No. 17-7546

In the Supreme Court of the United States

GREGORY HENDERSON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

James Roy Houts*
Deputy Attorney General
OFFICE OF ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jhouts@ago.state.al.us
*Counsel of Record

Counsel for State of Alabama

February 22, 2018

CAPITAL CASE

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QUESTION PRESENTED (REPHRASED)

Did the Alabama Court of Criminal Appeals err when it denied Petitioner's *Batson* claim under Alabama's plain-error standard of review, where the record establishes that Henderson twice informed the trial court, after jury selection, that he had no motions pertaining to the selection of the jury?

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STATEMENT OF THE CASE

A Lee County, Alabama, grand jury returned an indictment against Petitioner Gregory Henderson for the capital murder of an on-duty law enforcement officer. Jury selection began on September 26, 2011, and the process included juror responses to a seven-page questionnaire consisting of fifty-three questions. After the trial court and both parties conducted additional questioning of the venire, the trial court excused some potential jurors, and others were struck for cause. Thereafter, each side executed twelve peremptory challenges to select the petit jury.

After the jury was empaneled, the trial court asked if either party had any matter to bring to the court's attention. Henderson indicated that he had no motions to make following jury selection. Nonetheless, the prosecutor provided the court her reasons for striking potential jurors. After hearing the State's proffer, the trial court asked if either party had anything else to bring to the court's attention, and Henderson again declined to make any motion.

Thereafter, Henderson's trial commenced. After several days of testimony and argument, a jury convicted Henderson of capital murder as charged in the indictment. The penalty phase of trial began on October 5. The jury, by special interrogatory, found that Henderson committed the capital offense while he was under a sentence of imprisonment, that he had previously been convicted of a felony involving violence or the threat of violence to another person, that he committed the murder for the purpose of avoiding or preventing lawful arrest or to effect an escape from custody, and that he committed the offense in order to hinder or disrupt the lawful exercise of

a government function or enforcement of the laws. The jury did not unanimously agree that the murder was especially heinous, atrocious and cruel. The jury recommended a sentence of life without parole by a vote of nine in favor of life without parole and three in favor of death.

A sentencing hearing was held on July 27, 2012, whereupon the State presented additional witnesses and supporting evidence. After taking evidence, the trial court continued sentencing until September 20, with a request for further briefing by the parties. On September 20, the trial court rejected the jury's recommendation and sentenced Henderson to death based on the aggravating factors the jury found to exist. The trial court entered a thorough sentencing order detailing its reasons for sentencing Henderson to death.

Henderson timely appealed to the Alabama Court of Criminal Appeals. After receiving the benefit of oral argument, that court affirmed Henderson's conviction and sentence of death. *Henderson v. State*, __ So. 3d __, 2017 WL 543134 (Ala. Crim. App. Feb. 10, 2017). Henderson applied for rehearing, but his application was overruled. Thereafter, Henderson petitioned the Alabama Supreme Court for certiorari review, which was declined. Henderson then petitioned this Court for certiorari review.

REASONS FOR DENYING THE WRIT

Henderson's petition appears to concede that he does not seek certiorari review pursuant to one of the compelling reasons outlined in Rule 10 of this Court's rules. Instead, his petition is based on an allegedly erroneous application of *Batson v. Kentucky*, 476 U.S. 79 (1986), seeking either a de novo review of his *Batson* claim or a remand for a rehearing on this issue. (Henderson's Pet. 9-10.) For the following reasons, Henderson's petition does not present one of the rare cases where certiorari should be granted on the basis of such case-specific grounds.

Henderson cites to this Court's recent decision in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), and Justice Sotomayor's special writing in *Floyd v. Alabama*, 138 S. Ct. 311 (2017), to support his bald accusation that Alabama's appellate courts are composed of careless judges who abdicate their responsibility to uphold the constitutional rights of defendants and potential jurors. (Henderson's Pet. 8-9.) But the rhetoric he employs in the opening paragraph of his reasons for granting the writ must be viewed as the distraction it is intended to be, as it can only be assumed that this ad hominem attack on Alabama's intermediate criminal appeals court is offered in the hope that this Court will not hold him to account for his own conduct.

Henderson never asserted a *Batson* challenge in the trial court. After the jury was struck, the trial court asked, "Any motions?" Counsel for Henderson stated that he had no motion for the court. Even so, the prosecutor elected to place her reasons for each strike on the record. Thereafter, Henderson again informed the trial court

that the defense had no response to the State's proffer. The jury was then empaneled without objection.

