No. 86257-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIRK SAINTCALLE,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Other Authorities

A. INTRODUCTION

No one doubted that he pulled the trigger
And though they could not produce the gun
The D.A. said he was the one who did the deed
And the all-white jury agreed

Bob Dylan, "Hurricane".

Kirk Saintcalle was convicted of murder by an all-white jury after his co-defendants who pled guilty testified against him. Co-defendant Narada Roberts admitted that he "saved like fifty years by pleading guilty" and "all he had to say was that Mr. Saintcalle was the shooter." The surviving victims had told police that Mr. Saintcalle was with them upstairs when the decedent was shot downstairs by the Narada brothers, but the jury convicted Mr. Saintcalle anyway.

The jury included no African-Americans. The prosecutor struck the only black member of the venire despite acknowledging that because of the juror's empathy for both victims and defendants, she "may be representative of the perfect juror." The prosecutor also tried to exclude the only Mexican-American juror, but the trial court found the reasons pretextual and disallowed the strike.

The reasons for striking the African-American were also pretextual. The State claimed it was excluding the juror because she was sad about a friend's murder and did not know how she would react to the

evidence. But the State did not even question – let alone strike – a white juror who knew several people who had been shot. And the black woman's sympathy for a murder victim would have made her an ideal juror for the prosecution.

"[R]acial iniquities permeate [Washington's] criminal justice system."[1] Yet, in the 25 years since the United States Supreme Court decided Batson v. Kentucky, no Washington appellate court has ever reversed for the State's improper exclusion of a minority juror, even though the issue has been raised over 40 times. Appendix A.

This state is not alone in its failure to enforce the Equal Protection Clause under Batson. "Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries."[2] "[T]he dearth of recent cases in which courts have actually found racial discrimination in jury selection suggests not that such

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[1] Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System (March 2011) at 7 (hereinafter "Preliminary Report"). Available at: http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf (last visited January 5, 2012).

[2] Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (August 2010) at 4 (hereinafter "Continuing Legacy"). Available at: http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf (last visited January 5, 2012).

discrimination doesn't occur, but that the judiciary has failed to identify and remedy it."[3]

This court should remedy the discrimination that occurred here. Mr. Saintcalle was denied his Fourteenth Amendment right to equal protection under the law when the prosecutor was allowed to strike the African-American juror for pretextual reasons. A new trial should be granted.

B. ISSUE PRESENTED

The State denies a defendant equal protection of the laws when it puts him on trial before a jury from which a minority panelist has been purposefully excluded. In this case, the State attempted to obtain a minority-free jury, but the trial court denied the racially motivated strike of a Mexican-American juror. The court allowed the State to strike the African-American juror on the basis that she did not know how she would react to evidence of a murder given that she knew someone who had been murdered recently. But the State did not strike a white juror who knew people who had been shot, and the African-American venire member repeatedly stated that she could fairly weigh the facts and decide the case.

[3] Bidish Sarma, When Will Race No Longer Matter In Jury Selection?, 109 Mich. L. Rev. First Impressions 69, 72 (February 2011).

Did the exclusion of the black venire member from the jury violate the Equal Protection Clause of the Fourteenth Amendment?[4]

C. STATEMENT OF THE CASE

The Statement of the Case is set forth in the petition for review at pages 3-8. Additional relevant facts are included in the supplemental argument below.

D. SUPPLEMENTAL ARGUMENT[5]

1. The prosecutor's purposeful discrimination in jury selection resulted in the complete exclusion of African-Americans and violated Mr. Saintcalle's Fourteenth Amendment right to equal protection.

Because litigators do not explicitly exclude jurors based on race, appellate courts must engage in a searching inquiry of the record to determine whether the facially neutral reasons given are in fact pretext for discrimination. All relevant circumstances must be considered. In this

[4] The State may try to use this case to argue that the Court should overrule State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010), in which five justices held a party establishes a prima facie case of discrimination when the only remaining juror of his or her race is stricken. But the first step of the Batson analysis is not at issue here. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." State v. Hicks, 163 Wn.2d 477, 492, 181 P.3d 831 (2008). Furthermore, the State did not file an Answer, and therefore could not raise the issue now even if the case presented it. RAP 13.4(d).

[5] The petition for review sets forth the basic legal framework for the issue in this case, and provides a preliminary application.

case, the totality of relevant circumstances shows that the prosecution engaged in purposeful discrimination when it excluded the African-American juror, number 34, Anna Tolson.

