

*App. Supp. Brief*

FILED  
COURT OF APPEALS  
DEPT. OF JUSTICE

10 MAY -3 PM 1:49

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

NO. 38600-3-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

*Respondent,*

v.

GARY MEREDITH,

*Appellant.*

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SUPPLEMENTAL BRIEF OF APPELLANT ADDRESSING THE  
IMPACT OF THE *RHONE* DECISION OF THE SUPREME COURT

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Appellant Meredith submits this supplemental brief on the impact of the recent decision in *State v. Rhone*, Supreme Court No. 80037-5, \_\_\_ Wn.2d \_\_\_, 2010 WL 1240983 (April 1, 2010) upon this case.

**A. FOR ALL FUTURE CASES A MAJORITY OF THE *RHONE* COURT ADOPTED THE RULE THAT THE PROSECUTORIAL REMOVAL OF THE SOLE AFRICAN-AMERICAN MEMBER OF THE JURY ESTABLISHES A PRIMA FACIE CASE OF RACE DISCRIMINATION.**

In *State v. Rhone, supra*, the Supreme Court addressed the issue of whether to adopt a bright line rule that a defendant always establishes a prima facie case of race discrimination when the record shows that the prosecution exercised a peremptory challenge against the sole remaining member of a racial minority group. The nine justices split into three groups. Although a five justice majority decided that under the particular circumstances of the case defendant Rhone had not established a prima facie case of race discrimination, a different five justice majority held that in the future Washington courts would apply the bright line rule that a prima facie case is always established whenever the sole minority juror is removed from the jury by the prosecution.

Writing for four justices, Justice Charles Johnson rejected the proposed bright line rule. Writing for four other justices, Justice Alexander concluded that such a bright line rule should be adopted. And writing for herself, Chief Justice Madsen concluded that while Rhone

should not prevail in his appeal, in the future the bright line rule advocated by Rhone should be the rule of law applied in this State. Her opinion reads simply:

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

*Rhone*, at ¶ 21 (Madsen, C.J., concurring).

Thus, Chief Justice Madsen endorsed the following rule supported by Justice Alexander in his opinion:

It is my view . . . that we should adopt a bright line rule that a prima facie case of discrimination is established 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. I recognize that we have previously held that 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 1107 (2009) (quoting *Hicks*, 163 Wn.2d at 490, 181 P.3d 831)(alteration in original). Nevertheless, I am convinced that it makes sense to adopt the rule proposed by Rhone and amicus American Civil Liberties Union (ACLU).

*Rhone, supra*, at ¶ 27.

Justice Alexander concluded that the benefits of such a bright line rule "far outweigh" the minimal burden that such a rule places on the prosecution. *Id.*, at ¶ 28.

As the lead opinion notes, some of these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venire, and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial.

*Rhone, supra*, at ¶ 28 (Alexander, J., dissenting) (footnote omitted).

While four justices disagreed and felt that a bright line rule was not advisable, Chief Justice Madsen provided a fifth vote for adopting the bright line rule in all future cases: “going forward I agree with the rule advocated by the dissent.” Thus, a five justice majority has adopted the bright line rule that removing the sole minority juror automatically establishes a prima facie case of discrimination for purposes of the *Batson*<sup>1</sup> three step test for analyzing claims of intentional race discrimination in the selection of a jury.

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

**B. UNLIKE DEFENDANT RHONE, MEREDITH (1) MADE A TIMELY CLAIM THAT THE STATE'S EXERCISE OF A PEREMPTORY CHALLENGE WAS A PURPOSEFUL ACT OF RACE DISCRIMINATION; (2) IDENTIFIED SIMILAR JURORS WHOM THE STATE WAS TREATING DIFFERENTLY SOLELY BECAUSE OF THEIR RACE; AND (3) HE HAS EXPLICITLY BRIEFED THIS ISSUE.**

Given the unusual circumstances of the *Rhone* case, and the absence of such circumstances from this case, it seems likely that the four justices subscribing to Justice Charles Johnson's lead opinion would view Meredith's case as distinguishable from Rhone's case. The Johnson opinion stresses the fact that Rhone did not really make a claim of intentional race discrimination. It notes that Rhone's venire originally contained two African-American jurors and that one of them was "challenged for cause by agreement of the parties." *Rhone, supra*, at ¶ 2. Obviously, since Rhone himself agreed that this juror should be removed, he made no claim that any intentional race discrimination was at work there. The other African-American juror was removed by the prosecution with a peremptory challenge and the Johnson opinion notes: "Neither Rhone nor his counsel objected when juror 19 was removed." *Id.*

