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NO. 94853-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYREE JEFFERSON

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY NO. 47826-9-II

The Honorable Frank Cuthbertson, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUES

1. Mr. Jefferson's equal protection rights were violated by the prosecutor's race based peremptory strike of the only African American juror.
2. The *Batson* test needs to be revised by this Court to prohibit discrimination in the jury selection process.
3. Jefferson was denied his constitutional right to a fair and impartial jury.

B. STATEMENT OF THE CASE

a. Voir Dire Facts

The Court of Appeals issued a very brief summary of Juror No. 10's voir dire responses.

First, juror 10 stated that he thought the voir dire questioning was a "waste of time." Second, juror 10 admitted that he previously brought extraneous evidence into the deliberations while serving as a juror in a criminal trial. And third, juror 10 enthusiastically described, in detail, the movie 12 Angry Men.

State v. Jefferson, 199 Wn. App. 772, 784, 401 P.3d 805 (2017).

(i) Questions Regarding the Benefits of Voir Dire

What does that mean to you, "free from any outside

influence"?

JUROR NO. 1: Well, it means from the things we see in the media, the things that family and friends may bring to this, our own personal experience, and to focus on just what is here, take it seriously, really weigh seriously everything that's being said.

RP 137-138

MR. CURTIS: Why to keep outside information from jury?

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

RP 141.

THE COURT: -- I'm going to give a cautionary instruction for lunchtime. A couple of things. **One, I need to let you know that once you took the oath this morning, you were all considered officers of this court.** So you now leave here with a heightened responsibility. Please don't forget that the court is the third branch of government in addition to the legislative and executive branches. This is the most Democratic branch of government. This is where of

the people, by the people, and for the people becomes very real very quickly because, as was indicated earlier, you are the triers of fact. You all will make the critical decisions, and that's why it's so important to me that you stay involved, and that your comfort and your well-being is so important when you're sitting here. **As I said, you're officers of the Court.**

(Emphasis added) RP 147-48.

MR. CURTIS: When I left off, we were talking about being uninfluenced by any other considerations other than the evidence presented at trial and the instructions of the Court. And some of the feedback that I received was that some of the jurors stated that it would affect the process if outside considerations were able to influence your decision in this case, and I just want to talk about that, just briefly, a little more. You know, it's interesting because everyone here has already stood up and said -- and took the oath, right? **Everyone took the oath.** Juror No. 10, could you please stand? **So you've already taken your oath.**

JUROR NO. 10: Yeah.

MR. CURTIS: Why am I still here with 20 minutes to question you? Why does the Court allow that?

JUROR NO. 10: **Maybe you're trying to still figure out can we, or me, be influenced still by something from the outside.**

MR. CURTIS: You think I should continue to ask questions and take advantage of the time, or do you think it's enough that everybody stood up and took the oath?

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 –

MR. CURTIS: What if I was representing you in a case? Would you want me to ask the jurors questions and figure out if -- if you were my client, would you want me -- or just take everyone at their word -- jurors?

JUROR NO. 10: Just like you said, if everyone took the oath and you're expecting them to be partial to the evidence and everything that's presented, so -- and the questions that have been asked about, **you know, being influenced by anything from the outside, still need to separate those two from the facts and then -- and whatever they hear on the outside.**

RP 175-76 (emphasis added).

JUROR NO. 23: **I think I agree.** I think everyone comes in, we all have biases from our backgrounds and everything, but to insure that fairness will be served, I think the questions are important.

RP 177. Juror No. 5 responded to a related question about his opinions of whether the court room was more diverse than in the 1800's.

JUROR NO. 5: 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.

RP 179.

(ii) Twelve Angry Men

White Juror No. 23 responded to a question about Twelve Angry Men. RP 194.

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.

RP 195.

White Juror No. 1 next provides his recollection of the movie as follows.

JUROR NO. 1: There was a group -- the whole movie takes place in a jury room. And they're debating the case, and there's a lot of personalities involved and so forth. And I think, as it turns out in the end, there's the recognition that this witness, who seems so credible, could not possibly have seen what they claimed they saw.

RP 195.

Juror No. 9 followed.

JUROR NO. 9: I watched it. I think -- the main point I took out of it was that 11 people were against --

or were for the guilty verdict. Only one person was for not guilty. And slowly, throughout the movie, he kind of convinces them, gives that reasonable doubt in their head, and so it just kind of showed the power of the system at work. It's not because -- people had all these assumptions, and it slowly starts to reveal the biases in their heads that they didn't realize. So at the end, they all kind of change their mind and realize how even themselves, they couldn't trust their own opinion.

