No. _____

IN THE

Supreme Court of the United States

PATRICK JAMES KITLAS,

Petitioner,

v.

F. B. HAWS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HILARY POTASHNER
Federal Public Defender
EMILY GROENDYKE
Emily_Groendyke@fd.org
ANDREA A. YAMSUAN*
Andrea_Yamsuan@fd.org
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-0081

Attorneys for Petitioner
*Counsel of Record

QUESTION PRESENTED

Batson v. Kentucky, 476 U.S. 79 (1986) requires prosecutors to provide their actual reasons for striking jurors. The prosecutor here provided reasons for her strike at an evidentiary hearing held seven years after trial. Despite reviewing her notes and the voir dire transcript, she had no actual memory from the trial. Instead, she offered an "opinion" for why she struck the juror. The federal district court accepted the opinion and denied Kitlas's *Batson* claim. Does the Ninth circuit's affirmance of the denial conflict with this Court's actual reason requirement?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Patrick Kitlas ("Kitlas") petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

Kitlas attaches the Ninth Circuit's Unpublished Memorandum denying relief as Appendix A (Appendix ("App.") at 1-9); the district court's order granting a Certificate of Appealability on Kitlas's *Batson* claim ("COA") as Appendix B (App. at 10-11); the district court's order adopting the magistrate judge's report and recommendation as Appendix C (App. at 12); the district court's judgment as Appendix D (App. at 13); and the magistrate judge's report and recommendation to dismiss the petition as Appendix E (App. at 14-73).

The California Court of Appeal denied Kitlas's *Batson* claim on direct appeal in an unpublished, written decision. (App. F at 74-93.) The California Supreme Court denied Kitlas's petition for review. (App. G at 94.)

JURISDICTION

Kitlas is in state custody at the California State Prison in San Quentin, California. He filed a habeas corpus petition under 28 U.S.C. § 2254 challenging the constitutionality of his conviction and sentence. The district court denied the

petition with prejudice on the merits but granted a COA. (App. D at 13.) The Ninth Circuit affirmed the district court's denial of relief. (App. A at 1-9.) This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed within 90 days after the entry of judgment pursuant to Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "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."

STATEMENT OF THE CASE

The State charged Kitlas with second-degree murder, first-degree robbery, and first-degree burglary. (App. F at 75.) After trial, the jury found Kitlas guilty of all three charges. (*Id.*) The court sentenced Kitlas to fifteen years to life for murder, six years for burglary, and a concurrent three-year term for robbery. (*Id.*)

A. 2005 jury selection proceedings

The prosecutor tried Kitlas and his co-defendant, Mark Itaev, before two separate juries. (App. I at 103.) The court conducted some general questioning of the jury, then permitted counsel for each side to question the jurors for twenty minutes.

1. Jury selection for co-defendant Itaev

Itaev's jury selection proceedings went first. The court called fifty-seven jurors from the pool for questioning. (App. K at 190-93.) According to the prosecutor's notes, six of the jurors were Black. (*Id.*) The prosecutor marked the race of the Black jurors in her notes: "MB" for male Black and "FB" for female Black. (App. I at 15.) Of the six Black jurors, the court dismissed one for cause. The prosecutor used nineteen peremptory challenges, three against Black jurors. (App. K at 191.) Thus the prosecutor used 16% of her peremptory strikes against Black jurors: a rate double their percentage in the venire as a whole (8%).

After the prosecutor struck three prospective Black jurors, defense counsel objected. The prosecutor said her sole reason for striking the third juror was that she previously sat on a hung jury. Though the court noted that the prosecutor did not strike other jurors who had served on hung juries, the court allowed the strike. But it advised the prosecutor, "if you exercise another peremptory that doesn't have a justification based on what I believe to be ethnicity or race, then we will conduct a complete hearing."

2. Jury selection for Kitlas

Kitlas's jury pool consisted of 60 people; two were Black. (App. L 195, 214.) The prosecutor excused both of them with peremptory strikes. (App. E at 85.)

