

No. 70993-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DANTE URRELL PIGGEE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvis

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

D. STATEMENT OF THE CASE ..... 3

E. ARGUMENT ..... 4

THE PROSECUTOR’S USE OF RACE IN JURY  
SELECTION VIOLATED MR. PIGGEE’S AND THE  
AFFECTED JURORS RIGHTS TO EQUAL  
PROTECTION AND DUE PROCESS ..... 4

1. The use of race to strike a potential juror violates Equal  
Protection and Due Process under the Fourteenth  
Amendment. .... 4

2. The prosecutor’s reasons for striking jurors 16 and 35 were  
race-based, thus violating the jurors and Mr. Piggee’s right to  
equal protection. .... 9

a. The prosecutor erroneously believed juror 35 would  
not follow the law. .... 10

b. Based on the limited information the parties  
possessed, juror 35’s experience with domestic violence  
was different than that alleged to have been committed  
by Mr. Piggee. .... 12

c. The prosecutor held the fact juror 16 thought some  
might use court orders to gain an advantage against her, a  
view held by several other non-African-American jurors  
who were not struck. .... 13

3. The prosecutor's race-based peremptory challenges require a new trial..... 14

F. CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV ..... 1, 2, 4

### WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 21 ..... 1, 2

### FEDERAL CASES

*Arlington Heights v. Metropolitan. Housing Development Corporation*,  
429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)..... 4

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

*Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d  
395 (1991)..... 7, 8

*McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000) ..... 8

*Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196  
(2005)..... 5, 7, 9, 10

*Powers v. Ohio*, 449 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411  
(1991)..... 5

*Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834  
(1995)..... 10

*Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009) ..... 10

*Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175  
(2008)..... 8

*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101  
S.Ct. 1089, 67 L.Ed.2d 207 (1981)..... 9

*United States v. Collins*, 551 F.3d 914 (9th Cir.2009) ..... 14

<i>United States v. Vasquez-Lopez</i> , 22 F.3d 900 (9th Cir.1994).....	14
<i>Washington v. Davis</i> , 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).....	8
WASHINGTON CASES	
<i>State v. Cook</i> , 175 Wn.App. 36, 312 P.3d 653 (2013) .....	14
<i>State v. Hicks</i> , 163 Wn.2d 477, 181 P.3d 831 (2008).....	4, 7
<i>State v. Luvene</i> , 127 Wn.2d 690, 803 P.2d 960 (1995).....	7, 8
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013).....	5
<i>State v. Wright</i> , 78 Wn.App. 93, 896 P.2d 713 (1995).....	7

## A. INTRODUCTION

Dante Piggee, an African-American man, was charged with a count of felony violation of a court order and a count of third degree malicious mischief. The prosecutor used peremptory challenges to excuse the only two African-America women, and two of three African-Americans in the *venire*. The prosecutor's purported race-neutral reasons given for the challenges in response to Mr. Piggee's *Batson*<sup>1</sup> objection were based upon the jurors' answers to questions that were strikingly similar to jurors' answers who were not African-American and were not struck. Mr. Piggee's submits that the trial court erred in accepting the prosecutor's rationale for the strikes as they were violative of Mr. Piggee's as well as the jurors' constitutionally protected rights to equal protection and due process.

## B. ASSIGNMENTS OF ERROR

1. Mr. Piggee's Fourteenth Amendment and article I, section 21 rights to equal protection and due process were violated by the State's race-based use of peremptory challenges to excuse two of the three African-American jurors in the *venire*.

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

2. The State's use of race-based peremptory challenges to dismiss African-American Jurors 16 and 35 denied them the right to serve on a jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A party's use of race as a basis to exercise a peremptory challenge violates the Fourteenth Amendment and article I, section 21's guarantees of equal protection and due process. Here, over Mr. Piggee's objection, the State used peremptory challenges to strike two of the three African-Americans in the jury *venire* based upon the jurors' responses to questioning during *voir dire*, responses that were remarkably similar to responses given by non-African American jurors who were not struck. Was Mr. Piggee's right to due process and equal protection violated when the State's strikes were racially based and the rationale asserted by the State was pretextual?

2. Once the circumstances show some evidence of racial discrimination in jury selection, a prosecutor's reasons for challenging an African-American juror must be closely scrutinized to determine if they are supported by the record and are legitimately race-neutral. The reasons the prosecutor gave for striking Juror 16 and Jurors 35 were based upon views that applied equally to comparable jurors who were

seated. Did the prosecutor's reasons that were not supported by the record show the challenges were substantially motivated by the jurors' race?

