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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,
Respondent,

vs.

MATTHEW ERICKSON,
Petitioner.

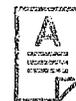
ANSWER TO AMICI CURIAE BRIEF

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ORIGINAL

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A. **RESPONSE TO AMICI CURIAE'S ERRONEOUS STATEMENT OF THE CASE**

Amici Curiae erroneously claims that during voir dire the *prosecutor* asked whether any prospective juror had ever argued with a police officer. Brief of Amici Curiae, at 2. The record is clear that this question was asked by Mr. Schwartz, defense counsel. RP at 151-52. Amici Curiae also erroneously claims that the *prosecutor* then asked juror 5 about the circumstances of his encounter with police officers. Brief of Amici Curiae, at 3. Again, the record is clear that this question was asked by defense counsel. RP at 152. Amici Curiae further erroneously claims that the *prosecutor* then asked juror 5 how he felt about being accused by the police officers. Brief of Amici Curiae, at 3. Again, the record is clear that this question was asked by defense counsel. RP at 152.

B. **ARGUMENT**

1. The trial court did not use an incorrect standard in ruling on defendant's objection to the prosecutor's use of a peremptory challenge to excuse juror 5.

Amici Curiae contends that the trial court's denial of defendant's objection to the prosecutor's exercise of a peremptory

challenge to juror 5 was incorrect, but fails to analyze or even acknowledge the standard that this court must apply in evaluating the validity of that decision. A trial court's ruling on a *Batson v. Kentucky*¹ challenge is accorded great deference on appeal and will be upheld unless clearly erroneous.²

Amici Curiae takes issue with the trial court's use of the word "pattern" in ruling on defendant's objection.³ The trial court did not state or suggest that a pattern of strikes was *necessary* to establish the first step of the *Batson* analysis and plainly understood that this step requires the objecting party to make a prima facie showing of purposeful discrimination.⁴ But, the existence of a pattern of strikes

¹ 476 U.S. 79, 90 L.Ed.2d 69, 106 S. Ct. 1712 (1986).

² *State v. Saintcalle*, 178 Wn.2d 34, 56, 309 P.3d 326, *cert. denied*, 134 S. Ct. 831 (2013); *State v. Rhone*, 168 Wn.2d 645, 651, 229 P.3d 752, *cert. denied*, 131 S. Ct. 522 (2010).

³ See RP at 206 (Second, Mr. Schwarz, you indicated in your argument that this one strike indicates a pattern, which is almost impossible. . . . There was a strike against an African American male. But that doesn't establish a pattern."); RP at 207 ("I can't establish a pattern."); RP at 208 ("There were many other opportunities to influence the racial makeup of the jury, the gender makeup of the jury, and I can't see any pattern at all as to any of that.")

⁴ See RP at 193 ("the defense has to make a prima facie showing"); RP at 193 ("does that meet the threshold of prima facie"); RP at 200 ("has the defense made a prima facie showing"); RP at 201 ("I can rule on whether the defense has met its prima facie burden"); RP at 207 ("I

against prospective jurors of a certain race might give rise to an inference of discrimination⁵ so is certainly a factor the trial court should consider in its evaluation. Also, the trial court's use of the word "pattern" plainly was in response to and invited by the following argument of defense counsel:

Therefore, it's not a situation where there are multiple people of the same cognizable group and thus a pattern could be detected from these people. It's a situation where there's only one person to that, in that group and therefore, we have to do our best to make a decision as to whether there is such a pattern based on that one piece of information rather than numerous pieces of information.⁶

The contention that the trial court's reference to the word "pattern" shows that it applied an incorrect standard in ruling on defendant's objection seems very similar to the argument rejected in *State v. Rhone*,⁷ where the trial court initially referred to a

don't believe that the defense has shown a prima facie case, made a prima facie showing that the City acted in a non-race neutral manner."); RP at 208 ("It's my belief here today that if I thought that there was a prima facie showing.")

