No. 18-8692

In the Supreme Court of the United States

JERRY ADAMS, JR.,

Petitioner,

v.

ROBERT NEUSCHMID, ACTING WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to federal habeas relief on his claim that the prosecutor's reasons for striking two black prospective jurors were pretextual in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Adams v. Swarthout, No. 15-56681, judgment entered Sep. 5, 2018 (this case below).

United States District Court for the Central District of California:

Adams v. Swarthout, No. 13CV0124, judgment entered Sep. 5, 2015 (this case below).

California Supreme Court:

People v. Gholston, et al., No. S191617, judgment entered Jun. 8, 2011 (this case below).

California Court of Appeal for the Fourth Appellate District:

People v. Gholston, et al., No. D058078, judgment entered Feb. 18, 2011 (this case below).

Riverside County Superior Court:

People v. Gholston, et al., No. RIF119755, judgment entered Feb. 6, 2009 (this case below).

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STATEMENT

1. One afternoon in October 2004, two teenagers were in their friend's garage in Moreno Valley, California. Pet. App. 8a, 61a. Through the open garage door, they observed the occupants of a passing car fire gunshots at the house. *Id.* The victims identified petitioner and another person in the car as the shooters, and identified a third occupant of the car as well. *Id.* The three assailants were associated with a criminal street gang. *Id.* at 10a, 63a.

2. The State charged petitioner and the two other assailants with various crimes arising from the drive-by shooting. Pet. App. 59a-60a. During voir dire at petitioner's trial, the trial court and counsel questioned 65 potential jurors over the course of two days. *Id.* at 25a. Following questioning by the court and by counsel, the parties challenged jurors for cause and then exercised peremptory challenges, until twelve jurors and three alternates were seated. *Id.*

During questioning, Juror No. 1 (E.H.) said that her father had been incarcerated from 1996 until he passed away in 2004. Pet. App. 26a. The prosecutor asked E.H. about a tattoo on the back of her ear, which E.H. explained was her son's zodiac sign. *Id.* The prosecutor exercised her third peremptory challenge to exclude E.H. *Id.*

Later, the prosecutor questioned a group of jurors about their views regarding circumstantial evidence. Pet. App. 26a. As an example, she discussed a hypothetical bank robbery in which no eyewitness could identify the robber, but police later apprehended a suspect nearby holding a bag of

money and wearing clothing similar to what witnesses said the robber was wearing. *Id.* The prosecutor asked jurors if they would be comfortable using this kind of circumstantial evidence, as the law allows, to establish a fact at trial. *Id.*

The prosecutor noted that Juror No. 16 (P.B.) gave a "little bit of a grimace" in response to the hypothetical and asked why he had made that expression. Pet. App. 27a. P.B. replied that it was possible the police had detained the wrong person. *Id.* He explained that the bank robber could have been running through a neighborhood where others were similarly dressed. *Id.* The robber could have dropped the money bag, and a neighborhood "kid" could have picked it up. *Id.*

The prosecutor agreed that P.B. had made a fair point and explained that as a juror, it would be his "prerogative" in the deliberation room to analyze the evidence and what it showed. Pet. App. 27a. She followed up by asking whether P.B. accepted the idea that it was not necessary to have an eyewitness to a crime to establish the identity of a perpetrator. *Id.* She provided another hypothetical example in which a home burglary took place without anyone seeing the perpetrator, but police later apprehended a suspect down the street who held an item that had been stolen from the house. *Id.* The prosecutor asked whether P.B. could be comfortable with the idea that the circumstances of a person's presence in the same neighborhood as the burglary, together with

his possession of recently stolen property, could be sufficient to establish that person as the burglar. *Id.*

P.B. continued to disagree that such evidence would be sufficient. Pet. App. 27a. He reiterated that a "kid" wandering through the neighborhood could have happened upon the stolen item and picked it up. *Id.* at 27a-28a. He asserted that "you have fingerprints, and you got to have something in concrete in that area when you are identifying them. I mean you just can't assume anything." *Id.* Around this time, the trial court suggested that perhaps P.B. was expressing the view that the amount of weight to give circumstantial evidence depended upon the overall facts. *Id.* at 28a. The court asked the prosecutor to move on to another line of questioning. *Id.* at 28a-29a. The prosecutor later exercised her ninth peremptory challenge to remove P.B. from the jury. *Id.* at 29a.