D. STATEMENT OF THE CASE

Dante Piggee was charged with a single count of felony violation of a court order and a single count of malicious mischief in the third degree for contacting his wife where a court order barred such contact.<sup>2</sup> CP 7-8. During jury selection, over Mr. Piggee's objection, the State used peremptory challenges to strike two of the three African-Americans in the *venire*, and the only two African-American women, jurors 16 and 35.<sup>3</sup> RP 6/25/2013RP 72, 74. The trial court rejected Mr. Piggee's *Batson* challenge, finding the reasons given by the prosecutor for the challenges were not pretextual. 6/25/2013RP 103.

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<sup>2</sup> The State also charged, and the jury found, the aggravating factor that the offense involved "domestic violence . . . and the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time . . ." CP 8, 56. At sentencing, the State did not seek, and the court did not impose, an exceptional sentence based upon the aggravating factor. CP 94, 96; 9/23/2013RP 13, 24-26.

<sup>3</sup> Mr. Piggee did not object to the strike of juror 16, but objected to the prosecutor's strikes when juror 35 was subsequently stricken. 6/25/2013RP 72-74. Mr. Piggee used a peremptory challenge to strike the only African-American man, who was a police captain and had formerly been in the department's domestic violence unit. 6/25/2013RP 75.



The jury subsequently convicted Mr. Piggee of the felony violation of a court order but acquitted him of the malicious mischief count. CP 31-32.

E. ARGUMENT

THE PROSECUTOR'S USE OF RACE IN JURY  
SELECTION VIOLATED MR. PIGGEE'S AND THE  
AFFECTED JURORS RIGHTS TO EQUAL  
PROTECTION AND DUE PROCESS

1. The use of race to strike a potential juror violates Equal Protection and Due Process under the Fourteenth Amendment. The Fourteenth Amendment's Equal Protection Clause requires defendant's be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86.<sup>4</sup> The *Batson* Court noted that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause'" and that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" 476 U.S. at 95, quoting *Arlington Heights v. Metropolitan. Housing Development Corporation*, 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The

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<sup>4</sup> Under art. I, § 21, the Washington Constitution provides greater protection than the Fourteenth Amendment's protection under *Batson*. *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008).

Court further declared that “[f]or evidentiary requirements to dictate that ‘several must suffer discrimination’ before one could object would be inconsistent with the promise of equal protection to all.” *Id.* at 95-96 (citation omitted). In addition, an individual juror has “the right not to be excluded from one [particular jury] on account of race,” and thus “the Equal Protection Clause prohibits a prosecutor from using the State’s peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race.” *Powers v. Ohio*, 449 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Racial discrimination in jury selection harms not only the accused, but also the excluded juror and society as a whole. *Batson*, 476 U.S. at 87.

Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

*Miller-El v. Dretke*, 545 U.S. 231, 237-38, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). *See also State v. Saintcalle*, 178 Wn.2d 34, 58, 309 P.3d 326 (2013) (“racial inequalities permeate our criminal justice system and present important moral issues we all must grapple with. Twenty-

six years after *Batson*, it is increasingly evident that discriminatory use of peremptory challenges will be difficult to eradicate.”).

A *Batson* challenge involves a three-part analysis: (1) the defendant challenging the State’s use of a peremptory challenge must first establish a *prima facie* case of racial discrimination; (2) if a *prima facie* showing of discrimination is made, the burden shifts to the State to offer a race-neutral reason for its peremptory challenge; and (3) the trial court then decides if the defendant has established that the State’s use of the peremptory challenge was purposeful racial discrimination. *Batson*, 476 U.S. at 94-98.

Relevant circumstances which a court may consider include: striking a group of jurors that share race as their only common characteristic, disproportionate use of strikes against a group, the level of a group’s representation in the venire as compared to the jury, race of the defendant and the victim, past conduct of the state’s attorney in using peremptory challenges to excuse all African-Americans from the jury venire, type and manner of State’s questions and statements during venire, disparate impact (i.e. whether all or most of the challenges were used to remove minorities from jury), and similarities between those

individuals who remain on the jury and those who have been struck.

*State v. Wright*, 78 Wn.App. 93, 99-100, 896 P.2d 713 (1995).

