

No. _____

19-8798

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

JUN 01 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RAFEEQ QADEER SALAHUDDIN — PETITIONER
(Your Name)

ORIGINAL

VS.

DAVID SHINN, DIRECTOR,
ARIZONA DEPARTMENT OF COR. ET. AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF ARIZONA

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Rafeeq Qadeer Salahuddin #056940

(Your Name)

Arizona State Prison - Florence / East Unit

P.O. Box 5000

(Address)

Florence, Arizona 85132

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether a state court of last resort has power to destroy a defendant's Constitutional right to trial by jury whose members are selected by non-discriminatory criteria pursuant to a newly declared Constitutional Rule (Batson Rule), made retroactively applicable to all similarly situated state and federal criminal defendants whose cases were not yet final, without first affording him notice, and an adequate opportunity to protect it?

Whether a state defendant has a due process and equal protection of the laws right to benefit from the protection of a newly declared Constitutional Rule (Batson Rule) when his case was pending on direct appeal as of right when the Constitutional Rule (Batson Rule) was announced by this Court?

Whether a state defendant that has timely and properly filed a claim of a constitutional Batson violation on direct appeal as of right, have a due process and equal protection of the laws right to have his case remanded for a Batson Evidentiary Hearing?

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LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: *Arizona Attorney General*

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at State v. Harris, 157 Ariz. 35; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the N/A court appears at Appendix _____ to the petition and is

- ☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Feb. 10, 2020. A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: March 3, 2020, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution; the Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

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.

The Civil Rights Act of 1875. 18 U.S.C. § 243:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.

STATEMENT OF THE CASE

On November 27, 1984, the Maricopa County Grand Jury returned an indictment charging petitioner with: first-degree burglary, two counts of kidnapping, two counts of armed robbery, and first-degree murder.

On November 5, 1985, the state and petitioner exercised their peremptory strikes of the jury panel.

On November 6, 1985, prior to opening statements, petitioner's counsel moved for a mistrial and requested that a new jury be selected on the grounds the state had used its peremptory strikes to remove all the blacks from the jury panel:

MR. BALKAN: I do, your Honor. This is a very brief legal motion, I don't think he needs to be present, I've discussed it with him.

Your Honor, at this time, the defense would move for a mistrial based upon the selection of the jury panel. The reason for this is that there are no people of the Negro or Black race impaneled on the jury. There were, I think we agree, there were black people examined. However, it appears that all of them have been removed from the jury at the stage of peremptory strikes.

It would be our legal position that the defendant has been denied his constitutional right to a jury by his peers, and therefore we move for a mistrial, we'd move for the court to dismiss this jury panel and select another.

THE COURT: Do you avow that you did not strike any of those people yourself?

MR. BALKAN: I avow I did not strike those people myself. I further avow that I kept track of those members of the panel who were black and that they would be, the ones who remained, were struck by the state.

THE COURT: Do you have any indication that the State systematically excluded them by reason of their race?

-MR. BAIKAN: Only by inference, your Honor.

THE COURT: All right, motion is denied.

Appendix (E) (R.T. of Nov. 6, 1985, Veroff five-page transcript, at 2-3).

On November 27, 1985, the jury returned a verdict finding petitioner guilty of burglary, two counts of kidnapping, two counts of armed robbery, and first-degree murder.

On February 6, 1986, the trial court sentenced petitioner to life imprisonment on the murder count, 21 years on the burglary charge, 21 years on the kidnapping charges, and 21 years on the robbery counts.

On February 12, 1986, petitioner filed a timely notice of appeal. The Arizona Supreme Court had jurisdiction to hear the appeal pursuant to Arizona Constitution, Article 6, section 5(3), and Ariz. Rev. Stat. §§ 13-4031 through 13-4035.

On April 30, 1986, this Court decided Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) holding that:

"it is a denial of Equal Protection of the Laws for a prosecutor to use his peremptory challenges to exclude jurors on the basis that they were of the defendant's race and that a black criminal defendant could make a prima facie case of an equal protection violation with evidence that the prosecutor used peremptory challenges to strike members of the defendant's race from the jury."

On January 13, 1987, this Court decided Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) holding that:

"a new rule for the conduct of criminal prosecutions, such as the ruling in Batson, applies retroactively to all cases, state and federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past. Failure to apply a newly declared constitutional

rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. After this Court has announced a new rule in the case selected for review, the integrity of judicial review requires the Court to apply that rule to all similar cases pending on direct review. In addition, selective application of a new rule violates the principle of treating similarly situated defendants the same."