Defense counsel argued to the trial court that the prosecution had struck two black jurors (E.H. and P.B.) on the basis of race, in violation of *Batson*. Pet. App. 29a. The court found that counsel had made a prima facie showing for the *Batson* inquiry and required the prosecutor to explain her reasons for striking E.H. and P.B. *Id.*

The prosecutor explained that she had challenged E.H. both because of her father's conviction and incarceration and because of her tattoo. Pet. App. 30a-31a. The prosecutor explained that she generally strikes all potential jurors who have a family member "arrested recently," because of their "close

ties to the system." *Id.* at 29a-30a. For example, the prosecutor had challenged Juror No. 6, who was a pastor and a white man, in part because he had a brother who was incarcerated on multiple occasions. *Id.* at 30a. However, she planned on keeping Juror No. 7, a black woman whose husband had been arrested over twenty years earlier, because the prosecutor considered it remote enough in time that it would not affect her as a potential juror. *Id.*[1] Separately, the prosecutor explained that she generally strikes all jurors with visible tattoos because she considers it to be "something outside of societal norm." *Id.* at 29a. The prosecutor noted that she intended to strike a second panelist with visible tattoos. *Id.* at 30a.[2]

As for P.B., the prosecutor explained that she challenged him because she felt he would have a hard time with the concept of circumstantial evidence. Pet. App. 31a. P.B.'s answers to the prosecutor's questions suggested that he would not be able to vote to convict the defendant unless there was eyewitness testimony or comparable evidence. *Id.*

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[1] The prosecutor also noted that she intended to strike Juror No. 8, who had been arrested. Pet. App. 30a. The prosecutor initially neglected to do so, but after it was brought to her attention that she had expressed a desire to strike that juror, she did so when given the opportunity. *Id.* n.18.

[2] The prosecutor failed to strike one juror with a tattoo on the back of his neck. Pet. App. 29a n.16. As the prosecutor later explained, she had not noticed the tattoo during voir dire because the juror was wearing a collared shirt, and not until the trial was "well under way" did the tattoo come to light. *Id.*

The trial court rejected petitioner's *Batson* claim, finding that the prosecutor's explanations for the two peremptory strikes were credible and race-neutral. Pet. App. 31a, 73a. With respect to P.B., the court noted that while it was possible to reach a "different judgment" than the prosecutor had, "I can see that where you asked the questions and responses he gave that you might think that he has some difficulty with the concept of aiding and abetting, and natural and probable consequences, and circumstantial evidence." *Id*. at 74a. With respect to E.H., while the court noted that tattoos are prevalent in society (including among police officers and other prosecutors), the court found that the prosecutor's views regarding tattoos and preference for jurors without them constituted a credible explanation for the peremptory strike, particularly in combination with E.H.'s father's felony conviction and subsequent incarceration. *Id*. at 73a, 75a.

3. The jury convicted petitioner of assault with a firearm (Cal. Penal Code § 245(a)), and shooting at an inhabited dwelling (Cal. Penal Code § 246). Pet. App. 59a-60a. The jury also found that he committed these crimes for the benefit of a criminal street gang (Cal. Penal Code § 186.22(b)), and that he used a firearm (Cal. Penal Code § 12022.53(d), (e)). *Id.* at 60a. The trial court sentenced petitioner to an indeterminate term of 15 years to life in state prison. *Id.*

On direct appeal, the California Court of Appeal affirmed petitioner's conviction and sentence, rejecting (among other arguments) his *Batson* claim. Pet. App. 59a-95a. As to E.H., the court noted that although the trial court expressed skepticism regarding the prosecutor's preference for jurors without visible tattoos, it found that the explanation was credible in light of the prosecutor's tone and demeanor, among other things. *Id.* at 78a-79a. The trial court was "uniquely suited to make that evaluation," and the court of appeal found "no basis to question that assessment …, regardless of whether the trial court first reacted to the prosecutor's explanation with skepticism." *Id.* at 79a. The court of appeal "attach[ed] no significance" to the prosecutor's failure to strike a juror with a tattoo on the back of his neck, because the prosecutor "had not noticed it during voir dire because the juror was wearing a collared shirt." *Id.* at 79a n.13. The court noted that the prosecutor also professed to have challenged E.H. based in part on her father's conviction, and the court concluded, based on "the totality of the circumstances," that there was no reason to "question the credibility of [that] explanation." *Id.* at 80a. The court observed that the prosecutor had been consistent in excusing other jurors who had themselves been, or had family members who had been, imprisoned recently. *Id.* at 79a-80a. By contrast, other jurors who were seated despite having family members with prior encounters with the criminal justice system were not comparable to E.H. *Id.* at 80a.

