in a pre-determined order and each party is given the opportunity to exercise a peremptory challenge and if neither does so that person is seated as a juror, continuing until the requisite number of petit jurors are seated;

“sequential method” – whereby voir dire is conducted of individual prospective jurors (though this is sometimes done in “blocks” or “groups”) with peremptories exercised and jurors seated until the petit jury is composed.

C.J. Wilson, *Proposing a Peremptory Methodology for Exercising*

*Peremptory Strikes*, 54 Am. Crim. L. Rev. 277, 288-97 (2017). Each

method presents differences with regard to the inferences of

discrimination that may be made when a peremptory strike is exercised or

not.

Here, the record indicates that jurors were seated in numerical order, closest to the jury box method described above. Of eighteen total jurors, jurors one<sup>6</sup>, three<sup>7</sup>, four<sup>8</sup>, five<sup>9</sup>, seven<sup>10</sup>, eight<sup>11</sup>, nine<sup>12</sup>, fifteen<sup>13</sup>, sixteen<sup>14</sup>, and eighteen<sup>15</sup> were excused. The resulting jury consisted of jurors two, six, ten, eleven, twelve, and thirteen. VRP 174-75. This shows that juror five would have been seated as a juror but for the prosecutor's peremptory strike. This other possible African American person was not in fact seated as a juror. The existence of this other person is inconsequential if she or he never had a chance of being seated because of the method used and where this person was in the prospective order of potential jurors. Because peremptory challenges were exercised after for-cause challenges, and because both the City and Mr. Erickson exhausted their peremptory challenges, it was impossible for this other possible African American venireperson to ever be seated. The lack of a peremptory challenge of this person tells us nothing about whether or not race played an impermissible

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<sup>6</sup> VRP 174

<sup>7</sup> VRP 134

<sup>8</sup> VRP 174

<sup>9</sup> VRP 173

<sup>10</sup> VRP 100

<sup>11</sup> VRP 107

<sup>12</sup> VRP 174

<sup>13</sup> VRP 174

<sup>14</sup> VRP 174

<sup>15</sup> VRP 169

role in the strike of prospective Juror 5, who would have been seated but for the peremptory strike. Prosecutors act strategically when they use peremptory challenges. *Cf. Miller-El v. Dretke*, 545 U.S. 231, 232-33, 125 S. Ct. 2317, 2320, 162 L. Ed. 2d 196 (2005) (state's acceptance of a black juror after 7 of 11 peremptory strikes exercised were made against black venirepersons did "not neutralize the early-stage decision to challenge a comparable venireman").

IV. Mr. Erickson Raised A Sufficient Prima Facie Case Under *State v. Rhone* Of A Racially Discriminatory Peremptory Strike.

“[A] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *Johnson* 545 U.S. at 170. The trial court must evaluate “the totality of the relevant facts” in determining whether a prima facie case has been made. *Saintcalle*, 178 Wn.2d at 42 (quoting *Batson*, 476 U.S. at 93-94).

The use of a peremptory challenge against the only venire member of the same cognizable racial group as a defendant may be sufficient to show a prima facie case of purposeful discrimination. *Rhone*, 168 Wn.2d at 652-53 (citing *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.2d 1107 (2009)). In determining if the prima facie case of discrimination has been

made, the Court should look for “something more” than merely a numerical analysis. *Id.* at 653. There is no hard and fast rule for what constitutes “something more,” but the Court should consider factors such as:

(1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against a group, (3) the level of a group's representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

*Id.* at 656 (citing *State v. Wright*, 78 Wn. App. 93, 100-01, 896 P.2d 713 (1995)).

The striking of Juror 5 satisfies the “something more” test because doing so highlighted the differences between between the race of Mr. Erickson and the police officers, struck the only member of the venire of the same racial group as Mr. Erickson, and the strike itself was based on a race based experience of Juror 5. Here, Mr. Erickson did present “something more”—stating “[i]n this case, it happens that the one black person also had an experience that was relevant to this case and he was dismissed from the jury.” VRP 205. Juror 5 described a situation in which he was racially profiled by the police. VRP 152. The City then used a

peremptory challenge against him. VRP 173. Under these facts, the trial court's reliance on the diversity of the jury is a failure to consider the totality of the relevant facts in clear violation of *Batson*. This is particularly true where Juror 5 was the only member of the venire of the same race as Mr. Erickson. VRP 193.

V. The Timing Of The *Batson* Objection In This Case Did Not Waive The Objection And There Still Exists a Meaningful Remedy.