COREY: Does anybody who watched the movie recall whether or not any of the jurors felt, at any time, pressures in reaching the verdict?

JUROR NO. 10: I know it's a long time ago. I think Jack-somebody played in the movie "12 Angry Men." The way it started out, a lot of jurors were ready to give a verdict right off the bat because a lot of them had things to do, places to go, other things going on in their life. And like the young man, No. 9, said, 11 of them wanted to go ahead and give a verdict, but that 12th man held out because he knew that the evidence, what he was listening to didn't add up. And like he said, it took days in a jury room, and it took some time to get those jurors to understand the facts that were given in court. And I say one by one, the jurors began to change they mind and see the evidence a little bit different than what they had started out to. In the end, if I can remember right, the person that was on trial didn't do it. It was someone else.

RP 196.

Defense counsel asked a follow up question
"Anybody been in a situation where opinions
deadlock because intelligent people have
justifications for their opinions, and they are firm and
steadfast in their opinions, and they can rationally

justify them.”

RP 198.

Juror No. 1 responded:

So when we have -- I'm a physician, and we have team meetings, monthly, and we're making decisions as to problem solving, things that go wrong, how we can make our systems better, and there's lots of different opinions. We oftentimes don't come to a conclusion.

RP 199.

(iii) Outside Information

Defense counsel asked a question about prior deliberations where a juror referred to matters that were “not germane”. RP 228.

“JUROR NO. 2: We all discussed it, and the person agreed that it didn't really pertain to what was going on.”

MS. COREY: Okay. Was a person called on that, essentially, and saying, this doesn't have anything to do with it?

RP 228.

JUROR NO. 2: Exactly.

MS. COREY: Juror No. 10.

JUROR NO. 10: Yes.

MS. COREY: And that worked?

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.

RP 229.

The Court singled out white Juror No. 1 for praise:

Juror 1's a physician. Sometimes there are complicated medical issues, and the jurors come in every time and listen, they focus and ask good questions. Sometimes in the civil cases, the jurors ask better questions than the lawyers. So it is important that you're here. We really appreciate it, and I hope that this is a good experience for you. I think it will be for those who get to serve.

RP 233.

b. Extrinsic Evidence to Jury

For the sake of efficiency and to avoid redundancy, these facts are set forth in the Court of Appeals briefing in detail and in the Argument section 3, below.

C. ARGUMENT

1. UNDER THE EXISTING *BATSON* TEST, THE PROSECUTOR'S UNDERLYING REASON FOR STRIKING THE ONLY AFRICAN AMERICAN JUROR - THE ONLY JUROR OF COLOR, WAS RACE BASED.

In Jefferson's case, the prosecutor used his peremptory challenge to remove the sole African American juror because of his race. Juror No. 10 was a qualified juror; he answered questions thoughtfully and honestly, and explained what he had learned from his previous jury experience. RP 175-76, 195, 229. He was open minded, aware, willing to be fair and understood the important responsibility all jurors undertake to be faithful to the law upon taking the jurors oath. This was particularly offensive to the prosecutor and the court.

This case represents a continuing struggle to require the Court to effectively protect Mr. Jefferson's equal protection guarantees in the jury selection process, and to suggest a framework to prevent future discrimination in the jury selection process.

Here, during jury selection, the deputy prosecutor exercised peremptory challenges excusing the only African American juror. RP 219-20; 238-39. Mr. Jefferson who is African American challenged this dismissal under *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and now under *City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017) CP 403-16.

A prosecutor's use of a peremptory challenge that appears to be racially motivated, violates a defendant's right to equal protection. *Georgia v. McCollum*, 565 U.S. 42, 44, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *City of Seattle v. Erickson*, 188 Wn.2d at 723. *Batson* "guarantees a jury selection process free from racial animus" *Erickson*, 188 Wn.2d at 723. Striking the only member of a cognizable racial group establishes a prima facie showing of racial discrimination-requiring further analysis under *Batson*. *City of Seattle v. Erickson*, 188 Wn.2d at 723-24.

a. Standard of Review

A harmless error analysis does not apply in *Batson* cases, because erroneous denial of a *Batson* challenge is *per se* reversible error. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987); *State v. Cook*, 175 Wn. App. 36, 44, 312 P.2d 653 (2013). *Batson*-type challenges are reviewed for clear error. *State v. Saintcalle*, 178 Wn.2d 34, 41, 309 P.3d 326 (2013) (reversed on other grounds in *City of Seattle v. Erickson*, 188 Wn.2d 721). "Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed." *Id.*

b. Batson Test

The Equal Protection Clause prohibits the use of

peremptory challenges to exclude otherwise qualified and unbiased jurors based upon their race. U.S. Const. Amend. XIV; *Batson*, 76 U.S. at 98; *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). *Batson* and subsequent cases set out a three-part test for whether the Equal Protection Clause has been violated by a peremptory challenge.

