No. 20-

In the

Supreme Court of the United States

Larry Grant Gentry,

Petitioner,

v.

State of Arizona,

Respondent.

On Petition for a Writ of Certiorari to the
Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a party taints the entire jury selection proceedings by providing a racially discriminatory basis for exercising a peremptory strike at the second step of a challenge made under *Batson v. Kentucky*, 476 U.S. 79 (1986).
2. Whether a court assessing a challenge to a prosecutor's use of a peremptory strike should assess the proffered basis for the strike under an objective observer test instead of the purposeful discrimination standard at the third step of a challenge made under *Batson v. Kentucky*, 476 US. 79 (1986).

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Petition for Writ of Certiorari

Petitioner, Larry Grant Gentry, petitions this Court for a writ of certiorari to review the judgment of the Arizona Court of Appeals affirming the conviction and the sentence in his case.

Decisions Below

The Arizona Court of Appeals opinion is reported at *State v. Gentry*, 247 Ariz. 381, 449 P.3d 707 (App. 2019).

Jurisdiction

The Arizona Court of Appeals issued its decision on July 30, 2019. Gentry timely filed a Petition for Review with the Arizona Supreme Court on August 23, 2019. The Arizona Supreme Court denied the Petition for Review on January 07, 2020. Gentry is timely filing this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Relevant Constitutional Provisions

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: No State shall … 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.

INTRODUCTION

During jury selection at Larry Gentry's trial, the prosecutor admitted to striking the last African-American juror on the panel because the prosecutor feared that the juror would identify with Gentry and his wife because the juror's husband had "the exact same background" as Gentry. Gentry and his wife are both African-American.

On appeal, Gentry argued that because the phrase "exact same background" invariably includes race, the jury selection in Gentry's trial had been tainted and could not be saved by any number of race-neutral reasons provided for the strike.

Although Arizona precedent requires reversal when a party admits to a discriminatory basis for the strike, the Arizona Court of Appeals concluded that there was not a discriminatory basis provided for striking the juror. The Arizona Court of Appeals neglected to address the importance of the prosecutor's statement concerning the "exact same background" of the juror's husband.

Arizona, Indiana, Georgia, South Carolina, Wisconsin, and the District of Columbia have adopted the tainted approach, which establishes that no number of race-neutral reasons may rebut the inference of purposeful discrimination when a party provides a facially discriminatory reason for exercising a peremptory strike on a juror at the second step of a *Batson* challenge.

The Second and Eleventh Circuits have expressly disavowed the tainted approach and adopted a mixed-motive approach. The Fourth and Eighth Circuits have adopted a mixed-motive approach in practice. Also known as the dual motivation analysis, the mixed-motive approach permits a party to provide a facially discriminatory reason for exercising a peremptory strike on a juror so long as the party can establish that the strike would have been exercised for additional non-discriminatory reasons in the absence of discriminatory intent.

This case presents an excellent vehicle to resolve the split. As this Court has recognized, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2244 (2019). Yet, lower courts continue to permit jurors to be stricken when a party provides a non-discriminatory reason in addition to an explicitly discriminatory purpose.

This Court should grant certiorari, adopt the tainted approach, find that the jury selection in this case was tainted by a facially discriminatory reason, and reverse.

The Arizona Court of Appeals also rejected Gentry's argument that the purposeful discrimination test established in *Batson v. Kentucky*, 476 U.S. 79 (1986), be replaced with an objective observer test recently adopted by the State of Washington.

This Court's existing *Batson* framework has long been considered ineffectual. It does nothing to address the implicit biases that unconsciously drive discriminatory acts. Rather than stamping out discrimination from jury selection, the purposeful discrimination test has permitted biases to continue unchecked, and, worse, allowed insidious motives to be easily masked by unimaginative excuses.

This case presents an opportunity to remedy the *Batson* framework by replacing the subjective purposeful discrimination test with an objective observer test. This proposed amendment to the third step of the *Batson* framework would promote confidence in our justice systems by ensuring that jurors are not denied the opportunity to serve on juries merely because a party could conceive of a non-discriminatory reason to mask a discriminatory intent.

Both questions merit this Court's review. This Court should grant certiorari on either or both.

STATEMENT OF THE CASE

A. The *Batson* Hearing During Gentry's Trial.

Gentry objected when the State utilized a peremptory strike on Juror 28, "the last African-American on the jury." Appendix C at Appendix-179.

