

NO. 86825-5

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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SUPREME COURT  
STATE OF WASHINGTON  
Jul 23, 2012, 12:28 pm  
BY RONALD R. CARPENTER  
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STATE OF WASHINGTON,

Respondent,

vs.

GARY MEREDITH,

Appellant.

RECEIVED BY E-MAIL *bjh*

STATEMENT OF  
SUPPLEMENTAL  
AUTHORITIES

Pursuant to RAP 10.8, appellant Meredith cites the following supplemental authorities in connection with the *Batson* issues stated in his Petition for Review:

1. *State v. Parker*, 836 S.W.2d 930 (Missouri 1992):

***The states are free to develop procedures for the vindication of Batson claims, subject, of course, to constitutional restraints. . . .***

In the interest of conservation of judicial resources, this Court in *Antwine* sought to eliminate the need for an appellate court to remand to the trial court to determine whether the prosecutor racially discriminated in the exercise of the state's peremptory challenges. *Antwine sought to develop a procedure to include the prosecutor's explanations somewhat contemporaneously with the defendant's Batson objection while all of the relevant participants are present and the events of voir dire remain fresh in the participants' minds. [Citation]. The danger of post-hoc rationalization is minimized because the prosecutor is forced contemporaneously to justify the reasons for the strikes.*

*Parker*, 836 S.W.2d at 938 (emphasis added).

In sum, this court continues to find that a unitary procedure for the vindication of *Batson* claims is superior to the bifurcated structure suggested by *Batson*. Missouri's procedure better protects the equal protection rights of defendants and venirepersons and facilitates the efficient administration of justice in this state. ***Finding that the prima facie showing requirement under Batson is not constitutionally required, [citations], trial courts shall no longer make such a finding. Trial courts are directed to conduct an evidentiary hearing to determine whether the prosecutor's strike was racially motivated, as outlined above, once the defendant has properly raised a Batson challenge.***

*Parker*, 836 S.W.2d at 940 (emphasis added).

2. *State v. Thurman*, 887 S.W.2d 403, 407-08 (Missouri 1994):

The State argues that it was not required to provide race-neutral reasons for the striking of Mr. Figures because Thurman failed to make a prima facie case of purposeful discrimination. However, under *Parker*, a defendant's failure to make a prima facie showing does not relieve the State of its obligation to provide a race-neutral explanation for the challenged strike.

3. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820 (2009), citing *State v. Haigler*, 334 S.C. 623, 629-30, 515 S.E.2d 88 (1999):

When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one.

4. *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989):

The en banc Court of Military Review in this case simplified the inquiry into just one part, adopting a *per se* rule as establishing a *prima facie* case of discrimination. Upon the Government's use of a peremptory challenge against a member of the accused's race and upon timely objection, trial counsel must give his reasons for the challenge. Today, we adopt a *per se* rule for all the services.

We do so in order to simplify this process for members of courts-martial, and, more importantly, to make it fairer for the accused. In military trials, it would be difficult to show a pattern of discrimination from the use of one peremptory challenge in each court-martial. As a matter of judicial administration, the *per se* rule has become recognized as the superior procedure for *Batson* challenges. *State v. Jones*, 293 S.C. 54, 358 S.E.2d 701, 703 (1987). See Note, *Nature of Peremptory Challenges Altered*, 40 S.C. L. Rev. 41, 43-44 (1988). ***After today, every peremptory challenge by the Government by a member of the accused's race, upon objection, must be explained by trial counsel.***

5. *Melbourne v. State*, 679 So.2d 759, 764 (Fla. 1996):

A party objecting to the other side's use of a peremptory challenge on racial grounds must (a) make a timely objection on that basis, [FN 2 omitted] (b) show that the venireperson is a member of a distinct racial group, [FN3 omitted], and (c) request that the court ask the striking party its reason for the strike. FN 4. ***If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.*** FN 5.

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4. See generally *State v. Johans*, 613 So.2d 1319 (Fla. 1993)

5. See generally *id.* at 1321 (“[W]e hold that from this time forward a *Neil* inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner.”). ***Johans eliminated the requirement that the opponent of the strike make a prima facie showing of racial discrimination.***

6. Note, *Excavating From the Inside: Race, Gender, and Peremptory Challenges*, 45 Valparaiso Univ. L. Rev. 307 (2010):

[T]he proposed model state statute eliminates the requirement that a litigant establish a prima facie showing of discrimination at the first step of the *Batson* procedure, easing the burden for litigants who contend that a peremptory strike is based on race-gender identity. . . .

