

No. 20-6386

IN THE SUPREME COURT OF THE UNITED STATES

January 13, 2021

JAMES WALKER, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

CAPITAL CASE

Whether this Court's intervention is unwarranted where no conflict of federal law exists and independent state grounds support denial of Walker's second petition for writ of habeas corpus.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A jury convicted Walker of Conspiracy to Commit Robbery, Burglary, two counts of Robbery With the Use of a Deadly Weapon, Attempted Murder With the Use of a Deadly Weapon, and Murder With the Use of a Deadly Weapon. The jury sentenced Walker to death for Anziano's murder. Walker unsuccessfully challenged the convictions and sentence on appeal, *see Walker v. State (Walker I)*, Docket No. 49507 (Order of Affirmance, March 3, 2010), reh'g denied Docket No. 49507 (Order Denying Rehearing but Clarifying Decision, May 17, 2010), and in a postconviction petition for a writ of habeas corpus, *see Walker v. State (Walker II)*, Docket No. 62838 (Order of Affirmance, November 25, 2014). Walker then filed a second postconviction petition for writ of habeas corpus which the district court denied as

procedurally barred as a matter of state law. The Nevada Supreme Court affirmed the court's decision. See Walker v. State (Walker III), Docket 75013 (Order of Affirmance, June 19, 2020).

STATEMENT OF FACTS

Walker stabbed Christine Anziano to death as she exited a Las Vegas, Nevada store and stole her purse and purchases. The next night, Walker slashed the throat of Kirk Cole and absconded with Cole's money. Cole survived his injuries. Walker's girlfriend, Myrdus Archie, assisted him in the incidents involving Anziano and Cole. Several hours before Anziano's murder, Walker approached 17-year-old Susan Simon while Simon was sitting in a car in a store parking lot. Walker reached into the car and stole her purse. Archie did not participate in this event.

REASONS FOR DENYING THE PETITION

I. WALKER'S BATSON CLAIM FAILS TO PRESENT AN IMPORTANT FEDERAL QUESTION

The question of whether the Nevada Supreme Court correctly concluded in an *unpublished* order that Walker's second petition was procedurally barred does not raise an important federal question. Walker claims that the Nevada Supreme Court has yet to address the merits of his allegation that during jury selection, the State asked an African American juror whether he would feel pressure by his friends or family to vote against the death penalty for an African American defendant, violated Batson v. Kentucky, 476 U.S. 69 (1986). Writ at 11-12. Specifically, Walker argues

that even though trial and postconviction counsels raised a Baston violation, neither the trial nor appellate courts have applied the Baston framework to his claim, in violation of his constitutional rights. Id.

This Court's precedents are clear that this Court does not sit in order to look for an "opportunity" to raise a constitutional issue but instead only addresses those problems that truly need resolution. Rule 10(c) of the Rules of the Supreme Court of the United States precludes discretionary intervention since certiorari is warranted in situations where a "state court ... has decided an important question of federal law that has not been, but should be, settled by this Court[.]" It is generally accepted that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." 36 C.J.S. Federal Courts §295 (2012). As explained in Ross v. Moffit, "[t]his Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." Ross v. Moffit, 417 U.S. 600, 616-17, 94 S.Ct. 2437, 2447 (1974).

An important question of federal law is one that goes beyond whether the alleged error complained of "is undesirable, erroneous or even 'universally condemned,'" Smith v. Phillips, 455 U.S. 209, 221, 102 S.Ct. 940, 948 (1982). In order to amount to an important federal question, the issue must be one of broad scope that actually needs to be settled:

A federal question raised by a petitioner may be ‘of substance’ in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... ‘Special and important reasons’ imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court’s duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616-17 (1955) (citations omitted).

Walker attempts to circumvent this well-settled rule by arguing that Rule 10(a) Rules of the Supreme Court of the United States grants this Court plenary power to review his claim on constitutional grounds. However, Walker ignores that Rule 10(a) applies only to federal courts and is therefore inapplicable here. Instead, Rules 10(b)-(c) control and both require establishing that a state court decision on a federal question conflicts with another state court’s interpretation of that same federal question. As Walker has failed to identify the existence of any such conflict here, his request for extraordinary review amounts to an attempt to escape an affirmation of his conviction for a gruesome murder. This attempt must fail, and this Court should decline to entertain the merits of Walker’s claim.

