No. 18-6411

In the Supreme Court of the United States

ENNIS REED,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy Solicitor General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
WILLIAM H. SHIN*
Deputy Attorney General
*Counsel of Record**
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6077
William.Shin@doj.ca.gov

CAPITAL CASE

QUESTION PRESENTED

Whether the California Supreme Court correctly determined that the facts in this case did not make out a prima facie case of racial discrimination in jury selection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATEMENT

1. In September 1996, Carlos Mendez and his wife, Amarilis Vasquez, were sitting in their car in a restaurant parking lot when petitioner Ennis Reed approached them on foot and fired multiple shots into their car with a semiautomatic handgun. Pet. App. A 9-10. Vasquez died from a gunshot wound to her head; Mendez survived despite being shot in the face and thigh. *Id.*

Two months later, Roy Fradiue and Paul Moreland were walking on the street when they encountered Reed holding an automatic rifle over his shoulder. Pet. App. A 10. Reed said something to Moreland and then fired multiple shots. *Id.* Moreland, shot nine times, died; Fradiue survived. *Id.*

2. The state charged Reed with the first-degree murders of Vasquez and Moreland—with an allegation of a multiple-murder "special circumstance" that made the murders punishable by death—and the attempted murders of Mendez and Fradiue. Pet. App. A 9.

When jury selection began, the first 18 jurors to fill the jury box consisted of nine Whites, six Blacks, two Hispanics, and one Asian. Pet. App. A 12. After conducting voir dire, the prosecutor in a first round of peremptory strikes exercised challenges against five jurors: Corrine T. (a White woman), Bert A. (a Black man), Billie L. (a Black woman), Betzaida C. (a Hispanic woman), and Janice C. (a Black woman). *Id.* During the next round, the prosecutor used peremptory challenges to excuse three more

jurors: Bruno B. (a Hispanic man), Nickey W. (a Black man), and Mary C. (a Black woman). *Id.*

Following the prosecutor's eighth peremptory challenge, against Mary C., defense counsel objected that the prosecutor had exercised his challenges on the basis of race. Pet. App. A 12.[1] He cited the fact that the prosecutor had used five out of eight strikes against Black prospective jurors, and said, "Well, it doesn't look like, in regards to the last one, there was any—that it was justifiable, and I think it was done on the basis of race." *Id.*; *see* Pet. 6; 2 RT 297. The trial judge overruled the objection, finding that "there has not been a showing of a strong likelihood" that the prosecutor's challenges were racially motivated. Pet. App. A 12.

After the denial of the objection, the prosecutor exercised five additional peremptory strikes, one against a Black woman. Pet. App. A 12. The prosecutor then exercised three additional peremptory strikes during the selection of alternate jurors, one against a Black woman. *Id.* In the end, the prosecutor used only 13 of his allotted 20 peremptory challenges. *See id.* The prosecutor at one point accepted a jury at a time when it contained two Blacks, and ultimately accepted a jury consisting of three Blacks, five Whites, one Hispanic, two Asians, and one "Middle Eastern" juror. *Id.* at 12-13.

---

[1] Defense counsel relied on *People v. Wheeler*, 22 Cal. 3d 258 (1978), the state-law counterpart to *Batson v. Kentucky*, 476 U.S. 79 (1986). *See Davis v. Ayala*, 135 S. Ct. 2187, 2195 (2015).

At the trial, the prosecution introduced the first-hand testimony of surviving victims Mendez and Fradiue identifying Reed as the shooter. Pet. App. A 10-11. The jury found Reed guilty as charged. *Id.* at 11. After a separate penalty hearing, the same jury returned a death verdict. *Id.* at 12.

3. On automatic appeal, the California Supreme Court affirmed the judgment of conviction and the sentence of death. Pet. App. A 24. As relevant here, the court rejected Reed's claim that the prosecution violated the constitution when exercising peremptory challenges to excuse the five Black prospective jurors. *Id.* at 12. The court recognized that the trial judge, in assessing whether Reed had made out a prima facie case of discrimination in connection with his *Batson*/*Wheeler* objection, had used the "more likely than not" standard that was called for by California law at the time of trial but that this Court later disapproved in *Johnson v. California*, 545 U.S. 162 (2005). *Id.* at 13. The supreme court therefore analyzed Reed's claim de novo under the *Johnson* standard, i.e., whether the totality of the record supported an inference that the prosecutor had excused a juror on the basis of race. *Id.*

First, the court concluded that, "[v]iewed in its overall context," the prosecutor's use of five of his first eight challenges against Black jurors did not itself suggest an inference of discriminatory intent. Pet. App. A 13. The court noted that, after the ruling on the *Batson*/*Wheeler* objection, the prosecutor's next four peremptory strikes were exercised against non-Black jurors. *Id.* It also observed that the prosecutor in the end exercised six out of

13 strikes (46 percent) against Black jurors for the regular jury panel, and seven out of 16 strikes (44 percent) overall including the alternate jurors—"barely" exceeding the 34 percent ratio of Black jurors in the venire. *Id.*

Second, the court observed that the prosecutor, who did not use all of his peremptory challenges, at one point accepted the jury when it contained two Black jurors and ultimately accepted a final jury panel that contained three Black jurors. Pet. App. A 13-14. The court reasoned that these facts "lessen[ed] the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply." *Id.* at 14.