⁵ *Batson*, 476 U.S. at 96–97; *State v. Wright*, 78 Wn. App. 93, 99, 896 P.2d 713 (1995) (the "other relevant circumstances" that may raise an inference of discrimination include a 'pattern' of strikes against members of a constitutionally cognizable group).

⁶ RP at 204.

⁷ 168 Wn.2d at 652.

requirement of a “systematic exclusion of jurors” before applying the correct standard under *Batson*.

Amici Curiae also contends that the trial court improperly considered the racial composition of the prospective jurors and the jurors who were chosen in defendant’s case. In reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.⁸ One of the factors that can be considered is the use of all or most of the challenges to remove minorities from jury.⁹ As a *Batson* challenge requires the trial court to evaluate the prosecutor’s demeanor and credibility in determining his state of mind,¹⁰ which prospective jurors the prosecutor excused and which ones he did not excuse would be relevant to his state of mind. If discrimination against one juror is evidence of discrimination against other jurors,¹¹ then the absence of discrimination against other jurors ought to be evidence of the lack

⁸ *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008); *Batson*, 476 U.S. at 96 (In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances).

⁹ *Wright*, 78 Wn. App. at 100.

¹⁰ *State v. Hicks*, 163 Wn.2d 477, 493, 181 P.3d 831, *cert. denied*, 555 U.S. 919 (2008).

of discrimination against a juror. Unless this court is prepared to say that, as a matter of law, the racial/ethnic composition of the jury actually empaneled is irrelevant,¹² then the trial court properly considered which jurors the prosecutor did not excuse.

Amici Curiae also faults the trial court for not rejecting the prosecutor's explanation for excusing juror 5, and asserts that juror 5's experience with police officers shows that he was racially profiled.¹³ "Racial profiling" is the illegal use of race or ethnicity as a factor in deciding to stop and question, take enforcement action, arrest, or search a person or vehicle with or without a legal basis under the United States Constitution or Washington state Constitution.¹⁴ Juror 5 had no knowledge of the information possessed by the police officers who stopped and detained him and did not suggest that he had such information. He did not claim he was stopped and detained because of his race, nor did defense counsel ask him if he thought he had been subject to racial profiling.

¹¹ *Saintcalle*, 178 Wn.2d at 43 (citing *Snyder*, 552 U.S. at 485).

¹² Such a conclusion would seem to be inconsistent with this court's examination in *Saintcalle*, 178 Wn.2d at 46, of the minority composition of the juries in post-*Batson* Washington appellate decisions.

He was not handcuffed. He was not searched. Without additional information regarding the circumstances of juror 5's encounter with the police officers, in particular the knowledge of those officers, Amici Curiae's claim that juror 5 was racially profiled is nothing but inflammatory speculation.

The prosecutor's explanation of the reason he excused juror 5, and his excusal of juror 16,¹⁵ the only other prospective juror who had been involved in an unfriendly encounter with police officers,¹⁶ shows that juror 5 was not excused because of his race. Excusing a prospective juror who has had an unpleasant experience with or is potentially biased against police officers, where the case involves the defendant's encounter with police officers, was held not to raise an inference of discriminatory intent in *State v. Rhodes*¹⁷ and *State v. Wright*.¹⁸ Amici Curiae has not shown that the trial court used an

¹³ Brief of Amici Curiae, at 11.

¹⁴ Laws of 2002, chapter 14, section 1.

¹⁵ RP at 174.

¹⁶ See RP at 153 & 164. Juror 16 was a long-time animal activist and also had been in a situation where she had argued with a police officer.

¹⁷ 82 Wn. App. 192, 917 P.2d 149 (1996).

¹⁸ 78 Wn. App. at 103 (Barbee's comments about the police would give any deputy prosecutor a legitimate reason to excuse a juror because of potential bias against a State witness.)

incorrect standard in ruling on defendant's objection to the prosecutor's use of a peremptory challenge to excuse juror 5.

