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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TYREE WILLIAM JEFFERSON, PETITIONER

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 13-1-02796-0

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**Brief of Respondent**

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A. ISSUES PERTAINING TO SUPPLEMENTAL BRIEF.

1. Where the prosecution's peremptory challenge was shown not to have been motivated by discriminatory intent, should the trial court's ruling upholding the challenge be affirmed?
2. Where the United States Supreme Court has eased the procedural and substantive standards for *Batson* challenges, are those standards sufficiently effective?
3. Where the trial court removed a deliberating juror out of a concern about jury interference and misconduct, and where the jury's impartiality was confirmed through individual *voir dire* of the entire jury, did the trial court abuse its discretion by not declaring a mistrial?

B. STATEMENT OF THE CASE.

On April 30, 2015, petitioner Tyree William Jefferson (the "defendant") went to trial accused of attempted first degree murder, first degree assault and first degree unlawful possession of a firearm. 1 RP 3. CP 1-2, 40-42. Jury selection began on May 4, 2015. 2 RP 106. During jury selection the trial court ruled on a defense peremptory challenge objection based on *Batson v. Kentucky*<sup>1</sup>. 3 RP 238.

During the colloquy and argument on the *Batson* challenge, the trial court questioned whether the juror was in fact the only African American juror saying, "there are so many people who are mixed race, and whatever, identify different ways." 3 RP 240. Nevertheless for the sake

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

of argument the court cautiously assumed that the defense attorney was correct in her belief that the juror was the only juror of African descent, considered the authority cited by the defense and ruled that a *prima facie* case had been made. 3 RP 241. Thereupon the court required the prosecutor to justify the challenge, which the prosecutor did without complaint. *Id.*

The prosecutor cited a number of reasons for his peremptory challenge that had nothing to do with race. The last reason cited was the juror's apparent admission of past juror misconduct consisting of the juror introducing extrinsic information into deliberations in a federal drug smuggling case. The juror was not contrite about the incident; he said of it, "I was too open-minded I guess." 2 RP 199-200, 3 RP 229. Upon hearing the prosecution's justification, the trial court ruled that the challenge was not racially motivated. RP 245-46.

Trial testimony commenced on May 5, 2015, with the state calling eleven witnesses and the defense two. 4 RP 281. CP 194. The trial proceedings were marred by several incidents. One involved a hostile out-of-state witness who had to be arrested and returned to court to complete her testimony. *See* 6 RP 512, *et. seq*, 10 RP 1133-36. The other involved what may accurately be described as repeated gallery misconduct. *See* 5 RP 498, 647, 660-61, 736-37. The misconduct was not confined to the

courtroom but also included an incident involving the jury during deliberations.

During the closing arguments, an incident of possible jury tampering occurred. 11 RP 1185-1267. Unbeknownst to the court the jurors left the courthouse the previous day (the day before closing arguments) at the same time as the defendant's family and supporters. *Id.* One of the jurors became concerned and at the urging of the other jurors brought her concerns to the attention of the court the next day. *Id.* With the agreement of the parties, the court first questioned that juror and then the entire jury to determine if they could fairly and impartially deliberate. All of the jurors except the one who voiced the concern indicated that their impartiality was unaffected. *See* 11 RP 1185-41. The defense moved for a mistrial. 11 RP 1266. After a short recess to consider the issue, the trial court denied the mistrial motion, excused the one juror who had voiced concern, and continued with the closing arguments. RP 1266-69.

The jury commenced deliberations the next day. On May 20, 2015, the jury returned guilty verdicts, convicting the defendant as charged of both attempted first degree murder and first degree assault, and of unlawful first degree firearm possession. CP 180-83.

C. ARGUMENT.

1. THE TRIAL COURT'S *BATSON* RULING SHOULD BE AFFIRMED BECAUSE THE PROSECUTION'S PEREMPTORY CHALLENGE WAS SHOWN NOT TO HAVE BEEN MOTIVATED IN SUBSTANTIAL PART BY DISCRIMINATORY INTENT.

The three-part test applied by courts across the country to analyze allegations of racial discrimination in petit jury selection has been with us for over thirty years. *Batson v. Kentucky*, 476 U.S. 79, 93–94, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), *City of Seattle v. Erickson*, 188 Wn.2d 721, 726–27, 398 P.3d 1124 (2017). The test, as it is currently applied in Washington, permits a litigant to bring a racial discrimination allegation to the attention of the trial court “at the earliest reasonable time while the trial court still has the ability to remedy the wrong”, and by showing that “the struck juror is a member of a ‘cognizable racial group.’ ” *City of Seattle v. Erickson*, 188 Wn.2d at 729 and 732.