Based upon those newly declared constitutional principles outlined above, on February 4, 1987, petitioner, represented by counsel on Direct Appeal as of right to the Arizona Supreme Court, submitted a timely and properly filed Opening Brief claiming an Equal Protection of the laws violation, pursuant to the newly declared constitutional Batson Rule:

"The defendant, a black man, was denied his right under the Fourteenth Amendment to the United States Constitution to Equal Protection of the laws where the prosecutor used his peremptory challenges to remove all black persons from the jury."

See Appendix (F)

On March 23, 1987, the Arizona Attorney General Robert K. Corbin and Assistant Attorney General Galen H. Wilkes, argued in their Answering Brief:

"Appellant's case should be remanded to the trial court for a hearing to allow the prosecutor an opportunity to 'come forward with a neutral explanation' to explain his striking of the black jurors from the jury panel."

and concluded:

"Because of the recent United States Supreme Court pronouncements, appellee respectfully requests that the Court remand this case to the trial court for a hearing so that the prosecutor may have an opportunity to provide a 'neutral explanation' for striking the blacks from appellant's jury panel."

See Appendix (G)

On May 3, 1988, the Arizona Supreme Court on direct appeal as of right, No. CR-86-0054-AP, affirmed petitioner's conviction and sentences, based upon its antecedent ruling in State v. Holder, 155 Ariz. 83, 745 P.2d 141, decided October 15, 1987, stating that:

"The question of whether a constitutional principle is 'retroactive' is a question distinct from the question of whether a defendant must timely assert the principle in order to receive its benefits. While the Supreme Court has twice considered the retroactivity of Batson, it has not considered the whether a defendant may successfully raise a Batson issue for the first time on appeal. Addressing retroactivity, the Court held in Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), that Batson was not available to defendants whose direct appeals were final at the time Batson was announced. In Griffith v. Kentucky, — U.S. —, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Court held, again addressing the issue of retroactivity, that Batson applied to defendants whose appeals had not become final by the time of the Batson decision. When the instant case was being briefed in the court of appeals, Griffith had not yet been decided, and the state urged in its brief that Batson should not be applied retroactively. The court of appeals correctly noted that the retroactivity issue was settled by Griffith. Since the defendant here falls within the Griffith ambit, the question then becomes whether he should be permitted to raise the Batson issue for the first time on appeal. The court of appeals held that he could do so. We disagree.

Absent fundamental error, error is usually considered to be waived on appeal unless it was objected to at trial. State v. Henley, 141 Ariz. 465, 687 P.2d 1220 (1984). This principle also applies to constitutional error. See State v. Magallanes, 110 Ariz. 235, 517 P.2d 505 (1973). Only fundamental error, that is, error which goes to the very foundation of the case, may be raised for the first time on appeal. State v. Burton, 144 Ariz. 248, 697 P.2d 331 (1985).

[At] least one federal circuit court has noted the passage and held that a Batson challenge does not involve fundamental error and is waived if a timely objection is not made. Virgin Islands v. Forte, 806 F.2d 73, 76-77 (3rd Cir. 1986). See also United States v. Erwin, 793 F.2d 654, 667 (5th Cir. 1986). In addition, several state appellate courts have held that a Batson challenge must be made in a timely fashion or it is waived. Ford v. State 180 Ga. App. 807, 850 S.E.2d 816 (1986); People v. Holder, 153 Ill. App. 3d 884, 106 Ill. Dec. 700, 506 N.E.2d 407 (1987); Weekly v. State, 496 N.E.2d 29 (Ind. 1986). We conclude that a Batson issue

does not present fundamental error and a failure to raise it cannot be excused on that ground."

Id at 85.

In petitioner's case in State v. Harris, 157 Ariz. 35, 36 decided on May 3, 1988, the Arizona Supreme Court held that:

"In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986), the court held it to be a denial of equal protection for a prosecutor to use his peremptory challenges to exclude jurors on the basis of defendant's race. In State v. Holder, 155 Ariz. ___, 745 P.2d 141 (1987), we held that a potential Batson error must be raised at trial, or it is waived. We are now required to determine when objection must be made. In this case, the first objection was not made at the time that peremptory strikes were exercised but the next day after the jury had been impaneled and all the stricken jurors excused. We hold this objection to be untimely and hence a waiver of the issue. Consequently, we affirm."