2. No compelling reason has been shown for replacing the existing *Batson* test for determining whether the use of a peremptory challenge is discriminatory.

Amici curiae contends that this court should adopt a bright line rule that a defendant establishes a prima facie case of discrimination when the record shows that the prosecution exercises a peremptory challenge against the sole remaining venire member of the defendant's constitutionally cognizable racial group.¹⁹ A majority of the court rejected this bright-line rule in *State v. Meredith*.²⁰ In the four years since *Meredith* was decided, only eight appellate cases have arisen involving a *Batson* issue,²¹ and this court

¹⁹ See *Rhone*, 168 Wn.2d at 659 (Alexander, J., dissenting).

²⁰ 178 Wn.2d 180, 184, 306 P.3d 942 (2013), *cert. denied*, 134 S. Ct. 1329 (2014) (We now clarify that the court did not adopt that bright-line rule.)

²¹ See *State v. Bowman*, No. 73069-0-I, 2017 WL 325700 (Wash. Ct. App. Jan. 23, 2017); *State v. Bardwell*, 192 Wn. App. 1033, *review denied*, 185 Wn.2d 1041 (2016); *State v. Daniels*, 185 Wn. App. 1050, *review denied*, 183 Wn.2d 1010 (2015); *State v. Piggee*, 185 Wn. App. 1019, *review denied*, 183 Wn.2d 1005 (2015); *State v. Brown*, 184 Wn. App. 1008 (2014), *review denied*, 182 Wn.2d 1026 (2015); *State v. Mobley*, 182 Wn. App. 1005, *review denied*, 181 Wn.2d 1025 (2014); *State v. Bennett*, 180 Wn. App. 484, 490, 322 P.3d 815, *review denied*,

has denied review of six of those cases, which would not suggest that trial courts have difficulty applying the current three-part test or that they are applying it erroneously. Trial judges are perfectly capable of deciding that a lawyer has exercised a peremptory juror challenge based on race.²² Our appellate courts are equally capable of reversing a trial court decision that a peremptory challenge was not based on race.²³ In *Batson*, the court stated “[w]e have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.”²⁴ Judges are not shrinking violets who are afraid to make difficult decisions or reticent about admonishing lawyers who engage in unlawful discrimination.

In the years since *Batson* was decided, trial court judges have gained extensive experience in evaluating claims of discriminatory

181 Wn.2d 1005 (2014); *State v. Benson*, 177 Wn. App. 1027 (2013), review granted, 179 Wn.2d 1022 (2014).

²² See *Bennett*, 180 Wn. App. at 490 (The trial judge, not this court, had the opportunity to observe counsel, hear his explanation, and consider it in the context of this case and other cases counsel has presented over the years.)

²³ See *State v. Cook*, 175 Wn. App. 36, 312 P.3d 653 (2013).

peremptory juror challenges. In addition, attorneys have become aware of and sensitive to the issue of unconscious prejudice and implicit bias noted by this court in *Saintcalle*.²⁵ *Amici curiae* seems to lack confidence in the ability of trial and appellate court judges to apply existing law and Washington attorneys to recognize and repudiate stereotypes; respondent does not share that lack of confidence.

Amici Curiae suggests that *Batson* should be replaced with a standard employing an “objective observer,” similar to that used in the appearance of fairness doctrine. But regardless of whether the trial court is evaluating all of the circumstances that bear upon the issue of racial animosity²⁶ from its own perspective or that of this disembodied “objective observer,” the trial judge himself or herself will still have to decide if the evidence indicates racial bias.²⁷ That trial judge does not shed any unconscious prejudice or implicit bias he or she has simply by replacing his or her trial judge hat with an

²⁴ 476 U.S. at 97.

²⁵ 178 Wn.2d at 46-49.

²⁶ See *Snyder*, 552 U.S. at 478; *Batson*, 476 U.S. at 96.