The prosecutor told the trial judge that she took "personal offense to a *Batson* challenge because of basically what it implies that I'm using for decision-making." *Id.* at Appendix-180. The prosecutor requested that the trial judge hold Gentry to his burden of establishing a prima facie case of discrimination before requiring that she provide a race-neutral reason for the strike. *Id.*.

The trial judge required Gentry to establish a prima facie case of discriminatory intent. *Id.*.

Gentry reiterated that Juror 28 was the last African-American on the jury and explained that the prosecutor had not sought to strike the juror for cause. *Id.*. Although Gentry conceded that the prosecutor had a non-discriminatory basis to strike Juror 15, also an African-American juror, Gentry argued that there was no obvious reason to strike Juror 28, as Juror 28 had answered questions like other jurors during voir dire. *Id.*

The trial judge required the prosecutor to explain why she struck the only remaining African-American juror. *Id.*

The prosecutor announced that there were "actually numerous reasons" for the strike. *Id.* The first reason the prosecutor gave was that the juror had scheduled "the trip that conflicts" with the trial schedule. *Id.*

But the trial judge had questioned Juror 28 about the trip. *Id.* at Appendix-044; Appendix-144. Juror 28 had planned a trip to Atlanta two weeks later, on March 15th. *Id.* at Appendix-044. The trial judge had asked Juror 28 what time the flight departed on the 15th, and Juror 28 had later informed the trial judge that the flight departed at 4:15 p.m. *Id.* at Appendix-044; Appendix-144.

But the flight would not conflict with trial since Juror 28's husband could take the juror straight to the airport from court since her husband worked downtown. *Id.* at Appendix-130.

The trial judge had been satisfied that it could accommodate the travel plans within the trial schedule, explaining "That's helpful to know. In the event that I ask you to do that, it sounds like you could probably accommodate that." *Id.* Later, the trial judge announced that it would accommodate Juror 28's travel plans by going "dark" on the 15th if the juror was retained to serve. *Id.* at Appendix-158.

Yet, the prosecutor claimed to have struck Juror 28 because she was concerned that the juror would be frustrated about serving despite her travel commitments. *Id.* at Appendix-181.

The prosecutor then claimed that the "bigger issue" with the juror was the fact that she was married to a military veteran who works at a bank. *Id.* The juror had a "blended family" with her husband, with each partner having children from other marriages. *Id.*

Thus, the prosecutor had "a real concern about her specifically identifying with the defendant and his wife. I don't know or care what race the husband is, but in terms of the fact that he has the exact same background, and they're working with a blended family, that's really concerning to the State." *Id.*

The prosecutor offered another reason for the strike but admitted that it "was not as pressing" as the concern that the juror would identify with the defendant and his family. *Id.* The concern was that the juror had "numerous family members in New York that were either arrested or convicted for drug-related crimes and her son's father was also convicted, I think also for drug related crimes." *Id.*

But the prosecutor admitted that the most pressing reason was Juror 28 potentially "identifying with the defendant and his wife who we expect to testify." *Id.*

Gentry and his wife are also African-American

The prosecutor never questioned Juror 28 about whether her marriage, family, or children would interfere with her ability to serve as an impartial juror.

The prosecutor never questioned Juror 28 about whether her scheduled trip would distract from the juror's ability to serve.

The prosecutor never asked Juror 28 about whether her family's experience with the criminal justice system in New York would impact her ability to serve as an impartial juror. Conversely, the trial judge had accepted her answer to its own question that the juror's experiences would not impact the juror's ability to be fair and impartial. *Id.* at Appendix-131.

When the prosecutor asked the entire jury panel whether their individual or those of family members or friends experiences with the criminal justice system would make it difficult to be fair and impartial, Juror 15 was the only juror to respond affirmatively. *Id.* at Appendix-162.

The prosecutor never asked Juror 28 a single question.

The trial judge found that the prosecutor had provided "a race-neutral reason," "even if limited to the explanation regarding the similarity of the background in the juror with respect to her husband's military experience" along with "the fact he works for a bank and the fact that the juror described having a blended family with multiple children," and concluded "that may be a basis for the juror to identify more closely with Mr. Gentry." *Id.* at Appendix-182. Alternatively, the trial judge found that the prosecutor's "other reasons[,] which do not have anything to do with Juror 28's race," to justify the strike. *Id.*

Gentry was charged with Manslaughter for shooting and killing a man who entered his home without permission, became verbally aggressive, and refused to leave.