Batson does not forbid the use of peremptory challenges against jurors of defendant's race. Rather it forbids such challenges because they are of defendant's race. When it appears that the forbidden purpose is being achieved, the prosecutor is required to come forward with a neutral explanation for the challenge. Implicit in this is that where no explanation is forthcoming, the challenged jurors must be allowed to sit. When no objection is made until after the challenged jurors have been excused, the possibility for immediate remedy for an unconstitutional action has been lost.

To allow a defendant to permit an error to go unrectified and then, as here, claim the right to a mistrial or a new trial if he is convicted violates the contemporaneous objection rule and waives the issue for purposes of appeal. Government of Virgin Islands v. Forte, 806 F.2d 73 (3rd Cir. 1986). See generally State v. Holder, 155 Ariz. ___, 745 P.2d 141 (1987); People v. Holder, 153 Ill. App. 3d 884, 106 Ill. Dec. 700, 506 N.E.2d 407 (1987).^{1/}

Affirmed.

^{1/} In United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987), the court held timely an objection made after the challenged jurors had been excused. To the extent this ruling was based on the proposition that the facts justifying the objection may not have been known until then, it has no application to this case. To the extent that the ruling was based on the absence of prejudice to the government because it was free to retry the defendant, we respectfully reject it. Because the government is always free to retry one who has his conviction overturned for procedural

errors, the Thompson rule would effectively eviscerate the contemporaneous objection rule and would allow all errors to be raised for the first time on appeal.

On July 20, 1988, petitioner filed a state petition for writ of habeas corpus pursuant to rule 1(a) with the state supreme court, with a claim for relief, 'new evidence' that was not part of the trial court record for appeal: a verified sworn affidavit of defence-counsel, asserting he made a timely objection to the prosecutor's use of peremptory challenges to exclude all black prospective jurors, in open court on the day of voir dire November 5th, 1985. (HC-88-0033)

On August 1, 1988, the state supreme court denied relief holding:
"it appearing that the relief sought by the petitioner may be obtained through a petition for post-conviction relief in the trial court."

On June 25, 1990, petitioner filed initial petition for post-conviction relief in the trial court claiming 'new evidence' which was not a part of the trial court record of the case on appeal, that alleged that trial-counsel did make a contemporaneous objection to the prosecutor's peremptory challenges to exclude all remaining black prospective jurors at petitioner's trial. (CR-144541) State v. Harris

On July 26, 1991, an evidentiary hearing was held in respect of trial-counsel's sworn affidavit, and subsequently, the trial court dismissed the petition for post-conviction relief. Appendix H.

On October 31, 1991, a motion for rehearing was filed and subsequently denied.

On November 13, 1991, a petition for review was filed in the

arizona court of appeals - division one, on February 18, 1993, the court of appeals denied relief. (CR-93-0177-PR) State v. Harris

On April 2, 1993, a petition for review by the state supreme court was filed, and on June 17, 1993, the state supreme court denied review.

In 1996, this Court decided Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); subsequently, the Arizona Department of Corrections in 1997 removed all full law libraries from all state prison facilities with the exception of the central-unit in the Florence Prison Complex; and thus, debilitated and retarded petitioner's ability to be apprised of any material, significant changes in laws handed down by this Court or by State Supreme court.

It wasn't until 2010 that petitioner was apprised by an inmate by the name of Jimmy Lucas, that the state supreme court had a mandatory constitutional and statutory obligation to review the entire record when a case comes to it on direct appeal as of right, in search of fundamental errors which included federal constitutional errors and where such errors are found to reverse the conviction.

On September 16, 2010, petitioner filed a petition to recall the mandate in the state supreme court M-10-0030, alleging that he has been denied his constitutional right to be deprived of his liberty as punishment for criminal conduct solely through due process and equal protection of the laws, guaranteed by the Fifth and Fourteenth Amendments; where, the proceedings of a state constitutionally guaranteed right to direct appeal is void by law, by state supreme.

court's failure to comply with mandatory statute A.R.S. §13-4035.

