

188 Wash.2d 721
Supreme Court of Washington.

CITY OF **SEATTLE**, Respondent,
v.
Matthew Alex **ERICKSON**, Petitioner.

No. 93408-8
|
Argued March 14, 2017
|
Filed July 6, 2017

Synopsis

Background: Defendant appealed from his convictions in the **Seattle** Municipal Court of unlawful use of a weapon and resisting arrest. The Superior Court, King County, Samuel S. Chung, J., affirmed the convictions, and defendant petitioned for discretionary review.

Holdings: The Supreme Court, en banc, Owens, J., held that:

[1] in a matter of first impression, defendant did not waive his right to a *Batson* challenge when he objected to the striking of a black juror after the jury was empaneled but before testimony was heard;

[2] the Superior Court erred by improperly relying on the absence of a pattern and the presence of other nonwhite jurors to come to its conclusion that under the first step of the *Batson* analysis, defendant failed to make a prima facie showing of discrimination;

[3] when ruling on a *Batson* challenge, a trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury, abrogating *State v. Saintcalle*, 178 Wash.2d at 51, 309 P.3d 326, *State v. Meredith*, 178 Wash.2d 180, 306 P.3d 942, and *State v. Rhone*, 168 Wash.2d 645, 229 P.3d 752; and

[4] remand for a new trial was warranted.

Reversed and remanded.

Stephens, J., filed concurring opinion, joined by Fairhurst, C.J.

Yu, J., filed concurring opinion, joined by González, J.

West Headnotes (11)

[1] Jury

🔑 Peremptory challenges

To make a successful *Batson* challenge, a defendant must: first, establish a prima facie case that gives rise to an inference of discriminatory purpose; second, if a prima facie case is made, the burden shifts to the prosecutor to provide an adequate, race-neutral justification for the strike, and; 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.

6 Cases that cite this headnote

[2] Criminal Law

🔑 Summoning, impaneling, or selection of jury

Criminal Law

🔑 Jury selection

A trial judge's decision under the original *Batson* test is entitled great deference and will be reversed only if the defendant can show it was clearly erroneous; however, the Supreme Court has great discretion to amend or replace the *Batson* requirements if circumstances so require.

[3] Jury

🔑 Peremptory challenges

Defendant charged with unlawful use of a weapon and resisting arrest did not waive his right to a *Batson* challenge when he objected to the striking of a black juror after the jury was empaneled but before testimony was heard; defendant noted that he made his objection as soon as the parties were outside the presence of the jury, and while it may have limited the municipal court's options, it did not remove them

completely, the judge still had the opportunity to declare a mistrial to address any error on the prosecution's part, and when defendant did make his challenge, no other motions had been filed, no testimony had been heard, and no evidence had been admitted.

[4] **Criminal Law**

🔑 Presentation of questions in general

Objections must generally be raised at a time that will afford the trial court an opportunity to correct the error.

3 Cases that cite this headnote

[5] **Criminal Law**

🔑 Summoning, impaneling, or selection of jury

While trial courts have traditionally given great discretion to findings of prima facie discrimination under *Batson*, and such findings are reviewed for abuse of that discretion, the Supreme Court also has the power to determine, under appropriate circumstances, whether the traditional *Batson* analysis should be amended or replaced to ensure the promise of equal protection. U.S. Const. Amend. 14.

[6] **Jury**

🔑 Peremptory challenges

Trial court erred by improperly relying on the absence of a pattern and the presence of other nonwhite jurors to come to its conclusion that under the first step of the *Batson* analysis, defendant failed to make a prima facie showing of discrimination with regard to the State's striking of the only black juror; defendant made a prima facie showing of discrimination when he challenged the State's peremptory strike based on the fact that the struck juror was the only black juror on the panel, and that single strike, absent other circumstances showing legitimate grounds, was enough to trigger a prima facie showing.

5 Cases that cite this headnote

[7] **Jury**

🔑 Peremptory challenges

Batson is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury; in addition, a *Batson* violation can occur if even one juror is struck, and although a pattern is informative, it is not necessary.

[8] **Jury**

🔑 Peremptory challenges

When ruling on a *Batson* challenge, the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury; 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, abrogating *State v. Saintcalle*, 178 Wash.2d at 51, 309 P.3d 326, *State v. Meredith*, 178 Wash.2d 180, 306 P.3d 942, and *State v. Rhone*, 168 Wash.2d 645, 229 P.3d 752.

