

No. 20-6386

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OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

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JAMES WALKER, Petitioner,

v.

WILLIAM GITTERE, et al., Respondent.

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On Petition for Writ of Certiorari to the  
Nevada Supreme Court

**PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE**

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## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a capital case where, in response to patent racial discrimination by the State, the trial and appellate courts misapplied, circumvented, and outright ignored *Batson's* three step framework and for over thirteen years failed to enforce the commands of the Equal Protection Clause. The State's brief in opposition ("BIO") contends the repeated flouting of *Batson* does not comprise a serious federal question and argues the Court lacks subject matter jurisdiction to correct the manifest injustice that occurred in this case. This reply follows.

### **A. Certiorari is warranted as Mr. Walker's claim involves an egregious misapplication of *Batson* and its progeny by the state courts.**

Here, the misapplication of *Batson v. Kentucky*, 476 U.S. 79 (1986), by both the state trial and appellate court comprises a compelling reason warranting review, irrespective of the applicability of subsections (a)–(c) of Rule 10, which "neither control[] nor fully measur[e] the Court's discretion . . . ." SCR 10.

The State obfuscates the issue at the center of Mr. Walker's claim by asserting that "whether the Nevada Supreme Court correctly concluded . . . that [Mr.] Walker's second petition was procedurally barred does not raise an important federal question." BIO at 2. Mr. Walker's claim, however, asserts invidious racial discrimination during his capital trial, which the Court has noted is particularly abhorrent. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race . . . is especially pernicious in the administration of justice."). Further, the claim asserts the egregious misapplication of *Batson*—which this Court has "vigorously enforced and reinforced . . . and guarded against any backsliding"—at the trial, appellate, and state post-conviction level. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)

(citing *Snyder v. Louisiana*, 552 U. S. 472 (2008); *Miller-El v. Dretke*, 545 U. S. 231 (2005) (*Miller-El II*)).

Here, the egregious misapplication of *Batson* is demonstrated by the State's inability to decipher the analytical framework applied by both trial and appellate courts when denying relief on Mr. Walker's claim. The State first attempts to reconcile the incongruous rulings by both state courts as entailing step one findings under *Batson*. BIO at 12-12. However, the State also hypothesizes the Nevada Supreme Court denied the claim pursuant to a step three analysis. BIO at 17. The variant and incompatible arguments advanced by the State reveal the misapplication of *Batson*. Further, incompatible or not, the State's renditions are belied by the record.

The State first argues the trial court rejected the *Batson* claim after finding Mr. Walker failed to make a prima facie case of racial discrimination. *Id.* at 12-13 ("there was no *Batson* violation because *Batson* was never implicated[.]"). However, the record unequivocally shows the trial court conducted a step two process, receiving three purported race-neutral reasons from the prosecutor for the peremptory challenge. *See* Pet. App. at 65 (pg. 234); *Hernandez v. New York*, 500 U.S. 352, 359 (1991) ("Once a prosecutor has offered a race-neutral explanation . . . the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). The trial court then skipped step three and instead imputed, to the prosecutor, its own impressions regarding prospective juror Henderson, finding—based on those unarticulated impressions—that discrimination had not factored in the peremptory strike. Pet. App. at 65 (pg. 237). The record shows the *Batson* challenge was rejected not on Mr. Walker's purported failure to make a "requisite showing of discrimination," but based on guesswork regarding the State's intent and the trial court's unexplained reason for sustaining the peremptory challenge. BIO at 15.

The Nevada Supreme Court, in turn, failed to address the trial court's error or apply the *Batson* framework altogether. The State nevertheless couches the state court's disjointed finding regarding the discriminatory nature of the voir dire question posed to Henderson by the prosecutor as a ruling pursuant to step one. The State suggests a finding as to the nature of a solitary voir dire *question* by the prosecutor is equivalent to a step one finding, despite the latter process assessing the nature of *peremptory strikes* and scrutinizing the "totality of the relevant facts." *Batson*, 473 U.S. at 93-94. Contrary to the State's cramped reading of the record, the Nevada Supreme Court both failed to address Mr. Walker's showing with respect to the peremptory strike and altogether ignored the totality of facts, which included the prosecutor's concession he asked a question explicitly proscribed by *Batson*. *See id.* at 97. Specifically, the prosecutor freely admitted his question to Henderson was a "reverse race question" and noted he thought it was proper to ask the prospective juror if he "would [ ]favor blacks or . . . be prejudiced against blacks[.]" Pet. App. at 61 (pg. 223-24). *See Flowers*, 139 S. Ct. at 2241 (noting *Batson* explicitly rejected the notion a prosecutor "could strike a black juror based on an assumption or belief that the black juror would favor a black defendant."). Nonetheless, even if it could be characterized as a step-one finding, the ruling still runs afoul of *Batson* given the prosecutor's offer of race-neutral explanations. *See Hernandez*, 500 U.S. at 359.

Here, the state trial and appellate court did not simply misapply *Batson*, but also contravened numerous rulings by the Court that safeguard *Batson*. *See e.g.*, *Williams v. Louisiana*, 136 S. Ct. 2156 (2016) (holding the trial judge is an arbiter, not a participant in the judicial process, and may not provide race-neutral reasons); *Johnson v. California*, 545 U.S. 162, 172 (2005) ("The *Batson* framework is designed to produce actual answers [from a prosecutor] . . . It does not matter that the prosecutor might have had good reasons; what matters is the real reason [jurors]

were stricken.”) (internal quotation marks and alterations omitted);

*Foster v. Chatman*, 136 S. Ct. 1737 (2016) (“The Constitution forbids striking even a single prospective juror for a discriminatory purpose.”).