Third, the court explained that the prospective jurors' responses in written pre-trial questionnaires and in voir dire provided "further evidence dispelling any inference of bias." Pet. App. A 14. For example, Bert A., Janice C., and Mary C. each had a close relative with a negative experience with law enforcement. *Id.* Bert A. also had previously served in a criminal jury that had deadlocked. *Id.* Billie L. had expressed strong opposition to the death penalty. *Id.* And Nickey W. had given conflicting answers in his questionnaire on the burden of proof in a criminal trial. *Id.* at 14-15.

Finally, the court concluded that even under "a comparison between the jurors struck by the prosecution and the non-black jurors that ultimately served on the jury," Reed had not "established a prima facie case of bias." Pet. App. A 15. Rather, he "fail[ed] to demonstrate that the totality of

relevant facts [gave] rise to an inference of discriminatory intent for the prosecutor's strikes." *Id.*

Justice Liu, joined by Justice Kruger, dissented. Pet. App. A 25-32. In their view, the prosecutor's "pattern of strikes, considered in the totality of circumstances, easily raised an inference of discrimination." *Id.* at 25. Although acknowledging that "postruling developments can be relevant in assessing the significance of a pattern of strikes," the dissenting opinion concluded that those developments in this case were not "so probative as to permit no reasonable inference that the prosecutor acted with discriminatory intent." *Id.* at 26-27. Similarly, the dissent acknowledged state and federal precedents approving consideration, on the question of a *Batson* prima facie case, of apparent race-neutral reasons supporting the challenged strikes; but it concluded that the "hypothetical" reasons cited by the majority in this case were insufficient to "necessarily dispel any inference of bias." *Id.* at 27-30.[2]

ARGUMENT

The Equal Protection Clause forbids a prosecutor from challenging potential jurors on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). In general, a trial court must undertake a step-by-step analysis in evaluating an objection to

---

[2] Reed's petition in this Court is drawn substantially from and closely tracks the arguments set forth by Justice Liu's dissenting opinion below. *Compare* Pet. 7-22 *with* Pet. App. A 24-30 (Liu, J., dissenting).

the prosecutor's use of peremptory challenges. *Batson*, 476 U.S. at 96-98; *see Johnson v. California*, 545 U.S. 162, 168 (2005). "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson*, 545 U.S. at 168. Second, if the defendant has made such a showing, the burden shifts to the prosecutor to explain his or her challenges by providing race-neutral explanations. *Id.* Third, if a race-neutral explanation is given, the trial court "'must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" *Id.*

At Reed's trial in 1999, the trial court applied a preponderance standard in assessing whether Reed had made out a prima facie case at the first step of this analysis. *See* Pet. App. A 9, 13. In 2005, *Johnson* rejected that standard as too demanding for purposes of triggering further inquiry, the making of a contemporaneous record, and factual findings by the trial court on the ultimate issue of discrimination. *See* 545 U.S. at 172-173. This case is thus one of a small and diminishing number of pre-*Johnson* matters in which an appellate court must review a claim of step-one *Batson* error by "conduct[ing] [its] own independent review of the record and apply[ing] the *Johnson* standard to determine whether the record supports an inference that the prosecutor excused a juror on a discriminatory basis." Pet. App. A 13. Here, after conducting that review, the California Supreme Court concluded that the "totality of relevant facts" revealed by the record did not

"give rise to an inference of discriminatory intent for the prosecutor's strikes." *Id.* at 15.

Reed points out that the state supreme court's consideration of the totality of the record in this case took account of events occurring after the trial judge's ruling on the *Batson* objection and of possible non-discriminatory reasons for the prosecutor's strikes that are apparent from the record. Pet. 3, 9. But he identifies no legal conflict among the federal courts of appeals or state supreme courts on the permissibility of proceeding in this way in a case like this one. On the contrary, he acknowledges, for example, that "[i]n appellate review of a first-stage ruling, post-ruling developments can be relevant in assessing the significance of a pattern of strikes." Pet. 11; *see also* Pet. App. A 26 (Liu, J., dissenting).

