No. 20-6990

In the

Supreme Court of the United States

Allyn Akeem Smith,

Petitioner,

v.

State of Arizona,

Respondent.

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

REPLY IN SUPPORT OF 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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REPLY

While Mr. Smith largely stands on the arguments presented in his Petition for Writ of Certiorari, there is a claim in the Brief in Opposition that must be addressed. The state of Arizona repeatedly argues that the Petition should be denied because Mr. Smith did not identify jurisdictional splits for either of the issues. But Mr. Smith argued the Arizona Supreme Court's decision conflicted with this Court's precedent—a separate basis for granting review. The state of Arizona's argument raises an additional issue regarding the *Batson* claim. The state itself identifies a jurisdictional split that this Court should consider when deciding whether to grant review. And this split exists on two levels.

1. The Arizona Supreme Court's departure from this Court's precedent is an independent reason to grant review.

As to each issue—cell site location information and *Batson*—the state of Arizona argues Mr. Smith failed to show a split between the decision of the Arizona Supreme Court and other jurisdictions. Br. Opp. 16-18.

But splits are not the only basis for review; this Court also grants Petitions when a court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Supreme Court R. 10(c).

As to both the cell site location information and *Batson* issues, Mr. Smith adequately identified how the Arizona Supreme Court's decision conflicted with this Court's decisions in the Petition.

Regarding the cell site location information, Mr. Smith argued in his Petition that this Court's decisions in *U.S. v. Jones*, 565 U.S. 400 (2012); and *Riley v. California*, 573 U.S. 373 (2014), were sufficient notice that the exclusionary rule should not have applied. Pet. Writ Cert. 9-11. *Jones* demands a search warrant before law enforcement can use a GPS device to track a

person's location. *Jones*, 565 U.S. at 404. And *Riley* requires a warrant before law enforcement can search for cell phone data. *Riley*, 573 U.S. at 393. The combination of these two cases adequately placed law enforcement and the state on notice that a search warrant was required for cell site location information. *See* Pet. Writ Cert. 10-11.

And Mr. Smith explained how the Arizona Supreme Court's reliance upon an implicit ruling and refusal to consider comparative juror evidence violated this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). Pet. Writ Cert. 12-17. This will be discussed in more depth in the next two sections.

Additionally, this case presents a reasonable opportunity to address each issue because the errors alleged do not involve "erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court R. 10. The errors alleged involve the scope of the good faith reliance doctrine and the strength of *Batson*.

While a jurisdictional split is a common basis for review, it is not the only basis for review. This Court also grants review when a lower court's decision conflicts with this Court's precedent. That is a proper basis to grant review here.

But since the state of Arizona has introduced the question of splits, it is worthy of discussing in more depth because the *Batson* issue specifically presents jurisdictional splits at two levels.

2. Appellate courts have split regarding whether they can or should rely upon a trial court's "implied ruling" in *Batson* cases.

In its Brief in Opposition, the state of Arizona claims Mr. Smith failed to allege a conflict regarding the *Batson* issue. Br. Opp. 17. The state assumes the framing as an implicit finding and argues there is no conflict between the Arizona Supreme Court's decision and other courts.

As noted above, this assertion misses the thrust of the Petition. The Arizona Supreme Court's reliance upon an implicit finding conflicts foremost with this Court's *Batson* progeny. This Court made clear that three steps must be conducted, not two. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986); *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003). At that third step, "[t]he trial court must consider the prosecutor's race-neutral explanations in light of all the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2243 (2019). With this burden, it is not enough for a trial court's ruling to be unstated and implicit; where a trial court has not made a specific third-step finding, there is no way to assess whether deference is appropriate. *See Snyder v. Louisiana*, 552 U.S. 472, 479 (2008).

Even if an outright split were needed, however, it exists.

The state of Arizona notably recognizes the existence of a split in footnote. Br. Opp. 18 fn.3. They attempt to minimize the import of the split by distinguishing some of the cases that reached a different decision than the Arizona Supreme Court. This misaddresses the importance of the split.

The split—identified and explained at least a decade ago—focuses largely upon the proper remedy when a trial court fails to adequately conduct *Batson*'s third step. *See* William Burgess & Douglas Smith, *The Proper Remedy for a Lack of* Batson *Findings: The Fall-Out from* Snyder v. Louisiana, 101 J. Crim. L. & Criminology 1, 2 (2011).

Per Burgess and Smith, appellate courts have used three different approaches when a trial court fails to make factual findings at the third step: (1) the appellate court conducts a de novo review and orders a new trial when the record does not support a prosecutor's offered reasons; (2) the appellate court remands the matter to the trial court for further findings; and (3) the appellate court relies upon the result regardless of the trial court's failure to conduct the third step of *Batson*. Burgess & Smith, 101 J. Crim. L. & Criminology at 13.

The Ninth and Eleventh Circuits have adopted the independent review approach. *Green v. LaMarque*, 532 F.3d 1028, 1029-33 (9th Cir. 2008); *Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013); *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252 (11th Cir. 2009); *Adkins v. Warden, Holman CF*, 710 F.3d 1241 (11th Cir. 2013).

