No. 588567-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

QIN CAO,

Plaintiff-Appellant,

v.

CITY OF SEATTLE,

Defendant/Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John P. Erlick)

APPELLANT'S OPENING BRIEF

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6. The trial court erred in when the trial court claimed the

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Batson challenge, which was made the day after the peremptory challenge against the Chinese American venire person, was untimely, even though the judge did not swear in the final jury until later in the second day, after the motion was made, and the Court continued to replace panel members throughout the day. *See* RP Vol. 4: 9.

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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a Chinese-American denied equal protection under the law when a trial court permits the only Chinese American venire person in a civil rights case to be peremptorily challenged in violation of *Batson*? (Assignments of error 1, 2, 3, 4, 5, 6, 7, 8)

2. Is a Chinese-American denied equal protection under the law when the trial court assumes the role of the challenging party by stating for the challenging party its reasons for exercising its peremptory challenge against a Chinese American venire person, which then prevents the Court from performing its designated function of evaluating the credibility of the challenging party's stated nondiscriminatory reason, and contravention of the shifting burden requirements of *Batson*? (Assignments of error 1, 2, 3, 4, 5, 6, 7, 8)

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challenges? (Assignments of error 1, 2, 5, 10, 12)

4. Is a Chinese-American denied equal protection under the law when a trial court denies a new trial after improperly permitting the only Chinese American venire person in a civil rights case to be peremptorily challenged in violation of *Batson* after the evidence shows that the challenged Chinese-American venire person, who was the first alternate, would have been seated owing to another juror's schedule conflict? (Assignment of error 9)

5. Is a Chinese-American venire person denied equal protection under the law when he is improperly stricken from a jury owing to his race and national origin? (Assignments of error 2, 3, 4, 11, 12)

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III. STATEMENT OF THE CASE

A. Claims And The Jury Selection Process

Plaintiff/Appellant Qin Cao is a Chinese American woman who is employed by the Seattle Public Library. CP 22, 13, 304, 309, 448-455. Ms. Cao is an immigrant from mainland China. CP 304. The defendant/respondent is the City of Seattle. CP 22, 13.

Ms. Cao alleges that she was discriminated against by supervisors and managers at the Seattle Public Library, which took the form of disparate treatment, harassment, and retaliation in violation of the Washington Law Against Discrimination. CP 23-31, 32, 303-304.

The case went to trial in February and March 2006, and resulted in a defense verdict. CP 179.

This appeal focuses on irregularities in the jury selection process, which denied Ms. Cao equal protection and a fair trial and also denied equal protection to a Chinese American venire person who was improperly denied the opportunity to serve as a juror in this case.

On February 14, 2006, attorneys for the parties met with the trial court in a pre-trial conference that addressed scheduling issues and motions in limine. RP Vol. 1: 4-5. At the conference, the trial court allocated the parties fourteen trial days indicating that the trial would start on February 27, 2006, and be sent to the jury by March 23, 2006. RP Vol. 1: 6-9. The trial court indicated its intention to allocate the time equally between the parties. RP Vol. 1: 9. Plaintiff's counsel indicated the possibility that plaintiff would need more time since Ms. Cao had the burden of proof. RP Vol. 1: 7. The trial court agreed to exercise some flexibility and to consider giving plaintiff an additional three hours for rebuttal. RP Vol. 1: 10. But the trial court admonished that "if the

plaintiff uses up its time on direct examination with the witnesses, I will cut short your cross-examinations." RP Vol. 1: 9.

On February 15, 2006, at a subsequent pre-trial conference, the trial court selected two alternate positions for a fourteen person jury panel at seat 3 (first alternate) and seat 7 (second alternate). RP Vol. 2: 47-48.