On January 18, 2011, the state supreme court recharacterized the petition as a Special Actions motion and declined to accept jurisdiction. M-10-0030

On September 5, 2013, petitioner filed a notice for post-conviction relief and a second petition for post-conviction relief in the trial-court; therein, petitioner challenged his conviction and sentence under his Sixth/Fourteenth Amendment right to the effective assistance of trial-counsel at every critical stage; and that Martinez v. Ryan, established cause for not raising the claim in the initial rule 32 proceedings, inter alia. CR-144541

On October 11, 2013, the trial-court summarily dismissed the petition. CR-144541 State v. Salahuddin

On October 28, 2013, petitioner filed in the trial-court a motion for rehearing. CR-144541

On December 5, 2013, the trial-court denied the motion for rehearing. CR-144541

On December 27, 2013, petitioner filed a petition for review in the court of appeals, state of arizona division one. 1 CA-CR 14-003 PR

On September, 29, 2016, the court of appeals granted review and denied relief. 1 CA-CR 14-0003 PRPC State v. Salahuddin

On January 11, 2017, petitioner filed a petition for review in the state supreme court. CR-17-0018-PR State v. Salahuddin

On August 17, 2017, the state supreme court denied the petition for review. CR-17-0018-PR

On November 17, 2017, petitioner filed his first petition for a

Federal writ of habeas corpus in the United States District Court for the District of Arizona, CV-17-04270; alleging inter alia that he was denied his constitutional right not to be deprived of his liberty without due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution; where, he was denied his guaranteed Constitutional right to a trial by jury whose members are selected by nondiscriminatory criteria, in violation of the Equal Protection Clause of the Fourteenth Amendment; denied his right counsel at the critical stage of the jury selection; denied his right to appellate counsel on direct appeal as of right; and that he pursuant to the Martinez Equitable Exception to procedural default announced by this Court in Martinez v. Ryan, 132 S.Ct. 1309 (2012), was entitled to a Martinez Evidentiary Hearing, when counsel in that proceeding was ineffective, where, under state law ineffective assistance claims must be raised during the first rule 32 proceeding. Salahuddin v. Ryan, CV-17-04270

On April 8th, 2019, the U.S. district judge denied the petition as untimely and dismissed the action with prejudice and denied request for C.O.A. Salahuddin v. Ryan, CV-17-04270

On May 3rd, 2019, petitioner filed timely notice of appeal contemporaneously with a motion for leave to proceed In Forma Pauperis on Appeal. Salahuddin v. Ryan, CV-17-04270

On May 9th, 2019, petitioner filed a request for a certificate of appealability in the U.S. Court of Appeals for the Ninth Circuit. 19-15984

On August 22, 2019, petitioner properly filed in the state supreme court a petition for writ of habeas corpus ad subjiciendum with a separate memorandum of points and authorities in support of the

petition for writ of habeas corpus ad subjiciendum HC-19-0027, pursuant to Arizona Revised Statutes §§ 13-4121 thru 13-4143 and Arizona Supreme Court Rule 1(a) 1; alleging that petitioner is unlawfully in custody in violation of his rights under the Fifth and Fourteenth Amendment to the United States Constitution to not be deprived of his liberty without due process and equal protection of the laws; (1) where, petitioner was deprived of his substantive constitutional right guaranteed by the Fourteenth Amendment to the United States Constitution to a trial by jury whose members are selected by nondiscriminatory criteria, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution - a structural error. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); (2) where, on direct appeal as of right, the state supreme court, without justification, refused to retroactively apply a mandatory newly declared constitutional Batson Rule, to a timely and properly presented claim of a constitutional Batson violation, in violation of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution; see Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); (3) and where, the state supreme court on direct appeal as of right arbitrarily foreclosed adequate and effective appellate review of the entire record in search of fundamental error as mandated by valid mandatory statute A.R.S. § 13-4035 (A) & (B), that deprived petitioner of a substantial right a state created liberty interest which the due process clause of the Fourteenth Amendment to the United States Constitution preserves against arbitrary deprivation by the state. See Hicks v. Oklahoma, 447

U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980), Salahuddin v. Ryan.