Although there may be “any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause . . . , the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].”

*Miller-El*, 545 U.S. at 239, quoting *Batson*, 476 U.S. at 98 n.2.

Once the defendant objects to the prosecutor’s exercise of the peremptory challenges, and the trial court has ruled that the challenges were race-neutral, the focus is on whether the State’s reasons given for the challenges were indeed race neutral. See *Hicks*, 163 Wn.2d at 492-93 (even “where a trial court [finds] a prima facie case ‘out of an abundance of caution,’” if the prosecutor has offered a race-neutral explanation, the ultimate issue of whether or not a “prima facie case was established does not need to be determined[.]”) *State v. Luvene*, 127 Wn.2d 690, 699, 803 P.2d 960 (1995) (“[I]f, as in this case, the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary *prima facie* case is unnecessary.”), citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

The trial court must weigh the evidence of discrimination against the reasons presented for dismissing the juror to “determine whether the defendant has carried his burden of proving purposeful discrimination.” *Hernandez*, 500 U.S. at 359. “An invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .” *Id.*, quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). “A prosecutor’s motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.” *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000). See also *Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (“The implausibility of this explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the excused juror’s].”). Where a proffered reason is shown to be pretextual, it “gives rise to an inference of discriminatory intent.” *Id.* at 1212.

The trial court’s determination of a *Batson* challenge will be reversed where it is clearly erroneous. *Luvone*, 127 Wn.2d at 699.

2. The prosecutor's reasons for striking jurors 16 and 35 were race-based, thus violating the jurors and Mr. Piggee's right to equal protection. Here, the prosecutor exercised peremptory challenges to excuse the only two African-American women and two of the three African-Americans in the *venire*. The trial court found the prosecutor's reasons for the strikes to be race-neutral. Thus, the issue here is whether the prosecutor's reasons were indeed race-neutral. Mr. Piggee contends they were not and he is entitled to reversal of his conviction and remand for a new trial.

A trial court's determination that the prosecutor's rationale for striking a juror was race-neutral is a factual determination based partly on the juror's answers as well as an assessment of the demeanor of the juror and the prosecutor. *Batson*, 476 U.S. at 98 n.21. The trier of fact may not turn a blind eye to purposeful discrimination obscured by race-neutral excuses. "[T]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n. 20, quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." *Miller-El*, 125 S.Ct. at

2332. The prosecutor's reasons must be "related to the particular case to be tried." *Batson*, 476 U.S. at 98. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam).

As part of its evaluation of the prosecutor's reasoning, the Court also must conduct a comparative juror analysis - that is, it must compare African-American panelists who were struck with those non-African-American panelists who were allowed to serve. *Miller-El*, 545 U.S. at 241. *See also Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) ("if the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects.").

a. The prosecutor erroneously believed juror 35 would not follow the law. The prosecutor was convinced juror 35 would not be a good juror because of the juror's experience with domestic violence, and the prosecutor's belief that the juror would not follow the

law in light of her reaction to her ex-spouse's violation of a court order.  
6/25/2013RP 97-98.

In questioning by Mr. Piggee, Juror 35 stated she was the victim of domestic violence and, as part of the criminal case against her former spouse, a no-contact order was imposed, one she did not request. Juror 35's spouse violated the no-contact order by appearing at their child's daycare; something juror 35 did not find out about until the daycare told her. Juror 35 did not contact the police regarding the violation, because she saw no harm resulting from the violation; she and her former spouse are the parents of the child and her spouse had visited the daycare in violation of the court order to visit his son.  
6/24/2013RP 137.

The prosecutor followed up on this disclosure by juror 35, who explained that she did not call the police because her spouse had stopped at the daycare, dropped off a gift, hugged his son, and left.  
6/25/2013RP 11. The prosecutor never asked juror 35 if she could follow the law or whether her experiences with the no-contact order would affect her judgment in this case. Mr. Piggee asked juror 35 if she could be fair and impartial in light of her experience and she replied affirmatively. 6/24/2013RP 136.



