

No. 21-

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In the  
Supreme Court of the United States

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Allyn Akeem Smith,

Petitioner,

v.

State of Arizona,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF ARIZONA

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**PETITION FOR A WRIT OF CERTIORARI**

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**CAPITAL CASE**

**QUESTIONS PRESENTED FOR REVIEW**

1. Does the good faith exception to the exclusionary rule obviate an illegal seizure of CSLI?
2. Whether a state's proffer of nondiscriminatory reasons for striking two jurors from the panel can be sustained without conducting the third step of the *Batson* analysis.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Allyn Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court affirming his death sentence.

### **OPINION BELOW**

A jury convicted Smith of premeditated Murder in the first degree of his former girlfriend, KL. It also convicted Smith of Child Abuse, a class two felony, for causing a gunshot injury to KL's two-month-old daughter, KS. The jury sentenced Smith to death for the premeditated murder. The trial court sentenced Smith to 20 years for the Child Abuse. The Arizona Supreme Court affirmed Smith's conviction in a published opinion on November 4, 2020. *State v. Smith*, 475 P.3d 558 (2020) (Appx. A). On December 1, 2020, the Arizona Supreme Court denied Smith's Motion for Reconsideration. (Appx. B).

### **JURISDICTION**

The Arizona Supreme Court affirmed Smith's conviction on November 4, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. As he did below, Mr. Smith asserts the deprivation of his rights as secured by the Constitution of the United States.

### **RELEVANT CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. IV: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be



compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, Sec. 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.

## STATEMENT OF THE CASE

**Carpenter Claim:** The state charged Smith with the first-degree premeditated Murder of his former girlfriend, KL, and Child Abuse for the gunshot wound incurred by his two-month-old daughter, KS. (Appx. C). One and one-half years after the state charged him with the crime, the state applied for a court order allowing it to seize Smith's historic cell site location information (CSLI). (Appx. D).

The state used the CSLI to place Smith at the scene of the crime. (Appx. E). There was no other testimony or evidence linking Smith to the crime scene. The evidence of guilt was not overwhelming: the police had information that Smith purchased a small caliber pistol on the day of the incident; KL's roommate identified Smith as the person who visited KL at her apartment hours before KL was killed; social media messaging between KL and Smith reflected that KL named Smith as KS's father for purposes of collecting government assistance; and Smith questioned whether he was really the child's father. (Appx. F). Smith appeared at the Department of Economic Security to provide DNA for paternity testing on the same day that KL was found dead and KS injured in an area of the desert near a children's playground and frequented by hikers. (Appx. G).

Smith moved to suppress the use of the CSLI against him. (Appx. H). The court denied the motion after a hearing. (Appx. I). The Arizona Supreme Court ruled that while the pre-*Carpenter* order was not the equivalent of a search warrant, the good faith exception to the exclusionary rule applied, allowing the admission of the CSLI against Smith. (Appx. A).

**Batson Claim:** During *voir dire*, the state used peremptory strikes to remove the only African Americans from the jury panel. (Appx. J). The state struck jurors 14 and 211. (*Id.*; Appx.

M; Appx. O). The defense raised a *Batson* challenge. (Appx. J). The court asked the state to provide its reasons for striking the two jurors. (*Id.*, p. Appendix-149).

The state explained that it struck 14 because he was hesitant to impose a death sentence. (*Id.*, p. Appendix-150). The state said that 14 had to search his soul, he couldn't make a decision, he did not want that weight, he hesitated before saying he could impose death, and he thought the evidence would be difficult to hear. (*Id.*). During *voir dire*, 14 disclosed that:

- he was a big picture person (Appx. K, p. Appendix-155);
- he relied on his spouse when making decisions (*Id.*, p. Appendix-156);
- he was trusting (*Id.*, p. Appendix-157);
- he had expertise in domestic violence (*Id.*, p. Appendix-158);
- the possibility of imposing a death sentence caused him to search his soul (*Id.*, p. Appendix-154); and
- he leaned toward life. (*Id.*, p. Appendix-162).

He confirmed that he could keep an open mind, that he worried about viewing graphic evidence, but could impose the death penalty when appropriate. (*Id.*, pp. Appendix-159; Appendix-162-166).