Jury selection began on February 27, 2006. RP Vol. 3: 34. The trial court brought sixty-nine venire persons into the courtroom. RP Vol. 3: 34. The trial court's process for seating the jury was to have venirepersons assigned numbers outside the courtroom and then to have them enter the courtroom in the assigned order filling the jury box and then the courtroom gallery. RP Vol. 2: 43-44. The process of assigning the initial numbers to venirepersons was not transparent because it occurred in the absence of the parties. *See*, RP Vol. 2: 43-46, Vol. 3: 5. In what must be considered extremely bad luck for the plaintiff, the trial court assigned the only Chinese American venire person in the jury pool (Juror No. 6) to first alternate seat number 3. CP 163.[2] Of the sixty-nine venire persons selected by the court to be in the jury pool, only four others were persons of color, and three of the four left the panel on claims of hardship. CP 157-158, RP Vol. 3: 34, 185, 191, 199-200, 167-168, 177,

[2] As will be seen, numerous opportunities for alternates to be used in this case were presented to the parties, but by that time, Jury No. 6 had been dismissed by the trial court.

140, 182, Vol. 4: 3-6. The remainder of the sixty-nine venire persons were Caucasians.[3] CP 157-158.

B. The City's Attorney And The Court Improperly Focused On The Only Chinese-American Venire Person

When the Court and counsel conducted voir dire, Juror No. 6 identified himself as an immigrant from mainland China. RP Vol. 3: 40. No other person identified him or herself as being of Chinese descent or an immigrant. RP Vol. 3: 1-215, Vol. 4: 1-42. The Court acknowledged that the juror "was the only person of Chinese descent" in the venire. RP Vol. 4: 17.

During plaintiff's voir dire, Ms. Cao's counsel asked if any jurors were children of immigrants. Juror No. 6 identified himself as such and indicated he could be fair and impartial. RP Vol. 3: 39-40. Ms. Cao's counsel asked if any jurors were aware of any cultural differences between Chinese and Japanese. Juror No. 6 volunteered that ***historically***, they ***hated*** each other. RP Vol. 3: 41-42 (emphasis added). In response to questions about whether anyone had been treated unfairly at work, Juror No. 6 stated that more than ***eight years earlier***, he was terminated perhaps

[3] There were just as many Boeing employees in the jury pool as persons of color: RP 132, Juror Nos. 7 (RP Vol. 3: 63), 24 (RP Vol. 3: 43), 33 (RP Vol. 3: 96), 43 (RP Vol. 3:92), and 62 (RP Vol. 3:113).

owing to his disability, but he was later reinstated and still works for the same company. RP Vol. 3: 42-43 (emphasis added).

The City's attorney questioned Juror No. 6 as to his potential bias in favor of the plaintiff based on his race. The City's attorney asked, "And I want to know, do you feel like you would be more sympathetic to Ms. Cao because you're both immigrants from China?" RP Vol. 3: 149. After equivocating for a moment, Juror No. 6 indicated that he would ***not*** be "a little bit more in favor of Ms. Cao before hearing all the evidence. RP Vol. 3: 150.

The Court likewise asked, "All things being equal, do you think because of that background, there is the potential for your giving Ms. Cao, if you will, the benefit of the doubt?" RP Vol. 3: 164. Juror No. 6 denied that he would treat Mr. Cao more favorably. RP Vol. 3: 164.

Neither the Court nor the defense counsel questioned Caucasian venire persons as to whether they could be fair and impartial because most of the City's witnesses were Caucasian. RP Vol. 3: 1-214, Vol. 4: 1-25.

During plaintiff's voir dire, Juror No. 57, a Caucasian Seattle Public librarian applicant, admitted that she was in the Seattle Public Library hiring pool for the librarian position, and that that fact might influence her objectivity. RP Vol. 3: 21-22, 108. In fact, Juror No. 57 admitted that she had met Human Resources Manager Clotia Robinson, an

adverse witness central to Ms. Cao's discrimination claim. RP Vol. 3: 129-130, CP 347-349, 368, 1868, 1871. Juror No. 57 also admitted that she might not be able to be impartial. RP Vol. 3: 129-130. To the Court, Juror No. 57 admitted "there could be a little niggling there" regarding her objectivity. RP Vol. 3: 166-167. Nevertheless, the Court denied plaintiff's challenge for cause of Juror No. 57. RP Vol. 3: 202-203.