On Nov. 18, 2019, the United States court of appeals for the ninth circuit denied the request for a C.O.A. 19-15986

On January 10th 2020, petitioner filed a petition for panel rehearing in the ninth circuit. Salahuddin v. Ryan, 19-15986

On February 11th 2020, the United States court of appeals for the ninth circuit, construed the petition for panel rehearing as a motion for reconsideration and denied it. Salahuddin v. Ryan, 19-15986

On February 10th 2020, the Arizona Supreme court dismissed the petition for writ of habeas corpus and separate memorandum of points and authorities HC-19-0027; holding that "in this petition Mr. Salahuddin presents claims based on Batson v. Kentucky, 476 U.S. 79 (1986), that he has previously presented to this court in an appeal and two Rule 32 post-conviction proceedings. This court denied relief or review. See State v. Harris, 157 Ariz. 35 (1988); State v. Harris, 175 Ariz. 64 (App. 1993) (review denied CR-93-0177-PR); State v. Salahuddin, 2016 WL 5436486 (Ariz. App. 2016) (review denied CR-17-0018-PR). Therefore,

It is Ordered that the Petition for Writ of Habeas Corpus and Separate Memorandum of Points and Authorities are dismissed." Salahuddin v. Ryan.

On February 26th 2020, petitioner filed a motion for panel reconsideration in the state supreme court HC-19-0027, alleging inter alia, that, contrary to federal law as determined by the United States Supreme Court's principles governing the retroactive application of newly declared constitutional rules, the state supreme court, without justification, refused to apply the Batson Rule retroactively to

petitioner's case on direct appeal as of right, where, petitioner timely and properly presented in an appropriate proceeding a claim of a constitutional Batson violation and denial of equal protection of the laws; dismissing the claim as waived and affirming conviction and sentence.

A judgment however, based solely upon a procedural error - wherein, petitioner has demonstrated was clearly incorrect - see Hamling v. U.S.,

418 U.S. 87, 107 (1974) (claim not precluded on appeal by failure to raise objection at trial because intervening Supreme Court decision changed law while appeal pending); O'Connor v. Ohio, 385 U.S. 92, 93 (1966) (same); U.S. v. Mulder, 889 F.2d 239, 240 (9th Cir. 1989) (same); U.S. v. Flores-Montano, 424 F.3d 1044, 1047 (9th Cir. 2005) (same); U.S. v. Vasquez-Rivera, 407 F.3d 476, 487 (1st Cir. 2005) (same); Harris v. Kuhlmann, 346 F.3d 330, 341 n.5 (2nd Cir. 2003) (same); U.S. v. Darwich, 337 F.3d 645, 656 (6th Cir. 2003) (same); Richardson v. U.S., 379 F.3d 485, 487 (7th Cir. 2004) (same); and see State v. Munninger, 209 Ariz. 473, 477, 108 P.3d 204, 208 (App. 2005) (same) - and not a judgment based upon the merits of the claim, and therefore, remedy by way of direct appeal was inadequate and ineffective as a judicial process to test the legality of petitioner's detention, thus, the Batson violation claim was dismissed without prejudice, and therefore, petitioner's claims are not collateral estoppel or estoppel by judgment; therefore, the State has deprived petitioner of his right to his Day in court to test the legality of his detention and the State has deprived him of his liberty without due process of law by its failure, in the circumstances set forth, to provide any corrective judicial process by which a conviction so obtained may be set aside. Salahuddin v. Ryan, HC-19-0027.

On March 5th 2020, in Salahuddin v. Ryan, HC-19-0027, the Arizona Supreme Court held that: "On February 27th 2020, Petitioner Rabeeg Salahuddin, Pro se filed a 'Motion for Panel Reconsideration'. Upon consideration, it is ordered dismissing petitioner's Motion for Panel Reconsideration."

REASONS FOR GRANTING THE PETITION

The questions before this Court - Whether a state court of last resort has power to destroy a defendant's constitutional right to trial by jury whose members are selected by non-discriminatory criteria pursuant to a newly declared Constitutional Rule (Batson Rule), made retroactively applicable by the Griffith Rule - to all similarly situated state and federal defendant's whose cases were not yet final, without first affording him notice, and an adequate opportunity to protect it - whether a state defendant has a due process and equal protection of the laws right to benefit from the protection of a newly declared Constitutional Rule (Batson Rule) when his case was pending on direct appeal as of right when the Constitutional Rule (Batson Rule) was announced by this Court - and whether a state defendant that has timely and properly filed a claim of a constitutional Batson violation on direct appeal as of right, have a due process and equal protection of the laws right to have his case remanded for a Batson Evidentiary Hearing - presents important issues concerning the administration of criminal justice.

SUMMARY OF THE ARGUMENT

Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. Functionally and symbolically, juries stand as a safeguard against the States' misuse of its powers to confine or execute its citizens. Racial discrimination in the selection of juries injures not only the defendant and the African-American citizenry who are excluded from service, but the entire community. Cynicism and disrespect for the law are the pre-

dictable results when courts condone blatant discrimination in the courtroom.

