No. 80037-5

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THEODORE R. RHONE,

Petitioner/Appellant.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to the constitutional principles of liberty and equality. The ACLU has long been dedicated to protecting the constitutional right to trial by a jury selected free of discrimination. It has submitted amicus briefs in numerous cases where that right is at stake, including *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831, *cert. denied*, *Babbs v. Washington*, 129 S. Ct. 278 (2008).

II. INTRODUCTION

The Pierce County Prosecutor peremptorily challenged the sole remaining African-American member of the venire at Petitioner Theodore Rhone's trial, in violation of Rhone's equal protection right to non-discriminatory jury selection, protected by the United States and Washington Constitutions. U.S. Const. amend. XIV; Wash. Const. art. I, § 21; *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Following well-reasoned decisions from other jurisdictions, this Court should adopt a rule that requires the State to articulate a race-neutral reason to peremptorily strike the only remaining minority from a particular constitutionally cognizable group. This rule would not impose any undue burden on the State, it would ensure an adequate record for appellate review, it would account for the realities of the demographic composition of Washington venires, and it would effectuate the Washington

Constitution's elevated protection of the right to a fair jury trial. Even if this Court declines to adopt this rule, however, the lower court erred under existing law, as the court clearly had discretion to require a race-neutral reason for the strike, and circumstances accompanying the exclusion of the last remaining African-American venire person demonstrate that Rhone established a prima facie case of discrimination.

III. STATEMENT OF THE CASE

At Rhone's trial for first degree robbery and unlawful possession of a firearm, the Pierce County Prosecutor peremptorily challenged Juror No. 19, the only remaining African-American member of the 41-person jury pool.[1] The record of voir dire strongly indicates that there was no race-neutral reason to exclude Juror No. 19 and that in fact No. 19 might have viewed the State's case favorably.

The State argued at trial that Rhone's alleged victim may have been a drug buyer. *See State v. Rhone*, No. 34063-1-II, 2007 WL 831725, at *10-11 (Wash. Ct. App., Mar. 20, 2007) (appellant claimed as error prosecutor's suggestion to jury that Rhone's victim was purchasing drugs). Accordingly, the most extensive colloquy between Juror No. 19 and the Prosecutor concerned whether the State should pursue, with equal vigor, charges against victims of perceived lesser social status. Juror No. 19 responded that he would look favorably on a prosecution regardless of the victim's status:

[1] There was one other African-American member of the jury pool, Juror No. 22, who had been previously excused for cause by agreement of the parties.

> State: Okay. What if you had a homeless person who was sitting out here, you know, in front of the courthouse? He is panhandling, let's say . . . . [L]et's presume that you are not supposed to panhandle out in front of the courthouse. What if that panhandler gets robbed? Juror No. 19, do you think the police and the prosecutor's office should investigate that case and seek justice in that case as well?
>
> No. 19: I do.

Supp. RP 93-94. The State nonetheless peremptorily challenged Juror No. 19. RP 547. Another venire person, Juror No. 33, responded to the same line of questioning the same way, and was ultimately seated as an alternate. Supp. RP 95-96, 139.[2]

Rhone, who is African American, objected to the exclusion of Juror No. 19 on the grounds that it was race-based. RP 439. The State offered to respond, but the trial court indicated no response was needed. RP 451 ("If the State feels it needs to respond, I will allow the State to respond. However, the Court is prepared to rule on the issue."). The trial court recognized Rhone's objection as a *Batson* challenge but summarily concluded that he had not established a prima facie case of discrimination.

> Therefore, out of a panel of 41, there was only one African American in the pool. The mere fact that the State exercised its peremptory on that African American, without more, is insufficient to establish a prima facie case of discrimination. Defense's request is denied.

RP 452-53. The next day, the Prosecutor attempted to justify striking

[2] Juror No. 33 was not African American. The State indicated that No. 33 was "perhaps Filipino-American." RP 547.

Juror No. 19 by suggesting *sua sponte* that some minorities—although no African Americans—remained on the jury. RP 547-48. But the Prosecutor still did not provide any race-neutral, or any other, reason for excluding Juror No. 19.

Division Two affirmed in an unpublished opinion. *See Rhone*, 2007 WL 831725, at *6-7. The court agreed that Rhone had failed to establish a prima facie case of discrimination, reasoning that the exclusion of the only remaining African-American venire member was insufficient "[i]n the absence of any other evidence indicating a discriminatory purpose." *Id.* at *7.