A *Batson* challenge is not waived if raised before testimony begins. *Rhone*, 168 Wn.2d 645, 648, 229 P.3d 752 (2010) (analyzing a *Batson* challenge on its merits that was made “after the jury was sworn in, but prior to trial”); *State v. Burch*, 65 Wn. App. 828, 839, 830 P.2d 357 (1992) (*Batson* challenge allowed for the first time on appeal because defendants are allowed to raise constitution errors for the first time on appeal). Further, the Ninth Circuit Court of Appeals has also held that a *Batson* objection made after the jury was sworn in was timely. *United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987).

Ideally, a *Batson* objection should be raised immediately after the offending peremptory challenge was issued. If the objection is made at the same time as the peremptory challenge, the trial court has a variety of remedies to correct the issue, such as reinstating the struck juror, or striking

the entire panel and declaring a mistrial. *Batson*, 476 U.S. at 99 n.24. If the objection comes later, as it did in this case, it appears the only remedy available is an entirely new venire and a mistrial.<sup>16</sup> The trial court in this case came to such a realization and noted explicitly that “[t]here is no waiver in Washington.” VRP 199. Because a remedy exists, and because controlling Washington case law, as well as federal case law, have not found a waiver in circumstances similar to those in this case, the *Batson* objection was timely and was not waived.

VI. The Court Should Establish the Bright-Line Rule Articulated in *Rhone* as a Means of Strengthening *Batson*.

A majority of justices of this Court have supported establishing a bright-line rule that a prima facie case of discrimination is proved when the record shows that the “State exercised a preemptory challenge against the sole remaining venire member of the defendant’s constitutionally cognizable racial group.” *Rhone*, 168 Wn.2d at 658 (J. Alexander, dissenting) (advocating for bright-line rule in dissent joined by four justices); *see also id.* at 658 (J. Madsen, concurring) (supporting adoption of bright-line rule going forward, but not applied to that case). This case

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<sup>16</sup> It is unlikely that such a mistrial will ever be to a defendant’s benefit because it will reset the commencement date for speedy trial. CrRLJ 3.3(c)(2)(iii).

presents the appropriate vehicle to establish this rule. This Court has stated unflinchingly that the framework addressed in *Batson v. Kentucky*, *supra*, is insufficient to protect jurors of color and to combat the biased use of peremptory challenges by prosecutors. *Saintcalle*, 178 Wn.2d at 44 (“Twenty-six years later it is evident that *Batson*, like *Swain* before it, is failing us”) (internal citation omitted). This Court has called on strengthening “*Batson* protections, relying both on the Fourteenth Amendment and our state jury trial right” to combat the ills of race-based peremptory challenges. *Id.* at 51. The clear intent of the Court is to strengthen *Batson* to provide meaningful protections to both jurors and defendants. *Id.* Adopting the bright-line rule advocated by the dissent in *Rhone* would be an important step toward accomplishing that goal.

Although this Court reconsidered the bright-line rule proposed in *Rhone* three years later in *State v. Meredith*, the Court did not reconsider the merits of adopting the rule there. Rather, the Court accepted the case only to decide the very narrow issue of whether the bright-line rule had been established in *Rhone*. *State v. Meredith*, 178 Wn.2d 180, 183-84, 306 P.3d 942 (2013) (holding bright-line rule had not been adopted in *Rhone*). Given the Court’s call for a strengthening of protections against discrimination in the jury selection process, and the support of a majority

of justices to adopt a bright-line rule for establishing a prima facie case, this Court should adopt the rule in this case.

Adopting such a bright-line rule does not create a substantial burden to any party. If this Court adopted the bright-line rule, it would merely eliminate the first step of the *Batson* analysis—the objecting party would not have to show prima facie evidence other than that the last member of the same cognizable protected class as the defendant was stricken. Simply put, this change would force the party using a questionable peremptory challenge to state on the record a race-neutral explanation as to why that challenge was used. It would allow for a trial court to immediately hear and analyze the reasons behind a challenge, ensuring that any questionable peremptory challenge would be thoroughly scrutinized on the record and on the merits, allowing for cleaner appellate analysis.

#### **E. CONCLUSION**

For the reasons above, this Court should reverse Mr. Erickson’s convictions and remand for a new trial; further, this Court should take the opportunity to strengthen this state’s *Batson* protections by adopting the bright-line rule first proposed in *State v. Rhone*.

RESPECTFULLY SUBMITTED this 6th day of February, 2017.

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