The Court sought to negotiate Ms. Cao's agreement to strike Chinese-American Juror No. 6 by offering to strike Juror No. 57 if she would agree to strike both. Ms. Cao would not agree. RP Vol. 3: 202-203. Contrary to her testimony, the court stated that Juror No. 57 could be fair and impartial, and maintained the position that she could not be challenged for cause event though she had gone through the same interview process as Ms. Cao, the fairness of which was the central issue in her case. RP Vol. 3: 203-204. CP 303-304.

At the end of the first day of voir dire, the City exercised a peremptory challenge against Chinese-American Juror No. 6. RP Vol. 3: 183. The jury was then sworn. RP Vol. 3: 184-185. After the jury was sworn, two jurors sought to be excused and their requests were granted. RP Vol. 3: 191-201. They were not replaced on the first day, and the court did not fill the vacancies with the alternate jurors. RP Vol. 3: 200-201.

On the second day, Ms. Cao filed a written objection to the City's exercise of a peremptory challenge against Chinese-American Juror based on *Batson*. No. 6. CP 33-82. Rather than addressing the *Batson* issue first, the trial court sought to seat the missing jurors. RP Vol. 4: 3. The trial court's plan was to call back jurors who were in the original pool, but who had been released for reassignment to other cases. RP Vol. 3: 201-202. The trial court did not call back Juror No. 6 after receiving the *Batson* objection. RP Vol. 4: 24.

On the second day of voir dire, additional jurors sought to be excused. RP Vol. 4: 2-3. As a result, Caucasian librarian Juror No. 57 was called back. RP Vol. 4: 5. Plaintiff was forced to use a peremptory challenge against her. RP Vol. 4: 8.

The trial court addressed the *Batson* objection before the new jury was sworn. RP Vol. 4: 9. First, despite the status of the new jury as being unsworn, the trial court mistakenly found that the *Batson* challenge was untimely since it was not raised at the time of the challenge. RP Vol. 4: 9. The court viewed the issue as plaintiff trying to "unring the bell." RP Vol. 4: 15. Second, the trial court questioned whether *Batson* applies to civil proceedings (although the court agreed to consider *Batson* as applying for the purposes of the analysis). RP Vol. 4: 9. Third, the trial court mistakenly viewed *Batson* as applying only to cases where there is "a

pattern . . . of excusing all persons of Asian descent or Chinese descent." RP Vol. 4: 15. The judge stated:

> I think if you look closely -- more closely at the case law, in general *Batson* does not apply to a singular excusal of one juror of a person of a color or minority. I think it applies -- generally the case law indicates that singular excuses *Batson* does not apply.

RP Vol. 4: 15-16.

The trial court sought to apply the shifting burden analysis required by *Batson*. The trial court admitted that Ms. Cao had stated a prima facie case. RP Vol. 4: 17. But rather than requiring the City to articulate the reasons for its challenge of Juror No. 6, on the record he "anticipated" the City's "non-race-based reason for requesting a dismissal." RP Vol. 4: 10. The trial judge asserted that he believed that whether Juror No. 6 met the higher requirements for a challenge for cause "was a borderline situation." RP 443. The judge then listed two reasons that City might use to support their position. The judge noted that Juror No. 6 had been in an employment dispute that could have been related to his disability. RP Vol. 4: 10. But the trial court did not note that the employment dispute had occurred eight years ago and that Juror No. 6 was still working for the same company. RP Vol. 4: 10. The judge also noted that:

> In addition, one of the issues that this Court anticipates will be raised in this case is the potential argument that there is animosity or racial animus on the part of Japanese toward

> Chinese. We have several Japanese -- persons of Japanese descent who will be witnesses and who are employees of the Seattle Public Library. And [Juror No. 6] in his responses to counsel's inquiries noted with respect to whether there are historical and cultural differences between Chinese and Japanese, his response was basically ***they hate each other***.

RP Vol. 4: 10-11 (emphasis added). The trial court's statement of fact was wrong. Juror No. 6 had volunteered that ***historically***, they ***hated*** each other. RP Vol. 3: 41-42 (emphasis added). He never said that Chinese and Japanese currently hate each other, or that he himself hated the Japanese people. RP Vol. 3: 41-42. The City's attorney was then asked by the trial court if she wished to supplement the trial court's list of reasons. The City's attorney adopted the trial court's "anticipated" reasons: "No your Honor. You covered it. Thank you." RP Vol. 4: 11.