Moreover, Walker does not identify a conflict between various federal and state court case law, which is a requirement before this Court may intervene. Walker does not identify a constitutional issue of sufficient scope to require this Court’s

attention. Instead, Walker merely re-argues the claims raised before the trial and Nevada Supreme Court, without identifying a conflict between federal and state courts. Writ, p. 13-28. Issue spotting does not rise to the level of an important federal question.

Instead, Walker ignores this requirement and claims that misapplication of settled law is sufficient for this Court to have jurisdiction to review his claim. In doing so, Walker misquotes Wearry v. Cain, 136 S.Ct. 1002 (2016), to insinuate that “this Court will review a capital habeas case arising from a state court judgment when the ‘lower courts have egregiously misapplied settled law.’” Writ at 13. Putting Walker’s cited quotation to Wearry into context, it is clear that this Court decision in Wearry has no bearing on its analysis of Walker’s argument. In Wearry, this Court reviewed a postconviction claim that a state prosecutor failed to provide exculpatory evidence to the defendant in violation of Brady v. Maryland, 373 U.S. 83, 83 (1963). Wearry, 136 S.Ct. at 1005. There, Wearry discovered new evidence that significantly cast doubt on the truthfulness of the state’s star witness—who was the only person to tie Wearry to his crime—and was sufficient to undermine any confidence in the jury’s verdict. Id. at 1006-07. This Court concluded that the state appellate court had incorrectly “valuated the materiality of each piece of evidence in isolation rather than cumulatively.” Id. at 1007. In rebuttal to the dissent’s claim that the court should not decide such a fact-intensive issue without full briefing and

argument, the court explained that “the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law.” Id. at 1007 (internal citation omitted). Walker is not challenging any of the evidence admitted against him. Accordingly, Wearry is inapplicable here.

II. APPLICATION OF STATE HABEAS PROCEDURAL BARS CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND

As set forth in the Statement of the Case section above, Walker is now seeking certiorari review of the Nevada Supreme Court’s affirmance of the denial of his successive state post-conviction petition which was procedurally barred under state law. The Order of Affirmance is unpublished and does not constitute precedent. Walker is attempting to use the recent Order of Affirmance as a means to obtain certiorari review of his Batson issue which was considered and denied on the merits in Walker I. In Walker III, the Nevada Supreme Court declined to revisit its prior ruling on the Batson issue and only considered the claim as it pertained to post-conviction counsel’s effectiveness when challenging trial counsel’s effectiveness regarding his Batson challenge. Walker III at 8-9. The Nevada Supreme Court specifically noted that any claim other than a challenge to postconviction counsel’s effectiveness was procedurally barred and affirmed the denial of Walker’s untimely and successive state habeas petition on state procedural default grounds. Id.

Application of state procedural bars is an adequate and independent state ground which will bar this Court's review of any federal question.

It is well established that this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546 (1991); Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 877 (2002). This rule applies whether the state law ground is substantive or procedural. Id. The adequate state ground doctrine applies to bar federal review when the state court declines to address an inmate's federal claims because the inmate had failed to meet state procedural requirements. Id.

Under Nevada habeas law, "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within one year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the supreme court issues its remittitur." NRS 34.726; see also Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

A second or successive habeas petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(2). The Petitioner has the burden of pleading and proving specific facts that demonstrate good cause for the petitioner's failure to present the claim or for presenting the claim again and actual prejudice to the petitioner. NRS 34.810(3). Even if Walker could establish good cause for these two procedural bars, he must also demonstrate actual prejudice, which requires a showing “ ‘not merely that the errors created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the [trial] with error of constitutional dimensions.’ ” See NRS 34.726(1); NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