The parties agree that Mr. Jefferson met the first prong of the *Batson* test- a showing of prima facie discrimination. *Jefferson*, 199 Wn. App. at 784; *Batson*, 476 U.S. at 94. Once this prong is satisfied, under the second prong, the burden shifts to the prosecutor to provide an adequate, race-neutral justification for the strike. *Id.* Finally, if a race-neutral explanation is provided, the court must weigh all relevant circumstances and decide if the strike was motivated by racial animus. *Id.*

The second and third prong are at issue in this case. The Court of Appeals accepted the prosecutor's mischaracterization of Juror No. 10's responses to hold that because the prosecutor provided, in the Court's opinion, two race-neutral explanations for the strike, those reason effectively eliminated any race based motivations. *Jefferson*, 199 Wn. App. at 784-85.

The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason. *U.S. v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989). If any of the state's reasons are race-based, under the combination of circumstances taken as a whole, the remaining race – neutral reasons are inadequate to overcome the race-based reasoning. *Chinchilla*, 874 F.2d at 699; *People v. Hall*, 35 Cal.3d 161, 168, 672 P.2d 854, 197 Cal.Rptr 71 (1983).

This approach is required under the third prong of *Batson*, which is designed to ferret out hidden race-based discriminatory practices because it truly examines all of the prosecutor's reasons rather than simply finding a plausible non-race based explanation in the midst of race-based reasoning.

c. The Prosecutor's Reasons were Pre-Textual and the Court Failed to Weigh all Relevant Circumstances Make This Ruling

(i) Comparative Juror Analysis

Comparative juror analysis is a device for determining the presence of purposeful discrimination. It examines "whether the proffered race-neutral explanation could apply just as well to a nonminority juror who was allowed to serve." *Miler-El v. Dretke*, 545

U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). “We do not allow prosecutors to go fishing for race-neutral reasons and then hide behind the legitimate reasons they do find. This disproportionately affects minorities.” *Miler-El*, 545 U.S. at 244-45.

“*Batson* requires the judge to determine whether a race-neutral reason offered for a challenge is honest”. *United States v. Roberts*, 163 F.3d 998, 1000 (7th Cir. 1998). See also, *Snyder v. Louisiana*, 552 U.S. 472, 485, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (court examines reasons to make sure they are not pretextual). See also, *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (stating that courts are not bound to accept neutral reasons that are either unsupported by the record or refuted by it).

(ii) Outside Influence-Pretext

The Court in *Johnson*, “found that the prosecutor had offered explanations which indicated the existence of specific bias; namely, (1) that Mrs. Nichols-Garland had worked for a defense attorney (not true- a divorce attorney); (2) that she was uneducated (responses intelligent and held important job); (3) that she had been evasive in answering questions (not true she answered questions); and (4) that her age was a problem (no explanation).

Johnson, 3 F.3d at 1329-30.

The trial court determined that these explanations were not pretextual, but were the actual causes that had induced the prosecutor to excuse Mrs. Nichols-Garland. *Id.* The Ninth Circuit reversed, holding that the prosecutor misstated the juror's responses based on his "alleged mistaken beliefs" which could not be considered race-neutral when examined against the record, and when examined in context, they were in fact pretextual. *Johnson*, 3F.3d at 1330-31.

Here, the prosecutor elicited responses from Jurors No. 1, 23, 33, and 10, regarding the need for voir dire to protect jurors from considering outside influences. RP 137-38, 141, 175-77. Juror No. 1 explained that outside influence was not appropriate in deliberation. RP 137-38. Juror No. 33 explained that everyone has built in bias that should be put aside. RP 141. Before taking a break, the court twice admonished the jurors that they took an oath and were now officers of the court. RP 147-48.

After the break, the prosecutor twice reiterated that the jurors had taken an oath and proceeded to question Juror No. 10 about being "uninfluenced by any other considerations other than the

evidence presented at trial". RP 175. Following this reiteration, the prosecutor asked Juror No. 10 the purpose of voir dire. RP 175. Juror No. 10 explained that voir dire permits the prosecutor to "figure out can we, or me be influenced still by something from the outside." RP 175. When asked if a person should be taken at their word, Juror No 10 responded that he personally believed that the oath had meaning. RP 175-76.