The facts of this case present an egregious example of just the type of government manipulation of the jury that denies justice and breeds disrespect for the law. The Maricopa County Attorneys Office routinely and deliberately excluded African-Americans from jury service solely because of their race through use of peremptory strikes at the time this case was tried and in preceding years. The prosecutors followed this practice in choosing the jury in this murder case. During Voir Dire the same questions were given to and answered in the same way by black prospective jurors who were stricken as white jurors who were allowed to sit as jurors. State court official Peter S. Balkan, testified that the same prosecutors who systemically struck African-Americans from the jury in this case had discriminated in the same manner in other trials for over sixteen years before petitioner's trial. Yet, instead of putting the prosecutors' strikes in context that bespeaks racial discrimination the Arizona courts refused to consider such evidence. Appendix H, page 24 lines 1-20.

The record here makes clear that this Court's determination to end invidious racial discrimination in the selection of juries remains unfulfilled in some jurisdictions. To assure that there is an adequate and certain check on the biased use of peremptory challenges to exclude African-Americans from juries, the Court needs to restate what would seem a self-evident proposition: that failure of lower Federal and state courts to apply newly declared constitutional rules to all criminal cases pending on direct appeal violates basic norms of constitutional

adjudication; places a clear and unreasonable burden upon a defendant's rights to due process and equal protection of the laws.

For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race.

This Court has made abundantly clear the harm from discriminatory exclusions of African-Americans is not to the defendant alone. When particular segments of the community are excluded from serving on juries, they are excluded from participating in an institution that stands at the heart of our democracy. To be told that you are unfit because of your race to judge your fellow citizens is to be told unequivocally that you are a second-class citizen. Your voice is not considered to be a voice of common sense to be interpose between the government and the accused. Your intelligence, your ability to be fair, your life experiences, your understanding of your society, and your integrity are all denigrated.

ARGUMENT

I.

The Practice of Excluding African-Americans from Juries
Undermine Justice and the Appearance of Justice

The Crucial Role of Juries in a Democratic Society

This case is of great significance because juries are both a real and symbolic bulwark against State's misuse of its powers to confine or execute its citizens. "The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." Batson, 476 U.S. at 86. It is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," Duncan v. Louisiana, 391 U.S. 145, 156 (1968), "a prized shield against oppression," Glasser v. United States, 315 U.S. 60, 84 (1942), that "fence[s] round and interpose[s] barriers on every side against the approaches of arbitrary power," *id.* at 84-85.

The jury also serves as the defendant's primary protection against the invidious influence of race in the decision whether he lives or dies. "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' Strauder v. West Virginia, 100 U.S. 303, 309 (1880). Racial prejudice can influence jurors' determination of the issue of guilt or innocence. "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." Georgia v. McCollum, 505 U.S. at 69 (O'Connor, J., dissenting). "[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' Rose v.

Mitchell, 443 U.S. 545, 556 (1979), and places the fairness of a criminal proceeding in doubt." Powers v. Ohio, 499 U.S. 400, 411 (1991).

Race-Based Exclusion Harm Jurors as Well as Defendants

As this Court has made abundantly clear, the harm from discriminatory exclusions of African-American jurors is not to the defendant alone. "People excluded from juries because of their race are much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." Carter v. Jury Commission, 396 U.S. 320 (1970).

"The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." Powers v. Ohio, 499 U.S. at 406 (quoting Balzac v. Porto Rico, 258 U.S. 298, 310 (1922)). For people who are excluded from jury participation, there is no such security, but doubt and mistrust that the system is functioning in a fair and impartial manner.

The fact that the prosecutors have long used peremptory challenges to purge juries of African-Americans is not news in the African-American community. When an African-American is struck from a jury, he or she is aware that the strike may be racially motivated. "[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." Edmonson v. Leesville Concrete Co., 500 U.S. at 628, the place where even-hand-

ed justice is supposed to reign. When the exclusion comes not just in a government forum, but at the instance of the government's representative himself, the injury is further compounded.

Such exclusions have led to the belief that what occurs in the courthouse is not justice, but "white man's justice".