Walker relies on Foster v. Chatman, 136 S.Ct. 1737, 1746 (2016) to argue that this Court has the jurisdiction to review the Nevada Supreme Court denial of Walker's second postconviction petition because Foster held that “the state habeas court's application of res judicata to Foster's Batson claim was not independent of the merits of his federal constitutional challenge.” In Foster, the Georgian defendant was convicted of capital murder and argued both before the trial court and on appeal

that the State's use of peremptory challenges to strike four black jurors was racially motivated in violation of Batson. Id. at 1742-43. The trial court rejected Foster's Batson challenge and the state appellate court affirmed the trial court's ruling and Foster's conviction. Id. When Foster raised this claim in his first timely postconviction petition, he did so after discovering new and credible information supporting his claim that the state's removal of the jurors was racially motivated. Id. at 1743-44. Specifically, Foster obtained copies of the state's trial file containing copies of the jury venire list with the names of each prospective black juror specifically noted as being black, as well as notes establishing that the state planned to remove any and all black jurors on the venire. Id. at 1744. None of this information was known or included in Foster's direct appeal. Id. Nevertheless, when denying Foster's habeas petition, the state habeas court declined to reconsider Foster's Batson challenge because it was adjudicated on direct appeal. Id. at 1745.

In granting certiorari, this Court noted that while it does not have jurisdiction to entertain a claim of a state court judgment if that judgment rests on independent and adequate state grounds, the doctrine of res judicata is not an independent or adequate state ground. Id. at 1745-46. As such, denying Foster's petition only on res judicata did not preclude this Court from considering Foster's claims, particularly when Foster had shown new facts and circumstances sufficient to overcome that procedural bar. Id.

Walker claims his case is similar to Foster. Walker is incorrect. Unlike Foster, Walker raised this claim in a second successive postconviction habeas petition. Walker further attempts to mislead this Court by claiming that the Nevada Supreme Court denied his Batson claim solely on the basis of law of the case. Writ at 13-15. This is belied by the Order of Affirmance. The Nevada Supreme Court concluded that any claim that was not a challenge to postconviction counsel's effectiveness was procedurally barred.

“Walker filed his petition over five years after the remittitur issued on his direct appeal. The petition was therefore untimely under NRS 34.726(1). The petition was also successive because he had previously filed a postconviction petition and constituted an abuse of the writ because he raised new claims that could have been litigated in prior proceedings. NRS 34.810(1)(b)(2), (2).” Walker III at 2. Specifically, in footnote 5, the court refused to consider Walker's claim “that postconviction counsel should have relitigated the Batson claim that was rejected on direct appeal, as opposed to challenging trial and appellate counsel's effectiveness.” Id. at 8. This constitutes independent and adequate state grounds sufficient to preclude review by this Court.

Additionally, this does not equate to the court rejecting Walker's Batson challenge solely on law of the case. Because Walker was convicted of capital murder and sentenced to death, NRS 34.820(1) entitled him to effective assistance of

postconviction counsel. Walker III at 5. The court concluded that any challenge to postconviction counsel's effectiveness was timely made. Id. "As Walker filed his petition within one year after this court issued remittitur from its decision affirming the denial of his first postconviction petition, his claims of ineffective assistance of postconviction counsel were raised within a reasonable time after they became available." Id. at 5-6 (*citing* NRS 34.726(1); Rippo v. State, 134 Nev. 411, 419-22 (2018); State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 235 (2005)).

To establish that Walker's postconviction counsel was ineffective, he had to demonstrate that counsel's performance was deficient and that but for that deficient performance, he would have been granted relief. Specifically, the court noted that for his claim to succeed, Walker had to demonstrate that both postconviction and trial counsel were ineffective. Walker III, at 5-6. Walker argued that postconviction counsel should have argued that trial counsel did not properly argue the Batson challenge. Id. at 8. The Nevada Supreme Court considered Walker's argument and rejected the claim on the merits:

Walker failed to allege sufficient facts to demonstrate deficient performance by postconviction counsel. The underlying Batson claim is partially based on a page from the district attorney's manual from seven years before Walker's trial, and nothing in the record of the jury selection proceedings suggests that the office still followed that manual's litigation strategies at the time of Walker's trial. Additionally, the manual did not advise prosecutors to use preemptory challenges to remove veniremembers based on any impermissible criteria or to misrepresent the reasons for a preemptory challenge. As to Walker's challenge that prior counsel should have provided a

comparative juror analysis, Walker fails to demonstrate prejudice. This court concluded on direct appeal that asking the veniremember if he might face any ridicule were he to impose a death sentence “was not grounded in racial discrimination.” Walker I, Docket No. 49507, Order of Affirmance at 2-3. This is the only way in which Walker alleged the prosecutor’s questioning of the challenged veniremember differed from the questioning of other veniremembers. And the reasons proffered for the preemptory challenge were based on an inquiry that was common to all the venire members and involved each one’s personal experience with the criminal justice system and attitudes toward the death penalty. Therefore, there was no reasonable probability of a different outcome had counsel provided a comparative juror analysis, and the District Court did not err in rejecting this postconviction-counsel claim without conducting an evidentiary hearing.