The prosecutor continued to press Juror No. 10 by using a hypothetical where the prosecutor represented Juror No. 10, and asked if Juror No. 10 would be still believe jurors should be taken at their word. RP 175-76. Juror No. 10 explained when a juror takes an oath, that should suffice unless the prosecutor is expecting the jurors to be "partial to the evidence", in which case, Juror No. 10 explained that the prosecutor must then educate the jurors to separate outside influences from the evidence. RP 175-76. Juror No. 23 agreed that people come to the table with bias and questions help. RP 177.

This interaction indicates that Juror No. 10, like Jurors No. 1, 23, and 33 all believed that people come to the table with bias and voir dire helps the prosecutor to understand this intrinsic bias and

educate the jurors to leave such bias outside the jury room. RP 137-38, 141, 175-77.

The prosecutor did not ask any other juror, except Juror No. 10, his or her personal opinion regarding whether the jurors oath was adequate without voir dire. RP 175. Juror No. 10 responded to this direct question about his personal beliefs, but like the other jurors, Juror No. 10 too agreed that voir dire was important for the prosecutor. RP 137-38, 141, 175-77.

Juror No. 10 agreed with juror No. 33 who stated that people come with bias and voir dire is designed to ferret that out. RP 137-38. On this point, Juror No. 23 also agreed with juror No. 10 and Juror No. 33. RP 141. Without explicitly stating as much, white Juror No. 5 informed the prosecutor that voir dire was a waste of time because all people have bias and they “may all say one thing, but they may not mean the same thing”. RP 178-79. This view was similar to Juror No. 10, but juror No. 5 was not struck.

Here, similar to *Johnson*, the prosecutor misstated Juror No. 10’s responses based on the prosecutor’s “alleged mistaken beliefs” which cannot be considered race-neutral when examined against the record. *Johnson*, 3F.3d at 1330-31. The prosecutor’s

reasons were pretextual because: (1) the prosecutor did not ask any other juror for their personal opinion; (2) the prosecutor misstated Juror No. 10's response to fit his explanation –focusing on Juror No. 10's "personal " opinion, rather than on Juror No. 10's understanding of voir dire from the prosecutor's perspective; and (3) Jurors No. 1, 23, and 33, like Juror No. 10 all responded similarly to questions about the purpose of voir dire- but they were not stricken.

The trial court and the Court of Appeals failed to properly consider the third prong of the *Batson* test, by not considering the prosecutor's explanation against the treatment of white jurors and in the context of the other explanations. The prosecutor's proffered race-neutral explanation regarding the benefit of voir dire did not apply just as well to nonminority jurors who were allowed to serve because Jurors 23, 33, and 5 who were not stricken. *Miller-El*, 545 U.S. at 241, 244-45.

(iii) Extrinsic Evidence

Cook provides a situation analogous to Jefferson's case, where the prosecutor took a juror's responses out of context to formulate a pretextual reason for striking an African American juror.

Cook, 175 Wn. App. at 42. In *Cook*, citing *Reed v. Quarterman*, 555 F.3d 364, 372-74 (5th Cir. 2009), the Court dismissed the prosecutor's attempt to single out a portion of a black juror's response that displeased the prosecutor where the remainder of the response made the juror more ideal to serve, and were consistent with other jurors who were permitted to serve. *Cook*, 175 Wn. App. at 41-42.

“Finally, the State recalled that Juror No. 34 had a negative experience with the police. But Juror No. 34 stated that he also had positive experiences with the police and harbored no bias against the police.” *Cook*, 175 Wn. App. at 42. The Court held that parsing out selective parts of the African American juror's responses and treating that juror differently than other white jurors who responded similarly, was pretext. *Cook*, 175 Wn. App. at 42.

Here, defense counsel asked a question about prior deliberations where a juror referred to matters that were “not germane”. RP 228. Juror No. 2 discussed that in a prior trial, the jury addressed a juror who discussed information that was not “germane” to the trial and successfully explained that such information could not be considered. RP 228-229. In response,

Juror No. 10 agreed with Juror No. 2 and admitted that he had discussed something not germane in a prior trial, and was successfully educated that that was not appropriate. RP 229.

The prosecutor here, as in *Cook*, took the part of Juror No. 10's response that displeased him and omitted the part that made Juror No. 10 a favorable juror candidate by misstating the record and informing the court that Juror No. 10 previously brought extraneous information into the deliberations, but without explaining that Juror No. 10, like Juror No. 2, agreed that this was impermissible. RP 228-229; *Jefferson*, 199 Wn. App. at 784.