After *Erickson* peremptory challenges of all groups heretofore recognized as cognizable under the equal protection clause can be reviewed by trial courts with little or no limitation. “[A] *Batson* violation can occur if even one juror is struck. We have noted that ‘[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.’ ” *City of Seattle v. Erickson*, 188 Wn.2d at 733, citing *State v.*

*Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013), and *State v. Hicks*, 163 Wn.2d 477, 491, 181 P.3d 831 (2008). Whatever may be said of the second and third parts of the three-part test, there should be no complaint from any quarter about the efficacy of the first part of the test. The ease with which an allegation of racial motivation may be placed in “the crucible of meaningful adversarial testing” means that judicial review is readily available to Washington litigants. See *Davis v. Ayala*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2187, 2217, 192 L. Ed. 2d 323 (2015) (Sotomayor, J., dissenting), quoting *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

The single peremptory challenge at issue in this case was brought before the trial court fully in compliance with *Erickson*. The trial court ruled, “I will take it on face value, at this point, that a *prima facie* showing has been made that Juror 10, I believe -- although I am not sure, given our current culture and the fact that there are so many people who are mixed race, and whatever, identify different ways. But assuming you're correct that Juror 10 is the only African-American, and assuming that you're correct that Mr. Curtis, the prosecutor, has stricken No. 10 and that creates a *prima facie* showing of discrimination under *Batson*, at this point, the burden shifts to Mr. Curtis to produce a non-discriminatory reason for striking Juror 10.” 3 RP 240. Without even referencing the first part of

the test, the prosecution thereupon provided the trial court and the defense attorney with its reasons for exercising a peremptory challenge against Juror 10.

The second part of the three part test likewise should not generate much controversy. After part one is satisfied, “The trial court must then require an explanation from the striking party and analyze, based on the explanation and the totality of the circumstances, whether the strike was racially motivated.” *City of Seattle v. Erickson*, 188 Wn.2d at 734, citing *Batson v. Kentucky*, 476 U.S. at 94, and *State v. Saintcalle*, 178 Wn.2d at 42. The second part of the test merely requires the opposing party to state for the record its reasons for the peremptory challenge. Unless trial courts are to rule on *Batson* challenges without input from one of the parties, surely there can be no objection to the striking party stating its reasons for the record.

The foregoing discussion brings us to the heart of the matter in this case, the constitutional validity of this particular peremptory challenge. After a *prima facie* case is made, “The trial court must ask for a race-neutral reason from the striking party and then determine, based on the facts and surrounding circumstances, whether the strike was driven by racial animus.” *City of Seattle v. Erickson*, 188 Wn.2d at 736.

While *Erickson* dealt primarily with the *prima facie* case, there have been a number of cases that have applied the third part of the *Batson* test. It can be shown that such cases have loosened the standard that governs the third part of the *Batson* test. For example, in 1991 the United States Supreme Court applied the clearly erroneous standard, stressed deference to the trial court's judgment, and upheld peremptory challenges justified merely by language barrier concerns. *Hernandez v. New York*, 500 U.S. 352, 369–70, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). “The trial court took a permissible view of the evidence in crediting the prosecutor's explanation. Apart from the prosecutor's demeanor, which of course we have no opportunity to review, the court could have relied on the facts that the prosecutor defended his use of peremptory challenges without being asked to do so by the judge, that he did not know which jurors were Latinos, and that the ethnicity of the victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury.” *Id.*

The deference encapsulated in *Hernandez* no longer prevails. *Miller-El v. Dretke*, 545 U.S. 231, 241-251, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). In *Miller-El*, the court considered whether the reasons given by Dallas, Texas prosecutors were a ruse considering that they had used peremptory challenges to strike 91 % of the eligible African

American jurors. The court observed, “A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.” *Id.* at 251.

The *Miller-El* court also extended its analysis well beyond the notion of pretext. Even though pretext might have been sufficient to undermine the purported race neutral reasons, it also considered the prosecution’s motives underlying such ostensibly neutral practices as a “jury shuffle” and “disparate questioning” and found that they too supported discriminatory intent. *Miller-El v. Dretke*, 545 U.S. at 266. “The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State.” *Id.* *Miller-El* serves as an example of the kind of analysis required in the third part of the *Batson* test.