Although Gentry presented justification defenses of Use of Deadly Force in Self-Defense, Defense of a Third Person, and Use of Force in Crime Prevention to the jury, he was ultimately convicted and sentenced to thirteen years imprisonment.

B. Gentry's Direct Appeal.

On direct appeal to the Arizona Court of Appeals, Gentry argued that the trial judge erred by permitting the prosecutor to strike Juror 28. Appendix D at Appendix-217-227. The State did not contest that Gentry had established a prima facie case of discriminatory intent at trial under the first step of this Court's *Batson* framework. Appendix E at Appendix-293-294.

Thus, the review on appeal concerned only whether the trial judge erred in finding that the prosecutor's reasons were race-neutral or whether any race-neutral reasons were pretextual responses that masked a discriminatory intent. Appendix D at Appendix-222-230; Appendix E at Appendix-293-297; Appendix F at Appendix-349-352; Appendix A at Appendix-3-4.

Gentry argued that the prosecutor admitted a discriminatory intent when she revealed that she struck Juror 28 out of fear that the juror would identify with the defendant because the juror had a husband with the "exact same background." Appendix D at Appendix-226. The fear of identification with the defendant turned on the similarities between the juror's "blended family" and Gentry's.

Gentry argued that any ostensibly race-neutral reasons were tainted by the discriminatory reasons, as race was inextricably intertwined with having the "exact same background" as Gentry. Any other reasons associated with the juror's family, including the juror's husband's military and employment history, Gentry argued, could not be separated from the reality that race is part of having the "exact same background" as another. *Id.*

The prosecutor's reasons concerning the juror's travel schedule were pretextual, Gentry argued, because the trial judge had already determined that the trial schedule would accommodate the juror's travel itinerary. *Id.* at Appendix-227.

Gentry also argued that Juror 28's reference to the involvement of other members of her family with the criminal justice system should be considered pretextual and discriminatory in of itself. *Id.*

Lastly, Gentry argued that this Court's *Batson* jurisprudence could be improved if the Arizona courts were to follow reforms implemented in the State of Washington. *Id.* at Appendix-228-230. Gentry argued that this Court's *Batson* jurisprudence only set procedures which were minimally required under the Fourteenth Amendment. Gentry argued that this Court's *Batson* framework has proven to be insufficient remedying discrimination from jury selection. *Id.*

The Arizona Court of Appeals rejected Gentry's *Batson* argument. It found that the prosecutor's proffered race-neutral reasons were not pretextual and concluded that there was "no indication the underlying reason for the strike was that the juror would identify with the defendant because they were both African-American, but because of the similarities between her husband's family and employment history." Appendix A at Appendix-004.

Yet, the Arizona Court of Appeals omitted any reference to the prosecutor's announcement concerning "the exact same background" of Juror 28 and her husband to Gentry and his wife. *Id.*

Citing the principle of stare decisis, the Arizona Court of Appeals also summarily rejected Gentry's argument that the Arizona courts should adopt the reforms adopted in Washington. *Id.*

Gentry filed a Petition for Review with the Arizona Supreme Court. Appendix G. In the Petition, Gentry argued that the Arizona Court of Appeals erred by concluding that the phrase "exact same background" did not include the race of Juror 28 and her husband. *Id.* at Appendix-

390-393. Gentry provided the definitions for each word, "exact," "same," and "background." *Id.* Looking to this Court's precedent in a college-admissions affirmative action case, *Grutter v. Bollinger*, 539 U.S. 306, 330-32 (2003), Gentry argued that the prosecutor's proffered reasons were discriminatory since race permeates the experience and background of every individual. *Id.* at Appendix-392.

The Arizona Supreme Court declined to grant review to Gentry's case on January 07, 2020. Appendix B.

Accordingly, this petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

1. CERTIORARI IS WARRANTED TO RESOLVE A SPLIT OVER WHETHER A PRESUMPTIVELY DISCRIMINATORY PURPOSE FOR A JUROR STRIKE MAY BE REMEDIED BY A TRIAL COURT'S FINDING THAT OTHER RACE-NEUTRAL REASONS FOR THE PARTY'S STRIKE WERE GENUINE.

State courts and the federal circuits are split over whether trial courts should proceed to the third step of a *Batson* inquiry after a party provides an impermissible reason along with a permissible reason for a strike at the second *Batson* step.