Prospective juror 7243 was a Black woman who worked as a college counselor and professor at community college. (App. E at 85-86.) She previously served on a jury that reached a verdict. (App. E at 86.) Her sister, brother, and sister-in-law were police officers. (*Id.*) Juror 7243 worked "with people who are traumatized by

natural disasters [and] victimized by various aspects of our society where they're tortured or victims of crimes," such as Holocaust survivors and Vietnam war refugees. (App. L at 200.) She agreed with the court's characterization that she was "sort of a victim advocate." (*Id.*) She said her work would "probably not" interfere with jury service. (App. L at 201.) The court asked if she had any concerns about her ability to respect the defendant's right to remain silent. She said, "I will do my best to be fair . . . I do think a person should speak up if they're innocent, but I will do my best to be fair." (App. L at 202.)

The prosecutor asked her whether her work would make her "more sympathetic to any of the parties in this case, either the victims or the defendants." (App. L at 204.) She said "I don't know. I don't think so." (*Id.*) The prosecutor then asked, "is any of the counseling that you do or work that you do with victims associated with Amnesty International?" (App. L at 205.) The juror said, "It's of that nature—and I have done volunteer work with people through that group, yes." (*Id.*) The prosecutor used her eighth peremptory strike to excuse this juror. (App. L at 215.)

Prospective juror 8053 was a Black man who worked as a choreographer and dancer. (App. L at 206.) During voir dire, he said he was "robbed at gunpoint" but wasn't "affected by it greatly." (App. L at 208.) He didn't report the incident to the police. (*Id.*) The prosecutor didn't ask any questions of this juror on voir dire, but she did ask the court at sidebar, "the one who said that he was a victim of a [robbery] at gunpoint. Did he say he did not report that to the police?" (App. L at

211.) The court confirmed. (*Id.*) The prosecutor used her twelfth peremptory challenge to excuse prospective juror 8053. (App. L at 213-14.)

Defense counsel objected to the strike, noting that the prosecutor had now struck the only two Black jurors from the panel. (App. L at 214.) The trial court overruled the objection with respect to Juror 7243 without asking for the prosecutor to explain the strike, but asked the prosecutor to give her reasons for striking Juror 8053. (App. L at 215.) The prosecutor said she was "bothered" that he had been robbed at gunpoint but failed to report the incident to the police. (*Id.*) She also claimed—erroneously—that she had questioned him about the robbery and "I felt that made him very uncomfortable." (*Id.*) The trial court denied the *Batson* motion, saying, "I will accept the explanation as to the exercise of the second [peremptory strike]." (*Id.*)

B. 2012 federal evidentiary hearing

The district court conducted an evidentiary hearing on September 28, 2012, seven years after the trial. (*See generally* App. I.) In so ruling, it found that "[Kitlas] has raised a colorable claim that the state court's adjudication of his step one *Batson* claim with respect to Juror No. 7243 was either contrary to or an unreasonable application of clearly established federal law."[1] (Dist. Ct. Case No. 08-6651-JSL(CW), Docket No. 41.) It found the hearing necessary to develop the

[1] Step 1 of *Batson* requires the petitioner to produce "evidence sufficient to permit [a] trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005).

factual record with respect to step two of *Batson*, since the trial court never ordered the prosecutor to give her reason for the strike.[2] (*Id.*)

The prosecutor was the sole witness. To prepare for the hearing, she reviewed the voir dire transcript and the notes she took during voir dire. (App. I at 106.) She testified that during voir dire, she took notes about jurors on post-it notes. (App. I at 109.) She took notes for "two reasons": to keep track of jurors and to preserve statements made by jurors "that would give me concern about them being an appropriate juror." (App. I at 152.) When she had time, she noted the race of jurors. (*Id.*) At Kitlas's trial, she noted the race of Juror 7243. (App. I at 116.) Specifically, she noted "FB" (for female Black). (App. J at 185.) She did not note the race of any other juror from Kitlas's jury pool. (App. I at 116.)