Further, one of the reasons shared by juror 35 for not calling the police for the potential court order violation was her belief that a person who really wanted to harm the protected party could. 6/25/2013RP 12. Under questioning by the prosecutor, juror 35 noted this was her only experience with a no-contact order and whether it worked was totally dependent on the cooperation of the people involved. 6/25/2013RP 12. This was a view also shared by non-African-American jurors 15 and 34. Juror 15 even went further and noted that no-contact orders were not an effective tool in protecting a domestic violence victim because “there’s nobody that’s going to watch you 24 hours a day and make sure you’re safe.” 6/25/2013RP 13. Juror 34 noted “[t]here’s not enough police officers out there to deal with all the domestics and everything else that you gotta deal with[.]” 6/25/2013RP 15.

b. Based on the limited information the parties possessed, juror 35’s experience with domestic violence was different than that alleged to have been committed by Mr. Piggee. While the prosecutor focused on what she perceived was the similarity between juror 35’s experience with domestic violence and the court order and the facts of Mr. Piggee’s case, the prosecutor never asked juror 35 any questions about this subject. The prosecutor never asked questions

about the specifics of juror 35's experience, relying instead on the prosecutor's perceived view of what juror 35 had experienced. The prosecutor only asked juror 35 questions regarding her refusal to call the police after she learned of her ex-spouse's violation of the court order.

The only information juror 35 disclosed to the parties about her domestic violence experience consisted of her statements that she had been in a violent relationship, the court imposed a no-contact order against her wishes, and her ex-spouse had been prosecuted for a felony for the domestic violence, but was convicted of a misdemeanor.

6/24/2013RP 135-36. It was impossible for the prosecutor to conclude from this scant information that juror 35's experience was similar enough to Mr. Piggee's case that the prosecutor could harbor reservations about juror 35 serving on the jury.

c. The prosecutor held the fact juror 16 thought some might use court orders to gain an advantage against her, a view held by several other non-African-American jurors who were not struck. One of the prosecutor's reasons for striking juror 16 was the juror's view that some people use no-contact orders as swords as opposed to shields. 6/25/2013RP 99. In fact, several non-African-American jurors

expressed a similar view that some people take advantage of no-contact orders to gain the upper hand in divorces and child custody matters.

For instance, Juror 37 noted his former spouse did just that; sought a court order to gain an advantage in the divorce. 6/24/2013RP 143-44. Juror 30 also shared that her sister's husband's ex-wife sought a court order out of spite. 6/24/2013 RP 145. Thus a strong inference results that the prosecutor used this fact to excuse Juror 16 as a pretext.

3. The prosecutor's race-based peremptory challenges require a new trial. Where the prosecutor's peremptory challenges are based upon race, the remedy is to reverse the conviction and remand for a new trial. *State v. Cook*, 175 Wn.App. 36, 44, 312 P.3d 653 (2013). In addition, should this Court to determine that a least one of the two struck jurors was impermissibly excused, this Court must grant Mr. Piggee a new trial. *See United States v. Collins*, 551 F.3d 914, 919 (9th Cir.2009) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.”), *quoting United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir.1994).

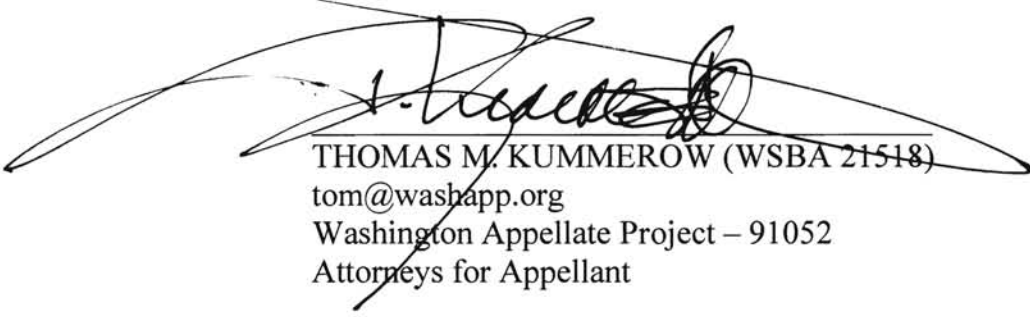
Here, the prosecutor's reasons for striking the two jurors were based upon their race. As a result, Mr. Piggee is entitled to reversal of his conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Piggee asks this Court to find the prosecutor's reasons for striking the only two African-American women were pretextual, and as a consequence, reverse his conviction.

DATED this 25<sup>th</sup> day of April 2014.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70993-3-I
v.	)	
	)	
DANTE PIGGEE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF APRIL, 2014.

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