The first approach, of which Arizona professes to belong, is the per se or tainted approach. Under this approach, a trial judge ends the *Batson* analysis at the second step when a party provides an impermissible basis for the strike, regardless of the number or persuasiveness of other permissible reasons that are proffered. Arizona adopted this approach in *State v. Lucas*, 199 Ariz. 366, 18 P.3d 160 (App. 2001).

The second approach, known as a mixed-motive approach or dual motivation analysis, permits the striking party to avoid liability for a discriminatory strike by establishing an alternative proper purpose for the strike.

In this case, despite the Arizona precedent set by *Lucas*, the Arizona Court of Appeals applied a mixed-motive approach when it omitted from its analysis any consideration of the prosecutor's admission that she struck Juror 28 because of the "exact same background" the juror and her family shared with Gentry and his family. This concern, which led the prosecutor to fear that the juror would identify with Gentry and his family, should have compelled the trial judge to find that the basis for the strike was per se discriminatory, regardless of whether additional race-neutral reasons were provided.

However, the Arizona Court of Appeals apparently applied the mixed-motive approach by analyzing and finding that the other proffered reasons were sufficiently race-neutral.

This Court should grant certiorari and resolve the split of authority concerning the per se / tainted approach and the mixed-motive / dual motivation approach.

A. The Decision Below Contributes To A Split.

The Equal Protection Clause of the Fourteenth Amendment prohibits a party from exercising peremptory juror strikes based on race. *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986). Exclusion of a single juror on account of race violates the Constitution and requires the reversal of a criminal conviction. *Batson*, 476 U.S. at 89; *Snyder v. Louisiana*, 552 U.S. 472, 474, 478 (2008).

Since *Batson*, courts must follow a three-step test to decide whether a peremptory strike violates the Equal Protection Clause. First, the objecting party must establish a prima facie case that a peremptory strike was exercised based on race. Second, upon such a showing, the striking party must offer a non-discriminatory basis for the strike. Third, the trial judge must decide whether the proffered reasons are merely a pretext for discrimination. *See*, *e.g.*, *Flowers* v. *Mississippi*, 139 S.Ct. 2228, 2241, 2243–44 (2019).

The split here concerns whether a trial judge should consider if additional reasons for a strike are pretextual when a party has offered a discriminatory basis for the peremptory strike.

1. At least five states, Arizona (*State v. Lucas*, 18 P.3d 160 (Ariz. Ct. App. 2001)), Georgia (*Rector v. Georgia*, 444 S.E.2d 862 (Ga. Ct. App. 1994)), Indiana (*McCormick v. Indiana*, 803 N.E.2d 1108 (Ind. 2004)), South Carolina (*Payton v. Kearse*, 496 S.E.2d 205 (S.C. 1998)), and Wisconsin, (*Wisconsin v. King*, 572 N.W.2d 530, 535 (Wis. Ct. App. 1997)), along with the District of Columbia (*Robinson v. United States*, 890 A.2d 674 (D.C. 2006)), have adopted the per se or tainted approach.

In 1998, South Carolina Supreme Court adopted the tainted approach in a civil case, *Payton v. Kearse*, 495 S.E.2d 205 (S.C. 1998). The dispute between black parties led to the plaintiff striking prospective white jurors. After the defense lodged a *Batson* objection, the plaintiff's counsel explained that a particular juror "was of a redneck variety." *Id.* at 208. The South Carolina Supreme Court rejected the dual motivation analysis of its Court of Appeals, found the term "redneck" to be a racially derogatory term for whites. *Id.* The South Carolina Supreme Court concluded that "[o]nce a discriminatory reason has been uncovered – either inherent or pretextual – this reason taints the entire jury selection procedure." *Id.* at 210. Thus, no number of additional race-neutral reasons could justify the strike. *Id.*

The District of Columbia Court of Appeals has explicitly held "that even where the exclusion of a potential juror is motivated in substantial part by constitutionally permissible factors (such as the juror's age), the exclusion is a denial of equal protection and a *Batson* violation if it is partially motivated as well by the juror's race or gender." *Robinson v. United States*, 890 A.2d 674, 681 (D.C. 2006).