(iv) Twelve Angry Men Misstated

In *Chinchilla*, the prosecutor treated white and Hispanic jurors differently. The prosecutor pretextually offered that he struck two Hispanic jurors based on where they lived, but the prosecutor did not move to strike a white juror who lived in the same area as the Hispanic jurors. *Chinchilla*, 874 F.2d at 698-99. The prosecutor also explained that he struck the Hispanic jurors based on their poor appearance and choice of employment. *Id.*

Oddly, the Ninth circuit held that the poor appearance and choice of employment "would normally be adequately 'neutral'

explanations taken at face value.” *Id.* However, the Court held that when weighing all of the prosecutor’s reasons for the strikes, the fact that the prosecutor offered a race neutral reason did not diminish the fact that the residence explanation was race-based. Ultimately, the prosecutor’s reasons were pretextual and did not hold up under judicial scrutiny, even though the Court believed some of the reasons appeared race neutral. *Chinchilla*, 874 F.2d at 698-99 (residence a race based reason).

Similarly, in *Hall*, the appellate court rejected the prosecutor’s explanation that he struck black jurors because of their connection with the state in which defendant previously resided, because a white juror from same city as defendant was unchallenged. *Hall*, 35 Cal.3d at 168. The Court held that prosecutor’s explanations were inadequate because “[s]uch disparate treatment is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons”. *Id.*

In *Cook*, the Court of Appeals held that African American Juror No. 34’s enthusiasm and negative experience with law enforcement were not sufficient to refute discrimination on the part

of the prosecutor, where many other juror's responded similarly to Juror No. 34 and Juror No. 34's enthusiasm was a proxy for discrimination. *Cook*, 175 Wn. App.at 41-44.

Here too, similar to *Chinchilla*, *Hall* and *Cook*, the prosecutor created pretextual reasons for striking Juror No. 10 based on his "enthusiastic" responses to questions about the movie *Twelve Angry Men*. RP 194-99. Four jurors responded to questions about *Twelve Angry Men*: three white and one African American. RP 194-99. Juror No.23 explained his recollection of the movie presenting a situation where jurors with different opinions could not agree on a conclusion and struggled together to come to a verdict. RP 195. Juror No. 1 explained that through the deliberation process, the jurors realized that a witness who seemed credible could not have testified truthfully. RP 195.

Juror No. 9 explained that out one out of the twelve jurors held steadfast to his belief that the defendant was not guilty and through the deliberation process, the other jurors came to agree. RP 196. Defense counsel followed up with a question regarding if any of the jurors in *Twelve Angry Men* were pressured into reaching a verdict. RP 196. Juror No. 10 explained that the jurors initially

wanted to reach a verdict without full deliberation, but through the deliberation process came to understand that the witness in question was not credible and the defendant could not be guilty. RP 196.

Here, the only difference between Juror 10's responses and Juror 1 and 23, was Juror No. 10's ability to recall more detail-similar to Juror No. 9. RP 195-99. All of the jurors however, explained that the movie presented a scenario where the jury as a group successfully struggled through the deliberation process to reach a verdict they all believed in. RP 195-99.

Even though Juror No. 9 was struck, the prosecutor's treatment of Juror No. 10 was pretextual in the same manner the prosecutors in *Chinchilla*, *Hall*, and *Cook*, because the prosecutor did not move to strike white Juror's No. 1 and 23 who responded similarly to Juror N. 10. *Chinchilla*, 874 F.2d at 698-99; *Hall*, 35 Cal.3d at 168; *Cook*, 175 Wn. App.at 41-44.

"When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it. Any other

approach leaves *Batson* a dead letter.” *Johnson*, 3 F.3d at 1331
The Court here impermissibly permitted the prosecutor to treat the only African American juror differently than two other white jurors (1 and 23) who responded similarly. *Miler-El*, 545 U.S. at 244-45; *Batson*, 476 U.S. 79; *Chinchilla*, 874 F.2d 695; *Cook*, 175 Wn. App 36, and *Hall*, *supra*. The Court of Appeals affirming the disparate treatment of similar juror responses violated Jefferson’s equal protection rights.

Relatedly, the Court of Appeals rejected the prosecutor’s explanation that an African American prosecutor and an African American judge could not make racially motivated peremptory strikes. *Jefferson*, 199 Wn. App. at 785. The Court of Appeals held that “[t]he State’s argument lacks merit, is inappropriate, and has no bearing on a Batson analysis.” *Id.*

The Court of Appeals understood that the focus is on the jurors not the prosecutor, and that race could not play a role in evaluating a *Batson* challenge, yet the Court ignored its own admonishment by permitting what it proscribed. The Court of Appeals accepted a racially motivated strike based on selective and inaccurate facts, and perhaps, because similar to all of the jurors,

the judge and prosecutor, like the rest of humanity, come to the table with intrinsic bias. *Jefferson*, 199 Wn. App. at 784.