The trial court never analyzed or weighed the City's reasons for challenging Juror No. 6 and never evaluated the credibility of the City's adopted reasons, but instead the trial court simply found they were adequate for the purposes of *Batson* despite the existence of a prima facie case that indicated discrimination. RP Vol. 4: 9-20.

After denying the *Batson* challenge, the trial court questioned and sat an additional juror, and then swore in the final jury. RP Vol. 4: 21-25.

On March 2, 2006, after the trial had begun and evidence had been presented, Juror No. 55 indicated that he needed to travel out-of-town on a

scheduled trial day. RP Vol. 7: 3-9. The trial court stated its intent to dismiss the juror and to seat the first alternate, who would have been Juror No. 6, had he not been dismissed. RP Vol. 10: 4, Vol. 2: 47-48. Rather than seating the first alternate, Ms. Cao agreed to give up five hours of trial time and keep the juror. RP Vol. 10: 5. If the City had not stricken Juror No. 6, Ms. Cao would not have sacrificed the five hours of trial. CP 101. Having given up the trial time affected Ms. Cao's ability to cross-examine defense witnesses and to present additional rebuttal witnesses. RP Vol 26: 3, Vol. 30: 2, Vol. 31: 2.

The jury returned a verdict for the City. CP 179-180. Ms. Cao timely filed a motion for a new trial based on *Batson*. CP 87. The trial court denied the motion for a new trial adopting the earlier reasoning from its oral ruling as set forth above. CP 297-298.

IV. ARGUMENT

A. The Integrity Of The Judicial System And Equal Protection Of The Plaintiff And The Prospective Juror Are At Stake In This Appeal, But Failure To Adequately Protect The Trial Process Also Violates the Washington State Constitution and Thwarts The Legislative Purpose Of The WLAD

Peremptory challenges are based on an attorney's

> seat-of-the-pants instincts as to how particular jurors will vote. . . . Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and

> overcome their own racism on all levels-a challenge I doubt all of them can meet.

Batson, 476 U.S. at 106 (Marshall concurrence) (citations and quotation marks omitted). Discrimination in the jury selection process within the courtroom raises serious questions as to the fairness of the proceedings conducted there. "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S.Ct. 2077, 59 USLW 4574, 114 L.Ed.2d 660 (1991). Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [minorities] that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 87-88 (citations omitted).

Such discrimination harms not just the litigants, but also the citizens who are called to sit as jurors. "If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation." *Edmonson*, 500 U.S. at 628. "The injury caused by the discrimination is made more severe

because the government permits it to occur within the courthouse itself." 500 U.S. at 628.

Jurors are a check on how the government conducts trials within the walls of the courthouse, and "for a jury to perform its function as a check on official power, it must be a body drawn from the community." *Batson*, 476 U.S. at 87 n.8 (citations omitted). "A person's race simply is unrelated to his fitness as a juror." *Batson*, 476 U.S. at 87 (citations and quotation marks omitted).

Invidious discrimination in the jury selection process is a violation of equal protection in both criminal and civil proceedings. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *State v. Evans*, 100 Wn.App. 757, 758-59, 998 P.2d 373 (2000) (emphasis added) (citations omitted).

The Washington State Constitution is broad enough to protect minorities from discrimination in the jury selection process, because failure to do so makes their constitutional right to a jury trial an illusion. Const. Article 1 §§21 and 30. Here, the discrimination in the selection of the jury occurred in a race and national origin discrimination case brought by Ms. Cao under RCW 49.60.180, et.seq. ("WLAD"), which makes it "an unfair practice for any employer to . . . discriminate against any person in

compensation or in other terms or conditions of employment because of . . . race, color [or] national origin." RCW 49.60.180 (3). Thus, not only is the integrity of the judicial system and equal protection of the plaintiff and the prospective juror at stake in this appeal, but also, failure to adequately protect the trial process violates the Washington State Constitution and thwarts the legislative purpose of the WLAD, which is to deter and eradicate discrimination. *See, Mackay v. Acorn Custom Cabinetry, Inc.***,** 127 Wash.2d 302, 309, 898 P.2d 284 (1995).