As to P.B., the court of appeal concluded that the prosecutor's reasons for challenging him were "reasonable and had a basis in accepted trial strategy," making the prosecutor's explanation "credible." Pet. App. 82a. The court reasoned that based on his answers to the voir dire questions about the hypothetical bank robber and burglar, "the prosecutor could reasonably have concluded that P.B. may have had trouble applying the concept of circumstantial evidence." *Id.* at 81a. "P.B.'s expressed skepticism toward circumstantial evidence and his insistence on corroborating facts could reasonably have led the prosecutor to believe that he would be more likely to favor a defense verdict than other jurors." *Id.* at 82a. Thus, the court concluded, "we can understand—as the trial court did—why the prosecutor would view P.B. as an unfavorable juror, regardless of his race." *Id.*

The California Supreme Court denied review in June 2011. Pet. App. 97a.

4. In January 2013, petitioner filed a petition in federal district court seeking habeas relief, based in relevant part on his *Batson* claim. The district court rejected that claim, adopting the magistrate judge's report and recommendation. Pet. App. 4a-57a.

The district court concluded that the California courts' resolution of petitioner's *Batson* claim was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts. Pet. App. 11a; *see id.* at 24a-42a. The

court noted that "[t]he credibility of a prosecutor's race-neutral explanations for striking a potential juror 'can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rational has some basis in accepted trial strategy.'" Pet. App. at 37a (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)). Applying that standard, "[t]here is no indication in the record that the trial court did not properly evaluate credibility of the prosecution's reasons for striking the jurors at issue considering these factors, and the Court of Appeal's deference to the trial court's credibility finding was appropriate." *Id.* Beyond finding that the state courts reasonably applied *Batson*, the district court also engaged in its own comparative juror analysis and concluded that there was nothing inconsistent in how the prosecutor exercised her peremptory strikes. *Id.* at 38a-41a.

The court of appeals affirmed. Pet. App. 2a-3a. It determined that the state appellate court had properly "evaluated the totality of the circumstances" in evaluating petitioner's *Batson* claim. *Id.* at 2a. The court observed that although reasonable minds might differ as to the credibility of the prosecutor's explanations for excusing E.H. and P.B., the court could not say that, "on this record, the state court 'had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude [petitioner] had shown a *Batson* violation.'" *Id.* at 3a (quoting *Rice v. Collins*, 546 U.S. 333, 341 (2006)).

ARGUMENT

Both the state and federal courts below reasonably applied settled law in denying petitioner relief on his *Batson* claim. There is no reason for further review.

1. Petitioner first argues that the state courts applied the wrong standard in evaluating his claim and that the federal courts should have evaluated his claim de novo instead of under the deferential standard of 28 U.S.C. § 2254(d). Pet. 22-26. That is incorrect.

The California Court of Appeal properly applied the *Batson* framework as this Court has described it. The court explained the three-step *Batson* inquiry: "'First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" Pet. App. 76a. (quoting *People v. Lenix*, 44 Cal. 4th 602, 612-613 (2008) (citing *Rice*, 546 U.S. at 338)).

As to the ultimate inquiry at the third step regarding whether the defendant has established a *Batson* violation, the state court rightly understood that "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be

measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Pet. App. 76a; *see Miller-El*, 537 U.S. at 339 (same). The court of appeal recognized that the trial court was in the best position to assess the prosecutor's credibility based upon her demeanor, tone, and how she generally handled the case before that court. *Id.* at 78a-79a.