5 Cases that cite this headnote

[9] **Criminal Law**

🔑 Ordering new trial

Remand for a new trial was warranted after Supreme Court adopted a new bright-line rule, and found a prima facie case of discrimination in the State's strike of the only African American juror in prosecution for unlawful use of a weapon and resisting arrest; the trial court's in-person examination of the credibility and demeanor of the prosecutor and jury would be essential in a *Batson* analysis, the trial judge was no longer on the bench, and even if he was, it would be unreasonable to require him to recall and evaluate demeanor after more than two years, or to recall the jury.

1 Cases that cite this headnote

[10] **Jury**

🔑 Peremptory challenges

The trial court's in-person examination of the credibility and demeanor of the prosecutor and jury is essential in a *Batson* analysis.

[11] Criminal Law

🔑 Ordering new trial

Remand for a new trial is generally appropriate when other rights, including trial rights, have been violated.

****1125** Appeal from King County Superior Court, No. 14-1-06819-7, Honorable Samuel S. Chung.

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Opinion

OWENS, J.

***723** ¶1 In 2013, Matthew **Erickson**, a black man, was charged in **Seattle** Municipal Court with unlawful use of a weapon and resisting arrest. After voir dire, the city of **Seattle** (City) exercised a peremptory challenge against the only black juror on the jury panel. After the jury was empaneled and excused from the courthouse with the rest of the venire, **Erickson** objected to the peremptory challenge, claiming the strike was racially motivated. The court found that there was no prima facie showing of racial discrimination and overruled **Erickson**'s objection.

¶2 *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986), guarantees a jury selection process free from racial animus. Yet, we have noted that our *Batson* protections are not robust enough to effectively combat racial discrimination during jury selection. We have repeatedly signaled our desire to better effectuate the equal protection guaranties espoused in *Batson*. However, we had not yet found the opportunity to do so. Now, by explicitly asking this court to amend our *Batson* analysis and squarely ***724** briefing the issue, **Erickson** has provided that opportunity. As a threshold matter, we find that **Erickson**'s *Batson* challenge was timely. We further adopt the bright-line rule first espoused by the dissent in *State v. Rhone*, 168 Wash.2d 645, 652 n.5, 229 P.3d 752 (2010) (plurality opinion). We amend our *Batson* framework and hold that the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court.

FACTS AND PROCEDURAL HISTORY

¶3 In June 2013, Officer Kevin Oshikawa Clay observed **Erickson** near Westlake Park in **Seattle**, Washington. He testified that **Erickson** was walking down the sidewalk backward and with a knife drawn, followed by several other individuals. Clay and his partner followed **Erickson** into the Pacific Place shopping center, drew their weapons, and ordered **Erickson** to drop the knife. **Erickson** complied, but refused to follow the officers' instructions to lay facedown on the floor. After a prolonged physical struggle throughout which **Erickson** refused the officers' commands and resisted their physical efforts to restrain him, the officers subdued him and took him into custody. He was charged in **Seattle** Municipal Court with unlawful use of a weapon and resisting arrest.

¶4 After voir dire, each party exercised three peremptory strikes. The City used one of those strikes against juror 5, the only black juror on the panel, and **Erickson** made no objections at the time.¹ The six-person jury was subsequently seated, the rest of the venire excused, the jury sworn in, and the jury dismissed for the day. **Erickson** then objected to *725 the striking of juror 5 pursuant to *Batson*, noting it was the first opportunity he had to do so without being “directly in front of the jury.” 1 Verbatim Report of Proceedings (VRP) (Oct. 21, 2014) at 180.

¶5 **Erickson** argued that the City violated *Batson* when it struck juror 5. He claimed that the striking of the only juror from a cognizable racial group made a prima facie case that the juror was struck based on race. The City rebutted that **Erickson** had waived his right to a *Batson* challenge, claiming the objection was brought after the venire had been dismissed and the jury excused for the day, thereby making the objection untimely. It further argued that **Erickson** had not made a prima facie case of discrimination because *Batson* stands for the “proposition that there needed to be a pattern or practice of discrimination.” 2 VRP (Oct. 22, 2014) at 200-01. It claimed the act of striking a single juror could not constitute such a pattern.

1127 ¶6 The municipal court found that **Erickson had not waived the *Batson* challenge. However, it also found that **Erickson** had not presented a prima facie case for discrimination. Though juror 5 may have been the only black juror, there were a number of other jurors from “constitutionally cognizable groups” who remained on both the panel and venire after juror 5’s strike. 2 VRP (Oct. 22, 2014) at 206-07. The court and the parties specifically identified five other individuals as “people of color,” but did not explicitly speculate about those individuals’ racial backgrounds or identities. *Id.* at 193-95, 205-07.