Racial Discrimination in Jury Selection Discredits the Entire Judicial System

Society has a paramount interest in maintaining confidence in its criminal justice system. A democratic society depends on the shared belief of its members that the system is fair and impartial, that verdicts are objective and reliable. "Wise observers have long understood that the appearance of justice is as important as its reality." J.E.B. v. Alabama ex rel. T.B., 511 U.S. at 155 (Scalia, J., dissenting).

It is not only African-Americans who equate racial discrimination in the courtroom with a denial of justice. This Court has repeatedly observed that "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality." Rose v. Mitchell, 443 U.S. at 556.

There continues to be widespread public suspicion about the fairness and accuracy of verdicts in criminal cases where all or nearly all-white juries are impaneled in communities with significant

minority populations

For all these reasons, state conduct that unlawfully manipulates a jury in a murder case so that minority juror participation is non-existent raises profoundly important issues.

II

The Lower Court's Refusal to Comply with Mandate of Rule of Retroactive Application of Newly Declared Constitutional Rule, Flout's This Court's Mandate to End Race Discrimination In Jury Selection

This case presents not only strong proof that intentional discrimination marred the selection of petitioner's jury but also a disturbing scenario of the lower court's ignoring both this evidence and controlling law in concluding that no Equal Protection violation occurred due to waiver by petitioner of retroactive application of newly declared constitutional Batson Rule, by his failure to "timely object" at trial; to the extent the State required petitioner to exhibit this sort of prescience it placed a clear and unreasonable burden upon his due process rights. Shuttlesworth v. Birmingham, 394 U.S. 147, 155-157, 89 S.Ct. 935, 22 L.Ed.2d 142 (1969).

Moreover, the Arizona Attorney General's office conceded that petitioner's case was entitled to remand to the trial court in light of Batson and Griffith; and the State has never contested the facts

that the prosecutors' actions in this case violated the constitutional rule announced in Batson and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Furthermore, it is clear that the retroactive application of that rule announced in Griffith, 479 U.S. 314, 107 S.Ct. 708, does not prevent petitioner from relying on Batson, since his conviction was not final when the decision in both Batson and Griffith was rendered.

Thus, the issue before the Court is the permissibility of invoking the Arizona procedural rule to defeat petitioner's meritorious Federal claim.

Petitioner asserts that under the circumstances of this case, the failure to make a contemporaneous objection in the trial-court cannot bar petitioner from the protection of his guaranteed constitutional Federal right to trial by jury whose members are selected by non-discriminatory criteria under Batson and the Equal Protection Clause of the Fourteenth Amendment. Recognition of the States' reliance on former decisions of this Court which Batson overruled was one of the principal grounds for prospective application of the rule of that case. See Griffith v. Kentucky, 479 U.S. 314, 322-23, 107 S.Ct. 708, 713, 93 L.Ed.2d 649. Defendants can no more be charged with anticipating the Batson decision than the States.

Petitioner was on direct appeal as of right in the Arizona Supreme court when this Court handed down its decisions in Batson and Griffith, wherein, Petitioner timely and properly asserted a Batson violation and Equal Protection of the laws claim.

Thus, his failure to make a contemporaneous objection to a practice

which Arizona had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court.

In an extraordinary number of attempts to raise the Constitutional issue in State courts, has been frustrated by a holding that the question was not properly raised or pursued. However, this Court has long held that: "[W]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 243 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143; and therefore, to give effect to a contemporaneous objection rule for its own sake, when there has been a significant change in the law handed down by this Court and made retroactively applicable to all State and Federal cases not yet final, "would be to force resort to an arid ritual of meaningless form." Staub v. City of Baxley, 355 U.S. 313, 320, 78 S.Ct. 277, 2 L.Ed. 2d 302.

Here, the State procedural ground is inadequate, and its inadequacy is especially apparent because no prior Arizona case gave notice of the existence of a required contemporaneous objection must be made, in order to give the prosecutor an opportunity to give a race neutral explanation for his/her unlawful acts, and if no race neutral explanation is forthcoming then the excluded juror must be allowed to sit. See State v. Harris, *supra*.

However, this Court has long held that: "Novelty in procedural requirements cannot be permitted to thwart review in this Court..." N.A.A.C.P. v. Alabama ex rel Patterson, 357 U.S. 449, 457.

Before Batson, the fact is that African-Americans were virtually openly excluded from participation in a system of justice purporting to promise equality and fairness bred cynicism and distrust. When this Court decided Batson, its manifest intent was to bring to an end—once and for all—these practices and to restore integrity to the system. However, cases like petitioner's show why it has not ended and will not end without this Court's decisive intervention.