First, the trial court found the prosecutor's attempted strike of the Mexican-American juror, number 10 Melissa Premone, was racially motivated and denied the strike. The reasons given for striking Ms. Premone ranged from factually inaccurate to patently offensive.

Second, the record shows that some of the reasons the prosecutor provided for striking Ms. Tolson were also pretextual, indicating that the reason the trial court accepted was pretext for race discrimination.

Third, a comparative juror analysis demonstrates the strike was racially motivated. This Court should reverse.

a. The trial court found the prosecutor engaged in purposeful discrimination when attempting to strike a Mexican-American juror, a finding highly relevant to this Court's *Batson* analysis as to the African-American juror.

The State's proffer of pretextual reasons for striking one minority juror is evidence that its strike of another minority juror was racially motivated. Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); Ali v. Hickman, 584 F.3d 1174, 1193 (9th Cir. 2009). In this case the trial court granted Mr. Saintcalle's Batson challenge when

the State tried to strike Ms. Premone,[6] the Mexican-American juror, meaning it found the reasons given were pretext for race discrimination. 3/10/09 RP 119-20. This finding is supported by the record and tends to show that the strike of Ms. Tolson, the African-American, was also racially motivated.

During a discussion on race, Ms. Premone stated that she was Mexican-American. 3/10/09 RP 76. When the prosecution tried to exercise a peremptory challenge against her, Mr. Saintcalle objected under Batson, and the State provided "race neutral" reasons. 3/10/09 RP 115-19. As the trial court found, the stated reasons were inaccurate.

Deputy Prosecuting Attorney ("DPA") Cheryl Snow[7] cited Ms. Premone's "youth", but Ms. Premone was 38 years old. 3/10/09 RP 117-19. Cf. Continuing Legacy at 34 (prosecutor described 43-year-old black juror as "somewhat aged"). She said Ms. Premone "chewed gum in open court," but the judge "didn't know she was chewing gum." 3/10/09 RP

[6] The transcripts refer to Ms. Premone as "Ms. Herman," but the minutes show her name is Melissa Premone.

[7] Cheryl Snow was also the DPA in McCoy, where she excluded a black juror who "believes police engage in racial profiling" and "said that race is an issue in every case." McCoy, 2002 WL 418033 at *2. DPA Snow is also the one this Court held committed flagrant misconduct by repeatedly telling a jury it did not have to give the defendant the benefit of the doubt. State v. Warren, 165 Wn.2d 17, 24-27, 195 P.3d 940 (2008). This Court affirmed in Warren, however, finding the error harmless. Id. at 31.

117, 119. Cf. Continuing Legacy at 17 (discussing Batson reversal in Alabama where "prosecutors offered reasons such as gum-chewing" for illegal strikes).

The prosecutor then said, "I just think that she appeared not to be very intelligent. No disrespect." 3/10/09 RP 118; Cf. Continuing Legacy at 17 ("A startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged 'low intelligence'"). DPA Snow's claim that Ms. Premone "appeared not to be very intelligent" was offensive notwithstanding the disclaimer. And it was inaccurate. Ms. Premone is a real estate broker, parent, and college student, and the record shows Ms. Premone's answers during voir dire were as intelligent as anyone's. 3/10/09 RP 119-20.

When the second deputy prosecutor proffered a hypothetical situation regarding whether he could prove he was a lawyer, he said, "Juror number ten, what are you looking for?" She responded, "Your knowledge of the law." 3/10/09 RP 31. When he asked how one could prove intent or another mental element, Ms. Premone said, "behavior, behavior, behavior." 3/10/09 RP 49-50.

In response to defense counsel's question regarding how the jury should evaluate evidence, Ms. Premone said she felt "basically the same" as the other jurors:

> I think that it's a tall order for a lot of people to put individual bias aside. Sometimes when we are dealing with really weighty issues, but I think that when you get twelve people together and – and you look at what's presented to you I think that your logic and your rational, kind of, overruling that in that instance, and you are able to tear apart most important parts of the case.

3/10/09 RP 11-12. In response to defense counsel's question regarding credibility of police witnesses, Ms. Premone said:

> I personally feel that they are trained, I agree with him [the previous juror who said police are trained to gather evidence properly]. But that doesn't take away from individual variation, and motive or intent or what kind of a police officer is a police officer wouldn't necessarily take away from that person's ability or inability to have human error or void unless unknown in his personal or behavior or recollection or I don't know that being an officer supersedes all that other humanness that he has or she.

3/10/09 RP 23-24.