Contrary to the State’s assertion, this case is appropriate for the Court’s review for the same reasons identified in *Wearry v. Cain*, 136 S. Ct. 1002 (2016). The State attempts to distinguish *Wearry* by noting Mr. Walker “is not challenging any of the evidence admitted against him.” BIO at 6. The State misapprehends the basis for this Court’s grant of certiorari. In *Wearry*, the Court granted certiorari in light of the state post-conviction court’s misapplication of *Brady v. Maryland*, 373 U.S. 83 (1963); specifically, its “materiality” determination. *Wearry*, 136 S. Ct. at 1007. That *Wearry*’s claim challenged evidence potentially factored against granting certiorari as evidenced by the Court’s general proscription against reviewing “fact-intensive cases” and the dissent’s position that the substantial amount of evidence impacting the claim rendered review “unreasonable” absent full briefing and argument. *Id.* at 1008, 1011 (Alito, J., dissenting). *Wearry*’s cite to *Foster, supra*, as exemplifying when review is warranted further belies the State’s assertion. *Wearry*, 136 S. Ct. at 1008. Like the present case, *Foster* did not involve a challenge to evidence nor fall under subsections (a)–(c) of Rule 10, but the Court still reviewed the state court’s denial of a *Batson* claim.

Here, as in *Wearry*, the state courts egregiously misapplied settled law and requiring Mr. Walker to litigate his claim in federal habeas proceedings would likewise force him “to endure yet more time on [ ]death row in service of a conviction that is constitutionally flawed.” *Wearry*, 136 S. Ct. at 1008.

**B. The Nevada Supreme Court’s law-of-the-case ruling is reviewable by this Court as it was a decision on the merits of Mr. Walker’s *Batson* claim.**

The State acknowledges that the supposed refusal, by the Nevada Supreme Court, to address the *Batson* claim rests upon the law-of-the-case or res judicata

doctrine. BIO at 9-10. Nonetheless, the State argues the Court lacks subject matter jurisdiction over Mr. Walker’s claim because the Nevada Supreme Court’s decision does not rest “solely” on the law-of-the-case doctrine. *Id.* Specifically, the State cites to a different part of the Nevada Supreme Court’s decision where the court held the petition was procedurally barred. *Id.* at 6; *see* Pet. App. at 2-3.

The state court’s order in this case is unambiguous: under the subheading “*Batson objection*,” it notes, “the decision rejecting that *Batson* claim, Walker I, . . . constitutes the law of the case” and states that Mr. Walker’s assertion it is incorrect does not “warrant reconsideration.” Pet. App. at 8-9, n. 5. The decision is thus clear it relies on the principle of *res judicata*, which means that this Court’s review is not precluded. *See Cone v. Bell*, 556 U.S. 449, 467 (2009) (“When a state court refuses to readjudicate a claim on the ground that it has been previously determined . . . it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for adjudication.”) (emphasis in original). Further, by restating its finding on direct appeal that the question posed to Henderson “was not grounded in racial discrimination[,]” Pet. App. at 9, the Nevada Supreme Court directly addressed the merits of Mr. Walker’s *Batson* claim, a conclusion the State seems to concede in its opposition. *See* BIO at 11-12. Consequently, application of the law-of-the-case bar “depend[ed] on [the] federal constitutional ruling” on direct appeal, rendering the bar not independent of federal law. *Foster*, 136 S. Ct. at 1740 (citing *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)).

At best, it is unclear whether the Nevada Supreme Court’s order rests on the law-of-the-case doctrine; state procedural default grounds; or, as the State seems to concede, a combination of both factors. *See* BIO at 9-10. The Court, nonetheless, “has created a conclusive presumption that there is no [independent and adequate state] ground if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or



to be interwoven with those claims, and did not ‘clearly and expressly’ rely on an independent and adequate state ground.” *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (citing *Harris v. Reed*, 489 U.S. 255, 261 (1989)).

The Court’s ruling in *Foster*, *supra*, which the State misconstrues, further supports review. In *Foster*, the Court noted it had jurisdiction not after finding the state post-conviction decision on the *Batson* claim had been denied solely on federal law—as the State contends is required—but the opposite: after concluding it could not conclude from the state court’s order “that its decision was based *wholly on state law*.” *Foster*, 136 S. Ct. at 1759 (Alito, J., concurring) (emphasis added). The Court noted that the state court’s analysis of the *Batson* claim on the merits and its review of “newly uncovered” evidence made it “*apparent* that the state habeas court’s application of res judicata . . . was not independent of the merits of his federal constitutional challenge.” *Id.* at 1746 (emphasis added). Here, the Nevada Supreme Court—as the State concedes, *see* BIO at 11-12—engaged in an analogous review of the *Batson* claim and newly uncovered evidence presented by Mr. Walker. *See* Pet. App. at 9. Thus, the Court has “jurisdiction to review its resolution of federal law.” *Rippo v. Baker*, 137 S. Ct. 905, 907 n.\* (2017) (citing *Foster*, 136 S. Ct. at 1737)).

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## CONCLUSION

For the foregoing reasons, Mr. Walker respectfully requests that this Court grant his petition for certiorari and reverse the judgment of the Nevada Supreme Court.

Respectfully submitted, this 11th day of February, 2021

Respectfully submitted,

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