B. Ms. Cao Was Denied Equal Protection Under The Law

1. Ms. Cao's *Batson* Challenge Was Timely

The trial court erroneously took the position that Ms. Cao waived her *Batson* challenge because she waited until the second day of voir dire to raise the issue in a written objection before the final jury panel was sworn. RAP 2.5 (a)(3) permits "manifest errors affecting a constitutional right" to be raised for the first time on appeal. *See also, State v. Burch*, 65 Wash.App. 828, 838-839, 830 P.2d 357 (1992). If a Batson challenge can be raised for the first time on appeal, it can surely be raised at trial before the final jury is sworn. As Ms. Cao's counsel explained to the trial court, this is an issue of constitutional magnitude that cannot be waived by delaying the objection by one day. RP Vol 4: 12-13. Since untimeliness was an apparent basis for the trial court's decision to deny Ms.Cao's

objection to the City's challenge of Chinese-American Juror No. 6, this error requires a new trial.

2. The Supreme Court Utilizes A Shifting Burden Analysis In *Batson* Challenges, Similar To That Which Is Used In Title VII Cases

The trial court utilizes a shifting burden analysis in determining whether the striking of a minority venire person violates equal protection requirements. Our Washington State Supreme Court has clearly articulated the three part test:

> *Batson* and its progeny utilize a three part test to determine whether a peremptory challenge is race based: Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

State v. Vreen, 143 Wash.2d 923, 926-927, 26 P.3d 236 (2001) (internal punctuation and citations omitted). As noted by the Court in *Batson*, this is generally the same type of process as would be followed by a trial court in conducting a shifting burden analysis under Title VII in a discrimination case. *Batson*, 476 U.S. at 94 n.18, 95 n.19, 98 n.21. Accordingly, on review, as in a Title VII case, the trial court's analysis through the shifting burden process is usually granted "great deference." *Batson*, 476 U.S. at 98 n.21.

3. Ms. Cao Stated A Prima Facie Case

Under the "great deference" standard of review, the trial court did not abuse its discretion in finding a prima facie case of discrimination under step one of the *Batson* test. To establish a prima facie case of discrimination in the jury selection process, Ms. Cao must show:

> that [s]he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson, 476 U.S. at 96 (citations and quotation marks omitted). Ms. Cao is a Chinese-American and the City's attorney exercised a peremptory challenge to remove Chinese-American Juror No. 6 from the petit jury even though he was the only Chinese-American on a panel made up of sixty-nine mostly Caucasian venire members. Moreover, the City's attorney improperly questioned Juror No. 6 about his ability to be objective because he shared Ms. Cao's race and national origin. "A person's race simply is unrelated to his fitness as a juror." *Batson*, 476 U.S. at 87 (citations and quotation marks omitted). It is a violation of

equal protection to strike a minority juror "on the false assumption that members of certain groups are unable to consider impartially the case against a member or a nonmember of their group." *Burch*, 65 Wn.App. at 836, *citing, United States v. De Gross*, 960 F.2d 1433 (9th Cir.1992) (en banc), *vacating* 913 F.2d 1417 (9th Cir.1990). The defense counsel never questioned any Caucasian venire persons as to whether they could be fair and impartial because most of the City's witnesses were Caucasian.

Other relevant circumstances include that the judge, on behalf of the City, openly asserted the prohibited discriminatory analysis:

> The fact of the matter is this is a case about discrimination; and therefore, the inquiry of an individual juror based upon their racial background is of importance, whether they be African American or whether they be Asian or whether in this instance they be Chinese.
>
> . . . .
>
> It's not a question of whether he has animosity, Mr. Sheridan. The question is whether or not he believes that some of the Japanese players or persons of Japanese descent in this case might have had animosity towards Ms. Cao. And if he's taking his personal knowledge or his personal belief or his cultural background on that issue, that could influence this case; that's information outside of the information of what other jurors may have. And that is certainly one basis.