The prosecutor repeatedly testified that she had no independent recollection of anything that happened during jury selection. (App. I at 106, 107, 117, 130.) But she said that after reviewing the transcript and notes, she had an "opinion . . . as to why" she struck the Black prospective jurors. (App. I at 122.) The prosecutor said she struck Juror 7243 because the juror had worked with Amnesty International. (App. I at 153.) The prosecutor said, "I would never keep someone" who had worked with the organization because he or she would likely doubt the validity of a confession. (*Id.*) The prosecutor said she struck Juror 8053 because he failed to

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[2] At step two of *Batson*, the "'burden shifts to the State to explain adequately the racial exclusion' by offering race-neutral justifications for the strikes." *Johnson*, 545 U.S. at 168.

report a robbery he experienced to the police. (App. I at 125.) When asked why that concerned her, the prosecutor said that the juror's failure to report indicated either sympathy for the perpetrator, involvement by the juror, or mistrust of law enforcement. (App. I at 126.)

C. The district court's post-hearing findings

The district court reviewed the *Batson* claim regarding Juror 7243 de novo after determining that the California Court of Appeal applied the wrong standard in deciding whether Kitlas made a prima facie case of discrimination. (App. E at 50.) The district court found that Kitlas met his *Batson* step one burden because the prosecutor excused the only two Black prospective jurors from the panel; the trial court found a prima facie case as to Juror 8053; and the trial court had earlier found that the prosecutor's use of strikes during Itaev's voir dire gave rise to a prima facie case of discrimination. (App. E at 52-53.) The district court found that the prosecutor satisfied step two by stating a race-neutral reason for striking Juror 7243 at the federal evidentiary hearing. (App. E at 55-59.) And the district court found that Kitlas did not meet his burden at step three of the *Batson* analysis to prove purposeful discrimination. (App. E at 59-64.) The court found that the prosecutor's proffered reason was "properly based on relevant circumstantial evidence—specifically the prosecutor's notes, the voir dire transcript, and her testimony at the evidentiary hearing." (App. E at 57-58.)

The court reviewed the *Batson* claim regarding Juror 8053 under a "doubly deferential" standard of review. (App. E at 47.) Under this standard, it concluded

that it wasn't "objectively unreasonable for the California Court of Appeal to affirm the trial court's *Batson* ruling." (*Id.*)

The Ninth Circuit affirmed the denial of the *Batson* claims. (App. A at 4.)

THIS COURT SHOULD GRANT THE WRIT

Supreme Court Rule 10(c) provides that this Court may grant the writ where the United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Here, the Ninth Circuit affirmed the district court's finding that the prosecutor's claimed reason for striking Juror 7243—that the juror had worked with Amnesty International—was "in fact the actual reason[] for the strike," even though the prosecutor's reason was based on speculation and undermined by her contemporaneous notes. (App. A at 3.) The Ninth Circuit's ruling conflicts with this Court's requirement that the prosecutor provide the actual reason for striking jurors. Thus this Court should grant the writ.

A. The Ninth Circuit's ruling contravenes this Court's requirement that prosecutors provide and courts identify the actual reason for the strike

1. This Court requires actual reasons for the prosecutor's strikes

"The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005). Ideally, the trial court handles *Batson* objections promptly, requiring prosecutors to provide race-neutral reasons as soon as a defendant raises a prima facie case of discrimination. *Johnson v. California*, 545 U.S. 162, 172 (2005) ("The three-step process . . . encourages 'prompt rulings on objections to peremptory challenges.'") (quoting *Hernandez v. New York,*

500 U.S. 352, 358-59) (1991)). Timely adjudicating *Batson* objections avoids "engaging in needless and imperfect speculation" about the prosecutor's motive. *Id.*

But even when a prosecutor is called to justify a strike years after trial, she must still satisfy the "actual reason" requirement; a post-trial *Batson* hearing is not an invitation to develop post hoc justifications. *See Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) (condemning a justification proffered by the state for the first time, 30 years after trial, for "reek[ing] of afterthought."). To ensure that prosecutors comply with the requirement in the post-trial context, federal circuit courts require prosecutors to provide reasons adequately corroborated by circumstantial evidence such as transcripts and contemporaneous voir dire notes. *See, e.g., Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015) (the prosecutor's reconstructed reason "must be supported by circumstantial evidence that tends to show that the asserted reasons were in fact the actual reasons for the strikes.")