In 2001, Arizona adopted the per se or tainted approach. *State v. Lucas*, 18 P.3d 160 (Ariz. Ct. App. 2001). In *Lucas*, the attorney justified the use of a peremptory strike because the juror was an attorney and because the juror was a southern male. *Id.* at 162, ¶¶ 9-10. The Arizona Court of Appeals rejected the mixed-motive approach and concluded that, "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process." *Id.* at 162, ¶11.

2. The Second Circuit (*Howard v. Senkowski*, 986 F.2d 24, 27 (2d Cir. 1993)), Eleventh Circuit (*Wallace v. Morrison*, 87 F.3d 1271, 1275 (1996)), have expressly adopted the

mixed-motive approach or dual motivation analysis. The Fourth Circuit and Eighth Circuit (*United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995)), have applied the mixed-motive approach without expressly referring to by name.

In 1993, the Second Circuit Court of Appeals relied on this Court's equal protection jurisprudence issued outside the realm of *Batson* cases, and adopted a dual motivation or mixed-motive approach. *Howard v. Senkowski*, 986 F.2d 24, 27 (2d Cir. 1993). Relying on this Court's decision in *Washington v. Davis*, 426 U.S. 229, 239, 246 (1979), the Second Circuit concluded that a violation of the Equal Protection Clause requires "a racially discriminatory purpose," not merely a racially "disproportionate impact." *Howard*, 986 F.2d at 26. Thus, the Second Circuit concluded that a mixed-motive or "[d]ual motivation analysis, in effect may supplant the so-called 'pretext' analysis." *Id.* at 27. According to the Second Circuit, dual motivation analysis and pretext analysis are not inconsistent since the burden lies on the claimant to establish purposeful discrimination, and where there is a non-discriminatory purpose in addition to a discriminatory purpose, the party exercising the strike bears the burden of proving that the strike would have been "exercised for race-neutral reasons in the absence of such partially improper motivation." *Id.* at 30.

The Eleventh Circuit Court of Appeals relied on *Howard* when it adopted the dual motivation analysis in a pre-AEDPA habeas corpus case, *Wallace v. Morrison*, 87 F.3d 1271, 1275 (1996). In *Wallace*, the prosecutor admitted to using race as a factor, along with age, place of employment, and other factors in creating a numerical scale to rate the desirability of each juror. *Id.* at 1273. After the prosecutor told the court that he had intended to leave a different black juror on the panel that had been struck by the defense, the trial judge concluded that the prosecutor had exercised the strike "solely for legitimate, race-neutral reasons." *Id.*

B. The Decision Below Is Wrong.

In the decision below, the Arizona Court of Appeals rejected Gentry's argument that he had established a *Batson* violation under the tainted approach established in *State v. Lucas*, 18 P.3d 160 (Ariz. Ct. App. 2001). Appendix A at Appendix-003-004; Appendix D at Appendix-224-227; Appendix F at Appendix-348-349.

Although the Arizona Court of Appeals noted that the prosecutor admitted to striking the juror because of the "similarities between the juror's husband and defendant" (Appendix A at Appendix-005), it omitted the precise language the prosecutor used to express the scope of those similarities. The prosecutor said that she struck Juror 28 because of "a real concern about her specifically identifying with the defendant and his wife. I don't know or care what race the husband is, but in terms of the fact that he has the exact same background, and they're working with a blended family, that's really concerning to the State." Appendix C at Appendix-181.

Under a tainted approach, the record before this Court establishes that the prosecutor had an improper discriminatory motive for striking Juror 28.

"Exact" means "exhibiting or marked by strict, particular, and *complete* accordance with fact or a standard." ("exact" *Merriam-Webster Online Dictionary*. 2019. https://www.merriam-webster.com/dictionary/exact (6 Aug. 2019)). (emphasis added).

"Same" means "conforming in *every* respect." ("same" *Merriam-Webster Online Dictionary*. 2019. https://www.merriam-webster.com/dictionary/same (6 Aug. 2019)). (emphasis added).

"Background" in this context means "the total of a person's experience, knowledge, and education." ("background" *Merriam-Webster Online Dictionary*. 2019. https://www.merriam-webster.com/dictionary/background (6 Aug. 2019)).

Given the plain meaning of "exact," "same," and "background," it is evident that race played a substantial part in the prosecutor's strike of Juror 28.

