State v. Rhone
Dissent by Alexander, J.

No. 80037-5

ALEXANDER, J. (dissenting)—I dissent because, in my view, the lead opinion wrongly concludes that Theodore Rhone failed to establish a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and is, therefore, not entitled to a new trial. In that regard, the lead opinion errs in putting its interpretation on the trial court's consideration of systemic[1] discrimination as part of its *Batson* analysis.

I would have this court adopt a bright line rule that a defendant establishes a prima facie case of discrimination when, as here, the record shows that the State exercised a peremptory challenge against the sole remaining venire member of the defendant's constitutionally cognizable racial group. For these reasons, I advocate reversing the Court of Appeals' decision affirming Rhone's conviction and sentence and

[1]As explained below, when the United States Supreme Court adopted *Batson*, it replaced the previous threshold requirement for a defendant to show "*systemic* discrimination" in proving that his Fourteenth Amendment rights were violated. *See Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (emphasis added). The trial court here, however, explained to Rhone that the Fourteenth Amendment prohibits "*systematic*" discrimination of jurors based on race. Verbatim Report of Proceedings at 451 (emphasis added).

would remand for a new trial.

In *Batson*, the United States Supreme Court unequivocally recognized that the equal protection clause requires that defendants be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 86 (citing *Martin v. Texas*, 200 U.S. 316, 321, 26 S. Ct. 338, 50 L. Ed. 497 (1906)). As the lead opinion observes, *Batson* outlines a three-part test to determine whether a venire member was impermissibly excluded pursuant to discriminatory criteria. Lead op. at 5. To meet the test, the defendant must first make out a prima facie case of discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *State v. Hicks*, 163 Wn.2d 477, 489, 181 P.3d 831 (citing *Batson*, 476 U.S. at 93-94), *cert. denied*, 129 S. Ct. 278, 172 L. Ed. 2d 205 (2008). If the defendant does so, the burden shifts to the State to present a neutral explanation for challenging the juror. *Id.* (citing *Batson*, 476 U.S. at 97). The trial court must then determine if the defendant has established purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98). As the lead opinion notes, only the first factor of the *Batson* test is at issue here.

In *Batson*, the United States Supreme Court clearly determined that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *Batson*, 476 U.S. at 95 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50

L. Ed. 2d 450 (1977)). In *Batson*, the United States Supreme Court replaced the previous "threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation." *Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

In my view, the trial court's consideration of systematic discrimination in its analysis of whether Rhone established a prima facie case of discrimination under *Batson* was clearly erroneous. In support of its decision, the trial court stated:

> The only right the criminal defendant has is that the selection process which produced the jury did not offer it to *systematically exclude* distinctive groups in the community . . . .
>
> . . . [T]his right is subject to the commands of the Equal Protection [C]lause of the 14th Amendment which prohibits *systematic exclusion* of otherwise qualified jurors based solely on race.

Verbatim Report of Proceedings at 451 (emphasis added). The lead opinion appears to concede that the trial court referred to an incorrect standard. It goes on to say, though, that it was not error because the trial court later applied the correct standard. I disagree. After *Batson*, it is clearly inappropriate for a trial court to consider whether the jury selection process involves *systemic exclusion* of venire members based on a discriminatory purpose. *See Batson*, 476 U.S. at 95. As noted above, a "single invidiously discriminatory governmental act" is sufficient to warrant reversal of a conviction. *Id.* Here, the trial court did not appear to recognize that fact and, consequently, its ruling on Rhone's *Batson* challenge was clearly erroneous having

been based on a misinterpretation of the requirements to establish a prima facie case of discrimination.

It is my view, moreover, that we should adopt a bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged. I recognize that we have previously held that "a trial court is 'not *required* to find a prima facie case [of discriminatory purpose] based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in their discretion, recognize a prima facie case in such instances.'" *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009) (quoting *Hicks*, 163 Wn.2d at 490) (alteration in original). Nevertheless, I am convinced that it makes sense to adopt the bright line rule proposed by Rhone and amicus American Civil Liberties Union (ACLU).