¶7 The court conceded that striking a single juror of a particular race could, under certain circumstances, rise to the level of prima facie discrimination. However, the court noted that it saw no such circumstances in this case. Because the municipal court ruled against **Erickson** on the first step of the *Batson* analysis, it terminated the analysis and allowed the trial to move forward. **Erickson** was convicted on both counts.

*726 ¶8 **Erickson** appealed the municipal court’s decision to King County Superior Court. The superior court affirmed the municipal court, finding that the circumstances

surrounding the challenge did not raise any inference that the juror was stricken because of his race. The judge did not address whether **Erickson**’s motion was timely.

¶9 **Erickson** then petitioned the Court of Appeals for discretionary review, which it denied. His motion to modify the commissioner’s ruling was similarly denied. He finally petitioned this court for discretionary review, which was granted. *City of Seattle v. Erickson*, 187 Wash.2d 1008, 386 P.3d 1098 (2017).

ISSUES

¶10 1. Did **Erickson** waive his right to a *Batson* challenge when he objected after the jury was empaneled and both the jury and venire excused?

¶11 2. Did the trial court err in finding that **Erickson** did not make a prima facie showing of racial discrimination when the City struck juror 5?

STANDARD OF REVIEW

¶12 On one level, this case hinges on a procedural question about the appropriate timing for a challenge to a peremptory strike under *Batson*. On another level, this case represents the struggle to defend our equal protection guaranties and to continue fighting against racial discrimination in the jury selection process.

[1] ¶13 *Batson* created a three-part test to replace the “‘crippling burden of proof’ ” previously required when attempting to prove a racially motivated strike. *State v. Saintcalle*, 178 Wash.2d 34, 43-44, 309 P.3d 326 (2013) (plurality opinion) (quoting *Batson*, 476 U.S. at 92, 106 S.Ct. 1712). First, the defendant must establish a prima facie case that “gives rise to an inference of discriminatory purpose.” *Batson*, 476 U.S. at 94, 106 S.Ct. 1712. Second, if a *727 prima facie case is made, 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. *Johnson v. California*, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed. 2d 129 (2005) (quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed. 2d 834 (1995) (per curiam)).

[2] ¶14 Though the United States Supreme Court provided this framework, it left the states to establish rules for the “particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Batson*, 476 U.S. at 99, 106 S.Ct. 1712. These local rules can define when an objection is timely. *Ford v. Georgia*, 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed. 2d 935 (1991). A trial judge’s decision under the original *Batson* test is entitled great deference and will be reversed only if the defendant can show it was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991). However, this court has great discretion to amend or replace the *Batson* requirements if circumstances so require. See *Saintcalle*, 178 Wash.2d at 51, 309 P.3d 326.

****1128** ¶15 As a threshold matter, we first must decide whether **Erickson** can bring a *Batson* challenge after the jury is empaneled and the rest of the venire excused. We then decide whether the municipal court erred when it found that **Erickson** had not established a prima facie case of racial discrimination in violation of equal protection. WASH. CONST. art. I, § 12. We find that **Erickson**’s objection was timely and that the municipal court erred when it failed to infer racial bias from the dismissal of the only black juror on the jury panel.

***728** 1. **Erickson** Did Not Waive His Right to a *Batson* Challenge When He Objected to the Striking of a Juror after the Jury Was Empaneled but before Testimony Was Heard

[3] [4] ¶16 As noted above, the United States Supreme Court has left it to state courts and legislatures to determine the procedure surrounding *Batson* challenges. *Ford*, 498 U.S. at 423, 111 S.Ct. 850. This court has not yet ruled on when a defendant may bring an objection under *Batson*. However, objections must generally be raised “at a time that will afford the [trial] court an opportunity to correct [the error].” *State v. Wicke*, 91 Wash.2d 638, 642, 591 P.2d 452 (1979) (citing *State v. Fagalde*, 85 Wash.2d 730, 539 P.2d 86 (1975)). In the past, this court has reviewed a *Batson* challenge brought after the jury was empaneled, though we declined to review the timeliness issue. *Rhone*, 168 Wash.2d at 652 n.5, 229 P.3d 752. We now choose to address it.