Then, "[a]fter the jury was sworn in, but prior to trial, defense counsel informed the trial court that Rhone wished to make a statement." *Id.*, at ¶ 3. Rhone's ensuing statement was simply that he "would like to

have someone” on the jury that was African-American. While Rhone commented that the prosecutor “took away” the sole remaining African-American from the jury, he did *not* make any assertion that the prosecutor’s motive for removing that juror was that the juror was African-American. Neither Rhone nor his attorney objected to that juror’s removal and neither suggested that the prosecutor’s peremptory challenge should be disallowed. Neither suggested that the removed minority juror should be put back on the jury (in the place of one of the twelve jurors who had been sworn in). Rhone simply stated: “I would like to have someone of my culture, of color, that has – perhaps may have to deal with improprieties [sic] and so forth, to understand what’s going on and what could be happening in this trial.” *Id.* at ¶ 3. Rhone’s lawyer then “informed the court that Rhone was requesting a new jury pool.” *Id.* Although “[t]he trial court understood Rhone’s statement to be a *Batson* challenge,” *id.*, it was *not* clearly a *Batson* challenge since the defendant never said that he believed that the prosecution’s peremptory challenge was racially motivated.<sup>2</sup> Justice Johnson’s opinion concluded: “Certainly, Rhone’s objection at trial was insufficient.” *Id.* at ¶ 15.

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<sup>2</sup> While it is understandable that a minority defendant would want his jury to include someone of his race, the law has consistently held that a defendant has no constitutional right to such a jury. There is a constitutional right not to have any potential juror *excluded* because of his or her race. But there is no right to be *included* on a particular jury because of race. “All that the Constitution forbids, however, is systematic exclusion

The lead opinion also noted that Rhone eventually made the argument *on appeal* that the prosecution's peremptory challenge was motivated by purposeful race discrimination, even then he failed to make this argument in a timely manner and failed to brief it:

[B]efore the trial court, Rhone failed to supply any evidence of circumstances raising an inference of discrimination by the prosecution, but only acknowledged that an African-American venire member had been removed by the prosecutor's peremptory challenge. [Citation]. The similarity between jurors 19 and 33 was ***raised only by amicus ACLU and in the State's response to the ACLU. Rhone's briefing is silent on the similarity between jurors 19 and 33, and Rhone's counsel did not raise the issue until oral argument before this court.***

*Rhone, supra*, at ¶ 16 (bold italics added).

None of these observations apply to the present case. Meredith did make an explicit *Batson* challenge in the trial court; his attorney expressly asserted that juror No. 4 was removed by the prosecution "because of her minority status," thus alleging purposeful race discrimination, RP III, 107. He pointed out to the trial court that the removed minority juror gave voir dire responses which were substantially identical to those given by the other jurors. RP III, 107. Meredith has continued to vigorously brief his

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of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded." *Apodaca v. Oregon*, 406 U.S. 404, 412 (1972). See also *Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("An individual juror does not have the right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.")

claim of purposeful discrimination, and finally, Meredith raised his *Batson* claim before the jury was sworn in.

Given the unique facts of *Rhone*, five justices were understandably reluctant -- and ultimately unwilling -- to reverse Rhone's conviction because they were concerned that Rhone's claim was *not* a bona fide *Batson* claim, was not timely made in any event, was not adequately briefed, and was merely a last minute effort by an appellate lawyer to recast the appellant's claim in a wholly different light by joining amicus curiae's argument for adoption of a bright line rule. The facts of this case afford no basis for concluding that such concerns have any application to this case.

**C. THE NEW BRIGHT LINE RULE APPROVED PROSPECTIVELY BY FIVE JUSTICES IN RHONE APPLIES TO ALL CASES STILL PENDING ON DIRECT APPEAL, AND THUS IT APPLIES TO THIS CASE.**

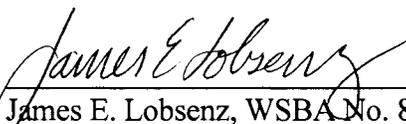
While Rhone himself did not get the benefit of the bright line rule approved of by five justices, that does not change the fact that a majority of the Court adopted the rule that prosecutorial removal of the sole minority juror necessarily establishes a prima facie case of purposeful race discrimination. It is well established that new constitutional rules apply retroactively to all criminal cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)(applying *Batson* to all such cases);

*State v. Harris*, 154 Wn. App. 87, 224 P.3d 830 (2010) (applying *Gant v. Arizona*, 129 S.Ct. 1710 (2009) to all such cases).

Since Meredith's direct appeal is currently pending before this court, the new bright line rule of *Rhone* is applicable to this case. Accordingly, since the State removed the sole remaining African-American juror, a prima facie case of race discrimination was established, and as a matter of law the trial court erred by refusing to order the State to offer a race-neutral reason for its removal of the juror. For the reasons stated in Meredith's opening brief, because of this error this Court should reverse all of Meredith's convictions and remand with directions to hold a new trial.

DATED this 30th day of April, 2010.

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NO. 38600-3-II

COURT OF APPEALS  
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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 May 3, 2010, I caused to be served via Legal Messenger, a true and correct copy of the following documents on:

Kathleen Proctor  
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Tacoma WA 98402-2171  
**(Via Legal Messenger)**

Gary Meredith 0921377  
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Reno, Nevada 89512  
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Entitled exactly:

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THE IMPACT OF THE RHONE DECISION OF THE  
SUPREME COURT**

A handwritten signature in cursive script, appearing to read "Lily T. Laemmlé", written in black ink.

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LILY T. LAEMMLE