The questionnaires and *voir dire* show that the majority of jurors who heard the evidence at trial, all white, also harbored various levels of doubt or hesitancy about imposing a death sentence. For instance:

- juror 131: “conflicted” about the death penalty (Appx. L);
- juror 2: “indifferent” toward the death penalty (Appx. M); “Just being able to impose that on somebody, I don't think I could do it if I gave it time...” “Just the

graphic details, the emotion, I don't think I'm ready to handle that now.” (Appx. K, p. Appendix-153);

- juror 57: “I’m not for or against the death penalty” (*Id.*, p. Appendix-167);
- juror 83: concerned about the gravity of the decision to impose death (Appx. N; Appx. K, p. Appendix-168); and
- juror 190: the facts of the case may be difficult to consider (Appx. O; Appx. P); the moral act of putting someone to death would be difficult (Appx. Q).

Regarding 211, the prosecutor explained that 211 presumably believed in “redemption and forgiveness” because she was a human services counselor. (Appx. J). She had medical issues. (*Id.*). 211 had doctor’s appointments that could not be rescheduled. (*Id.*). 211 also took medications for migraines. (*Id.*).

White jurors 83 (Appx. N) and 57 (Appx. W) stated that they believed in forgiveness, yet they remained on the panel. Juror 143 had medical issues that required a series of injections, yet 143 remained on the panel. (Appx. R). During *voir dire*, 211 told the parties that:

- she was detail oriented (Appx. S);
- her nephew was convicted of a felony, but they were not close (*Id.*);
- her husband was an Air Force veteran (*Id.*);
- she was not sure about the death penalty (*Id.*);
- she wanted to hear all of the evidence first (*Id.*);
- she believed in mercy (*Id.*);
- she could impose the death penalty when appropriate (*Id.*); and
- She had doctor’s appointments that would need to be rescheduled if she were chosen to be on the jury. (*Id.*).

The prosecutor's reason for striking 211 was, because she was a human services counselor, she probably believed in forgiveness and redemption. (Appx. T). The second reason was because 211 had "medical issues." (*Id.*). Again, white jurors 83 (Appx. N) and 57 (Appx. W) remained on the panel even though they believed in forgiveness. Juror 143 had medical issues that required a series of injections. (Appx. R).

The court denied the *Batson* challenge, finding that the state gave race-neutral reasons for the strikes. (Appx. U).

All right. The *Batson* motions are denied. I find that the State has made race-neutral reasons for striking them. I remember juror 14 very clearly being very hesitant about being able to serve on this. We talked to him for some period of time. And I believe we spoke to him privately. 211 there were race-neutral reasons given. She does have hardships with regard to her health, at least to a certain degree. So I find that the *Batson* challenges shall be denied. So let's call them in. (*Id.*).

The court agreed that 14 was hesitant, and that 211 had hardships regarding her health. (*Id.*).

### **Arizona Supreme Court**

On appeal, the Arizona Supreme Court affirmed Smith's convictions and death sentence. *State v. Smith*, 475 P.3d 558 (2020). It found that the state acquired the CSLI via an improper court order that was not the equivalent of a search warrant, but the good faith exception to the exclusionary rule allowed the admission of the CSLI into evidence.

The Arizona Supreme Court also found that it was able to make an implicit finding that the trial court properly denied Smith's motion made pursuant to *Batson v. Kentucky*. "Moreover, our precedent allows us to defer to an implicit finding that a reason...was nondiscriminatory even

when the trial court did not expressly rule on the third *Batson* factor.” *State v. Smith*, 475 P.3d at 577, ¶ 73.

## **HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW**

The federal issues Smith raises in this petition concern fundamental constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. These issues were presented to the Arizona Supreme Court in Petitioner's appellate briefs and motion to reconsider challenging his conviction and death sentence and were considered by the Arizona Supreme Court in its opinion affirming the convictions and sentences. (Appx. A).

## REASONS FOR GRANTING THE WRIT

1. The good faith exception to the exclusionary rule does not apply when there is binding appellate precedent forbidding the warrantless seizure of cell phone data. The Arizona Supreme Court found that the good faith exception to the exclusionary rule applied to allow admission of the CSLI into evidence against Smith. Binding appellate precedent existed in the form of United States Supreme Court opinions issued prior to obtaining the order which should have alerted the state that a search warrant was necessary. The good faith exception cannot excuse this illegal search.