The effectiveness of the searching analysis that was conducted in *Miller-El* has also been enhanced by the adoption of a less deferential standard of review. Whereas *Batson* required a party challenging a discriminatory peremptory strike to establish “purposeful discrimination”, the current standard is much less demanding. *See Batson v. Kentucky*,

476 U.S. at 98 (“The trial court then will have the duty to determine if the defendant has established purposeful discrimination.”). In *Snyder v. Louisiana*, 552 U.S. 472, 485, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) the court articulated the current standard, namely that, “For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained. . . .”

After *Snyder*, absolute deference to a trial court’s *Batson* ruling certainly cannot be considered a requirement. Furthermore, the court has also made it clear that the substantial discriminatory motivation standard requires that the entire record, not just the professed non-discriminatory reasons, be consulted: “We have ‘made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.’” *Foster v. Chatman*, 136 S. Ct. 1737, 1748, 195 L. Ed. 2d 1 (2016), quoting *Snyder v. Louisiana*, 552 U.S., at 478. In *Foster* the court applied the analytical methods from *Miller-El* and *Snyder* and invalidated two peremptory challenges despite lower court rulings to the contrary:

As we explained in *Miller-El v. Dretke*, “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.” . . . With

respect to both [of the challenged jurors], such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that “bear[s] upon the issue of racial animosity,” we are left with the firm conviction that the strikes of Garrett and Hood were “motivated in substantial part by discriminatory intent.” (citation omitted)

*Foster v. Chatman*, 136 S. Ct. at 1754, quoting *Miller-El v. Dretke*, 545 U.S. at 241, and *Snyder v. Louisiana*, 552 U.S. at 478.

If the purpose of a *Batson* challenge is to accurately determine whether in fact a lawyer struck a juror out of racial animus, the improvements to the *Batson* test articulated by this court’s federal brethren are rational. This court has embarked on a parallel course of improving on *Batson*. The evolution of this court’s jurisprudence concerning the first part of the three-part test is evidence of this court’s commitment. It cannot be denied that it is much easier than it used to be to move from step one to steps two and three of the three part test. *City of Seattle v. Erickson*, 188 Wn.2d at 734. See *State v. Rhone*, 168 Wn.2d 645, 653, 229 P.3d 752 (2010), *State v. Saintcalle*, 178 Wn.2d 34, 54, 309 P.3d 326 (2013) and *State v. Meredith*, 178 Wn.2d 180, 185, 306 P.3d 942, 944 (2013). The question now is whether the current standards

applied by the federal Supreme Court are not only necessary but sufficient to accomplish *Batson's* purpose.<sup>2</sup>

*Foster* and *Snyder* have one thing in common: when the reasons for the peremptory challenges in those cases were examined in light of “all of the circumstances that bear upon the issue of racial animosity” the reasons were found wanting in each case. *Foster v. Chatman*, 136 S. Ct. at 1748. Not so here. In the case before the court, the prosecutor’s reasons stand up to scrutiny.

In the first place, the prosecutor not only provided non-racial reasons for his challenge of Juror 10, he also explained to the court how he had and would exercise all of his peremptory challenges. His method included ensuring that he had one-on-one, interpersonal interaction with each individual juror. “And in this instance, each of the jurors that I struck so far, in this case, I went through the same identical analysis. Each of them I have asked to stand, and I asked them questions. And their responses to my questions, or the nature of my interaction with that

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<sup>2</sup> The discussion below concerning the efficacy of current federal *Batson* procedures and standards should also be viewed as addressing the question of whether this court should “extend greater-than-federal *Batson* protections to defendants under the greater protection afforded under our state jury trial right. . . .” *State v. Saintcalle*, 178 Wn.2d at 51. Whether discrimination is considered through an equal protection lens or through a jury trial right lens, the question remains: is any particular procedural or substantive protection necessary and sufficient to accomplish the anti-discrimination purpose.

individual dictates whether I will exercise a peremptory challenge on that individual.” 3 RP 241-42.

By having the jurors stand so that he would be face to face with them, the prosecutor was ensuring that he and the juror had an opportunity to connect. The record shows that the prosecutor engaged each of the prospective jurors one on one without discrimination. *See* 2 RP 137-38, et. seq. Thus, when he exercised his peremptory challenges it was only after engaging the prospective jurors in a respectful conversation from close proximity. In this respect, Juror No. 10 was treated with the same dignity and respect as all of the other prospective jurors. 2 RP 175.

