IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of	)	No. 101204-7
THEODORE R. RHONE,	)	EN BANC
Petitioner.	)	Filed: May 11, 2023

OWENS, J.—All defendants have a right to be tried before a jury selected by nondiscriminatory criteria. *Batson v. Kentucky*, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Race discrimination in jury selection violates the Fourteenth Amendment's equal protection guaranty. *Id.*; *State v. Jefferson*, 192 Wn.2d 225, 242-43, 429 P.3d 467 (2018); U.S. CONST. amend. XIV. *Batson*, while designed to remove racism from the jury selection process, has fallen short of its objective. *See Miller-El v. Dretke*, 545 U.S. 231, 267-69, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Breyer, J., concurring). This court has since taken steps to increase the effectiveness of *Batson* and protect defendants and prospective jurors from implicit racial discrimination. *See City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017)

(modifying the first step of *Batson* to establish a prima facie case of discrimination when the last person of a racially cognizable group is struck from the jury venire); *Jefferson*, 192 Wn.2d at 252 (modifying the third step of *Batson* to require trial courts to "ask if an objective observer could view race as a factor in the use of the peremptory challenge"); GR 37 (seeking to eliminate bias in peremptory challenges by requiring an objective evaluation in light of implicit, institutional, and unconscious biases and listing presumptively invalid reasons that have historically been associated with improper discrimination).

In his direct appeal, petitioner Theodore Rhone asked this court to adopt a bright line rule establishing a prima facie case of discrimination when the State peremptorily strikes the last member of a racially cognizable group from a jury venire. Without the benefit of the considerable knowledge we have gained regarding the impact of implicit bias in jury selection, a fractured majority of this court declined to adopt Rhone's proposed rule in 2010. But seven years later, we did. *Erickson*, 188 Wn.2d 721. Although this case comes to us as a personal restraint petition (PRP), the central issue is our 2010 decision in Rhone's own case. We take this opportunity to revisit and correct that decision. Given the unique factual and procedural history of this case and in the interest of justice, we recall our prior mandate, reverse Rhone's convictions, and remand for a new trial.

FACTS

Rhone proceeded to trial on charges of first degree robbery, unlawful possession of a controlled substance with intent to deliver, unlawful possession of a firearm, and bail jumping. During jury selection, the parties agreed to remove one of the two Black venire jurors in the 41-member pool for cause. The prosecution—using a peremptory challenge—struck the remaining Black venire juror. After the court swore in the jury, Rhone made the following statement:

> I don't mean to be facetious or disrespectful or a burden to the Court. However, I do want a jury of my peers. And I notice that [the prosecutor] took away the [B]lack, African-American, man off the jury.
>
> Also, if I can't have—I would like to have someone that represents my culture as well as your culture. To have this the way it is . . . seems unfair to me. It's not a jury of my peers. . . . I am an African-American [B]lack male, 48 years old. I would like someone of culture, of color, that has—perhaps may have had to deal with [improprieties] and so forth, to understand what's going on and what could be happening in this trial.

State v. Rhone, 168 Wn.2d 645, 649, 229 P.3d 752 (2010) (*Rhone* II) (plurality opinion) (quoting 6 Verbatim Rep. of Proc. (VRP) (Apr. 28, 2005) at 439 (Wash. No. 80037-5 (2006))), *abrogated by Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

The court understood Rhone's statement as a *Batson* challenge, found no prima facie case of discrimination, and declined the State's offer to respond. The court explained:

> "Here the defendant has not provided this Court with any evidence of circumstances raising an inference of discrimination by the prosecution.

> The defendant merely makes a bare assertion that there are no African-Americans on this jury."

Id. at 650 (quoting 7 VRP (Apr. 28, 2005) at 452). The court continued:

> The Court notes that there were only two African Americans in the entire . . . panel. One was excused for cause based on agreement by the defense. Therefore, out of a panel of 41, there was only one African American in the pool.

7 VRP (Apr. 28, 2005) at 452-53. And the court added:

> "The mere fact that [sic] State exercised its preemptory [sic] on that African-American, without more, is insufficient to establish a prima facie case of discrimination.

Rhone II, 168 Wn.2d at 650 (quoting 7 VRP (Apr. 28, 2005) at 453). After the court denied Rhone's request for a new jury panel, the jury convicted him of all charges. Based on his stipulation to three prior most serious offenses, Rhone received a life sentence without the possibility of parole for two of his convictions. *State v. Rhone*, noted at 137 Wn. App. 1046, 2007 WL 831725, at *3 (*Rhone* I).