When defense counsel followed up on the prosecutor's discussion of racial bias, Ms. Premone said:

> I think individually, I think, only speak in support of myself, I'm Mexican-American. Anybody knows that just looking at me. And so that kind of has posed – it's only a set of challenges or advantages, wherever you are, my background might be very different from a lot of people in that room in the way that I grew up. But I don't think that that – I don't think that that affects my ability to be reasonable or logical or the ability to separate fact from fiction, and right from wrong, and what – what's just and not just. So I think we all have that ability regardless what we came from or what our nationality is or what our skin color may be.

3/10/09 RP 76-77. These answers contradict the prosecutor's claim that Ms. Premone is "not very intelligent."

Another incredible answer DPA Snow gave in response to the Batson challenge regarding Ms. Premone was the following:

> I asked her a question during our – my first round that my response, when we walked back to our office afterwards, is that what I called the Ms. America answer. She gave an answer that was completely gobbledygook gook question [sic]. I asked her a very serious question that may have related to race or something, and it reminded me of South Carolina. What I said – I was not in any way satisfied with the answer that she gave.

3/10/09 RP 117. The only question the prosecutor asked Ms. Premone during the first round was how she felt about accomplice liability. 3/9/09(2) RP 74, 78. Some jurors had expressed complete opposition to the concept and others had no problem with it. Ms. Premone gave a more nuanced answer, saying it depended on the facts:

> I think that each situation, like number 23 said, it's really hard to determine. You can't make a blanket judgment for every case until you know who knows what and who did what and what they went – we don't know in any case whether somebody knew somebody had a gun.

3/9/09(2) RP 78. Far from being "gobbledygook," Ms. Premone's statement is essentially a correct explanation of the law of accomplice liability.[8]

[8] In contrast, DPA Snow had told the jury that accomplice liability means one is "in for a dime, in for a dollar," a characterization that is clearly incorrect. 3/9/09(2) RP 77; see State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

The trial court rejected the prosecutor's inaccurate "race neutral" reasons for attempting to exclude Mexican-American juror number 10, Melissa Premone. The fact that the prosecutor's reasons for striking Ms. Premone were pretextual is powerful evidence that her reasons for excluding Ms. Tolson, the African-American, were also pretextual.

b. Several of the reasons the prosecutor gave for striking the African-American juror were clearly pretextual, indicating that the reason the trial court accepted was also pretextual.

The prosecutor engaged in similar misrepresentations when presenting "race neutral" reasons for striking the African-American panelist, Ms. Tolson (Juror 34). For example, DPA Snow described Ms. Tolson as "very checked out," and stated, "She doesn't seem to be engaged." 3/10/09 RP 101. The characterization brings to mind Justice Marshall's observation that a party's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is sullen, or distant, a characterization that would not have come to his mind if a white juror had acted identically." Batson, 476 U.S. at 106 (Marshall, J., concurring). The Equal Justice Initiative has similarly found that prosecutors "have countered Batson claims by describing African Americans in the jury pool as inattentive." Continuing Legacy at 30.

But while the tactic is common, the prosecutor's description of Ms. Tolson as "checked out" and unengaged was not validated by the trial

court and therefore is due no deference on appeal. Snyder, 552 U.S. at 479. Furthermore, as with the prosecutor's claims regarding Ms. Premone, the claim that Ms. Tolson was "very checked out" is contrary to the record, further demonstrating that the exclusion was racially motivated. Id. at 485 (noting the "pretextual significance" of a "stated reason [that] does not hold up"); Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (explanation unworthy of credence is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive").

Ms. Tolson was extremely active during voir dire. She raised her card and spoke during the first session, telling the court she would need to check with her job to make sure she would get paid during jury service. 3/9/09(1) RP 27. After the break, she raised her card again and confirmed she would be compensated. 3/9/09(2) RP 5. She raised her card again when the judge asked if anyone knew people who work in prosecutor's offices, and yet again when the judge asked the same about defense offices. 3/9/09(2) RP 15-16. She raised her card when the court asked if anyone had strong feelings about drugs. 3/9/09(2) RP 18. She raised her card when the judge asked if anyone had health conditions to which the court should be alerted. 3/9/09(2) RP 18. Ms. Tolson later explained that because of back pain from a car accident, she would need to stand up at

least once an hour. 3/9/09(2) RP 26. In sum, she spoke or raised her card seven times during the judicial portion of voir dire. She was obviously engaged.