The cases cited herein, demonstrate that the reviewing Court must look beyond an explanation that in a vacuum seems race-neutral, but that is in fact race-based, and “weigh all relevant circumstances and decide if the strike was motivated by racial animus”, even where the prosecutor may not even be aware of his own race-based discrimination. *Batson*, 476 U.S. at 94; *Saintcalle*, 178 Wn.2d at 53.

Regardless of the prosecutor’s conscious intent in Jefferson’s case, the prosecutor made a race-based strike against the only African American juror. The Court of Appeals parsed through juror No. 10’s answers to find seemingly race-neutral explanations while dismissing the race-based reasons to justify the striking juror No. 10. RP 228-29. *Cook*, 175 Wn. App. at 42-44. However, here, none of the prosecutor’s reasons were actually race-neutral.

This Court should reverse Jefferson’s conviction and remand for a new trial based on the prosecutor’s race-based reasons for striking Juror No. 10, which denied Jefferson his constitutional right

to equal protection.

2. BECAUSE THE PRIMARY PROBLEM WITH *BATSON* IS THE REQUIREMENT OF PROVING INTENTIONAL DISCRIMINATION, THIS COURT SHOULD HOLD THAT A PEREMPTORY CHALLENGE IS INVALID IF AN OBJECTIVE OBSERVER COULD VIEW RACE, ETHNICITY, GENDER OR SEXUAL ORIENTATION AS PLAYING A ROLE IN THE USE OF THE PEREMPTORY CHALLENGE.

Batson is broken and it is up to this Court to create a meaningful solution because “[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.” *City of Seattle v. Erickson*, 188 Wn.2d at 730 (quoting, *Snyder* 552 U.S. at 478; *Batson* 476 U.S. at 96 (citing *Ford v. Georgia*, 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991))); *Saintcalle*, 178 Wn.2d at 51.

In *City of Seattle v. Erickson*, this Court took the first step toward addressing the ineffectuality of the test set forth in *Batson*, designed to prevent racial discrimination in the jury selection process. *City of Seattle v. Erickson*, 188 Wn.2d at 731-33. Specifically, this Court provided a bright-line rule that henceforth,

removal of the sole member of a protected class automatically satisfies the burden of establishing a prima facie case of “discriminatory purpose.” *City of Seattle v. Erickson*, 188 Wn.2d at 732-34; *Batson*, 476 U.S. at 94.

This Court left intact the balance of the *Batson* test which continues to permit racially discriminatory jury selection when the prosecutor explains his or reasons to the satisfaction of the court. *City of Seattle v. Erickson*, 188 Wn.2d at 74; *Batson*, 476 U.S. at 94; *Saintcalle*, 178 Wn.2d at 42. “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 74; *Batson*, 476 U.S. at 94.

This remaining portion of *Batson* is as ineffectual as the first prong because it does not “eradicate” racial discrimination, rather it permits the removal of jurors based on race if the prosecutor provides any race-neutral reason, even if the prosecutor’s motivation for striking the juror is race based. *City of Seattle v. Erickson*, 188 Wn.2d at 734, 737-6, (Stephens concurring); *State v.*

Rhone, 168 Wn.2d 645, 662, 229 P.3d 752 (2010) (dissent)¹
(majority opinion reversed on other grounds in *City of Seattle v. Erickson*, 188 Wn.2d 721).

In other words, the prosecutor is permitted to exercise a peremptory challenge that is unintentional but in fact discriminatory, and if intentional, it is acceptable as long as the prosecutor provides a race neutral explanation. *City of Seattle v. Erickson*, 188 Wn.2d at 737 (Stephens concurring); *Saintcalle*, 178 Wn.2d at 92-93 (Gonzalez, J., concurring).

The notion that decisions based on race are prohibited in our justice system are not new, but seemingly, despite many years of admonishing against the use of race, the courts and the state continue with impunity, to use race as grounds to advance cases. “Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and

¹ “[P]lausible race-neutral reasons are quite easy to conjure up in any given case, regardless of whether the peremptory challenge is actually based on racial discrimination and regardless of whether such racial discrimination is conscious or unconscious.” *Saintcalle*, 178 Wn.2d at 92-93 (Gonzalez, J., concurring). “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Furthermore, as noted, “*Batson* recognizes only ‘purposeful discrimination,’ whereas racism is often unintentional, institutional, or unconscious.” *Saintcalle*, 178 Wn.2d at 36;

impartial trial.” *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)). For these practices to stop, this Court must act now with clear direction.