¶17 Several state and federal jurisdictions allow *Batson* challenges even after a jury has been selected and sworn in. Virginia has developed a statutory rule that allows a challenge after the jury has been sworn “with leave of court.” *Lewis v. Commonwealth*, 25 Va. App. 745, 749, 492 S.E.2d 492

(1997) (citing VA. CODE ANN. § 8.01-352). Texas, too, has developed a rule allowing a defendant to bring a challenge after the jury is empaneled if the claim is “so novel” or the law “so well settled” as to require it. *Jones v. Martin K. Eby Constr. Co.*, 841 S.W.2d 426, 428 (Tex. Ct. App. 1992).

¶18 A number of federal courts also allow *Batson* challenges after the jury has been sworn. In *United States v. Thompson*, the Ninth Circuit upheld a *Batson* challenge as timely even though it came after the swearing-in of the jury, noting the objectionable action “might not have been apparent until the jury was selected.” 827 F.2d 1254, 1257 (9th Cir. 1987). That court later clarified its ruling, indicating that *Batson* challenges can be proper after a jury is sworn, ***729** but “must occur as soon as possible.” *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991) (citing *Thompson*, 827 F.2d at 1257). The Seventh Circuit similarly allows *Batson* challenges after the swearing of a jury if it is the party’s earliest opportunity. *United States v. Williams*, 819 F.3d 1026, 1029 (7th Cir. 2016). In contrast, the Eighth Circuit gives deference to the trial courts in determining whether a *Batson* challenge brought after jury selection is appropriate. See *Reynolds v. City of Little Rock*, 893 F.2d 1004, 1009 (8th Cir. 1990).

¶19 We have not ruled on the timeliness of *Batson* challenges. However, finding the above approaches persuasive, we now hold that **Erickson**’s *Batson* challenge was timely. Read together, the above decisions have adopted rules requiring that a *Batson* challenge be brought at the earliest reasonable time while the trial court still has the ability to remedy the wrong. These cases recognize that judges and parties do not have instantaneous reaction time, and so have given both trial courts and litigants some lenience to bring *Batson* challenges after the jury was sworn. This is in line with our own jurisprudence. Objections should generally be brought when the trial court has the ability to remedy the error, and allowing some challenges after the swearing in of the jury does not offend that ability. *Wicke*, 91 Wash.2d at 642, 591 P.2d 452.

¶20 In this case, **Erickson** did not bring his objection until just after the jury had been excused for the day and the venire dismissed. He noted that this was the first time the parties had been out of the presence of the jury. As the municipal court acknowledged, this limited the court’s remedial options, but it did not remove them completely. Had the ****1129** challenge been brought sooner and had the judge sided with **Erickson**, the judge may have placed the stricken juror back on the panel or dissolved the venire and called a new jury pool. Though

these options were unavailable once the jury was sworn in, the judge could still declare a mistrial to address any error on the prosecution's part. When **Erickson** *730 made his challenge, no other motions had been filed, no testimony heard, and no evidence admitted. The timing was not ideal, but the challenge was raised when the trial court still had an opportunity to correct it. We find that even though **Erickson** brought his challenge after the jury was empaneled, the trial court still had adequate ability to remedy any error. Therefore, **Erickson** made a timely challenge and we continue to the second issue for review.

2. *The Municipal Court Erred When It Found That **Erickson** Had Not Provided a Prima Facie Case of Racial Discrimination in the Removal of Juror 5*

[5] ¶21 As noted above, the United States Supreme Court has left it to the states to provide *Batson* procedures. *Ford*, 498 U.S. at 423, 111 S.Ct. 850. Washington trial courts have traditionally given great discretion to findings of prima facie discrimination under *Batson*, and we review such traditional findings for abuse of that discretion. *State v. Hicks*, 163 Wash.2d 477, 490-91, 181 P.3d 831 (2008). However, we also have the power to determine, under appropriate circumstances, whether the traditional *Batson* analysis should be amended or replaced to ensure the promise of equal protection. *Saintcalle*, 178 Wash.2d at 51, 309 P.3d 326.

A. This Court Has Not Foreclosed the Possibility of Adopting a Bright-Line Rule under *Batson*

¶22 This court recognized a trial court's discretion in finding prima facie discrimination in *Hicks*. There, the trial court found a prima facie showing of discrimination after the sole black jury member was struck. 163 Wash.2d at 491, 181 P.3d 831. We found that the trial court was "well within [its] discretion" to make such a finding, noting that *Batson* affords broad leeway to trial courts when it comes to prima facie showings. *Id.* at 490-91, 181 P.3d 831. We reaffirmed this holding in *State v. Thomas*, 166 Wash.2d 380, 397, 208 P.3d 1107 (2009).