IV. ARGUMENT

A. Rhone Established a Prima Facie Case of Discrimination Based on the Exclusion of the Sole Remaining African-American Member of the Venire.

The Equal Protection Clause of the U.S. Constitution forbids peremptorily challenging venire members based on their race. *Batson*, 476 U.S. at 89; *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). In *Batson*, the U.S. Supreme Court established a three-step framework for evaluating defendants' claims of racial discrimination in the exercise of peremptory challenges. First, the defendant must establish a prima facie case of purposeful discrimination. To do so, the defendant "must show that he is a member of a cognizable racial group" and must show that "these facts and any other relevant circumstances raise an inference" of racial discrimination. *Batson*, 476 U.S. at 96 (internal citations omitted). Second, once a prima facie case is established, "the

burden shifts to the State to come forward with a neutral explanation for challenging" the juror. *Id.* at 97. Third, the court must evaluate the reasons given to determine "if the defendant has established purposeful discrimination." *Id.* at 98. This Court should hold that Rhone carried his prima facie burden at step one of this analysis, based on the State striking the only remaining African-American member of the venire.

1. This Court should adopt the well-reasoned rule that striking the only remaining venire person of a particular minority carries the *Batson* prima facie burden.

The burden of establishing a prima facie case under *Batson* is not "onerous" and is satisfied by significantly less than a preponderance of the evidence. *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). Consistent with the modest prima facie showing required by *Batson*, a number of states have effectively dispensed with that first step of the analysis and require the prosecution to articulate a race-neutral basis for peremptory exclusion of a minority juror. *See, e.g.*, *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244 (2006) ("After a party objects to a jury strike, the proponent of the strike *must* offer a facially race-neutral explanation.") (emphasis added); *State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992); *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166 (1989).

Courts in several other states, in a variation on that rule, hold that a defendant establishes a prima facie case if a peremptory challenge is exercised against the sole remaining member of a particular minority from

the venire. *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004) ("[T]he State used a peremptory challenge to remove the only African American venire person on the panel. Thus . . . it is clear that [defendant] made at least a prima facie showing of purposeful discrimination in the jury selection process."); *Hollamon v. State*, 312 Ark. 48, 53, 846 S.W.2d 663 (1993) ("[T]he defendant must first establish a prima facie case of purposeful discrimination, which the appellant clearly did in this case 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) ("We conclude that the prosecutor's actions here [striking the only minority in the venire] were sufficient to make out a prima facie case."); *Reynolds v. State*, 576 So. 2d 1300, 1302 (Fla. 1991) ("The act of eliminating all minority venire members, even if their number totals only one, shifts the burden to the state to justify the excusal upon a proper defense motion."); *Durham v. State*, 185 Ga. App. 163, 166, 363 S.E.2d 607 (2007) (same).

The reasoning in these cases is sound, and they implement a rule that effectuates *Batson*'s intent by creating a record allowing adequate review of the challenge. As the Connecticut Supreme Court explained in *Holloway*, requiring the State to provide race-neutral reasons in the face of a *Batson* objection "provide[s] an adequate record for appellate review [and] also aid[s] in expediting any appeal." *Holloway*, 209 Conn. at 646; *see also State v. Jones*, 293 S.C. 54, 57, 358 S.E.2d 701 (1987) (requiring

race-neutral reasons "ensure[s] a complete record for appellate review").[3]

This benefit—ensuring that a complete record exists evincing the basis for a potentially discriminatory strike—comes at a very modest cost. The State must simply articulate its race-neutral basis for the challenge:

> The burden imposed on the state by this requirement is, at worst, minimal. It will entail no more than a minute or two of time. All that is required is for the trial court to ask the state why it has peremptorily excused the only minority member. All the state must do is give reasons that show a valid, nondiscriminatory purpose for the excusal . . . . These reasons will then be evaluated by the trial judge, whose determination of the matter is given deference on appeal. The slight inconvenience of this procedure clearly and unmistakably is justified as a means of preventing the injustice that would result if the only minority venire member could be peremptorily excused without accountability.

Reynolds, 576 So. 2d at 1301-02 (internal citations omitted). Rhone's case illustrates just how minimal this cost is. In response to Rhone's *Batson* challenge, the State offered to provide its reasons for the strike. RP 450. The trial judge simply declined the offer. RP 451. As a result, a savings of perhaps 90 seconds came at the cost of a potentially discriminatory strike, exercised against the single remaining member of the defendant's particular minority group, made for reasons unknown.