Six months ago, six justices agreed that “[w]e are unlikely to see different outcomes unless courts are willing to more critically evaluate proffered race-neutral justifications in future cases.” *City of Seattle v. Erickson*, 188 Wn.2d at 738 (Stephens J., concurring). The time has arrived to create a new standard for eliminating discrimination in voir dire.

This Court has undertaken a proposed rule change for GR 36 (now 37) that would eliminate the need for proving intentional discrimination under *Batson*, in favor of a rule that would prohibit peremptory challenges based on an appearance of racial motivation. *City of Seattle v. Erickson*, 188 Wn.2d at 738-39 (Stephens J., concurring).

The proposed rule is as follows:

JURY SELECTION

- (a) Scope of rule. This procedure is to be followed in all jury trials.
- (b) A party may object to an adverse party’s use of a

peremptory challenge on the grounds that the race or ethnicity of the prospective juror could be viewed as a factor in the use of the challenge, or the court may raise this objection sua sponte. When such an objection is made, the party exercising the peremptory challenge must articulate on the record the reasons for the peremptory challenge.

(c) Using an objective observer standard, the court shall evaluate the reasons proffered for the challenge. If the court determines that an objective observer could view race or ethnicity as a factor for the peremptory challenge, the challenge shall be denied.

Proposed GR 36, changed to proposed GR 37.

The proposed rule will hopefully eradicate racial discrimination in the jury selection process rather than merely curb discrimination, such as exists under the current *Batson* test as modified under *City of Seattle v. Erickson*, 188 Wn.2d at 734. This proposal is laudable, but does not address the discrimination directed towards other cognizable groups based on ethnicity, gender, sexual orientation, or religious beliefs.

Consistent with due process, and equal protection, to provide a meaningful, workable approach to eliminating all impermissible bias in the jury selection process requires this Court to prohibit a peremptory challenge if an objective observer could view race, gender, sexual orientation, religious beliefs, or ethnicity

as playing a role in the use of the peremptory challenge, regardless of whether the party striking the juror actually intended to discriminate. *U.S. v. Martinez-Salazar*, 528 U.S. 304, 315, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); *J.E.B. v. Alabama*, 511 U.S. 127, 141-46, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (gender based discrimination impermissible); *Powers v. Ohio*, 499 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (the discriminatory selection of jurors has been the subject of a federal criminal prohibition since Congress enacted the Civil Rights Act of 1875; Wash. Const. art. I, §§ 3, 11, 12.

a. Eliminate Peremptory Challenges

Alternatively, to effectively eliminate impermissible bias in the jury selection process against cognizable minority groups, this Court should eliminate the peremptory challenge all together as suggested by Justice Gonzalez and supported by Justice Yu. *City of Seattle v. Erickson*, 188 Wn.2d at 739-40 (Yu, J., concurring) (citing *Saintcalle*, 178 Wn.2d at 69-118 (Gonzalez J., concurring)).

[T]he use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, imposes substantial administrative and litigation costs, results in less effective juries, and unfairly amplifies resource

disparity among litigants—all without substantiated benefits. The peremptory challenge is an antiquated procedure that should no longer be used.

Saintcalle, 178 Wn.2d at 69-70 (Gonzalez, J., concurring).

At least two members of this Court understand that “[w]e should assume that all members of the public who adhere to a summons to appear for jury service are qualified to hear a case unless otherwise shown.” *City of Seattle v. Erickson*, 188 Wn.2d at 740-41 (Yu, J., concurring). “[D]isparate questioning of minority jurors can provide evidence of discriminatory purpose because it creates an appearance that an attorney is “fishing” for a race-neutral reason to exercise a strike. *Miller-El*, 545 U.S. at 244-45; *Reed*, 555 F.3d at 379.

In *Saintcalle*, this Court presented a graph to visualize the disparate treatment of minority jury pool members from their white counterparts. *Saintcalle*, 178 Wn.2d at 59. The statistics revealed the average white juror was asked 4.5 questions, while the African American juror was asked 17 questions, approximately four times more than the white jurors. *Id.*

In this case, the volume of questions directed at juror No. 10 was even higher than the percentage of questions directed at the

white jurors. RP 136-147, 175-186, 193-207, 214. The prosecutor asked the 29 members of the jury pool 47 questions averaging approximately 1.56 questions per juror. *Id.* The defense asked the same group 61 questions, averaging 2 questions per juror. *Id.* In total, the white jurors were asked approximately 3.56 questions. *Id.* The prosecutor asked juror no. 10, eleven questions, and the defense asked juror no. 10 ten questions for a total of 21 questions, which is 5.89 times more questions directed at juror No. 10. *Id.* This scenario, like that in *Saintcalle*, is not an aberration, it is the norm.