Henderson's *Batson* challenge was brought on appeal under Alabama's plain-error standard of review, applicable only to cases involving prisoners sentenced to death. *See* Ala. R. App. P. 45A. Here, that review was complicated by the fact that the trial court was never asked to determine whether a prima facie case of discrimination existed. Even when the prosecutor placed her reasons for each strike on the record, Henderson did not attempt to challenge them as being pretextual. Considering that "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be substantiated unless it is clearly erroneous," *Snyder v. Louisiana,* 552 U.S. 472, 477 (2008), it would be difficult to fault the Alabama Court of Criminal Appeals for affirming under this standard of review, as further constrained by the narrower "plain error" state-court standard applicable to this claim. Unless the trial court committed clear error by not declaring that the state's strikes were motivated by race, both sua sponte and without any input from the defense, Henderson cannot prevail.

Certiorari should be denied in consideration of the invited-error doctrine. Not once, but twice, Henderson affirmatively represented to the trial court that he had no objection to the jury-selection process. Once the prosecutor provided her reasons for her strikes, Henderson was in a perfect position to inform the trial court of any alleged pretext, inconsistencies, or other seemingly disparate treatment of jurors that were not adequately addressed by the State's proffer. After all, the trial court "is ordinarily in the best position to determine the relevant facts and adjudicate the

dispute." *Puckett v. United States*, 556 U.S. 129, 134 (2009). Instead, Henderson engaged in conduct this Court has described as "sandbagging," whereby a defendant remains "silent about his objection and belatedly rais[es] the error only [when] the case does not conclude in his favor." *Id.*

This Court does not view invited-error as an absolute bar to the consideration of an issue, but rather as a consideration bearing on the appropriateness of granting certiorari. *See United States v. Wells*, 519 U.S. 482, 488 (1997). In this case, this consideration is due considerable weight because Henderson's conduct prevents a review of this issue that would genuinely be oriented toward discerning the truth.

Unlike the situation this Court faced in *Foster v. Chatman*, 136 S. Ct. 1737, 1743 (2016), where "Foster immediately lodged a *Batson* challenge," Henderson was not so moved by the State's jury-selection practices. Similarly, in *Snyder* this Court noted that defense counsel disputed the State's proffered race-neutral reasons for its strikes, *Snyder*, 552 U.S. at 479, far different from Henderson's explicit acceptance of the State's proffered reasons for its strikes. Even in *Miller-El v. Drake*, 545 U.S. 231, 245 (2005), a *Batson* analysis complicated by the fact that jury selection had occurred two years prior to *Batson*'s existence, this Court relied on defense counsel's "point[ing] out that the prosecutor had misrepresented [a potential juror's] responses on [a] subject" in response to the prosecutor's stated reasons for a strike. There, when the prosecutor was confronted by defense counsel "he neither defended what he said nor

withdrew the strike." *Id*. at 246. Here, neither the State nor the judge were confronted by Henderson at all.

Even Henderson's reliance on *Hernandez v. New York*, 500 U.S. 352 (1991), is misplaced in the light of his affirmatively stating that he had no objection to the jury-selection process. In *Hernandez*, the prosecutor's motive to provide race-neutral reasons was the defendant's *Batson* motion, which is not the case here. *Id*. at 356. But even if a prosecutor's statement of reasons in the absence of a *Batson* challenge nonetheless renders step one of the *Batson* inquiry moot, the step-three analysis must still be informed by a defendant's response to the proffered reasons as being pretextual. In *Hernandez*, the defendant's response was to move "for a mistrial 'based on the conduct of the District Attorney'" and a subsequent renewal of that motion. *Id*. at 357. In Henderson's case, however, the response to the prosecutor's stated reasons was to inform the court that he was ready for trial. Henderson never directed the trial court to any alleged discriminatory treatment or practice.

Henderson does not offer this Court any compelling reason to grant certiorari to review his claim. Even to the extent this Court is required on rare occasions to intervene in fact-bound cases to avoid miscarriages of justice, Henderson's refusal to make a *Batson* challenge at trial, choosing instead to sandbag the issue on appeal, removes his case from the sphere of such cases. Furthermore, the state-law "plain error" standard of review that applied to Henderson's *Batson* claim on appeal, due to his affirmative misrepresentations to the trial court, warrants denial of the writ.

CONCLUSION

For the above-mentioned reasons, this Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

/s/ James Roy Houts
James Roy Houts*
Deputy Attorney General
OFFICE OF ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jhouts@ago.state.al.us

Counsel for State of Alabama

*Counsel of Record

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