The manner in which the prosecutor interacted with the panel is significant. There was no disparate questioning. Such questioning is prohibited because when a minority juror is asked questions in a different manner than the other jurors there is reason to doubt the credibility of professed non-racial motivation. *Miller-El v. Dretke*, 545 U.S. at 266. No such disparate questioning occurred here. If the prosecutor had asked Juror 10 to stand while allowing the other jurors to sit, thereby singling him out or making him uncomfortable, the trial court would have been justified in finding disparate treatment. No such finding was made and not even the defense attorney argued that the prosecutor had treated Juror 10 differently than the other jurors in the way he interacted with No. 10.

The substantive reasons offered likewise were supported by the record. One of the prosecutor's main concerns during jury selection was that the jurors render a decision based on the evidence introduced in court during the trial "free from outside influence". 2 RP 137. This precept was the basis of the second question the prosecutor asked of the panel. *Id.* Plus it was a subject that he returned to subsequently. 2 RP 175. That specific concern (a universal concern among trial lawyers) was one of the express reasons for the peremptory challenge of Juror 10. The prosecutor stated during the *Batson* argument:

Defense asked a question about how jurors can sometimes consider things that are outside the case, and how -- and she asked Juror No. 3 and she asked him, how do you reel people back in? Again, the juror who indicated to me that he thought it was a waste of time, that continued to ask questions, raised his card again, and he indicated that he was on a jury where a prospective juror was bringing in things that were irrelevant to the case. And he indicated that was him, and that the other jurors had to bring him back in. And then he finished by saying, I was too open-minded, I guess.  
3 RP 244-45.

The totality of the record supports the prosecutor's concern about Juror 10. First of all, the case that the juror previously served on appeared to have been a federal criminal case arising from international drug smuggling. 2 RP 199-200. A reasonable inference to be drawn from that information alone is that Juror 10 previously served on a case that was

tried in a far more formal tribunal, that was more complex, and that likely involved overwhelming and sophisticated evidence. There is a reason that the term “federal case” has entered the modern lexicon. That prior jury experience alone would be enough to raise a red flag for most state criminal lawyers whose cases are not generally “federal cases”. Furthermore, the record supports an additional concern about extrajudicial information and conceivably juror misconduct. Evidently in Juror No.10’s federal case he had brought in outside information or evidence. In response to a defense line of questions about “a situation where anybody referred to matters that were not germane to what you were considering” the juror volunteered:

JUROR NO. 10: I agree with No. 2. I did have that same situation because I was one of them.

MS. COREY: You were one of them that brought up stuff?

JUROR NO. 10: Yeah. I was too open-minded, I guess.

3 RP 229

This unapologetic admission was specifically cited by the prosecution as a non-racial reason for his peremptory challenge. It was a valid reason. Juror No. 10 was a juror who believed that bringing up extraneous information to his fellow jurors was evidence of open-mindedness. This made him a juror that few lawyers would take a chance on. Trial attorneys control what evidence they will offer and can respond

to evidence they know will be offered by the other side. But they cannot respond to what a juror might bring into deliberations that is “not germane” to the issues being tried. Moreover, the flippant tone of the response in light of it having evidently happened in the formality of a federal drug prosecution raises a question about whether the juror could be counted on to abide by the court’s instructions. Both the prosecutor and defense knew (and the importance of this point is borne out by the totality of the record because both attorneys asked questions about it) that the instructions would include the following admonition:

Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial.

CP 141-179, Instruction No. 1.

Another incident adds further support to the prosecutor’s concern about Juror No. 10. Just before the *Batson* colloquy the prosecutor brought to the court’s attention that the juror had approached and made a comment to the court reporter. 3 RP 237. That comment followed mere moments after the trial judge had explained that juror appreciation week was being observed in the courthouse:

I get the honor of going upstairs with the county exec and the council chair and the members of the county council to issue a proclamation about Juror

Appreciation Month. It sounds kind of corny, maybe, but it really is important. I mean, all the things that people said this morning about why it's important to serve as a juror, all the stories are very compelling.

I've been a judge for 15 years, and I just -- my faith in the jury system continues to grow. It is so integral. Every jury I've had, folks are always focused, attentive, great people, and some are on criminal cases like this, some are on complicated business cases.  
3 RP 232-33.