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[3] The need for an adequate record for appellate review is recognized under Washington law as a consideration that weighs strongly in favor of requiring the prosecution to state its basis for excusal on the record. *State v. Wright*, 78 Wn. App. 93, 101, 896 P.2d 713 (1995) ("By [stating the race-neutral basis for exclusion on the record], the prosecutor would ensure an adequate record for review should an appellate court disagree with the trial court's ruling that no prima facie case was established.").

Batson's purpose is to elicit the basis for the potentially discriminatory strike, which is otherwise left to unreliable *ex post* speculation when that basis goes unstated. *Johnson*, 545 U.S. at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."). Adopting a rule that requires the trial court to have the State provide reasons for peremptorily challenging the only remaining minority in the venire, as numerous other States have done, would come at a very modest cost to Washington courts and the State. It 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 guarantee. Moreover, as discussed below, it would take into account the demographic realities of Washington venires and the State's criminal justice system.

2. Statistical data favors requiring the State to provide a race-neutral reason for striking the sole remaining venire person from a particular minority.

Washington's criminal justice system is marked by its significantly disproportionate effect on minorities, particularly African Americans. This Court should take those disparities into account and recalibrate *Batson*'s prima facie requirements under Washington law accordingly. *State v. Evans*, 100 Wn. App. 757, 772, 998 P.2d 373 (2000) ("We hasten to add that under appropriate circumstances, these facts [demographic statistics of people of color] might be part of a showing to fulfill the requirements of the law.").

In the Washington Sentencing Guidelines Commission's most recent report, data shows "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." *See* Wash. Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* 1 (Apr. 2008), *available at* http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionality_Disparity_FY07.pdf. This follows the same trend of overrepresentation of African Americans in sentencing from 2000, 2002 and 2005. *Id.* at 2. Pierce County, where Rhone was tried, is a particularly troubling jurisdiction. The Commission's analysis shows (through its comparison of minority representation in sentencing with minority representation in a county's total population) that Pierce County fell close to the bottom of the 30 counties analyzed, ranking 25th in terms of overrepresentation of African Americans. *Id.* (Figure 4).[4] The disproportionate effect of Washington's criminal justice system on African-American defendants justifies an elevated concern for rules formulated to ensure race-neutral jury selection.

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[4] In 2006, a federal court in Washington, after considering submissions of two experts concerning racial discrimination in Washington's criminal justice system, made the following finding:

> The Court finds . . . these reports to be compelling evidence of racial discrimination and bias in Washington's criminal justice system. . . . [T]he Court is compelled to find that there is discrimination in Washington's criminal justice system on account of race.

Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E. D. Wash. July 7, 2006). *Farrakhan* is currently on appeal in the Ninth Circuit.

Although specific demographic data is not available for the racial composition of Washington juries, numerous *Batson* challenges over the past 10 years anecdotally evidence that given the small number of African-Americans within venires, peremptory removal of one or two will often result in the removal of all. *State v. Thomas*, 166 Wn.2d 380, 396, 208 P. 3d 1107 (2007) (one remaining); *Hicks*, 163 Wn.2d at 481 (same); *State v. Sadler*, 147 Wn. App. 97, 107, 193 P.3d 1108 (2008) ("peremptory challenges to . . . the only two African-American jurors on the panel"); *State v. Perry*, No. 59287-4-I, 2008 WL 176363, at *1 (Wash. Ct. App. Jan. 22, 2008) ("peremptory challenge to . . . sole prospective African-American juror"); *State v. McCoy*, Nos. 58423-5-I, 58890-7-I, 2007 WL 2757129, at *1 (Wash. Ct. App. Sept. 24, 2007) ("peremptory challenges to exclude . . . the only two African-American jurors on the venire"), *review denied*, 163 Wn.2d 1055 (2008); *State v. Nunn*, No. 34697-4-II, 2007 WL 2713734, at *6 (Wash. Ct. App. Sept. 18, 2007) ("peremptory challenge to remove the only African American juror in the jury pool"); *State v. Pugh*, No. 54112-9-I, 2005 WL 1820024, at *1 (Wash. Ct. App. Aug. 1, 2005) ("peremptory challenges against the only two African-American jurors in the venire"); *State v. Walker*, No. 2203-6-III, 2004 WL 2988608, at *2 (Wash. Ct. App. Dec. 28, 2004) ("peremptory challenge to remove the only African-American juror on the venire"); *State v. Peters*, No. 49282-9-I, 2004 WL 418099, at *4 (Wash. Ct. App. Mar. 8, 2004) ("one [African-American venire person] was excused for medical reasons, and the other two were challenged by the