Walker III at 8-9.

Accordingly, not only was Walker’s second petition denied on independent and adequate state grounds—namely, that it was procedurally barred—but his claim challenging postconviction counsel’s argument about trial counsel’s litigation of the Batson claim was properly considered and denied on the merits.

III. THE CONSTITUTION DOES NOT REQUIRE A TRIAL COURT TO RECONSIDER A PROPERLY DENIED BATSON CHALLENGE

Even if this Court could look past the state procedural default in this case and belatedly review the merits of the Batson claim from the direct appeal in 2010, Walker has failed to show a violation of federal law. When affirming Walker’s Judgment of Conviction, the Nevada Supreme Court concluded that there was no Batson violation because Batson was never implicated:

Second, Walker argues that the district court erroneously denied his challenge to the State's peremptory challenge of an African-American prospective juror pursuant to Baston v. Kentucky, 476 U.S. 79 (1986). His claim stems from a colloquy in which the prosecutor questioned whether a juror would feel community pressure not to return a death sentence because the defendant is also African American. Considering the context of the prosecutor's question, we conclude that it was not grounded in racial discrimination, thereby invoking Batson, but rather was designed to expose bias. Accordingly, the District Court did not air in this regard.

Walker I at 2-3.

Certainly, Walker disagrees with the court's conclusion by attempting to allege that the state court's erred by refusing to consider his Batson claim, but he proffers no conflicting and directing federal authority. Indeed, the Nevada Supreme Court's conclusion on direct appeal was proper and Walker has failed to show otherwise. Walker claims that the trial court erred because when Walker accused the prosecutors of violating Batson during jury selection, the trial court did not employ the three-step burden-shifting framework for evaluation claims of racial peremptory strikes. Writ at 16. Walker goes on to accuse the Nevada Supreme Court of constitutional error because when reviewing his Batson claim on direct appeal, the court did not apply the framework either. Id. Walker's claims were properly rejected by both the trial and appellate court.

In Batson, 476 U.S. at 89, the United States Supreme Court held that the Equal Protection Clause forbids the State from challenging potential jurors solely on account of race. There are three steps to the analysis of a Batson challenge. See

Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769 (1995). First, a defendant must make out a prima facie case of systemic racial discrimination. Id. at 767. Once a defendant has made the requisite showing, the burden then shifts to the State to come forward with a race-neutral explanation. Batson, 476 U.S. at 97; Purkett, 514 U.S. at 767.

The Court emphasized that the prosecutor's explanation need not rise to a level justifying the exercise of a challenge for cause. Batson, 476 U.S. at 97. Moreover, this requirement does not demand an explanation that is persuasive, or even plausible and the reason proffered will be deemed race neutral if not discriminatory on its face. Purkett, 514 U.S. at 768; Libby v. State, 115 Nev. 45 (1999). The prosecutor's credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable or how improbable explanations are, and by whether the proffered rationale has some basis in accepted trial strategy. Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

If a race-neutral explanation is tendered, the trial court must then decide whether the defendant has proved purposeful discrimination. Purkett, 514 U.S. at 768. At this stage of the Batson inquiry, the trial court must determine whether the state's justifications for its use of peremptory challenges are mere pretexts for purposeful discrimination. Miller-El, 545 U.S. at 241; Walker v. State, 113 Nev. 853, 867 (1997). The district court's finding of an absence of discriminatory intent

in the prosecution's peremptory strikes of racial minorities is a pure issue of fact that is accorded significant deference on appellate review. Id.