Juror No. 10 evidently saw little that jurors should be appreciated for. He walked up to the court reporter after hearing this heart-felt sentiment from the judge, attempted to engage her in conversation, and during the conversation made a statement that was preserved for the record at the prosecution's request: "It's my understanding from Ms. Allison that a juror asked a question. It was Juror No. 10 and, apparently, Juror No. 10 asked, in reference to my statement about it being Juror Appreciation Month, what was the appreciation." 3 RP 237. This response, like the flippant "open-minded" comment, would have given any trial attorney concern about the juror's attitude toward the justice system, its judicial officers, and the importance of the proceedings at hand. This concern had nothing to do with racial animus. In light of this record alone, the prosecutor was fully justified in striking Juror No. 10 for reasons that are universal among trial attorneys and that have nothing to do with the race of the juror.

Yet another non-racial reason for peremptory challenge was Juror No. 10's receptiveness or lack thereof to each of the trial attorneys and his reaction to the jury deliberation and acquittal movie, 12 Angry Men. As to receptiveness the prosecutor pointed out that the juror considered the prosecution's questions to be a waste of time. 3 RP 242-44. This concern arose from the juror stating:

JUROR NO. 10: No, I don't think you should waste time. Honestly --

MR. CURTIS: You think I should take everybody at their word and just keep it moving, right?

JUROR NO. 10: Well, I mean that's up to you, but for me, personally, it's a waste of time, so, okay --  
2 RP 176.

The prosecutor then also pointed out that the juror was receptive to the defense questions and not once referred to them as a waste of time. 3 RP 243-44. The record bears this out. The defense attorney asked a question about a theatrical portrayal of a jury having acquitted a criminal defendant. To that line of questioning, Juror No. 10 volunteered an answer, gave a lengthy account of the movie to include an actor's name, and wrapped up his statement by saying "the person that was on trial didn't do it." 2 RP 196. These contrasting attitudes toward the prosecution's lawyer and the defense lawyer would have been notable to any attorney. It might have been instructive for the prosecutor to have grilled the juror about his attitude in an effort to develop a for-cause

challenge for bias but to do so would also have singled the juror out for disparate treatment. The discrepancy between the juror's attitude toward the prosecution and the defense was tailor-made for a peremptory challenge.

The prosecutor's statements during the *Baston* challenge are not the only evidence that he was free of racial animus. Twice during *voir dire* diversity and race were expressly referred to and both times it was the prosecutor who made the reference. 2 RP 177, 3 RP 221. In the first of these references, the prosecution asked the question about diversity on the page of the transcript immediately following the waste of time comment by Juror No. 10. See 2 RP 176-77. He asked, "Okay. Do you think this courtroom, right now, the makeup of the staff and attorneys and judge is a little bit different than the late 1800's?" Several jurors responded, including juror No. 5, who said:

JUROR NO. 5: What do I think? Yes, I think the system's improved from where it was 35 years ago. They're still -- they're doing their best, but they're still dealing with humans, and people have biases, and people have their own thoughts and decisions. And they, you know, just -- people in general, people aren't all the same. They may all say one thing, but they may not mean the same thing, if that makes any sense.

MR. CURTIS: Yeah, that makes sense. It makes sense. Thank you.  
2 RP 178.

It should be noted that Juror No. 5 was struck from the jury by the defense attorney, not the prosecutor, using her second peremptory challenge and ironically immediately before bringing the *Batson* challenge that is at issue in this case. CP 443.

The second diversity reference was in response to a defense motion to excuse a juror, ostensibly for non-racial reasons, and expressly because English was his second language. See 2 RP 208-09. 3 RP 218-25. During his unsuccessful attempt to keep the juror on the jury, the prosecutor argued:

MR. CURTIS: I actually didn't see any reason for him to be -- I guess the concern was that his lack of confidence -- is it more of a confidence issue than a realistic issue, because when he was speaking to the Court, he was very articulate. He understood. He was thoughtful, and he was actually thinking about the process. And I think when these questions are going around, they can be kind of intimidating, especially when English is your second language. But he appears to be, you know, engaged. I saw other people with their eyes closed. He had his open.

So I wouldn't join in a motion, but I understand the Court's concern. But I think it was more of his own insecurity, or lack of confidence, rather than the actual inability to communicate.  
2 RP 214-25.

The next day in response to the defense for-cause motion, the prosecutor further stood up for Juror No. 7:

MR. CURTIS: My concern is that neither counsel asked him any questions. He wasn't given an opportunity to answer any of the questions, or to provide his insight into

the process that came from this Court. And he did indicate that he would feel uncomfortable back there discussing the case because of his perception of his ability to articulate himself. This Court recognized that he spoke clear English, that he -- and I think the record would reflect that he was able to communicate with the Court.