It is clear that Arizona courts need a clear admonition from this Court that this Court will not turn a blind eye to the truth of racial prejudice and discrimination that permeates American life and the American court system.

Therefore, petitioner asserts, failure of lower federal and state courts to apply newly declared constitutional rules to all criminal cases not yet final, when claims are timely and properly presented in appropriate proceedings, violates this Court's mandate; basic norms of constitutional adjudication, and the principle, "that all persons who are similarly situated shall be treated the same"; and such inequity places a clear and unreasonable burden upon Defendants rights to due process and equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution.

III

The Lower Courts Refusal to Recognize the Evidence Presented of Purposeful Discrimination Flout's This Court's Mandate to End Race Discrimination In Jury Selection

In early 1985, it was widely known that Maricopa County prosecuting attorneys used peremptory challenges to keep African-Americans off juries, but the courts apparently believed that Swain immunized their actions. Once Batson lifted that immunity, it was plain the courts could now provide relief to petitioner.

But relief was not granted because the courts failed to apply the clearly established law requiring consideration of the compelling pattern and practice evidence in the record as bearing on the question whether petitioner had shown that the strikes constituted racially-biased conduct.

It is difficult to tell whether the Arizona courts simply misunderstood Batson and Griffith, or were so unreceptive to a claim of racial discrimination that they refused to consider compelling facts in support of the claim.

"For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by state's purposeful conduct. 'The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, Strauder, [100 U.S.,] at 305 [25 L.Ed. 664], or on the false assumption

that members of his race as a group are not qualified to serve as jurors. see Norris v. Alabama, 294 U.S. 587, 599 [55 S.Ct. 579, 584, 79 L.Ed. 1074] (1935); Neal v. Delaware, 103 U.S. 370, 397 [26 L.Ed. 567] (1881). Batson, supra, 476 U.S., at 86, 106 S.Ct., at 1717 (footnote omitted). Although a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race', Strauder, 100 U.S., at 305, 25 L.Ed. 664, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria."

Powers v. Ohio, 499 U.S. 400, 404, 111 S.Ct. 1364, 1367, 113 L.Ed. 2d 411 (1991).

In petitioner's view, it is hard to imagine a case with clearer proof that the prosecutor intended to discriminate in this case in the jury selection process, absent an explicit confession from the prosecutor;

(1) The petitioner, a black man is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.

(2) In this case involved a black defendant and white victims, during Voir Dire the same questions were asked by the trial judge, and were answered in the same manner given both to black prospective jurors who were excluded and white prospective jurors, who were allowed to be seated as jurors.

(3) Arizona Attorney Peter S. Balkan, testified under oath and without any objection, that prior to the trial in this case he informed petitioner of the fact that he would be tried by an all-white jury.

(4) Arizona Attorney Peter S. Balkan, testified under oath and without any objection, that in his practice of law in the Superior Court for the County of Maricopa for 16 years, he has never had an African-American impaneled on a jury, not a single one. Appendix H.

(5) The Maricopa County Attorneys office had at the time of petitioner's trial a long history of vastly excluding African-Americans through use of peremptory strikes from service on juries solely because of their race.

(6) The Maricopa County prosecutor in this case used two of his peremptory challenges to exclude 100% of the remaining qualified African-Americans from the venire solely because of their race. Appendix H.

(7) The Arizona Attorney General in this case in its Answering Brief, conceded error - a prima facie case of purposeful discrimination in jury selection proceedings - and argued that petitioner's case is entitled to remand in light of Batson and Griffith.

"Notwithstanding history, precedent, and the significant benefits of the peremptory challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded". Powers v. Ohio, 499 U.S. at 430 (Rehnquist, C.J., dissenting). Petitioner's was just such a jury.

Despite clear and emphatic statements condemning race discrimination in the selection of juries in this Court's decisions since 1879, prosecutors in Maricopa County in 1985 openly followed a policy of excluding African-Americans through the use of peremptory challenges.

As our nation's history aptly demonstrates, discrimination in jury selection will continue unless this Court reaffirms in clear and emphatic language that review of a Batson claim is not a shell game, but the exercise of steadfast and resolute judicial commitment to ending race-based exclusions of African-American citizens from participation in the American judicial process.

Petitioner's conviction and sentence of life should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 06 - 01 - 2020