Next, DPA Snow conducted her voir dire, and elicited a discussion regarding unfairness in the justice system. 3/9/09(2) RP 62, 64. One juror pointed out that there was only one black panelist, so the prosecutor asked Ms. Tolson to provide her thoughts on the criminal justice system. 3/9/09(2) RP 65-66.[9] Ms. Tolson complied and gave a thoughtful answer to the question. 3/9/09(2) RP 66-67. She also confirmed that she could "listen to the facts and … follow the judge's instruction." 3/9/09(2) RP 67. Then, without prompting, she offered the additional information that she was friends with a person who had been killed recently. 3/9/09(2) RP 67-68. The prosecutor commented that because of Juror 34's empathy for both victims and defendants she "may be representative of the perfect juror." 3/9/09(2) RP 69. The prosecutor asked her if she could be fair to both sides given her recent loss, and Ms. Tolson said, "I'd like to think that I could be." 3/9/09(2) RP 70. Clearly, Ms. Tolson was fully engaged in this portion of voir dire as well.

[9] First the prosecutor asked Ms. Tolson briefly about her background. Ms. Tolson said she was a school counselor but did not want to name the school. The prosecutor said, "Is it an inner city school?" 3/9/09(2) RP 66.

The next day Ms. Tolson again participated, contrary to the prosecutor's claim that she was unengaged. Among other things, Ms. Tolson explained that despite her recent loss she felt she should serve because she is an "honest" person who "look[s] through all the facts." 3/10/09 RP 42.[10] In sum, given Juror 34's high level of participation in voir dire, the prosecutor's characterization of her as "checked out" and "not engaged" is patently incredible. See Miller-El, 545 U.S. at 244 (reversing where prosecutor mischaracterized voir dire). The more likely explanation is that the prosecutor was attempting to secure a demeanor-based finding that would insulate the Batson ruling from review.

A related reason the State provided for the strike was also pretextual. The prosecutor said she thought it was "odd" that Ms. Tolson "didn't answer the question" when the defense attorney asked whether anyone "knew somebody who was the victim of a violent crime." 3/10/09 RP 101. This justification is preposterous. Ms. Tolson knew that the attorneys and court were already aware that she knew a murder victim, because she had discussed it at length the afternoon before during the prosecutor's voir dire. There was absolutely no reason for her to raise her card again to the defense attorney's question, which was asked the very

[10] On pages 42-43 of the transcript the court reporter incorrectly describes statements made by Juror 34 as statements made by Juror 66. The context makes clear that Juror 34 is speaking.

next morning. 3/10/09 RP 15. The prosecutor was grasping at straws in trying to come up with a valid reason to exclude Ms. Tolson.

Another reason the prosecutor gave was, "we just don't want to risk losing her down the road" – a reason the State repeated on appeal. 3/10/09 RP 102. But Ms. Tolson never said she thought she might leave. She said she did not know how she would react to the evidence in the case given her friend's recent murder, but she also said she did not tend to be an emotional person. 3/9/09(2) RP 67-70; 3/10/09 RP 42-43. To the extent she might be emotional about the murder of a friend, that would tend to favor the prosecution. See Miller-El, 545 U.S. at 247 ("Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence"); Ali, 584 F.3d at 1184 (prosecutor struck black juror ostensibly because her daughter had been molested; court held this reason pretextual because to extent juror was upset about daughter's molestation, that would favor the prosecution, not the defense). And to say Ms. Tolson might get so emotional that she would abdicate her duties as a juror was rampant speculation. See Snyder, 552 U.S. at 482 (prosecutor's "highly speculative" claim that juror might find defendant guilty of a lesser-

included offense in order to be finished earlier and return to his job was not a sufficient race-neutral reason for striking the juror).[11]

The trial court found the prosecutor engaged in purposeful discrimination when she attempted to exclude the Mexican-American juror, and the record demonstrates that several of the prosecutor's stated reasons for striking the African-American juror were also pretextual. These circumstances show that the reason the trial court accepted – that Ms. Tolson did not know how she would react to the evidence given her friend's murder – was pretext for race discrimination. Snyder, 552 U.S. at 485; Miller-El, 545 U.S. at 241.

c. A comparison to the treatment of other jurors provides further evidence that the State engaged in purposeful discrimination in striking the African-American panelist.

Additional evidence of pretext exists in the failure of the prosecutor to exclude a similarly situated white juror and white jurors who espoused defense-friendly positions. If the fact that Ms. Tolson knew a shooting victim were the real reason for her dismissal, the State would also have dismissed Juror 33, who was acquainted with multiple individuals who had been shot. 3/10/09 RP 15. But number 33, who was white, served on the jury, and Ms. Tolson, who was black, did not.