Now, if Defense Counsel wanted to inquire a little bit more with him, I wouldn't have any problems with that. My concern is that if it was the state, I'd probably be subject to a *Batson* challenge because I wouldn't have asked him any questions, and I would eliminate him because my perception of his accent.  
3RP 219-20.

The race of Juror No. 7, nor of any of the jurors, is not documented in the record except where it is referred to by the court or the parties. Nevertheless, there is certainly support in the record that it was the defense attorney who wished to have the English-as-a-second-language juror excused rather than the prosecutor. The prosecutor sought to keep the juror on the panel.

The primary defense argument in the court below and in this petition is that comparative analysis of the totality of the record reveals racial animus. The fallacy in the defense argument is that none of the cited jurors came close to admitting or being defiant about having introduced extrajudicial information into a criminal trial. Furthermore, examination of their responses to the parties' questions shows that they had much that would have made them attractive prosecution jurors.

Juror No. 1 was a neurosurgeon whose respect for jury duty included a willingness to re-schedule surgeries if necessary in order to serve on the jury. 2 RP 154-56. That attitude stands in stark contrast to Juror No. 10 who deemed the proceedings, at least the part involving the prosecutor's questions, a waste of time. 2 RP 176. In addition, Juror No. 1 reported that his father was a police officer [2 RP 128.], and toward the end of *voir dire* told the defense attorney:

JUROR NO. 1: An acquaintance of mine said to me, and I thought it was very disrespectful, but he said, you wind up being tried by the jury of people who are too stupid to get out of jury duty.

MS. COREY: Yeah. I've heard that, but, yeah.

JUROR NO. 1: Well, I think it's a civic duty. I think it's a privilege as well.

MS. COREY: It's the obligation of a citizen.

JUROR NO. 1: Absolutely.

3 RP 230.

Whatever may be said of this juror's attitude toward 12 Angry Men, it could not be more obvious why a prosecutor might be receptive to a juror with such pride in citizenship and civic responsibility.

Juror No. 9 was the second peremptory challenge by the prosecutor and was challenged for one of the same reasons as No. 10. CP 443. 3 RP 243-44. Accepting for the sake of argument the defense position that No. 9 was not a member of a racially cognizable ground while No. 10 was, there were other responses that further explain the prosecutor's decision to

strike No. 9. Juror No. 9 was one of three jurors who failed to follow the court's instructions to report to jury administration after a break. 2 RP 173-75. (This precaution was a matter of some importance since it would prevent any juror from seeing the defendant in restraints.) Of those three jurors who demonstrated at least to some extent inattentiveness to the court's instructions, all three were challenged. CP 443. The defense struck No. 22 and the prosecution struck No.s 9 and 33. From this record, there is no basis to the argument that Juror No. 9 was comparable to No. 10, and in any event the prosecution struck No. 9 without any objection from the defense.

Juror No. 11 was not stricken by either party and thus deliberated. He was a car collector [2 RP 116.], who gave the following response to a prosecution question about judging credibility:

JUROR NO. 11: Life experience, people I've dealt with -- I'm 65 years old, and I been basically out on my own since I got drafted at age 19. So I been able to interact with different people. I worked for 32 years in the fire department, interacted with a lot of Asian, Hispanic, African-American. So I take all that information I've got over the years and try to make the best judgment that I can. I mean -- and some of the -- I guarantee you, it's not gonna be the best because I'm maybe a little prejudiced toward one age group because I don't trust anybody under 30, or I trust more people my age.

MR. CURTIS: I'm over 30. I just want to say that for the record. I'm over 30.  
2 RP 180.

If the prosecutor was motivated by racial animus, one would think that a juror having the foregoing attitudes and experience with diversity would be the first to go. The prosecutor did not use a peremptory against the juror for obvious reasons, none of which have anything to do with racial animus.

Juror No. 23 responded to the defense attorney's question about 12 Angry Men as did several of the other jurors offered for comparison. Juror No. 23 gave the following response after having been called on by the defense attorney:

JUROR NO. 23: Many, many years ago, yes.

MS. COREY: Can you give us a synopsis of the plot, please?

JUROR NO. 23: Oh, boy. That's putting me to the test. As far as I can remember, it's a jury comes together, and you have very differing opinions, and they can't come to a conclusion, if I remember correctly. It's very difficult to come to a conclusion that they can all agree on the same verdict.