The manner in which Juror No. 10 was questioned during voir dire, stands in stark contrast to the other jurors, seemingly in search of experiences the prosecutor could use as grounds to remove Juror No. 10. It is time for this Court to eliminate peremptory challenges in favor of accepting that an oath to be impartial is meaningful unless there is actual cause to believe otherwise.

3. JEFFERSON WAS DENIED HIS WASH. CONST. ART. I, § 22 AND SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

The facts and basic legal arguments are set forth in the

petition for review and incorporated by reference herein.

The trial court abused its discretion in Jefferson's case by denying the motion for a fair trial where the jurors were exposed to powerful prejudicial evidence that could not be cured with an instruction, and for arguing with two jurors about their understanding of the nature of the extrinsic prejudicial evidence presented to them.

Jurors promises to remain impartial after exposure to extrinsic evidence does not mean that the defendant will receive a fair and impartial trial because the psychological impact on the juror is often impossible to disregard. *Marshall v. United States*, 360 U.S. 310, 312-13, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961); *Delaney v. United States*, 1 Cir., 199 F.2d 107, 39 A.T.R.2d 1300 (1952).

For example, in *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial, thus having contact with the jurors during the trial outside the courtroom. Despite the deputies promises that they had not talked to the jurors about the case, the Court held that, "even if it could be

assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association” *Turner*, 379 U.S. at 473. The Supreme Court in *Turner*, reversed the conviction relying on the reasoning in *Dowd*, where the jury was exposed to pre-trial prejudicial evidence, to hold that Turner’s due process rights to an impartial jury were violated. *Turner*, 379 U.S. at 471; *Dowd*, 366 U.S. at 722.

The U.S. Supreme Court does not distinguish between pre-verdict and post-verdict challenges to extrinsic evidence introduced to a jury, because the underlying power of human nature is not altered by the timing of lawyers’ challenges. *Turner*, 379 U.S. at 471; *Dowd*, 366 U.S. at 722; *Marshall*, 360 U.S. at 312- 13. Rather, in the words of a juror, some evidence simply cannot be erased from memory or set aside. *Dowd*, 366 U.S. at 728-29 (quoting a juror). Chief Justice Hughes observed in *Wood*, “Impartiality is not a technical conception. It is a state of mind...that is not chained to any ancient and artificial formula.” *Wood*, 299 U.S. at 14-46.

In *Gaines*, contrary to the wisdom of these Supreme Court cases, the Court of Appeals upheld the trial court’s application of an

artificial subjective, pre verdict standard to determine whether jurors could be impartial regardless of the impact of their exposure to extrinsic evidence. *Gaines*. 194 Wn. App. at 897-898. The trial court determined that under a subjective analysis, only one juror was tainted and dismissed one juror but not the entire 12 member jury who promised they could remain impartial. *Gaines*, 194 Wn. App. at 895-96.

The Court of Appeals in Jefferson's case erroneously relied on *Gaines*, 194 Wn. App. at 898, to uphold denial of the motion for a mistrial in the face of a significant jury taint, based on a subjective analysis. The subjective focus in *Gaines*, followed in Jefferson's case, is contrary to the wisdom in *Turner*, *Dowd* and *Wood*, wherein each Court recognized that human nature is powerful and not subject to artificial court imposed analysis. *Turner*, 379 U.S. at 474; *Dowd*, 366 U.S. at 722; *Wood*, 299 U.S. at 14-46.

Here, Jefferson did not specifically argue for an objective rather than a subjective evaluation of the jurors' ability to remain impartial, because under either standard, some evidence is too powerful to disregard under either standard. *United States v. Wood*,

299 U.S. 123, 145-46, 177, S.Ct. 185, 81 L.Ed.78 (1936); *Accord*,
Turner, 379 U.S. at 473; *Dowd*, 366 U.S. at 727; *Marshall*, 360 U.S.
at 312- 13.

The Court of Appeals erred in Jefferson's case by denying
his motion for a mistrial based on an irreparably tainted jury.

D. CONCLUSION

For the reasons stated herein and in Jefferson's Petition for
Review and prior briefing for the Court of Appeals, Jefferson
respectfully requests this Court reverse his conviction and remand
for a new trial.

DATED this 5th day of March 2018.

Respectfully submitted,



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Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Tyree Jefferson/DOC#305122, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on March 5, 2018. Service was made by electronically to the prosecutor and Tyree Jefferson by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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