Rather than explain why jury selection was not tainted by the prosecutor's explanation, the Arizona Court of Appeals elected instead to examine the other reasons offered by the prosecutor and concluded that there was no discriminatory intent. Appendix A at Appendix-004. Given the meaning of the term, "exact same background," combined with the fact that Gentry, his wife, and Juror 28 are all African-Americans, the Court of Appeals analysis amounts to a dual motivation analysis.

C. The Question Presented Is Important.

This Court has long recognized that "racial discrimination in selection of jurors harms not only the accused," but "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87. The mixed-motive approach undermines the core principle that the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers*, 139 S.Ct. at 2244.

"Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991). Yet, the mixed-motive approach permits racial discrimination to persist so long as it is masked with additional non-discriminatory motives.

This Court should grant certiorari, adopt the tainted approach, and find that the jury selection in this case was infected by racial discrimination after the prosecutor admitted to striking Juror 28 because the prosecutor feared Juror 28 would identify with Gentry and his wife because the juror's husband had the "exact same background" as the defendant.

2. ALTERNATIVELY, CERTIORARI IS WARRANTED BECAUSE THIS COURT SHOULD REFORM THE THIRD STEP OF ITS *BATSON* FRAMEWORK BY REPLACING THE SUBJECTIVE PURPOSEFUL DISCRIMINATION ASSESSMENT WITH AN OBJECTIVE REASONABLE PERSON STANDARD.

"From its inception, [this Court's] landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors." *State v. Holmes*, 221 A.3d 407, 411 (Conn. 2019) (citing *Batson* 476 U.S. at 106 (Marshall, J., concurring); *State v. Veal*, 930 N.W.2d 319, 359–61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); *State v. Saintcalle*, 309 P.3d 326, 335-337 (Wash. 2013) (overruled in part on other grounds by *Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017)), cert. denied, 571 U.S. 1113 (2013); J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1077–78 (2011); N. Marder, "*Foster v. Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1182–83 (2017); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 178–79 and n.102 (2005); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1887–89 (2015).).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held the Equal Protection Clause of the Fourteenth Amendment is violated when a prosecutor exercises peremptory strikes in a discriminatory manner. 476 U.S. at 85–86. The right to a jury that represents a fair cross section of society extends to all defendants, regardless of whether the defendant is a member of a minority group.

To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts must engage in a three-step process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003) (internal citations omitted).

At the second step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). Thus, even "implausible or fantastic justifications" satisfy the second step. *Id.* at 768.

The third step is when the trial court evaluates the proffered reasons. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The proffer of a pretextual reason for striking a juror "naturally gives rise to an inference of discriminatory intent." *Id.*at 485.

However, trial courts are reluctant to find that a member of the bar has committed misconduct by providing a pretextual reason to mask discriminatory intent that served as the basis for striking the juror. *See* J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113 (2011) ("so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understandably reluctant to find *Batson* violations"); M. Bennett, "Unraveling the Gordian Knot of Implicit Bias in Jury

Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Policy Rev. 149, 162–63 (2010) (noting dual difficulties that "[m]ost trial court judges will ... find such deceit [only] in extreme situations," while other troubling cases indicated that "some prosecutors are explicitly trained to subvert *Batson*"); R. Charlow, "Tolerating Deception and Discrimination After *Batson*," 50 Stan. L. Rev. 9, 63–64 (1997) ("[S]hould courts apply *Batson* vigorously, it would be even less appropriate to sanction personally those implicated. Moreover, judges may be hesitant to find *Batson* violations, especially in close cases, if doing so means that attorneys they know and see regularly will be punished personally or professionally as a result."); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1897–98 (2015) ("[The *Batson* rule's focus on pretext] requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist. Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to the bar for disciplinary proceedings. Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule." [Footnotes omitted.]).

Even if trial judges were not reluctant to find that a member of the bar sought to strike a juror for discriminatory reasons, the existing *Batson* framework does nothing to address the problems that implicit biases inject into our justice system's efforts to root out discrimination during jury selection.

A. *Batson* Does Not Account For Implicit Bias.

"Implicit biases" are discriminatory biases based on either implicit attitudes-feelings that one has about a particular group-or implicit stereotypes-traits that one associates with a particular

group. *See* Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Calif. L. Rev. 945, 948-51 (2006).

In *State v. Holmes*, 221 A.3d 407, 403-431 (Conn. 2019), the Connecticut Supreme Court recently explained why an understanding of implicit bias is paramount to addressing the problem of discrimination in our justice systems. The Connecticut Supreme Court reviewed a "landmark article" and concluded implicit biases contribute to inevitable unconscious racial discrimination during jury selection. *Id.* citing A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 156 (2005).