[11] Furthermore, in the unlikely event that Ms. Tolson left, an alternate would have taken her place; it is not as if a mistrial would be required, as the State claimed on appeal.

3/10/09 RP 113-14. See Snyder, 552 U.S. at 479-83 (State's proffered reason for striking juror – his student-teaching obligation – failed because other members of the venire also had conflicting obligations but they were not struck); Miller-El, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.").

At a minimum, if the State was concerned about the impact of a juror's knowing shooting victims, it would have inquired further of Juror 33. But the State asked no questions of this juror regarding his acquaintances who had been shot and the effect on him. This disparate questioning further indicates that Ms. Tolson's exclusion was racially motivated. See Miller-El, 545 U.S. at 244-45 (prosecutor said he struck black juror because of his thoughts on rehabilitation, but fact that prosecutor did not inquire further of other jurors who raised similar issues showed reason was pretext for discrimination); Reed v. Quarterman, 555 F.3d 364, 379 (5th Cir. 2009) (prosecutor's disparate questioning regarding misunderstandings of the word "premeditation" indicated pretext).

That the stated race-neutral reasons were pretextual is further borne out by the fact that the prosecution did not challenge white jurors who espoused defense-friendly positions. Juror 49, for example, stated in

no uncertain terms that he or she did not believe the law of accomplice liability was fair. 3/9/09(2) RP 75.

> I don't believe it's fair. I think the person that actually did the killing is the guilty person for murder, and I think the other one should be charged with a different crime, but not – unless they are hanging on the person or somehow involved physically and, you know, holding them down or something along those lines.

3/9/09(2) RP 75. But Juror 49 served on the jury, while Ms.Tolson, who would have had empathy for victims because of her friend's recent murder, was struck. 3/10/09 RP 113-14, 123.

Jurors 23 and 24 expressed a stricter understanding of the "beyond a reasonable doubt" standard than their fellow jurors. The prosecutor asked whether the fact that a person drove to a gas station and pulled their car up to a gas pump was enough to prove that their intent was to fill their tank with gas. 3/10/09 RP 50. Several jurors said yes, while others said they would need to hear the person say they were "low on gas." 3/10/09 RP 51-53. But Juror 24 would not find they intended to get gas until they actually "went to get the gas or opened their gas can." 3/10/09 RP 52. Juror 23 agreed that the "tipping point" was when they "open the tank." 3/10/09 RP 53. Despite their defense-friendly view of the standard of proof, the State did not strike numbers 23 and 24; they served on the jury, while Ms. Tolson did not. 3/10/09 RP 111, 113-14.

In sum, the totality of circumstances shows that DPA Snow engaged in purposeful discrimination when excluding the African-American juror, number 34, Anna Tolson. The prosecutor gave outrageous "race neutral" reasons in attempting to strike the Mexican-American juror, Ms. Premone, and the trial court found that strike was racially motivated. The prosecutor also provided blatantly pretextual reasons for striking Ms. Tolson, further indicating that the reason the trial court accepted was also pretextual. Finally, the fact that Ms. Tolson was upset about her friend's murder would have been good for the prosecution, and the State neither questioned nor struck a white juror who knew shooting victims. The totality of circumstances shows the strike of Ms. Tolson was racially motivated. This Court should enforce the Equal Protection Clause and reverse.

2. The fact that the African-American juror voiced concerns about racism in the criminal justice system in response to the prosecutor's repeated questions of her is not a proper basis for exclusion.

During voir dire, the prosecutor repeatedly asked whether anyone felt certain segments of society were treated unfairly by the criminal justice system. 3/9/09(2) RP 62-64. One juror spoke up and said he thought an accused person was supposed to be tried by a jury of his peers, but that all the faces were white. 3/9/09(2) RP 65. The prosecutor then

asked the one African-American panelist, Ms. Tolson, to address the issue. 3/9/09(2) RP 65. She responded that she felt "on the spot," but she dutifully answered. 3/9/09(2) RP 66. She said that both wealth and race play a part in how a person fares in the justice system. She expressed concern about stereotypes and how young African-American men are portrayed in the news. She said, "So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what's running through their mind as they see this young man sitting up here." 3/9/10(2) RP 66-67.