¶23 We later signaled that this rule could be subject to change under particular circumstances. In *Rhone*, the defendant *731 made a *Batson* challenge after the State struck the last remaining African American member of the jury panel. 168 Wash.2d at 648-50, 229 P.3d 752. Five justices held that the trial court did not err in not finding a prima facie case when the

sole black juror was struck. *Id.* at 655-56, 229 P.3d 752. In so doing, we declined to adopt a bright-line rule that the striking of the sole member of a particular race is a per se prima facie showing of discrimination. *Id.* at 653, 229 P.3d 752.

¶24 However, four dissenting justices and one concurring justice suggested that a bright-line rule would be appropriate. *Id.* at 661, 229 P.3d 752 (Alexander, J., dissenting), 658, 229 P.3d 752 (Madsen, C.J., concurring). The dissent reasoned that such a rule would not only lead to greater protection from racial discrimination, but would help effectuate Washington's elevated right to a fair jury trial. *Id.* at 661, 229 P.3d 752 (Alexander, J., dissenting). Those justices disagreed with the lead opinion that such a rule would change "a shield against discrimination into a sword cutting against the purpose of a peremptory challenge." *Id.* at 654, 229 P.3d 752 (C. Johnson, J., lead opinion). Rather, they believed it would "merely require the State to offer a race-neutral explanation for its peremptory challenge." *Id.* at 662, 229 P.3d 752 (Alexander, J., dissenting). Then Chief Justice Madsen's concurrence added that although applying such a rule would be inappropriate in the case before her, it could legitimately be applied "going forward." *Id.*

¶25 Justice Madsen clarified this statement in *State v. Meredith*, 178 Wash.2d 180, 306 P.3d 942 (2013). She reasoned that because the parties were not on notice of a bright-line rule in *Rhone* itself, it was inappropriate to apply such a rule under *Rhone*'s facts. *Id.* at 186, 306 P.3d 942 (Madsen, C.J., concurring). However, she explained that "this alternative method of establishing the prima facie case **1130 [i.e., the bright-line rule] should be available once trial courts, prosecuting attorneys, and defendants and their counsel are on notice that this rule may be followed." *Id.* at 186, 306 P.3d 942.

¶26 This court also used the majority opinion in *Meredith* to clarify the *Rhone* decision. 178 Wash.2d at 184, 306 P.3d 942. We *732 stated that despite the chief justice's concurrence expressing intent to adopt a bright-line rule going forward, it did not provide a binding, five-justice (or more) precedent. *Id.* We did not foreclose the possibility of eventually adopting such a rule. Rather, "[u]ntil [at least] five justices agree to actually adopt such a bright-line rule, the previous rule remains in effect." *Id.*

¶27 We most recently declined to alter the *Batson* framework in *Saintcalle*. There, the lead opinion noted that although this court has power to alter or replace the *Batson* framework, it

ought not to do so when “[n]either party has asked for a new standard or framework” and when the trial court and the Court of Appeals did not consider such an argument. *Saintcalle*, 178 Wash.2d at 55, 309 P.3d 326. In this case, however, **Erickson** does ask for a reworking of *Batson*. He requests that we alter the standard framework to adopt a bright-line rule. Though this court declined to do so in *Saintcalle*, *Meredith*, and *Rhone*, the possibility of altering *Batson*’s framework is not closed to us. **Erickson**’s case presents the circumstances *Rhone* alluded to, allowing us to amend our *Batson* analysis.

B. We Adopt the Bright-Line Rule
First Articulated in the *Rhone* Dissent

[6] ¶28 We now follow our signal in *Rhone* and adopt a bright-line rule. The purpose of *Batson* is to ensure that jury selection proceedings are free from racial discrimination. To create a prima facie case of racial discrimination, a defendant must first demonstrate that the struck juror is a member of a “cognizable racial group.” *Batson*, 476 U.S. at 96, 106 S.Ct. 1712. Though a pattern of striking multiple jurors may demonstrate racial animus, “[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.” *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed. 2d 175 (2008) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

¶29 Here, the trial court erred in the first step of its *Batson* analysis. The court noted that it could not discern a *733 pattern of discriminatory strikes in part because other people of color remained on the jury. It found further that because there were other people of color, the jury was “diverse.” With these findings, the court ruled **Erickson** had not provided a prima facie showing of discrimination.