Here, during jury selection, prosecutors asked Mr. Henderson, the first African-American juror they questioned whether he would face ridicule by family or friends if he put an African American man on death row. Pet. Appx. At 80. In response, Mr. Henderson said he did not believe so but that he did not think he could impose the death penalty regardless of race. Id. at 81. The state then exercised a peremptory challenge to remove Mr. Henderson from the venire. Mr. Henderson was the third prospective juror removed. The first two were not African American. When Walker objected to Mr. Henderson's removal under Batson and demanded to hear the State's race neutral reason for releasing him, the prosecutors accurately noted that Walker had not made the requisite showing of systematic exclusion on the basis of race, and the district court agreed.

Because Walker failed to trigger the Batson three-step framework by first making a prima-facie showing of racial discrimination, there was no requirement for the prosecutor or the court to engage in the rest of the Batson analysis. Simply crying Batson is not enough. Both the prosecutor and the court made clear that the prosecutor's question was not grounded in racial discrimination. Rather, the aim was to uncover bias. The question posed was a fair one because it asked if the juror would face ridicule from family and friends for sentencing another African American to

death and whether that ridicule would hinder his ability to be an impartial juror. Ridicule from family and friends could potentially hinder any juror's ability to render a fair and impartial verdict. This question further fell within the range of race questions that had been asked of other jurors by defense counsel. Moreover, and contrary to Walker's argument that the state engaged in disparate questioning depending on the jurors' race, the record shows that the state explored the potential racial biases and prejudice of potential jurors who were not African American.

Nevertheless, the State offered race-neutral reasons for removing Mr. Henderson. Henderson's family had an extensive history of criminal activity, Henderson expressed dissatisfaction regarding how police investigated the death of a relative and expressed concerns about his ability to impose death. This mirrored the prosecutor's removal of two other non African American jurors, both of whom had family members with criminal backgrounds. Finally, Mr. Henderson was the only African American juror the prosecutors used a peremptory challenge to remove. There were only three African Americans in the jury panel. One was removed by stipulation, and the other sat on Walker's jury.

While Walker alleges that he provided the court additional information in the form of jury questionnaires and described jury-selection testimony by non-African American jurors, he did not establish that this information was newly discovered, and he did not establish that any information in those documents would have

reasonably altered the Nevada Supreme Court's conclusion. Writ at 11-12. Even before this Court, Walker has not provided those documents and has not pointed to specific portions of those documents establishing that the state engaged in a pattern of discrimination when removing a black juror from the panel.

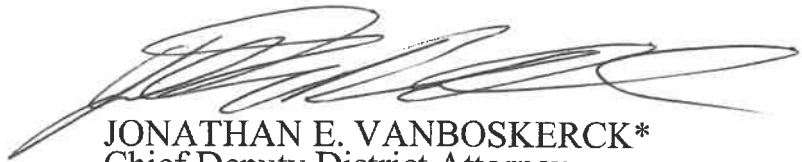
Regardless, the appellate court properly reviewed this alleged new evidence and concluded that Walker continued to fail to establish that the prosecutors acted with any discriminatory intent in removing Mr. Henderson. The reasons provided by Respondent for challenging Henderson were not pretextual, despite Appellant's comparative juror analysis, because, unlike the comparisons to other jurors who had (1) family with criminal history, (2) victimized family, or (3) equivocated on whether they could impose death, Henderson had all of these. Notably, none of the jurors cited by Walker had family criminal histories like Henderson's. The state provided race-neutral reasons for challenging Henderson that were not pretextual, and the comparative analysis presented in Walker's second postconviction fails to consider the strong reasons compelling a challenge to Henderson. Moreover, this analysis failed to show that postconviction counsel was ineffective when challenging trial counsel's effectiveness.

CONCLUSION

In the unpublished Order of Affirmance at issue in this Petition, no federal constitutional claim was involved at all in the application of state procedural bars

which constitute an independent and adequate state ground barring federal review. The Nevada Supreme Court did not rule upon the merits of any federal question regarding Batson unless such a challenge was made in the context of postconviction counsel's effectiveness. Even then, the court correctly concluded that Walker failed to show that postconviction counsel was ineffective. Further, there were separate and adequate state grounds to deny Walker's petition. Accordingly, this Court should decline to entertain Walker's claim.

Respectfully submitted.



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