State"); *State v. Bergman*, Nos. 46018-8-I, 47717-0-I, 2003 WL 21690212, at *15 (Wash. Ct. App. July 21, 2003) ("peremptory challenge to excuse . . . the only African American in the jury pool"); *State v. Jako*, No. 50498-3-I, 2003 WL 21518785, at *1 (Wash. Ct. App. July 7, 2003) ("peremptory challenge to exclude the only African-American on the voir dire panel"); *State v. Dial*, No. 27771-9-II, 2003 WL 352982 (Wash. Ct. App. Feb. 14, 2003) (striking one of only two); *State v. Neal*, No. 47513-4-I, 2001 WL 1643536, at *1 (Wash. Ct. App. Dec. 24, 2001) ("a peremptory challenge to exclude the only African American on the voir dire panel"); *State v. Vreen*, 143 Wn.2d 923, 925, 25 P.3d 236 (2001) ("only African-American on the panel"); *State v. Jorden*, 103 Wash. App. 221, 229, 11 P.3d 866 (2000) ("dismissal of the only African American juror").[5]

The *Batson* right is intended to protect the rights of these potential jurors as well as defendants. *Georgia v. McCollum*, 505 U.S. 42, 48, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) ("[T]his Court [has] recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror."). By mandating procedures that monitor improper exclusion, Washington law would ensure that the likelihood of African-American service on juries in this State is not diminished.

[5] The unpublished Court of Appeals opinions identified above are not cited "as an authority." GR 14.1(a). These cases are included only to evidence the fact that, with recurring frequency, the peremptory removal of one African-American from the venire often results in the removal of all African-Americans from the venire.

This evidence counsels heavily in favor of the modest modification to Washington's implementation of *Batson* sought by amicus. Requiring the State to articulate a reason for striking the only remaining African-American venire person would help ameliorate the bias against African Americans within the criminal justice system. And it would justly and efficaciously protect the rights of Washington citizen jurors, whose equal protection rights are offended by discriminatory jury selection practices. *McCollum*, 505 U.S. at 48.

3. The Washington Constitution favors requiring the State to provide a race-neutral reason for striking the sole remaining venire person from a particular minority.

The Washington Constitution affords greater protection to jury trials than the Sixth Amendment of the U.S. Constitution. *Hicks*, 163 Wn.2d at 492 ("Article I, section 21 states, 'The right of trial by jury shall remain inviolate . . . .' In interpreting 'inviolate,' this court has relied on *Webster's* definition: '"free from change or blemish: PURE, UNBROKEN . . . free from assault or trespass: UNTOUCHED, INTACT"'") (internal citations omitted). This greater protection, in turn, "supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group." *Id.*

To the extent that this Court is not persuaded by the reasoning from the numerous other decisions cited above, the vigorous protection of the right to a jury trial under the Washington Constitution should resolve any doubt. *Batson* established the federal constitutional *minimum* to

ensure that peremptory challenges did not interfere with equal protection rights. *See* 476 U.S. at 99 n.24. So, even though *Batson* requires a showing of "relevant circumstances" to establish a prima facie case, 476 U.S. at 96, the greater protection to a trial by jury afforded by the Washington Constitution certainly permits this Court to deem those circumstances present in a particular class of cases or to dispense with that requirement altogether. This Court should do so here, where requiring the State to articulate a race-neutral reason for attempting to strike the only remaining member of a particular minority from the venire would impose little cost and would help effectuate the protections of the Washington Constitution.

Indeed, the United States Supreme Court recently reaffirmed that there is no constitutionally protected right to a peremptory challenge. *Rivera v. Illinois*, 129 S. Ct. 1446, 1453, 173 L. Ed. 2d 320 (2009) ("[T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges."). By comparison, the Equal Protection Clause *requires* race-neutral jury selection in order to protect the accused, the jury, and the very integrity of the judicial process. *Miller-El v. Dretke*, 545 U.S. 231, 237-38, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). The balance is therefore decidedly one-sided when weighing the State's limited right to peremptory challenges against the right to race-neutral jury selection zealously protected by the Washington Constitution.

B. Rhone Established a Prima Facie Case of Discrimination Based on Existing Washington Law.

1. Washington law provides ample discretion for the trial court to require a race-neutral reason for striking a sole remaining minority from the venire.