RP Vol. 4: 18-19. This is exactly the false assumption that is prohibited by the requirements of equal protection. The opposite is true. Only diverse juries can be trusted to fully comprehend the facts supporting

claims of discrimination. These statements were made by the judge on behalf of the City and support the plaintiff's prima facie case. All of these factors support the trial court's finding that plaintiff stated a prima facie case.

In reaching his conclusion that Ms. Cao stated a prima facie case of invidious discrimination in the voir dire process, the judge clearly discounted his earlier erroneous statements regarding Ms. Cao's need to show a pattern of discrimination from other cases, which is not supported by legal precedent. Relying on Title VII as a guide, the *Batson* court specifically rejected the older case law proposition that a pattern of discrimination from other cases is a necessary part of the prima facie case. The Court held that a party "may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case.*" *Batson*, 476 U.S. at 95. This makes sense, because "for evidentiary requirements to dictate that several must suffer discrimination before one could object, would be inconsistent with the promise of equal protection to all." *Batson*, 476 U.S. at 95 (citations and quotations omitted); *and see*, *Id*. n.19 (Title VII plaintiff may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him). Thus, the trial court

properly found the existence of a prima facie case of invidious discrimination.

4. The Trial Court Impermissibly Collapsed The Three-Part *Batson* Test Into A Two-Part Test That Failed To Weigh Credibility

The process required that the trial court proceed to step two: the City was required to "articulate a neutral explanation related to the particular case to be tried" and "the trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. Specifically, after finding that Ms. Cao had stated a prima facie case, the burden of production shifted to the City to come forward with a race and national origin-neutral explanation for the peremptory challenge of Juror No. 6. Instead, the trial court collapsed the test and stated on behalf of the City its alleged race and nation origin-neutral explanation. This was error. "A court may not collapse the three-part *Batson* test into something else." *Evans*, 100 Wash. App. at 769, *citing*, *Purkett v. Elem.*, 514 U.S. 765, 767-770, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The effect in this case was to eviscerate the three-part test and for the judge to so depart from his role as a neutral arbiter presiding over the trial process, that the judge essentially became an advocate for the City.

The court's role was to assess the credibility of the City's attorney in her alleged neutral explanation for the strike of Juror No. 6 to determine if her state of mind was really discriminatory. This is a credibility determination based on her demeanor. *Batson*, 476 U.S. at 98 n.21 (citations omitted); *Evans*, 100 Wash. App. at 764 (citations omitted).

The trial court could not perform the third and most important credibility assessment function of the three-step *Batson* test because the judge did not ask the City's attorney to articulate the City's basis for striking Juror No. 6. Instead, the judge stepped into the shoes of the City. The Court of Appeals cannot now give "great deference" to the trial court's actions regarding the last two steps of the analysis, because the trial court did not maintain impartiality and follow the requirements of the *Batson* test. This error requires reversal.

5. The Court's Nondiscriminatory Reasons Were Based On Erroneous Facts And Impermissible Assumptions

Even assuming this Court were to examine the trial court's stated neutral reasons for granting the City's peremptory challenge of Juror No. 6, the first stated reason is suspect because the trial court ignored important facts regarding the employment of Juror No. 6, and the second stated reason is discriminatory on its face because the judge relied on the false assumption that persons of color cannot be fair in trials involving

parties like them.

The judge's first allegedly neutral reason justifying the peremptory challenge was that Juror No. 6 had been in an employment dispute that could have been related to his disability. But the trial court did not note that the employment dispute had occurred ***eight years earlier*** and that Juror No. 6 was still working for the same company. The trial court's willingness to omit these important facts give the appearance of bias on the part of the trial court.

The second allegedly neutral reason for the challenge adopted by the City is discriminatory on its face because the question presumes that Juror No. 6 was going to be biased because he is a Chinese-American. The judge asserted that:

> one of the issues that this Court anticipates will be raised in this case is the potential argument that there is animosity or racial animus on the part of Japanese toward Chinese. We have several Japanese -- persons of Japanese descent who will be witnesses and who are employees of the Seattle Public Library. And [Juror No. 6] in his responses to counsel's inquiries noted with respect to whether there are historical and cultural differences between Chinese and Japanese, his response was basically ***they hate each other***.