One of the strongest reasons to adopt such a bright line rule is that the benefits of such a rule far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge during venire. As the lead opinion notes, some of these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venires,[2] and effectuating the

[2]According to amicus ACLU, "'African Americans comprise 3.36% of the state population in Washington but received 14.91% of all felony convictions and were the most over-represented racial group with a 4.44 [disproportionality] ratio.'" Amicus Br. of ACLU at 9 (alteration in original) (citing Wash. Sentencing Guidelines Comm'n, *Disproportionality in Adult Felony Sentencing* 1 (Apr. 2008), *available at* http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionality_Disparity_FY0

Washington Constitution's elevated protection of the right to a fair jury trial. Lead op. at 7.

Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a *Batson* challenge. The United States Supreme Court noted in *Johnson v. California*, 545 U.S. 162, 172, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005), that the *Batson* inquiry was designed to produce actual answers to suspicions that peremptory challenges are racially motivated, stating that "[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." A bright line rule would provide clarity and certainty concerning the State's obligations in future cases and would simultaneously engender greater fidelity to *Batson* and its equal protection guaranty.

The lead opinion claims that adopting a bright line rule is beyond the intended scope of *Batson* and would transform "a shield against discrimination into a sword cutting against the purpose of a peremptory challenge." Lead op. at 9. I disagree. A bright line rule would merely require the State to offer a race-neutral explanation for its peremptory challenge. So long as the State's purpose in excluding the venire member is nondiscriminatory, it will be permitted to exercise its challenge and the purpose of the

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7.pdf). Pierce County, where this case was tried, ranks 25th out of 30 counties analyzed in terms of overrepresentation of African-Americans in the criminal justice system. *Id*.

peremptory challenge will not be undermined.

The lead opinion also claims that a bright line rule would be "inconsistent" with what other courts have held. *Id*. The fact is that there is a split among the jurisdictions. Some have held that a prima facie case of discrimination is established under *Batson* either when the last remaining member of the defendant's cognizable racial group is dismissed or when the last remaining minority venire member is peremptorily challenged. *See, e.g.*, *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (holding the government's exercise of a peremptory challenge to strike the last remaining juror of defendant's race is sufficient to raise an inference that the juror was excluded on account of his race); *Hollamon v. State*, 312 Ark. 48, 846 S.W.2d 663, 666 (1993) ("the defendant must first establish a prima facie case of purposeful discrimination, which the appellant clearly did . . . when he pointed to a peremptory strike by the state dismissing the sole black person on the jury"); *People v. Portley*, 857 P.2d 459, 464 (Colo. Ct. App. 1992) (holding a defendant establishes a prima facie case of discrimination if no members of a cognizable racial group are left on a jury as a result of the prosecutor's exercise of peremptory challenge, even when alternate jurors who remain on the venire are members of a cognizable racial group); *State v. Holloway*, 209 Conn. 636, 553 A.2d 166 (1989) (citing with approval the rule that after a party objects to a strike, the proponent of the strike must offer a racially neutral explanation); *Highler v. State*, 854 N.E.2d 823, 827 (Ind. 2006) (stating the removal of the only African-American juror raises an inference that the strike was racially motivated); *State*

v. Parker, 836 S.W.2d 930, 940 (Mo. 1992) (holding that once a defendant raises a *Batson* challenge, the trial court must conduct an evidentiary hearing to determine whether the prosecutor's strike was racially motivated); *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244, 247 (2006) ("After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation.").

Adopting a bright line rule similar to that which has been adopted by the above jurisdictions would provide a significant benefit in that the voir dire process would remain fair and nondiscriminatory, while ensuring that parties are able to continue exercising legitimate peremptory challenges. This rule, additionally, would prevent speculation after the fact about the basis for potentially discriminatory peremptory strikes and safeguard the Fourteenth Amendment protections established in *Batson*. As such, I would hold that when the defendant objects, the State must provide a race-neutral reason for exercising a peremptory challenge against the only remaining minority member of the defendant's cognizable racial group or the only remaining minority in the venire. I would hold, in addition, that the trial court clearly erred in considering "systematic discrimination" as part of its *Batson* analysis. I would, therefore, reverse Rhone's conviction and sentence and remand for a new trial.

For these reasons, I respectfully dissent.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice Mary E. Fairhurst

Justice Richard B. Sanders

Justice Tom Chambers