2 RP 194.

This rather innocuous response stands in contrast to Juror No. 10 who recalled that the movie involved an acquittal and an individual on trial who was innocent. 2 RP 196. Furthermore, Juror No. 23 differed markedly with Juror No. 10 when he told the prosecutor that the prosecutor's questions about bias were important and not a waste of time. 2 RP 177.

Lastly, Juror No. 33 was the last prosecution peremptory challenge. While the defense compares some of what Juror No. 33 said to the responses of Juror No. 10, the two jurors could not have been more different. To begin with Juror 33 had legal training and had worked in two prosecutor's offices. 2 RP 127. There may be a trial lawyer out there who would be comfortable with a lawyer or a law student sitting on his or her jury but it must also be acknowledged that many would not. Be that as it may, this juror expressly acknowledged bias and indicated nothing could be done about it:

JUROR NO. 33: I think that we bring a part -- like, all of our experiences are going to come into that jury room, no matter what, because experience becomes a part of you. So I don't necessarily think there's going to be a ton of extra bias. I think you already have built-in bias.  
MR. CURTIS: But what do you do with those biases?  
JUROR NO. 33: I think you have to put them aside.  
MR. CURTIS: Why?  
JUROR NO. 33: So that this person can have the best outcome for them -- not necessarily the best outcome, but --  
2 RP 141.

For very different reasons Juror No. 33 was just as much an appropriate prosecution peremptory challenge as No. 10. The comparison of these two jurors strengthens the conclusion that the prosecutor was not motivated by racial animus. He was motivated by what each of these

jurors had to say substantively and exercised a peremptory challenge because of what they said.

The searching analysis of the record for evidence of racial animus places a great responsibility on both trial and appellate judges to be discerning about a lawyer's peremptory challenge motives. A lawyer's reasons need not be voluminous but they must evince a proper motive. In *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001), this court upheld a peremptory challenge against the sole member of a racially cognizable group because the African-American juror, was "a pastor and retired from the military 'he would have been of an authoritarian mindset, so could give more credence to the state's arguments and evidence.' " With this explanation having been provided on the record, and with the state's concession on appeal that the reason was sufficient, this court not only held that the peremptory challenge was valid but that the denial of it was not harmless error. *Id.* at 931-32.

Both appellate judges and trial judges are to a certain extent impartial observers during jury trials. As such they have an ideal vantage point from which to discern whether a lawyer's motives are pure or impure. Furthermore, they make credibility judgments in virtually every proceeding brought before them. Most rulings in a criminal or civil trial involve some form of credibility determination. It is not overstatement to

say that our trial judges make judgments involving improper motives on a daily basis. There is no reason to suppose that in this context they are unable to do the work necessary. Respectfully, the trial court in this case saw these events play out in front of him and concluded that the prosecutor's motives were appropriate. That judgment is the same judgment this court should make after applying the standard articulated by *Snyder v. Louisiana*, namely whether the prosecutor's peremptory challenge was shown to have been motivated in substantial part by discriminatory intent in light of the entire record and "all of the circumstances that bear upon the issue of racial animosity". *Foster v. Chatman*, 136 S. Ct. at, 1748, quoting *Snyder v. Louisiana*, 552 U.S., at 478.

2. APPLICATION OF CURRENT FEDERAL  
BATSON PROCEDURES AND STANDARDS  
WILL BE EFFECTIVE IN STRENGTHENING  
BATSON PROTECTIONS IN PETIT JURY  
SELECTION.

In this court's order granting review, the parties were directed to address the *Batson* test and its efficacy. It is not lost upon the state that this court has accepted and submitted for comment proposed rule changes intended to minimize bias in petit jury selection. *Suggested Change to the GENERAL RULES, Rule 37 – Jury Selection*. This court has also indicated that it will very likely "strengthen our *Batson* protections,

relying both on the Fourteenth Amendment and our state jury trial right.”

*State v. Saintcalle*, 178 Wn.2d at 51. The court has also indicated that one of the means by which this state’s *Batson* protections might be strengthened is by doing away with peremptory challenges altogether.

*State v. Saintcalle*, 178 Wn.2d at 52.