[7] ¶30 The trial court improperly applied the first step of the *Batson* analysis. First, it is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African American member proves the prosecutor’s strike was not racially motivated. *Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury. *Saintcalle*, 178 Wash.2d at 42, 309 P.3d 326. In addition, 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.” *Hicks*, 163 Wash.2d at 491, 181 P.3d 831 (alteration in

original) (internal quotation marks omitted) (quoting *Batson*, 476 U.S. at 95, 106 S.Ct. 1712). Though a pattern is informative, it is not necessary.

¶31 In addition, **Erickson** made his prima facie showing of discrimination. He challenged the prosecutor’s peremptory strike based on the fact that juror 5 was the only black juror on the panel. The municipal court should have followed the example of the trial court in *Hicks*, at the least finding a prima facie case out of “ ‘an abundance of caution.’ ” *Id.* at 484, 181 P.3d 831. This single strike, absent other circumstances showing legitimate grounds, was enough to trigger a prima facie finding. The trial court improperly relied only on the absence of a pattern and the presence of other nonwhite jurors to come to its conclusion. We find the trial court erred in its first step of the *Batson* analysis and **1131 **Erickson** properly made a prima facie showing of racial discrimination.

[8] ¶32 In light of these errors, we have broad discretion to alter the *Batson* framework to more adequately recognize and defend the goals of equal protection. *734 *Saintcalle*, 178 Wash.2d at 51, 309 P.3d 326. In the past, this court has provided great discretion to the trial court when it comes to the finding of a prima facie case pursuant to a *Batson* challenge. To ensure a robust equal protection guaranty, we now limit that discretion and adopt the bright-line *Rhone* rule. We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury. 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. *Batson*, 476 U.S. at 94, 106 S.Ct. 1712; *Saintcalle*, 178 Wash.2d at 42, 309 P.3d 326.

¶33 This alteration does not change the basis for a *Batson* challenge. The evil of racial discrimination is still the evil this rule seeks to eradicate. Rather, this alteration provides parties and courts with a new tool, allowing them an alternate route to defend the protections espoused by *Batson*. A prima facie case can always be made based on overt racism or a pattern of impermissible strikes. Now, it can also be made when the sole member of a racially cognizable group is removed using a peremptory strike.

¶34 This court has long discussed a change to the *Batson* framework. In *Rhone*, we signaled our intent to change our analysis, putting both courts and parties on notice of that change. In *Meredith*, we declared that once at least

five justices agree, a bright-line rule could be adopted. In *Saintcalle*, we lamented the inadequate state of our *Batson* inquiry but declined to alter it because neither party had raised the issue. Here, the circumstance is different. **Erickson** explicitly advocates for a change to the *Batson* test. Both parties have briefed the issue and placed it squarely before us. We are not hampered with the same constraints that weighed us down in previous cases. We first find that **Erickson** has made a prima facie case of discrimination. We further take this opportunity to alter the *Batson* framework and adopt the bright-line rule described in the *Rhone* dissent.

***735** 3. *Remand for a New Trial Is the Appropriate Remedy*

[9] [10] [11] ¶35 Traditionally, the remedy for this error would be to remand to the trial court for a complete three-part analysis as the United States Supreme Court did in *Batson* itself. 476 U.S. at 100, 106 S.Ct. 1712. But **Erickson** urges that if we adopt a new bright-line rule and find a prima facie case of discrimination, we should remand for a new trial. We agree. The trial court’s in-person examination of the credibility and demeanor of the prosecutor and jury is essential in a *Batson* analysis. *Hicks*, 163 Wash.2d at 493, 181 P.3d 831. Here, the passage of time since the ruling would make this analysis problematic. **Erickson**’s presiding judge has left the **Seattle** municipal bench. Even if he had not, he heard the original challenge in October 2014, two and a half years ago. It would be unreasonable to require the trial court to recall and evaluate the prosecutor’s demeanor and credibility after that passage of time, let alone recall and evaluate the jury. It would also be inappropriate to dismiss **Erickson**’s charges outright. *See State v. Grenning*, 169 Wash.2d 47, 60, 234 P.3d 169 (2010) (“[O]utside of reversal for insufficiency of the evidence ..., outright dismissal is rarely granted.”). However, remand for a new trial is generally appropriate when other rights, including trial rights, have been violated. *See id.* at 61, 234 P.3d 169; *State v. Brightman*, 155 Wash.2d 506, 518, 122 P.3d 150 (2005); *State v. Lord*, 117 Wash.2d 829, 887, 822 P.2d 177 (1991); *State v. Russell*, 101 Wash.2d 349, 354, 678 P.2d 332 (1984). Because of the unavailability of the original trial judge and the stretch of time since the original challenge, we remand the case for a new trial.