Washington's implementation of *Batson* was recently revisited in *Hicks*, 163 Wn.2d 477, and *Thomas*, 166 Wn.2d 380. In *Hicks*, the trial court concluded that a prima facie case of discrimination had been established where the prosecution peremptorily excused the sole remaining African-American venire person. *Hicks*, 163 Wn.2d at 484, 491. This Court responded with approval, explaining that "the trial judge, in his discretion, [may] find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group." *Id*. at 492. This Court favorably acknowledged cases from other jurisdictions "that have similarly found that striking the sole remaining [minority] . . . juror may be sufficient for a prima facie case under *Batson* . . . [which] seems consistent with the Supreme Court's concern in *Batson*." *Id.* at 490-91 (footnote omitted). This Court identified the "increased protection of jury trials under the Washington Constitution" as further support for the trial court's discretionary decision finding a prima facie case of discrimination. *Id.* at 492.

Thomas presented similar facts. The State had exercised a peremptory challenge to strike the lone African-American juror in the venire. 166 Wn.2d at 397. After the defendant raised a *Batson* challenge and the State proffered a race-neutral reason, the trial court concluded that the explanation was sufficient to overcome the defendant's challenge. On

review, this Court held that "[the] finding of a race-neutral motivation for striking [the juror,] after hearing arguments in support of and against, is a correct application of the law" and therefore confirmed that "a prima facie determination need not be had where the State has offered a race-neutral reason for exclusion of a juror from the venire." *Id*. at 398.

In both *Hicks* and *Thomas*, it is true, this Court did not adopt a rule requiring the State to articulate its basis for peremptorily striking the last remaining juror of a particular minority group. Instead, this Court stated in dicta that while trial courts are "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, . . . they *may*, in their discretion, recognize a prima facie case in such instances." *Hicks*, 163 Wn.2d at 490; *accord Thomas*, 166 Wn.2d at 398. But in both *Hicks* and *Thomas*, the prosecutor offered the trial court its explanation for the strike, so this Court was not confronted with the question of whether, in the absence of an explanation by the State, striking the last remaining African-American juror is sufficient to make a prima facie case under *Batson*. *See Hicks*, 163 Wn.2d at 493; *Thomas*, 166 Wn.2d at 398. In short, the question remains open and is squarely presented here.

The most just and efficient course is for this Court to hold, as many other jurisdictions have done, that whenever the State has peremptorily stricken the only remaining venire person from a particular minority group and the defendant has responded with a *Batson* challenge, the State must articulate a race-neutral reason for its strike.

2. The excusal of the only remaining African American from the venire constituted a sufficient "relevant circumstance" to require the State to provide race-neutral reasons for the challenge.

Even if this Court declines to adopt the rule discussed above, Rhone is entitled to relief. Under the "relevant circumstances" test, Rhone has established a prima facie case of discrimination.

Washington courts have identified a number of "relevant circumstances" that can support a prima facie case of discrimination. *See State v. Wright*, 78 Wn. App. 93, 100, 896 P.2d 713 (1995) (identifying, as examples, the striking of a group of jurors with race as a common characteristic, the disproportionate use of strikes, the level of a group's representation in the venire compared to the jury, the race of the defendant and the victim, past conduct of the State's attorneys, the type and manner of questions during venire, the disparate impact, and similarities between those remaining and those stricken). In addition, a trial court should "evaluate whether there is an apparent non-discriminatory explanation for a set of strikes." *Id*. at 101.

Whenever the only remaining member of the defendant's particular minority group is peremptorily stricken from the venire, many of these "relevant circumstances" automatically favor the defendant. In Rhone's case, for example, the removal of the only remaining minority from the venire (1) had the effect of striking the one-person "group" of African Americans that remained in the venire, (2) left no African-American members in the jury, and (3) resulted in the removal of the one minority venire person of the same race as the defendant. Even under the "relevant

circumstances" test, therefore, Rhone has made a prima facie case.

The particular circumstances of Juror No. 19's strike make Rhone's showing even stronger. If anything, the questioning evinced that Juror No. 19 would have viewed the State's case favorably. The juror stated that he supported criminal prosecution regardless of the status of the victim, a key consideration given that the alleged victim in Rhone's case may have been purchasing drugs. Supp. RP 93-94. Indeed, Juror No. 33 answered the State's questioning the same way as No. 19 but was seated as an alternate. Even if the State had attempted to offer a race-neutral reason for this kind of disparate treatment (and it did not), the discrepancy would be "powerful" evidence of discriminatory intent. *Miller-El*, 545 U.S. at 241, 252 ("Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not."). Certainly, that evidence is sufficient to meet the minimal showing necessary to establish a prima facie case of discrimination. *Johnson*, 545 U.S. at 170.