Petitioner has not shown, as he must to obtain federal habeas relief, that the trial court "had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude [he] had shown a *Batson* violation." *Rice*, 546 U.S. at 341. As the state appellate court reasoned, the trial court had ample grounds for rejecting petitioner's *Batson* claim. With respect to juror E.H., the court found no reason to question the trial court's determination that the prosecutor was credible in explaining her preference for jurors with no visible tattoos and no recent family history of arrest or incarceration. Pet. App. 78a-81a. The prosecutor did not allow any comparable prospective juror of a different race onto the jury, and declined to strike a black juror with a more distant family arrest history. *Id.* at 80a. As to juror P.B., his "expressed skepticism toward circumstantial evidence and his insistence on corroborating facts could reasonably have led the prosecutor to believe that he would be more likely to favor a defense verdict than other jurors." *Id.* at 81a-82a. These are

ordinary, race-neutral rationales for striking prospective jurors, and the state courts reasonably determined them to be credible.

As the court of appeals held in affirming the denial of petitioner's habeas petition, even if "reasonable minds … could doubt the veracity of the prosecutor's explanations for the challenges at issue," petitioner has shown no more than that. Pet. App. 2a-3a. Where "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility, … on habeas review that does not suffice to supersede the trial court's credibility determination." *Rice*, 546 U.S. at 341-342.

2. Petitioner insists that the record shows the prosecutor's reasons for excusing E.H. and P.B. were pretextual. Pet. 27-29. That argument mischaracterizes the record.

Petitioner asserts that the trial court "discredited" the "tattoo rationale" offered by the prosecutor, so it should have been disregarded. Pet. 25. The record shows otherwise. While the trial court "initially commented that it found it 'very difficult' to credit the prosecutor's focus on the tattoo," that was before "the prosecutor … elaborated on why she had focused on the tattoo," explaining that she considered it to be an indicator of a disregard for social norms. Pet. App. 78a; *see id.* at 29a. After that explanation, the trial court determined the prosecutor's rationale to be credible, and the prosecutor exercised a peremptory challenge against another prospective juror with visible tattoos. *Id.* at 30a, 36a.

While the trial court expressed skepticism about the merits of that approach to jury selection, that is not a basis for finding a *Batson* violation. Even perplexing or facially irrational reasons for striking a juror are permissible so long as they are credible and race-neutral. *See Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam) (rejecting *Batson* claim where prosecutor challenged juror because "he had long, unkempt hair, a mustache, and a beard"). The question is not the "*reasonableness* of the asserted nonracial motive," but rather "the *genuineness* of the motive." *Id.* While the reasonableness of the motive is one factor relevant to an assessment of credibility, *see Miller-El*, 537 U.S. at 339, the rationale offered by the prosecutor here was not so implausible as to compel the conclusion that it was pretextual, in light of the totality of the circumstances observed by the trial court. *See* Pet. App. 78a-79a; *Purkett*, 514 U.S. at 769.

Petitioner also asserts that the prosecutor's explanation that she challenged E.H. in part because of her father's felony conviction and incarceration was pretextual in light of other jurors the prosecutor did not challenge. Pet. 25, 28. But the trial court found otherwise, and its conclusion was not unreasonable. It is true that the prosecutor did not challenge certain jurors whose family members had been arrested (including one black juror). But these family arrests were in the distant past, were for relatively less serious offenses such as driving under the influence, or apparently did not lead to conviction and incarceration. Pet. App. 79a-80a. E.H., in contrast, had a

family member who was convicted of a felony and incarcerated for nearly a decade. *Id.* at 26a. She also had a visible tattoo, unlike the other jurors with family members who had been arrested. *Id.* at 80a. The state appellate court concluded, "[l]ooking at the totality of the circumstances," that "a comparative juror analysis does not lead us to question the credibility of the prosecutor's explanation" for challenging E.H. *Id.* That conclusion was reasonable, and the courts below rightly declined to second-guess it on federal habeas review.

Finally, petitioner asserts that the prosecutor challenged P.B. because she "invoked the stereotype of the ignorant Black man" who would not be able to properly assess the evidence. Pet. 28. The record does not support that accusation. P.B. clearly indicated, in response to voir dire questioning elicited by his "grimace" in reaction to the prosecutor's hypothetical question, that he would be reluctant to convict a defendant based upon circumstantial evidence, even strong circumstantial evidence. Pet. App. 27a, 71a-72a. The trial court found credible the prosecutor's explanation that she challenged P.B. because of that reluctance, and the state appellate court deemed that a "reasonable" exercise of "trial strategy." *Id.* at 82a. The federal courts below correctly respected that state-court determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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