CONCLUSION

¶36 We have repeatedly recognized that *Batson* is a particularly difficult hurdle to overcome. As Justice Wiggins

noted in *Saintcalle*, “*Batson* ... appears to have created a ***1132** ‘crippling burden,’ making it very difficult for defendants to prove discrimination even where it almost ***736** certainly exists.” 178 Wash.2d at 46, 309 P.3d 326. This underscores the need to amend our procedures and ensure that jury selection is more secure from the threat of racial prejudice. As a threshold matter, we find that **Erickson**’s *Batson* challenge was timely. More significantly, we adopt *Rhone*’s, bright-line rule. We hold that the peremptory strike of a juror who is the only member of a cognizable racial group on a jury panel constitutes a prima facie showing of racial motivation. 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.

¶37 We reverse and remand to the trial court for a new trial.

WE CONCUR:

Johnson, J.

Madsen, J.

Wiggins, J.

González, J.

Gordon McCloud, J.

STEPHENS, J. (concurring)

¶38 I find myself once again sounding “a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection.” *State v. Saintcalle*, 178 Wash.2d 34, 65, 309 P.3d 326 (2013) (Stephens, J., concurring). I continue to believe “there are better avenues than judicial opinions” for addressing this problem. *Id.* at 69, 309 P.3d 326. While I have no opposition to the majority’s decision to embrace the bright-line rule articulated in the *Rhone* dissent,¹ it is neither necessary nor particularly likely to transform the *Batson*² analysis into a useful tool for combatting racial bias injury selection.

¶39 The majority’s new rule is unnecessary because Matthew **Erickson** made a prima facie showing of intentional discrimination under the first prong of the *Batson* ***737** analysis by proving “‘something more’ than a peremptory challenge of a member of a racially cognizable group.”

State v. Rhone, 168 Wash.2d 645, 653, 229 P.3d 752 (2010) (plurality opinion) (emphasis added). Indeed, reversal under the traditional *Batson* framework was the sole argument raised in **Erickson**'s motion for discretionary review.³ See Mot. for Disc. Review (July 25, 2016) at 10-11 ("Because Mr. **Erickson** has shown 'something more'—that Juror 5 was stricken from the venire for sharing a relevant life experience steeped wholly in racism and racial tension—he has made the prima facie case for discrimination necessary to satisfy the first prong of *Batson*."). He further demonstrated that the trial court erred by considering his challenge in light of "whether there were members of any constitutionally protected group on the jury." *Id.* at 11.

¶40 Not only is the majority's new rule unnecessary to the resolution of this case, it is also unlikely to significantly reduce racial bias in jury selection because the ultimate inquiry under *Batson* remains whether the peremptory strike against a sole member of a constitutionally protected group evidenced *intentional* race discrimination. Both the majority and **Erickson** recognize that presuming discrimination under the first step in the analysis is relatively unambitious. See majority at 1129 (quoting *Rhone* dissent that its rule "'merely require[s] the State to offer a race-neutral explanation for its peremptory challenge,'" 168 Wash.2d at 662, 229 P.3d 752); Suppl. Br. of Pet'r at 18 (noting "such a bright-line rule does not create a substantial burden to any party" because "it would merely eliminate the first step of the *Batson* analysis"). Considering the range of justifications that have traditionally been recognized **1133 as race-neutral reasons for striking a juror under the second step of *Batson*, taking the first step may not represent much progress. *738 See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 & n.16, 114 S.Ct. 1419, 128 L.Ed. 2d 89 (1994) (noting peremptory strikes based on juror experiences disproportionately affecting minority groups remain race neutral absent a showing of pretext); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991) (accepting bilingual status as race-neutral reason for striking Latino juror). We are unlikely to see different outcomes unless courts are willing to more critically evaluate proffered race-neutral justifications in future cases.