RP Vol. 4: 10-11 (emphasis added). The trial court's misstatement of fact as a basis for its holding supports the conclusion that the reason is erroneous. Juror No. 6 had volunteered that ***historically***, they ***hated*** each other. He never said that Chinese and Japanese currently hate each other,

or that he himself hated the Japanese people. The City's attorney then adopted the erroneous statement. Moreover, the statement presumes what is impermissible: it is a violation of equal protection to strike a minority juror "on the false assumption that members of certain groups are unable to consider impartially the case against a member or a nonmember of their group." *Burch*, 65 Wn.App. at 836, *citing*, *United States v. De Gross*, 960 F.2d 1433 (9th Cir.1992) (en banc), *vacating* 913 F.2d 1417 (9th Cir.1990). The City's attorney conducted voir dire that also presumed such bias. This is an outrageous attack on Juror No. 6 that caused him "open and public discrimination as a condition of [his attempted] participation in the justice system." *Edmonson*, 500 U.S. at 628. "The injury caused by the discrimination is made more severe because the [trial court] permit[ted] it to occur within the courthouse itself." 500 U.S. at 628. In fact, the trial court authored the inflammatory reason for striking Juror No. 6 and then denied a new trial to Ms. Cao after the evidence was presented again along with uncontradicted evidence that showed Juror No. 6 would have been seated on the jury owing to the need of another juror to travel on a court session day. Moreover, the trial court maintained his earlier reasoning in the denial of the new trial.

6. The Court's Actions Denied Equal Protection to Juror No. 6

The City's questioning and the Court's stated concerns over the possible bias of Juror No. 6, adheres to the false assumption that "members of certain groups are unable to consider impartially the case against a member or a nonmember of their group." *Burch*, 65 Wn.App. at 836, *citing*, *United States v. De Gross*, 960 F.2d 1433 (9th Cir.1992) (en banc), *vacating* 913 F.2d 1417 (9th Cir.1990). That approach and the ultimate decision to strike Juror No. 6 denied him his right to equal protection. *Edmonson*, 500 U.S. at 628-629. "Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror." *Edmonson*, 500 U.S. at 631. Here, Juror No. 6 was treated as though he could not be fair owing to his nationality and race. No other juror was subjected to that treatment, and he was denied his right to serve on this jury panel in violation of his rights to equal protection.

7. A Harmless Error Analysis Does Not Apply And Reversal Is The Only Option

Harmless error analysis does not apply here. The trial court's denial of Ms. Cao's objection to the City's challenge of Juror No. 6 represents a structural error in the case. "Structural errors . . . are defects

in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *State v. Vreen*, 143 Wn.2d 923, 930, 26 P.3d 236 (2001). Juror No. 6 would have sat as a juror in this case had the trial court not granted the City's peremptory challenge. There is evidence that Ms. Cao suffered independent prejudice at trial because she had to give up an entire day of testimony under the trial court's allocation of trial time to prevent the first alternate, who had taken the place of Juror No. 6, from being seated and essentially ran out of time for cross-examination and rebuttal. However, since the trial court's failure to sustain Ms. Cao's objection to the City's challenge of Juror No. 6 is a structural error of constitutional magnitude, no further prejudice need be shown. The case must be reversed and a new trial granted.

C. The Actions Of The Trial Court Violated Ms. Cao's Right To A Jury Trial As Guaranteed By Article 1, §21

The Washington State Constitution provides that "The right of trial by jury shall remain inviolate. . . ." WASH. CONST., art 1 § 21. In Washington, the right to a trial by jury "may not be impaired by either legislative or judicial action." *Wilson v. Olivetti North America, Inc*., 85 Wash.App. 804, 934 P.2d 1231, *citing*, WASH. CONST., art 1 § 21; *Geschwind v. Flanagan*, 121 Wash.2d 833, 839-40, 854 P.2d 1061 (1993).

For the right to a jury trial to have any meaning, the structural safeguards must protect the trial process from discriminatory influences and bias.