Ultimately, the Connecticut Supreme Court concluded that it should follow the lead of the Washington Supreme Court by exploring ways that discrimination during jury selection could be ameliorated with the adoption of new rules. *Holmes*, 221 A.3d at 436-439.

The Washington Supreme Court has taken the lead in the area of *Batson* reform with the adoption of Washington General Rule 37. This Court should consider the reform taken in Washington and modify the third step of its existing *Batson* framework by replacing the purposeful discrimination test with an objective reasonable person, or as Washington has called it, "objective observer" test.

B. This Court Should Adopt The Objective Observer Test.

Whether it be due to implicit bias controlling unconscious decision-making or because discriminatory acts are masked through an insidious design that is "better organized and more systemized than ever before," (*Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring)), "it is clear that *Batson* has failed to eliminate race discrimination in jury selection." *State v. Jefferson*, 429 P.3d 467, 475 (Wash. 2018).

It is time for this Court to remedy *Batson*'s shortcomings.

The simplest way forward to effective reform is the replacement of the purposeful discrimination test in the third step of this Court's *Batson* framework with the objective observer test adopted by the State of Washington in Washington General Rule 37.

This reform would disempower parties who seek to mask a discriminatory intent for striking jurors with race-neutral reasons by ensuring that trial courts are not required to find a subjectively discriminatory intent before sustaining a *Batson* objection.

The objective observer test would also empower appellate courts to remedy discriminatory acts during jury selection. In *State v. Jefferson*, the Washington Supreme Court explained the impact of the adoption of the objective-observer test:

> Whether "an objective observer could view race as a factor in the use of the peremptory challenge" is an objective inquiry. It is not a question of fact about whether a party intentionally used "purposeful discrimination," as step three of the prior *Batson* test was. It is an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in non-explicit, or implicit, unstated, ways. For that reason, we stand in the same position as does the trial court, and we review the record and the trial court's conclusions on this third *Batson* step *de novo*. This is a change from *Batson*'s deferential, "clearly erroneous" standard of review of the purely factual conclusion about "purposeful discrimination."

State v. Jefferson, 429 P.3d 467, 480 (Wash. 2018).

Appellate courts in other states have cited to Washington and GR 37 to call for reforms to the *Batson* framework. *See, e.g.*, *People v. Bryant*, 40 Cal. App. 5th 525, 548 (Ct. App. 2019), review denied (Jan. 29, 2020) (Humes, P.J., concurring) ("The State of Washington has shown that other reforms are also possible."); *State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019), reh'g denied (July 15, 2019) (Wiggins, Justice, concurring in part and dissenting in part) ("In the majority of the cases, the reasons given by prosecutors in response to a *Batson* challenge appear to be

pretextual. Washington General Rule 37 . . . helps but does not solve the problem."); *State v. Curry*, 298 Or. App. 377, 389 (2019) ("Washington's experience, and whether a similarly concrete set of rules would improve our handling of peremptory challenges, are questions that may be appropriate for the Council on Court Procedures and the legislature to consider.").

At least two states are actively examining *Batson* reforms in the task force and work group setting: California and Connecticut. *See, e.g., Holmes, supra*, 221 A.3d at 412 (creating a "Jury Selection Task Force, appointed by the Chief Justice, to consider measures intended to promote the selection of diverse jury panels in our state's court-houses"); Announcement of the Supreme Court of California, January 15, 2020, available at: https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt20200129.pdf.

However, this response is not enough.

The Arizona Supreme Court declined to grant Gentry's request to adopt the objective observer test. Appendix B; Appendix G at 393-395.

Even though this Court has acknowledged that its *Batson* framework only establishes the minimum requirement for states under the Fourteenth Amendment, the minimum is all that has concerned states like Arizona. *See* Appendix A at Appendix-004; *State v. Urrea*, 421 P.3d 153, 157, ¶20 (Ariz. 2018).

This Court should act now.

In the event that this Court concludes that the prosecutor did not taint the entire jury selection hearing with her admission that she struck Juror 28 because she feared the juror would identify with Gentry and his wife because the juror and her husband had "the exact same background," as Gentry, it should nonetheless grant certiorari and fix the third step of its *Batson* framework by replacing the purposeful discrimination test with an objective observer test.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED March 31, 2020.

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