“objective observer” hat. Amici Curiae seems to believe that trial counsel (particularly prosecutors) are afflicted with unconscious prejudice and implicit bias, but that trial court and appellate judges are not.

A more fruitful avenue of addressing the disproportionate absence of minorities, especially African-Americans, on juries is to look at the beginning of the jury selection process – a citizen’s response to a summons for jury service – rather than the end of the process – choosing the jurors. As shown by the record in this case, African-Americans are disproportionately absent from the initial jury panel. Defense counsel noted there was only a single African-American in the two jury panels called in defendant’s case.²⁸ Determining whether African-Americans respond to a summons for jury service at a lower rate than other racial groups and whether age, employment status, marital status or economic factors affect that response rate perhaps would suggest means of improving it. Lifting

²⁷ Even under the appearance of fairness doctrine, evidence of a judge’s actual or potential bias is required before the doctrine applies. *State v. Gamble*, 168 Wn.2d 161, 187–88, 225 P.3d 973 (2010).

the \$25/day maximum compensation for jurors,²⁹ requiring courts to provide parking or transit passes to prospective jurors, requiring employers to provide paid time off for jury service³⁰ and a public relations campaign promoting jury service might improve the response rate to a summons for jury service. Such steps would require the judiciary to collaborate with other branches of government, but, if the discriminatory use of peremptory juror challenges is as much as a crisis as suggested by this court in

²⁸ See RP at 204. There were at least 16 persons in the first jury panel, *see* RP at 69, and 18 in the second jury panel, *see* RP at 143-44.

²⁹ *See* RCW 2.36.150, which provides, in pertinent part:

Jurors shall receive for each day's attendance, besides mileage at the rate determined under RCW 43.03.060, the following expense payments:

- (1) Grand jurors may receive up to twenty-five dollars but in no case less than ten dollars;
- (2) Petit jurors may receive up to twenty-five dollars but in no case less than ten dollars;
- (3) Coroner's jurors may receive up to twenty-five dollars but in no case less than ten dollars;
- (4) District court jurors may receive up to twenty-five dollars but in no case less than ten dollars.

³⁰ *See* RCW 2.36.165, which provides, in pertinent part:

(1) An employer shall provide an employee with a sufficient leave of absence from employment to serve as a juror when that employee is summoned pursuant to chapter 2.36 RCW.

(2) An employer shall not deprive an employee of employment or threaten, coerce, or harass an employee, or deny an employee promotional opportunities because the employee receives a summons, responds to the summons, serves as a juror, or attends court for prospective jury service.

Saintcalle,³¹ such collaboration would seem to be necessary and prudent.³²

C. CONCLUSION

Based on the foregoing argument and that in the Supplemental Brief of Respondent, this court should affirm defendant's conviction for Unlawful Use of Weapons and Resisting Arrest.

Respectfully submitted this 2nd day of March, 2017.

Richard Greene
Assistant City Attorney
WSBA #13496

³¹ *See* 178 Wn.2d at 44-55.

³² Respondent assumes that this court has, at least, informed the executive branch of the nature and extent of this problem, pursuant to RCW 2.04.230, which provides:

The judges of the supreme court shall, on or before the first day of January in each year, report in writing to the governor such defects and omissions in the laws as they may believe to exist.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,)
Respondent,)
vs.)
MATTHEW ERICKSON,)
Petitioner.)

No. 93408-8

CERTIFICATE OF PROOF
OF SERVICE

I am an Assistant City Attorney representing respondent City of Seattle in this case.
On March 2, 2017, I served a true copy of the Answer to Amici Curiae Brief on counsel at
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I certify under penalty of perjury under the laws of the State of Washington that the

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foregoing is true and correct.

Signed this 2nd day of March, 2017 at Seattle, Washington.

Richard Greene
Richard Greene

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Attached is the respondent City of Seattle's Answer to Amici Curiae Brief in case 93408-8, Seattle v. Erickson, as well as proof of service. My bar number is 13496.



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