In this case, the actions of the trial judge impaired Ms. Cao's right to a trial by jury. First, the initial seating of Juror No. 6, the only Chinese-American out of a sixty-nine, mostly Caucasian, member venire, was done in a way that was not transparent. The chances of his being seated in one of only two alternate seats, was roughly one in thirty-three. Yet against the odds, he was seated in a place that limited his potential involvement in the case.[4] This lack of transparency raises the appearance of impropriety and calls into question the procedures for jury selection in that courthouse. Second, the trial judge's actions in abandoning his role as impartial arbiter by providing the City's allegedly neutral reasons justifying the challenge to Juror No. 6, gives the impression of bias and taints the jury process. Third, the actions of the trial court denied Ms. Cao equal protection, which denied her a fair jury trial as required by the Washington State Constitution. Fourth, The actions of the trial court in attempting to negotiate Ms. Cao's agreement to strike Juror No. 6 in exchange for striking the Caucasian Librarian applicant, who admitted bias in favor of the City, created the appearance of bias in favor of the City because the

[4] Although owing to another juror's travel plans, ultimately he would have served had he not been removed.

issue of the librarian's bias was evident from her business relationship with the library, but he trial court held her up as a bargaining chip to exclude unbiased Juror No. 6 whose only connection with Ms. Cao was by virtue of their race and national origins. Fifth, the actions of the trial court denied Juror No. 6 equal protection, which impaired Ms. Cao's right to a jury trial. Sixth, the actions of the trial judge in forcing Ms. Cao to give up one trial day to keep a seated juror, who had to miss one trial day for travel, to avoid seating a less favorable alternate juror, which resulted in limited cross-examination and rebuttal, also impaired the trial process in violation of the Washington State Constitution.

Keeping in mind that all of this conduct occurred in the context of a race and national origin claim brought under the WLAD, which permits a civil action for discrimination **(**RCW 49.60.030), makes the court's conduct all the more improper and prejudicial. The purpose of the WLAD is to eradicate discrimination, and judicial interference in the fairness of the conduct of a jury trial involving claims of discrimination subverts that purpose. As stated earlier, discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [minorities] that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 87-88 (citations omitted). This forms an independent state basis for a new trial.

D. The Actions Of The Trial Court Violated Ms. Cao's Right To A Jury Trial As Guaranteed By Article 1, §30

The Washington State Constitution provides that "The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." WASH. CONST., art 1 § 30. This article of the Constitution supports the contention that "equal protection" is a right under the Washington Constitution—one retained by the people--and that the principles of *Batson* should be applied under the Washington State Constitution to protect Ms. Cao and Juror No. 6. This forms an independent state basis for a new trial.

V. APPELLANT REQUESTS ATTORNEYS FEES AND COSTS

Pursuant to RAP 18.1, Appellant Qin hereby requests an award of attorney's fees and costs for this appeal assuming she prevails in a second trial. RCW 49.60.030.

VI. CONCLUSION

For the reasons stated above, the case must be remanded for a new trial.

DATED this 3rd day of January, 2007.

THE SHERIDAN LAW FIRM, P.S.

By: _____
John P. Sheridan, WSBA # 21473
Attorneys for Plaintiffs

DECLARATION OF SERVICE

Aileen Luppert states and declares as follows:

1. I am over the age of 18, am competent to testify in this matter, am a Paralegal at the Law Office of John P. Sheridan, P.S., and make this declaration based on my personal knowledge and belief.

2. On January 3, 2007, I caused to be delivered via ABC Legal Messenger Service, Inc. addressed to:

Katrina Kelly
Erin Overbey
Seattle City Attorney
600 Fourth Ave., 4th Floor
Seattle, WA 98104-4769

a copy of Appellant's Opening Brief, filed January 3, 2007.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of January, 2007, at Seattle, King County, Washington.

Aileen Luppert

U.S. CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON STATE CONSTITUTION

ARTICLE 1

Section 21: Trial By Jury. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Section 30: Rights Reserved. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

WASHINGTON STATE STATUTE

Washington Law Against Discrimination

RCW 49.60.180: It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, or any intent to make any such limitation, specification, or

discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

RCW 49.60.030

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph; and

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of

boycotts as authorized by law pertaining to labor disputes and unfair labor practices.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.