*Id.* at 353.

Some states may fear that elimination of the prima facie requirement in *Batson* will destroy the peremptory challenge. This is not the case. As discussed, Connecticut, Florida, Missouri, South Carolina and the Military Court of Appeals have eliminated the prima facie step and have not needed to eliminate the challenge altogether. . . .

*Id.* at 355.

7. W. Burgess, *The Proper Remedy for a Lack of Batson Findings: The Fall-out From Snyder v. Louisiana*, 101 J. Crim. L. & Criminology 1, 22-25 (2011):

The practice of allowing remands for further findings on a defendant's *Batson* challenge has often proven to be unworkable and has caused significant inefficiency in the lower courts. There are many practical and theoretical problems associated with the practice, which at times has taken on a life of its own, leading to successive appeals and additional proceedings.

#### A. THE IMPOSSIBLE BURDEN ON TRIAL JUDGES

. . . When an appellate court orders a remand for retroactive findings on a *Batson* challenge, the trial judge may be asked to recall – often years after the jury selection – such things as a challenged juror's facial expression, whether a prosecutor's race-neutral explanation for challenging an African-American juror applied equally to non-challenged white jurors, and the prosecutor's demeanor at the time of the peremptory challenge.

The Court recognized in *Snyder* that, where more than a decade had passed between jury selection and the Court's decision, there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date." [FN 134]. Given the typical timing of the appellate review process and the sensitivity of the inquiry, the Court's observation in *Snyder* is also applicable to the run of the mill appeal that moves more quickly. [FN 135]. More often than not, it is unreasonable to expect trial judges to recall such subtle details months, if not years, after the fact. Other courts have recognized this as well, at least in

cases involving delays of several years between the *Batson* challenge and the remand. [FN 136].

#### B. AN INVITATION FOR POST HOC JUSTIFICATIONS

In addition to the unreasonableness of asking trial courts to make retroactive findings on *Batson* challenges, such requests invite post hoc justifications from prosecutors for making peremptory challenges and from trial judges in allowing them. This is both an aspect of human nature and a phenomenon that numerous courts have recognized. [FN 137].

\* \* \*

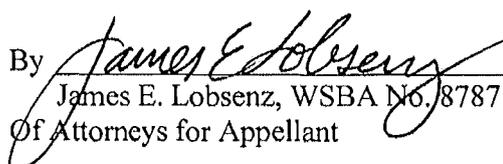
The Supreme Court noted the potential for unfairness under similar circumstances in *Miller-el v. Dretke*, where it rejected a prosecutor's after-the-fact reason for exercising a peremptory challenge that the prosecutor did not give during jury selection, stating that it "reek[ed] of afterthought," [FN 141], and noting that "when legitimate grounds like race are in issue, a prosecutor simply has to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."

The same concerns apply with even greater force where the prosecutor may be asked to explain the challenge months or years later and the trial court is forced to make findings long after the fact. The potential for post-hoc rationalizations under such circumstances is great, particularly given that both the prosecutor and the trial court have a significant incentive to avoid a new trial.

(Footnotes omitted) (emphasis added).

DATED this 23rd day of July, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Of Attorneys for Appellant

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.

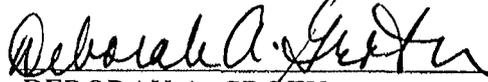
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On July 23, 2012, I caused to be served via E-MAIL and US MAIL, a true and correct copy of the following document 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](mailto:bwasank@co.pierce.wa.us)

Entitled exactly:

STATEMENT OF SUPPLEMENTAL AUTHORITIES

  
DEBORAH A. GROTH

## OFFICE RECEPTIONIST, CLERK

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**To:** Groth, Debbie  
**Cc:** [bwasank@co.pierce.wa.us](mailto:bwasank@co.pierce.wa.us); Lobsenz, Jim; Laemmle, Lily  
**Subject:** RE: State v. Meredith No. 86825-5

Rec'd 7/23/2012

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**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** [bwasank@co.pierce.wa.us](mailto:bwasank@co.pierce.wa.us); Lobsenz, Jim; Laemmle, Lily  
**Subject:** State v. Meredith No. 86825-5

Please find attached for filing (Appellant's) Statement of Supplemental Authorities filed by James E. Lobsenz WSBA #8787 206-622-8020 [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com)