### **The exclusionary rule applies when binding appellate precedent does not support the legality of a search.**

Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. *Davis v. United States*, 564 U.S. 229, 232 (2011). In this case, binding appellate precedent should have alerted the prosecution that it was not reasonable to rely on a state statute that allowed seizure of CSLI by court order as opposed to a warrant.

The state indicted Smith on February 17, 2015. Smith was arraigned on February 25, 2015. The prosecution did not apply for the court order authorizing disclosure of the CSLI until September 9, 2016.

Although the state obtained the court order before *Carpenter v. United States*, 138 S.Ct. 2206 (2018), was decided, two United States Supreme Court cases issued before September 13, 2016, should have alerted the prosecution that a search warrant was necessary. In 2012, the United States Supreme Court held that attaching a GPS tracking device to a vehicle and using the device to monitor its movement constituted a search. *United States v. Jones*, 565 U.S. 400, 404 (2012). Then, in 2014, the Court issued its opinion in *Riley v. California*, 573 U.S. 373 (2014). *Riley* required a search warrant for searches of cell phone data. *Riley v. California*, 573 U.S. at 386. The Arizona Supreme Court distinguished *Riley*'s application to the present case because the present case addressed CSLI instead of cell phone data.



But there is no meaningful distinction between the two. Cell phone users have a reasonable expectation of privacy for both CSLI which reflects a cell phone user's location and cell phone data which reflects a cell phone user's daily phone usage.

The United States Supreme Court issued *Riley* two years before the prosecution in this case relied upon a state statute to acquire an order for CSLI. Add to that *Jones*'s prohibition of using GPS to track an individual's location without a warrant, and the state's reliance on a state statute to acquire Smith's CSLI becomes clearly unreasonable. The good faith exception to the exclusionary rule simply does not apply under these circumstances.

The exclusionary rule exists to deter state action that invades the privacy of its citizens. *Davis v. United States*, 564 U.S. at 248. Reckless disregard of constitutional requirements demands exclusion. *Herring v. United States*, 555 U.S. 135, 147 (2009). Exclusion of the CSLI in this case is proper to deter the prosecution from acquiring CSLI by ignoring established, binding, appellate precedent and choosing to instead rely on a state statute which was quickly becoming outdated.

*Jones* protects a person's location information (albeit by GPS instead of cell phone), and *Riley* protects a person's cell phone content. Law enforcement and the prosecution had adequate notice that a person's location recorded via the mere act of carrying a cell phone enjoyed heightened protection, and required a warrant.

**There is no distinction between privacy expectations for cell phone data or CSLI.**

A search warrant is required to use a GPS device to track a person's location. *United States v. Jones*, 565 U.S. at 404. A search warrant is required for cell phone data. *Riley v. California*, 573 U.S. at 393. As of 2018, a search warrant is required for CSLI. *Carpenter v. United States*,

138 S.Ct. 2206 (2018). Both cell phone data and CSLI are protected by the Fourth Amendment. Cell phone users have a reasonable expectation of privacy for both CSLI and cell phone content.

Whether the cell phone stored information or was the conduit for the information makes no difference in the level of privacy that people expect when carrying or using their cell phone. Nevertheless, the Arizona Supreme Court distinguished between the two, finding that CSLI is less protected than cell phone data. *Riley v. California* sufficiently put the state on notice that a search warrant was necessary to obtain CSLI, and negated the reasoning behind the good faith exception to the exclusionary rule.

**Because the prosecution of the defendant was well underway at the time the police sought to obtain the CSLI, the state prosecutors should have been aware that relevant caselaw required a search warrant for CSLI.**

The good faith doctrine does not apply to this case. The state sought the CSLI a year and a half after Smith's indictment and arraignment. By this time, the parties were preparing for trial. The prosecutor was in command of the prosecution of the case.

Binding appellate precedent sufficiently put the prosecutor and the police on notice that obtaining Smith's CSLI required a warrant. The prosecutor, especially, must be aware of the requirements established by current caselaw. While the police may not be aware of legal trends reflected by caselaw, surely the prosecutor is aware of it.

The good faith exception does not apply when binding appellate precedent existed forbidding the warrantless seizure of cell phone data. *Davis v. United States*, 564 U.S. at 232. *Davis* addressed cell phone content but applied just as forcefully to CSLI. There is no meaningful distinction between cell phone content and CSLI. People have an expectation of privacy in both.