In any event, the Court of Appeals did not meaningfully consider any of the factors identified in *Wright* and instead rationalized the strike based on reasoning that was either speculative or unsupported. Division Two gave three reasons to affirm denial of the prima facie case: (1) "the trial court had no suspicion that the State acted with discriminatory purpose"; (2) "Rhone's own attorney did not seem to believe that a discriminatory motive existed; Rhone actually raised the issue pro se"; and (3) the strike was "not a situation in which the State used a peremptory

challenge on the only African American on the venire" or "attempt[ed] to exclude all minorities." *Rhone*, 2007 WL 831725, at *7. [6]

The first reason—the trial court's apparent lack of suspicion of a discriminatory purpose—is wholly circular and not a consideration among the "relevant considerations" that inform the prima facie inquiry. The issue on appeal was whether the trial court decided the prima facie issue *correctly*; the fact that the trial court ruled against Rhone is hardly a basis for concluding that the ruling was correct. Similarly, Division Two's second reason—that Rhone raised the *Batson* issue himself—is not a "relevant circumstance" that counts against the merits of the request. Rhone raised his *Batson* objection pro se, but there is no legal basis for penalizing Rhone for acting to protect his rights. *See People v. Partee*, 268 Ill. App. 3d 857, 866, 645 N.E.2d 414, 206 Ill. Dec. 409 (1994) (rejecting State's argument that *Batson* issue should be viewed with greater suspicion if raised by pro se petitioner instead of counsel).

Finally, Division Two's reliance on the fact that the State did not

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[6] Division Two also erroneously relied on the fact that, prior to the peremptory removal of the only remaining African American on the venire, the only other African American had been excused for cause by agreement of counsel. *Rhone*, 2007 WL 831725, at *7. Without question, excusing one venire person for cause cannot immunize a discriminatory peremptory challenge exercised against a separate venire person, and, in any event, *Batson* is concerned with the exercise of peremptory challenges, not with challenges for cause. *Batson*, 476 U.S. at 96 (prima facie case based on whether "the prosecutor has exercised *peremptory* challenges to remove from the venire members of the defendant's race") (emphasis added). So, for example, in *Hicks*, prior to the State's use of a peremptory challenge to remove the only remaining African American from the venire, two other African Americans were excused. 163 Wn.2d at 484. Yet this Court did not rely on the prior for-cause excusals as grounds for treating as proper the peremptory removal of the only remaining African-American venire person. *Id.* at 490.

"attempt to exclude all minorities," *Rhone*, 2007 WL 831725, at *7, is not a relevant circumstance that cuts in the State's favor in Rhone's case. The day after the trial court had ruled on the *Batson* issue, the State attempted to justify the excusal of No. 19 by reference to the racial composition of the empanelled jury. RP 547. But the fact that other minorities might have remained on the jury after the excusal of the only remaining African American does not help the State, because the jury still lacked a single African-American member. *See Wright*, 78 Wn. App. at 100 (identifying as a relevant circumstance the "[s]imilarities between those individuals who remain on the jury and those who have been struck"). And it is telling that the State painstakingly avoided discussion of the actual questioning of Juror No. 19, likely because the record from the voir dire confirms that No. 19 provided answers consistent with venire members who remained on the jury. Supp. RP 93-96, 139.

In short, the trial court and Division Two erred in concluding that Rhone had failed to establish a prima facie case of discrimination under *Batson*. Even under the "relevant circumstances" test, Rhone established a prima facie case of discrimination and therefore was constitutionally entitled to an explanation.

V. CONCLUSION

This Court should hold that removing the only remaining member of a particular minority from the venire is sufficient to carry a defendant's prima facie burden and require the State to provide race-neutral reasons for the challenge. Because Rhone's trial was allowed to proceed after the

improper excusal of the only African-American juror left on the venire, this Court should reverse the Court of Appeals and remand for a new trial.

DATED: September 8, 2009

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CERTIFICATE OF SERVICE

I, Charles C. Sipos, attorney for Amicus Curiae American Civil Liberties Union of Washington, certify that on September 8, 2009, I personally served to each of the following persons a copy of the document on which this certification appears:

Rita A. Griffith (via email)	Counsel for Petitioner
Karen A. Watson (via legal messenger)	Counsel for Respondent

Signed at Seattle, Washington, this 8th day of September, 2009.

/s/ Charles C. Sipos
Charles C. Sipos