Reed's claim thus reduces down, in essence, to a request for further review of what he perceives to be an erroneous application of the *Batson* inference test to the unique facts of this case. He argues that the post-ruling events in this case are "not so compelling" as in other cases; that there is "a potential ambiguity" in the prosecutor's post-ruling pattern of strikes; and that the possible race-neutral reasons for the strikes that the California Supreme Court found persuasive in dispelling any inference of discrimination are instead "underwhelming." Pet. 12-14, 17. And he seeks this fact-bound inquiry in a case involving the rare circumstance in which a trial court's error in identifying the correct legal standard to apply at the first stage of the

Batson inquiry (an issue since definitively resolved by this Court) deprives that court's decision of the deference that would normally be accorded to it on appeal. *See Tolbert v. Page*, 182 F.3d 677, 682 (9th Cir. 1999). Under these circumstances, the case is not an appropriate one for this Court's review.

In any event, the California Supreme Court reasonably applied *Batson* in this case. Reed first suggests that the court should have considered only the events in the record leading up to the trial judge's step-one *Batson* ruling. Pet. 9-14. However, because the trial court had applied an incorrectly stringent legal standard in making that ruling, on appeal the state supreme court put aside any deference to the trial judge's ruling and itself reviewed the entire voir dire record to determine whether, taken as a whole, it supported an inference of discriminatory exercise of peremptory challenges. That approach comports with this Court's teaching that assessment of a prima facie case of purposeful discrimination depends upon "all relevant circumstances." *Batson*, 476 U.S. at 97; *see Johnson*, 545 U.S. at 168 ("the totality of relevant facts"); *Miller-El*, 545 U.S. at 239.[3]

As the state supreme court recognized, the record as a whole

---

[3] Citing *People v. Chism*, 58 Cal. 4th 1266 (2014), and *People v. Scott*, 61 Cal. 4th 363 (2015), Reed argues that the California Supreme Court's practice of considering events occurring after the trial court's ruling on the *Batson* motion to dispel any inference of discriminatory intent is at odds with its own rulings in prior cases. Pet. 10. Any such internal conflict would not be a matter for resolution by this Court. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

sufficiently dispelled any inference of discrimination. Pet. App. A 13-15. The rate of peremptory challenges against Black jurors turned out to be much lower than it would have appeared at the time of the initial *Batson* objection, and in line with the percentage of Blacks on the larger venire. *Id.* at 13. The prosecutor repeatedly accepted a jury containing Blacks even though he retained additional peremptory challenges at his disposal. *Id.* at 13-14. And the record disclosed obvious race-neutral reasons for the strikes. *Id.* at 14-15.

Reed argues that it was wrong for the California Supreme Court to consider apparent race-neutral reasons supporting the prosecutor's exercise of the peremptory challenges where the prosecutor was never called upon to explain the strikes. Pet. 14-22. But, as with relevant events occurring after the judge's ruling, it was reasonable under the circumstances of this case for the appellate court to take cognizance of evident non-racial reasons that naturally would have prompted a prosecutor's challenges. Circuit precedents cited by Reed—*Williams v. Runnels*, 432 F.3d 1102, 1109 (9th Cir. 2006), and *United States v. Stephens*, 421 F.3d 503, 516 (7th Cir. 2005)—exemplify this. Under unusual circumstances like those here—where a reviewing court must assess the record after the trial court applied an incorrect legal standard at a pre-*Johnson* trial—there is no reason for the court to blind itself to convincing circumstantial evidence, apparent in the record, that bears on the ultimate question of whether the prosecutor's

actions gave rise to an inference of purposeful race discrimination.

Contrary to Reed's assertion (Pet. 15-16), *Johnson* itself did not signal any departure by this Court from the "all relevant circumstances" scope of the prima facie case inquiry recognized by *Batson*. The trial judge in *Johnson*, in declining to find a prima facie case, had noted some reasons that could have supported the strikes. *Id.* at 170-171. But this Court did not rule on the propriety of that particular approach by the judge. Instead, the Court held that the state courts had applied too strict a standard for determining whether the defendant had established a prima facie case. *Id.* Certainly, the Court noted the benefits of the full three-step *Batson* approach in getting a "direct answer" to the ultimate question of discrimination in the trial court, at a time when additional inquiries and findings can be made and a focused, contemporaneous record can be created. *See id.* at 172-173. (In *Johnson*, the prosecutor had challenged all of the African-American prospective jurors in a prosecution of an African-American man for killing "his White girlfriend's child," the state judge had found the question "very close," and the appellate courts had found the circumstances "troubling" and "suspicious." *Id.* at 167, 173.) But *Johnson* never suggested that, in an unusual appellate review situation like that at issue here, a reviewing court should not consider all the evidence in the record in evaluating whether it reveals a prima facie case of intentional discrimination warranting the complete retrial of a 20-year-old case. The

California Supreme Court carefully reviewed the record in this case and reasonably concluded that "the totality of relevant facts" did not "give rise to an inference of discriminatory intent." Pet. App. A 13-15. That conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy Solicitor General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General

WILLIAM H. SHIN
Deputy Attorney General

January 22, 2019