2. *Batson v. Kentucky* requires a three-step procedure when an allegation of discriminatory peremptory strikes arises during jury selection. The Arizona Supreme Court held that while the trial court did not conduct this three-step process, it could make an “implicit finding” that the prosecutor’s reasons for striking the only two African Americans on the panel were race-neutral. This Court must enforce the three-step procedure required by its holding in *Batson*.

**The trial court did not properly conduct the third step of the *Batson* analysis.**

To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts must engage in a three-step process. *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986). First, the challenging party must make a *prima facie* showing of discrimination based on race, gender, or another protected characteristic. *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003); *State v. Gallardo*, 225 Ariz. 560, 565, ¶ 11 (2010).

Second, the striking party must provide a neutral reason for the strike. *Miller-El v. Cockrell*, 537 U.S. at 328; *State v. Gallardo*, 225 Ariz. at 565, ¶ 11. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed neutral. *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

Third, the trial court must determine the credibility of the proponent’s explanation and whether the opponent met its burden of proving discrimination. *Batson v. Kentucky*, 476 U.S. at 97-98; *Miller-El v. Cockrell*, 537 U.S. at 328-329. The third step is when the trial court actually evaluates the prosecutor’s credibility. *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; *Flowers v. Mississippi*, 139 S.Ct. 2228, 2248-2249 (2019).

The Arizona Supreme Court did not enforce the third step of *Batson* when it relied upon an “implicit finding” instead of requiring the trial court to determine the credibility of the prosecutor’s explanation for striking the only two African Americans on the panel. In order to

fulfill the three-step process required by *Batson*, the court must rule in a way that is identifiable and recognizable to the parties. The trial court must actually evaluate the given reasons during the third step. *Snyder v. Louisiana*, 552 U.S. at 477. The trial court must address the credibility of the prosecutor's stated reasons for striking the only two African-American jurors on the panel.

**There are practical ways to ensure that the trial court properly conducts the third step of the *Batson* analysis.**

It is not enough for the appellate court to rule that the trial court "implicitly" fulfilled the third step of the *Batson* analysis. To actually evaluate the reasons given during the third step, and to make this analysis meaningful, the trial court must address the credibility of the prosecutor. *Miller-El v. Cockrell*, 537 U.S. at 328-329. One possibility would be to require the trial court to: (A) independently confirm the basis of the explanation; (B) affirmatively find that any other jurors with similar characteristics to the challenged juror were struck; (C) determine that an explanation based on characterizations of a group which includes a juror be shown specifically true of the challenged juror; and (D) find that an explanation is rational, meaningful, and related to the particular case. Michael J. Raphael, Edward J. Ungvarsky, Excuses, Excuses; Neutral Explanations Under *Batson v. Kentucky*, 27 U. Mich. J. L. Reform, 229-275 (1993).

The court presided over *voir dire*. The court did not sit in a vacuum during this process. More than a rubber stamp, the trial court must recognize the pattern of peremptory strikes against a racial group, assess the credibility of the prosecutor's explanations for these strikes, and recognize a fantastic explanation when it is given. The strikes must be justified by genuine, not pretextual, race-neutral reasons whenever there is a pattern of strikes against minority jurors.

The Arizona Supreme Court allowed the trial court to undercut the meaningful protection of *Batson*. *Batson* requires the trial court to make a credibility assessment. Appellate courts must

refuse to presume a justification was credible only because the trial court denied the challenge. The record does not support the prosecutor's proffered reasons for striking the only two African American jurors from the panel.

The trial court's ruling denying Smith's *Batson* challenge was as follows:

All right. The *Batson* motions are denied. I find that the State has made race-neutral reasons for striking them. I remember juror 14 very clearly being very hesitant about being able to serve on this. We talked to him for some period of time. And I believe we spoke to him privately. 211 there were race-neutral reasons given. She does have hardships with regard to her health, at least to a certain degree. So I find that the *Batson* challenges shall be denied. So let's call them in. (Appx. U).

The trial court's ruling was legally inadequate because it did not properly apply *Batson*'s third step. The trial court must make a credibility assessment and determine if the prosecutor's claim is true. In this case, juror 14 acknowledged that he had concerns about imposing the death penalty but affirmed that he could impose the death penalty when appropriate. (Appx. K, pp. Appendix-159-160; Appendix-162-166). Juror 14 never said that he should not be on the jury, but acknowledged that serving on the jury would be difficult. (*Id.*, pp. Appendix-159-161).