Ms. Tolson's discussion of racial bias was not the prosecutor's stated reason for striking her, and therefore cannot be used to justify the exclusion post hoc. United States v. Taylor, 636 F.3d 901, 902 (7th Cir. 2011) (citing Miller-El, 545 U.S. at 252). In any event, her concerns were valid. "[R]ace and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system." Preliminary Report at i. Racial disparities exist in juvenile justice, adult sentencing, drug-law enforcement, car searches, and legal financial obligations. Id. at 1-2, 14-17.

"[T]here is substantial evidence to support the notion that racial iniquities … permeate the criminal justice system." Id. at 7. In

Washington, African-Americans are incarcerated at 6.4 times the rate of whites, and this discrepancy is not explained solely by differences in crime commission rates. Id. at 10-11.

Furthermore, "the research on bias tends to show that a juror who associates Blacks (as opposed to Whites) with a particular crime will be more likely to convict Blacks (as opposed to Whites) of that crime on the *same* evidence." Id. at 20. Consistent with what Ms. Tolson said, the Working Group found that "Whites tend to find it more difficult to associate positive concepts with Black (as opposed to White) faces or names (and the reverse is true with negative concepts)." Id. at A-17. "[B]iased decision-making artificially inflates the proportion of minorities in the criminal justice system, which likely creates more stereotypes and associations, and thus results in a negative feedback loop." Id. at 20. In sum, "when it comes to Washington State's criminal justice system, race matters."[12] Id. at 7.

It is unconstitutional to allow prosecutors to voir dire African-American panelists about race and the justice system and then to exclude them on the basis of their truthful answers. Turnbull v. State, 959 So.2d

[12] Also, the United States Department of Justice recently found that the Seattle Police Department engaged in unconstitutionally excessive use of force, and that over 50% of the excessive-force cases involved minorities. United States Department of Justice, Civil Rights Division, Investigation of the Seattle Police Department (December 16, 2011) at 6.

275, 276-78 (Fla. Ct. App. 2006). To hold otherwise would place black prospective jurors in an untenable position: either tell the truth about race discrimination and be excluded, or lie under oath. Ms. Tolson's truthful statements about racial bias cannot support the strike.

E. CONCLUSION

As explained above, the record demonstrates that the prosecution engaged in impermissible race discrimination when striking the African-American juror, Ms. Tolson. Mr. Saintcalle respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 22nd day of January, 2012.

Respectfully submitted,

/s/ Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

The following cases are cited for the factual assertion in the introduction, not as legal authority.

State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010); State v. Thomas, 166 Wn.2d 380, 208 P.3d 1107 (2009); State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008); State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995); State v. Harris, 2011 WL 3667878; State v. Meredith, 163 Wn. App. 75, 259 P.3d 324 (2011); State v. Saintcalle, 2011 WL 2520000, rev. granted, No. 86257-5 (this case); State v. Russell, 2011 WL 1238303; State v. Dubose, 2010 WL 1756369; State v. Scanlan, 2009 WL 5070420; State v. Perry, 2008 WL 176363; State v. McCoy, 2007 WL 2757129; State v. Nunn, 2007 WL 2713739; State v. Jackson, 2007 WL 1241896; State v. Reese, 2007 WL 1395437; State v. Titialii, 2005 WL 2365253; State v. Pugh, 2005 WL 1820024; State v. Walker, 2004 WL 2988608; State v. Peters, 2004 WL 418099; State v. Williams, 2003 WL 22891175; State v. Jalothot, 2003 WL 21744336; State v. Bergman, 2003 WL 21690212; State v. Jako, 2003 WL 21518785; State v. Dial, 2003 WL 352982; State v. Napoli, 2003 WL 23019945; State v. McCoy, 2002 WL 418033; State v. Nordlund, 2002 WL 31081997; State v. Mandera, 2002 WL 339351; Altamirano v. Dexter, 2001 WL 244353; State v. Neal, 2001 WL 1643536; State v. Beau Currier, 2000 WL 557858; State v. Polnett, 1999 WL 1054697; State v. Berry, 1998 WL 758894; State v. Guzman, 1998 WL 403944; State v. Garrett, 1997 WL 583617; State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996); State v. Wright, 78 Wn. App. 93, 896 P.2d 713 (1995); State v. Medrano, 80 Wn. App. 108, 906 P.2d 982 (1995); State v. Sanchez, 72 Wn. App. 821, 867 P.2d 638 (1994); State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993); State v. Powell, 55 Wn. App. 914, 781 P.2d 899 (1989) State v. Morales, 53 Wn. App. 681, 769 P.2d 878 (1989)