Rhone appealed, and the Court of Appeals affirmed, holding that Rhone failed to prove a prima facie case under step one of *Batson*. *Id.* at *7. This court granted review of the *Batson* issue only. *Rhone* II, 168 Wn.2d at 648. Rhone argued for a bright line rule announcing that a defendant establishes a prima facie case of discrimination whenever a prosecutor peremptorily challenges the only remaining venire member of a racially cognizable group. *Id.* at 652. Four justices declined to adopt or apply a bright line rule to Rhone's case, reasoning that this court had recently

reaffirmed that a trial court *may*, *but is not required to*, find a prima facie case in such circumstances. *Id.* at 653 (quoting *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009)).

The four-justice dissent would have adopted a bright line rule establishing a prima facie case of discrimination when "the last remaining minority member of the venire is peremptorily challenged." *Id.* at 661 (Alexander, J., dissenting). The ninth justice concurred with the majority but stated, "[G]oing forward, I agree with the rule advocated by the dissent." *Id.* at 658 (Madsen, C.J., concurring).[1]

In 2017, this court substantially adopted the bright line rule Rhone proposed on direct appeal. *Erickson*, 188 Wn.2d 721. Rhone now seeks collateral relief based on *Erickson*. The Court of Appeals held that Rhone's PRP is not time barred because *Erickson* is a significant, material, and retroactive change in the law, and it transferred the petition to this court as successive. *In re Pers. Restraint of Rhone*, 23 Wn. App. 2d 307, 313, 319-22, 516 P.3d 401 (2022) (citing RCW 10.73.100(6)). We retained the matter for hearing.

[1] In *State v. Meredith*, 178 Wn.2d 180, 182, 306 P.3d 942 (2013), *abrogated by Erickson*, 188 Wn.2d 721, we clarified that the rule advocated by the *Rhone* II dissent was not precedent. Chief Justice Madsen expressed approval of a bright line rule in the future but agreed not to adopt such a rule in Rhone's case. *Id.* at 184.

ISSUE

Should the court recall the mandate in Rhone's case and reverse based on the bright line rule he argued for on direct appeal, which was later adopted in *Erickson*?

ANALYSIS

Batson sets forth a three-part test to address unconstitutional peremptory strikes: (1) the party challenging the strike must establish a prima facie case that "'gives rise to an inference of discriminatory purpose,'" (2) if a prima facie case is established, the striking party must provide an adequate race-neutral explanation, and (3) if a race-neutral explanation is provided, the trial court must weigh the circumstances to decide whether the strike was racially motivated. *Erickson*, 188 Wn.2d at 726-27 (quoting *Batson*, 476 U.S. at 94). The *Batson* framework has been roundly criticized for its inefficacy at prohibiting discriminatory peremptory strikes. *See Miller-El*, 545 U.S. at 268-72 (Breyer, J., concurring) (surveying studies finding *Batson* challenges rarely succeed). Recognizing that racism continues to plague jury selection,[2] this court has altered the *Batson* test to better effectuate its goals. *Erickson*, 188 Wn.2d at 733-34; *Jefferson*, 192 Wn.2d at 249-51.

[2] EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION (2021) (explaining that racially discriminatory jury selection inflicts harm on excluded jurors, produces wrongful convictions, and compromises the integrity of the legal system), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [https://perma.cc/N965-RCGS].

Our decisions strengthening *Batson* protections came after Rhone's direct appeal—and we embraced the very argument he advanced on appeal. *See Erickson*, 188 Wn.2d at 732. As a result, Rhone was placed in the unfortunate position of seeking collateral relief to revisit the question of whether his jury selection process was unconstitutional. The interests of justice therefore require us to recall our mandate in *Rhone* II and grant Rhone relief. RAP 2.5(c)(2); RAP 12.7(d); RAP 12.9.[3] It is undeniable that our understanding of the impact of implicit racial bias on jury selection has changed since our 2010 decision. "We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole." Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/QNT4-H5P7]. Recalling the mandate in the unique circumstances of Rhone's case accomplishes this mission; we must allow him to benefit from the rule *he proposed* that ultimately became the law in this state.

[3] To the extent this disposition waives or alters any provision of the appellate rules, we do so to serve the ends of justice. RAP 1.2(a), (c). To be clear, our decision today gives Rhone the benefit of the burden-shifting rule he proposed on direct appeal. *See Rhone* II, 168 Wn.2d at 652. It does not retroactively apply any precedent.

CONCLUSION

We recall the *Rhone* II mandate, reverse Rhone's convictions,[4] and remand for a new trial.

Owens, J.

WE CONCUR:

González, C.J.

Gordon McCloud, J.

Johnson, J.

Yu, J.

Madsen, J.

Montoya-Lewis, J.

Stephens, J.

Whitener, J.

[4] Two of Rhone's convictions have been vacated on other grounds. *State v. Rhone*, No. 46960-0-II, slip op. (Wash. Ct. App. July 6, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2046960-0-II%20Unpublished%20Opinion.pdf.