This Court has neither explicitly endorsed nor prohibited the use of reconstruction hearings, though it did express reservations about them in *Snyder v. Louisiana*. There, the prosecutor gave two reasons for striking the juror at trial. 552 U.S. 472, 478 (2008). On appeal, this Court found one reason patently unbelievable. *Id.* at 483. And this Court refused to order a remand for a hearing to determine to whether the second stated reason was the determinative factor in striking the juror because there was no "realistic possibility" that the prosecutor's actual reasons for his strike "could be profitably explored further on remand at this later date, more than a decade after petitioner's trial." 552 U.S. 472, 486 (2008). Finding sufficient

evidence in the record that undermined the prosecutor's claimed reason for the strike, this Court granted relief. *Id.* Though it doesn't appear that this Court in *Snyder* held retrospective *Batson* hearings inappropriate in every case[3], it sent a message that actual reasons matter and that reasons given many years after trial should be scrutinized with care.

2. The prosecutor's own notes and testimony about her general voir dire practices undermine her purported reason for striking Juror 7243

After the evidentiary hearing, the State argued in its post-hearing brief that the prosecutor struck Juror 7243 because "she was generally uncomfortable with jurors who worked with Amnesty International, and that she would 'never keep' such a prospective juror in a case that involved a confession." (Dist. Ct. Case No. 08-6651-JSL(CW), Docket No. 60 at 1.) The district court found the reason credible and not a pretext for discrimination. (App. E at 59-64.) It found that the voir dire transcript, the prosecutor's notes, and prosecutor's own testimony supported the Amnesty reason. (App. E at 57.) The Ninth Circuit agreed. (App. A at 4.) The record compels a finding, however, that the Amnesty reason wasn't the actual reason for the prosecutor's strike.

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[3] At least one federal court of appeals granted relief for a *Batson* violation on the record without ordering a remand for an evidentiary hearing in light of *Snyder*. *See Haynes v. Quarterman*, 561 F.3d 535, 541 (2009). Most other courts have continued to hold reconstruction hearings. *See, e.g., Lark v. Sec'y v. Pa. Dep't of Corr.*, 645 F.3d 596, 617 (3d Cir. 2011) (approving of district court holding *Batson* evidentiary hearing); *United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011) (same); *Madison v. Comm'r*, 677 F.3d 1333, 1339 (11th Cir. 2012) (remanding for evidentiary hearing on *Batson* step 2).

The prosecutor testified that she took notes with an eye towards preserving reasons for strikes in case she was called to justify them. (App. I at 152.) The notes helped her identify "specific" reasons for striking jurors. (App. I at 141.) Based on this testimony, one would expect the best evidence for the prosecutor's "actual" reason for the strike to be in her contemporaneous voir dire notes. The prosecutor's post-it note on Juror 7243 mentions the juror's residence; that she was twice-divorced; that her sister was in the military; that the juror worked as a college counselor; that she works as a victim's advocate; that she has mental health training; that she previously served on a jury that came to a verdict; and that her father had a J.D. (App. J at 185.) But nowhere does it mention the juror's work with Amnesty. In the prosecutor's own words, her Amnesty explanation was an "opinion" that she derived from reviewing her notes and transcripts. (App. I at 122.) The prosecutor made abundantly clear that she had no independent recollection of Kitlas's voir dire, which took place seven years before the hearing. (App. I at 106, 107, 117, 130.) The absence of any notations about Amnesty suggests that the prosecutor simply made up the Amnesty reason for the purposes of the hearing.

The district court and Ninth Circuit here did not heed this Court's warning in *Snyder* to view the prosecutor's opinion testimony with the skepticism warranted under the circumstances. The prosecutor's Amnesty reason may have been a "good reason"; a reason which, if true, should be found to be race-neutral. But "it does not matter that the prosecutor might have had good reason[s] . . . [w]hat matters is the real reason they were stricken[.]" *Johnson*, 545 U.S. at 172 (quoting *Paulino v.*

Castro, 371 F.3d 1083, 1090 (9th Cir. 2004). Because the prosecutor did not give her actual reason for the strike, the Ninth Circuit affirmed the denial of Kitlas's petition in contravention of this Court's actual answer requirement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: 11-21-2018

By: _____
ANDREA A. YAMSUAN *
Research and Writing Specialist

EMILY GROENDYKE
Deputy Federal Public Defender

Attorneys for Petitioner
**Counsel of Record*