The discussion above serves a dual purpose in light of the order granting review. First, it constitutes a discussion of the efficacy of current federal *Batson* procedures and standards in the context of the jury selection record from this case. It is respectfully submitted that the recent decisions of the United States Supreme Court discussed above have in fact improved *Batson’s* efficacy. Human institutions are inherently fallible but it cannot be denied that if a trial or appellate court determines that a peremptory challenge was motivated in substantial part by discriminatory intent, that determination and the consequent denial of a peremptory challenge constitutes a significant blow against invidious discrimination. See *Foster v. Chatman*, 136 S. Ct. at 1748, quoting *Snyder v. Louisiana*, 552 U.S., at 478.

As to dispensing with peremptory challenges, page limitations preclude a complete discussion of the implications of such an action. The proposal was first championed by our nation’s greatest civil rights jurist:

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," . . . and "one of the most important of the rights secured to the accused," . . . I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." . . . We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well. (citations ommitted)

***Batson v. Kentucky***, 476 U.S. at 107–08 (Marshall, J. concurring).

To ban peremptory challenges for prosecutors but not for defense attorneys seemed unjust to Justice Marshall in the abstract. In practice it would be no less unjust. One can well imagine the reaction of a murder victim's family to the sight of the defense excusing jurors unfavorable to the defense case while the prosecution is required to accept all of the remaining jurors no matter what they said in *voir dire*.

In light of Justice Marshall's wise counsel it may therefore be useful to consider the composition of this jury if peremptory challenges were denied to the parties in this case. On the prosecution side, Juror No. 10 would have been seated of course and may or may not have introduced extrajudicial information into deliberations or engaged in other juror misconduct. Other notable examples of problematic jurors on the

prosecution side include: (1) Juror No. 3 who would have served despite indicating that he would more harshly judge the police compared to other witnesses [2 RP 129.]; (2) Juror No. 9 who would have served despite having failed to follow the courts instruction when he came to the courtroom after the break, and despite expressing discomfiture with the notion of hostile witnesses (in a case that was to be filled with them) [2 RP 173, 184-85.]; (3) Juror No. 21 who would have served despite expressing concerns about credibility of witnesses if they were shown to have used drugs or alcohol (in a case filled with such witnesses) [2 RP 205]; and (4) Juror No. 33 who would have served despite having legal training [2 RP 140], not following the court's instruction and coming to the courtroom after the break [2 RP 173] and having specific knowledge of eye witness identification [2 RP 206.].

On the defense side similar difficulties can be found. The defendant would have had to accept: (1) Juror No. 2 even though her daughter was best friends with a deputy prosecutor's daughter and who when serving on a prior jury "solved" the case [2 RP 128-29, 3 RP 228]; (2) Juror No. 5 even though she was a Tukwila Police homicide investigator [2 RP 125.]; (3) Juror No. 13 even though his best friend was a courtroom security corrections officer [2 RP 131.], and (4) Juror No. 20 even though English may have been a second language and even though it

was suspected that she may have seen the defendant during a break (possibly in restraints) in violation of the court's order not to come to the courtroom [2 RP 189-93.].

None of the reasons for excusing these jurors rises to the level of cause. RCW 4.44.160 and 4.44.170. Also none of the reasons give the appearance of being racially motivated. The only hope for either party in excusing jurors such as these with whom a party is not entirely comfortable is a peremptory challenge. It is respectfully submitted that both sides in this hotly contested trial might have had a genuine concern about the fairness of the proceedings if the jurors they excused had instead had been forced upon them and wound up deliberating.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT DECLARING A MISTRIAL BECAUSE IT INSTEAD REMOVED A JUROR OUT OF A CONCERN ABOUT JURY INTERFERENCE AND MISCONDUCT, AND CONFIRMED THE REST OF THE JURY'S IMPARTIALITY THROUGH INDIVIDUAL *VOIR DIRE* OF THE ENTIRE JURY.

The court's order granting review did not specify whether review was limited to the *Batson* issue. Space limitations preclude an in depth discussion of the merits of the juror misconduct issue. Nevertheless, the state does not concede that issue and offers the discussion found in section C.7 of its response brief in the court below in response to the juror

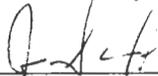
misconduct issue. In short, the court below applied the correct standard and correctly affirmed the trial court's ruling. This conclusion is supported both by the authorities and arguments submitted to the court below and especially by the fact that the trial court engaged in an objective inquiry concerning possible taint through individual *voir dire* of the entire jury after replacing the juror alleged to have been tainted. 11 RP 1215-1237.

D. CONCLUSION.

For the foregoing reasons the decision of the court below should be affirmed.

DATED: Friday, February 23, 2018.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
\_\_\_\_\_  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-23-18 Theresa Ke  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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