The prosecution unreasonably *assumed* that juror 211 believed in forgiveness and redemption only because 211 was a human services counselor. (Appx. T). The second reason for striking 211 given by the prosecutor was that 211 had medical issues. (*Id.*). This reason was disingenuous given the fact that the court passed 211 for hardship and Caucasian juror 143 had medical issues too but was allowed to sit on the jury. (Appx. R). 211 told the court that her medical appointments would not conflict with trial. (Appx. V).

The trial court failed to recognize that the record did not support the reasons for the strikes. The proffer of a pretextual reason "naturally gives rise to an inference of discriminatory intent."

*Snyder v. Louisiana*, 552 U.S. at 485; *Flowers v. Mississippi*, 139 S.Ct. at 2248-2249. The trial court did not assess the prosecutor’s proffered reasons for his strikes and provided superficial reasoning for its conclusion that the state’s reasons were race-neutral. The court noted only that 14 was “hesitant” and that 211 had hardships with regard to her health. The trial court failed to meaningfully conduct the third stage review required by *Batson*.

**The Arizona Supreme Court did not conduct an independent examination of the record when analyzing this *Batson* issue.**

The United States Supreme Court requires an independent examination of the record when analyzing a *Batson* issue. *Foster v. Chatman*, 136 S.Ct. 1737, 1748 (2016). An independent examination of the record includes a consideration of all of the relevant facts and circumstances. *See Flowers v. Mississippi*, 139 S.Ct. at 2235. When the record makes it possible for an appellate court to 1) review the answers given by jurors during voir dire, and 2) discern which jurors were struck and which jurors remained on the jury after giving the same answers, the court should conduct this review in order to fulfill the requirement to consider all facts and circumstances. The record in the present case is sufficient to allow an appellate court to perform this type of review.

An appellate court may review the juror questionnaires and *voir dire* which demonstrate that the majority of jurors who heard the evidence at trial, all white, also harbored various levels of doubt or hesitancy about imposing a death sentence. For instance:

- juror 131: felt “conflicted” about the death penalty (Appx. L);
- juror 2: was “indifferent” toward the death penalty (Appx. M.); “Just being able to impose that on somebody, I don’t think I could do it if I gave it time...” “Just the graphic details, the emotion, I don’t think I’m ready to handle that now.” (Appx. K, p. Appendix-153);

- juror 57: said, “I’m not for or against the death penalty” (Appx. W);
- juror 83: expressed concern about the gravity of the decision to impose death (Appx. N; Appx. K, p. Appendix-168); and
- juror 190: felt the facts of the case may be difficult to consider (Appx. O; Appx. P); and that the moral act of putting someone to death would be difficult (Appx. Q).

Caucasian jurors 83 (Appx. N.) and 57 (Appx. W) stated that they believed in forgiveness, yet they remained on the panel. Juror 143 had medical issues that required a series of injections, yet 143 remained on the panel. (Appx. R).

When a prosecutor’s proffered explanation for striking a Black panelist applies just as well to an otherwise similar non-Black panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination. *Flowers v. Mississippi*, 139 S.Ct. at 2248-2249. In this case, the prosecutor demonstrated a pattern of discrimination because the reasons for striking jurors 14 and 211 applied just as well to white jurors who were permitted to serve. According to the *Flowers* rationale, doing so tends to prove purposeful discrimination.

The Arizona Supreme Court found that it was not “required” to conduct a “comparison analysis.” But in order to consider all of the facts and circumstances as required by *Flowers*, *Snyder* and *Foster*, a comparison analysis may be necessary, as long as the record contains the necessary details to do so. *Flowers v. Mississippi*, 139 S.Ct. at 2247-2249.

The record in this case makes it possible for the Court to consider the information provided by struck and non-struck jurors. A review of this information conducted while complying with the duty to review the totality of the circumstances shows that in this case, the only two African-American jurors 14 and 211 were struck while other, similarly situated white jurors remained.

This type of review on appeal is appropriate, given the mandate repeated in *Snyder*, *Foster* and *Flowers*. A review of the totality of the circumstances must include a review of information provided by the jurors who heard the trial in light of information provided by jurors who were struck. Because the trial court did not properly perform the third step of the *Batson* analysis, and because the Arizona Supreme Court did not require the trial court to do so, reversal is required.