¶41 Pending before this court in our administrative rule-making capacity is a proposed court rule that would alter the method for evaluating claims of race-based peremptory challenges so that the intentional discrimination that must be proved under *Batson* is no longer required. See Proposed General Rule (GR)

37 (Wash. 2017),⁴ http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537 [<https://perma.cc/YB3Q-U4ZK>]. In addition to moving away from *Batson*'s intentional discrimination inquiry, the proposed rule also recognizes that many frequently proffered race-neutral reasons for striking jurors "have operated to exclude racial and ethnic minorities from serving on juries in Washington." *Id.* at cmt. 4. It would therefore create a presumption against the validity of justifications such as "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling," or "not being a native English speaker." *Id.* at cmt. 4(b), (g). The proposed rule was formally published for comment from November 2016 through April 2017, and numerous individuals and organizations have commented on the rule. See Comments for GR 37⁵ (Wash. 2017), *739 http://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=537. The comments address not only the merits of the proposed rule, but also possible modifications, expansions or alternatives to the rule, and practical challenges to implementation. The debate has been robust and informative, and has underscored two truths: (1) *Batson* has largely failed in its promise to eliminate bias in jury selection and (2) finding a meaningful solution goes well beyond simply tinkering with the first prong of the *Batson* analysis.

¶42 The court has convened a work group to carefully examine the proposed court rule with the goal of developing a meaningful, workable approach to eliminating bias in jury selection. That process will be informed by the diverse experiences of its participants and will be able to consider far broader perspectives than can be heard in a single appeal. Unconstrained by the limitations of the *Batson* framework, the rule-making process will be able to consider important policy concerns as well as constitutional issues. It would be unfortunate if today's decision adopting the *Rhone* dissent's bright-line rule were perceived as somehow signaling that the court has "fixed the problem." I hope instead that our decision sends the clear message that this court is unanimous in its commitment to eradicate racial bias from our jury system, and that we will work with all partners in the justice system to see this through.

Fairhurst, C.J.

YU, J. (concurring)

¶43 I concur with the majority's effort to address the equal protection concerns expressed in *Batson v. Kentucky*, 476

U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986), and I applaud the adoption of a bright-line rule. However, I write separately because I am concerned that our solution assumes too much and falls short on ensuring that no juror is removed solely because of race, gender, sexual orientation, or religious beliefs. I am unable to say *740 with certainty that every peremptory challenge by the State against a person of color is motivated by racial animosity, and adopting a bright-line rule that does **1134 not extend to members of other cognizable groups does not address discrimination on any basis other than race.

¶44 In my view, the basic framework of *Batson* does not work, and the record in this case demonstrates the awkwardness and impracticability of the so-called *Batson* challenge. Thus, I now join Justice González in calling for the complete abolishment of peremptory challenges. *State v. Saintcalle*, 178 Wash.2d 34, 69-118, 309 P.3d 326 (2013) (González, J., concurring). Too many qualified persons are being excluded from jury service for no reason at all, and tinkering with court rules or issuing incremental decisions a decade at a time are unsatisfactory solutions. As Justice González wisely stated in his concurrence in *Saintcalle*,

[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.

Id. at 69-70, 309 P.3d 326 (citation omitted).

¶45 We should assume that all members of the public who adhere to a summons to appear for jury service are qualified *741 to hear a case unless otherwise shown. Our system of jury selection provides a meaningful method for any party to remove a juror “for cause” when there is a showing that a particular juror cannot be fair or impartial. *Id.* at 77, 309 P.3d 326. Because jury selection is such an important part of trial, it may be time for us to require that counsel be afforded ample time for thoughtful questioning of prospective jurors, and that removal of jurors must rest solely on causal challenges.

¶46 I respectfully concur.

González, J.

All Citations

188 Wash.2d 721, 398 P.3d 1124

Footnotes

- 1 The trial court noted it could not conclude with certainty that juror 5 was the only black individual in the venire. However, the trial court and the parties could specifically remember four other “people of color” who were seated on the panel as well as another in the venire; they identified none of them as African American. 2 Verbatim Report of Proceedings (Oct. 22, 2014) at 193-95, 206-07.
- 1 *State v. Rhone*, 168 Wash.2d 645, 658-64, 229 P.3d 752 (2010) (Alexander, J., dissenting).
- 2 *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).
- 3 **Erickson** first asked the court to embrace the *Rhone* dissent’s approach in his supplemental brief after review was granted. Suppl. Br. of Pet’r at 16-18. Amici also advocated for this approach. Br. of Amici Curiae Am. Civil Liberties Union of Wash., et al. at 15-16.
- 4 The rule was published as GR 36, but was renumbered as GR 37 due to the court’s adoption earlier this year of a court security rule numbered GR 36 (effective April 25, 2017).
- 5 See note 4.