Several other jurisdictions have held the proper remedy is to remand the case to the trial court to perform the third step. *E.g. Dolphy v. Mantello*, 552 F.3d 236, 240 (2d Cir. 2009); *Coombs v. Diguglielmo*, 616 F.3d 255, 265 (3d Cir. 2010); *U.S. v. McAllister*, 693 F.3d 572, 582 (6th Cir. 2012); *U.S. v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009).

The third approach, which Burgess and Smith note is endorsed sparingly, refuses a remedy even where the trial court fails to comply with *Batson*. Burgess & Smith, 101 J. Crim. L. & Criminology at 20. The Eighth Circuit endorsed this approach in *Smulls v. Roper*, 535 F.3d 853, 860 (8th Cir. 2008). The Arizona Supreme Court has joined this small minority. *State v. Smith*, 475 P.3d 558, ¶ 73 (Ariz. 2020).

This is not, as the state of Arizona asserts, a split "at first glance"; it is a more fundamental breakdown in how appellate courts address a trial court's failure to meaningfully conduct the third step of *Batson*.

Here, the trial court's rulings had nothing to do with the third step of *Batson*—they were rulings as to *Batson*'s second step. The trial court ruled:

> 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.

Appendix-317; *see also Smith*, 475 P.3d 558, ¶ 65.

The trial court's finding was "that the State has made race-neutral reasons for striking" the jurors. The court explained why it construed the rationale for juror 14 as race-neutral. And when dealing with juror 211, the court again concluded "there were race-neutral reasons given."

The trial court's rulings were about whether race-neutral reasons were given—a second-step analysis.

The trial court did not make a third-step finding that the reasons were not pretextual. While the court came close in its discussion of juror 14's hesitance, the court's analysis of juror 211 fell well short of the mark.

The trial court's failure is in direct contravention of this Court's repeated admonition that there are three steps in *Batson*, and that the third step requires the trial court to evaluate the prosecutor's proffered reasons, not merely find them race-neutral.

3. The Arizona Supreme Court split from this Court, and at least the Ninth Circuit, when it outright refused to consider comparative juror evidence when deciding the *Batson* issue.

In the Brief in Opposition, the state of Arizona argues the comparative analysis is waived because Mr. Smith's attorneys did not advance a comparative analysis when they raised the *Batson* challenge at trial. Br. Opp. 21-24.

This argument, however, begs the question of who bears responsibility at *Batson*'s third step. The state presumes the burden falls upon Mr. Smith to raise all conceivable arguments that fall under the umbrella of the totality of circumstances at the trial level. The state of Arizona's presumption, however, is inconsistent with this Court's precedent placing the burden of the third step upon the trial court.

This Court made clear that the trial court is responsible for conducting the third step in *Batson* itself: "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

This Court reiterated the same point in *Miller-El v. Dretke*: "As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke,* 545 U.S. 231, 251-52 (2005). And this Court recognized, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* at 241.

As a result, in *Miller-El v. Dretke*, this Court rejected the very argument the state of Arizona now presses. *Id.* at 241 fn.2. The dissent would have refused to consider "Miller-El's arguments about the prosecution's disparate questioning of black and nonblack panelists and its use of jury shuffles" because Miller-El had not put the issue to the lower courts. *Id.* The majority concluded, however, this "conflates the difference between evidence that must be presented to the state courts to be considered … and theories about that evidence." *Id.* Because the voir dire transcript was available and Miller-El based his arguments on that transcript, the issue was

properly before this Court. *Id.*; *see also Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006) (applying *Miller-El* to conduct comparative analysis)

The Arizona Supreme Court's decision thus conflicts with this Court's precedent requiring the trial court, not the litigant, to go through the process of considering the totality of evidence at *Batson*'s third step. And it conflicts with this Court's cases expressly engaging in comparative analyses.

Like in *Miller-El*, the transcript is available here. It was available to the Arizona Supreme Court and excerpts from the pertinent transcripts were included in the Appendix to the Petition filed in this Court. The evidence, therefore, was properly before the Arizona Supreme Court and is properly before this Court.

And Mr. Smith's theory about that evidence is drawn exclusively from that transcript.

The Arizona Supreme Court reached its incorrect decision by flipping this Court's jurisprudence on its head. The Arizona Supreme Court cited two of this Court's cases to support its refusal to conduct a comparative analysis: *Foster v. Chatman*, 136 S.Ct. 1737, 1749-50 (2016), and *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008). *See State v. Smith*, 475 P.3d 558, ¶ 71 (Ariz. 2020). But in each case this Court actually engaged in a comparative analysis for the first time on appeal.

In *Foster*, this Court expressly recognized it conducted an "independent examination of the record" that undercut the reasons proffered by the state. *Foster*, 136 S.Ct. at 1749. The Arizona Supreme Court conceded this, but emphasized that this Court did not *mandate* an independent examination. *Smith*, 475 P.3d 558, ¶ 71.

This Court also engaged in a comparative juror analysis in *Snyder*, 552 U.S. at 483. The Arizona Supreme Court focused upon this Court's recognition that "a cold appellate record may

be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483 (quoted at *Smith*, 475 P.3d 558, ¶ 71).

But neither the absence of a mandate nor the recognition of shortcomings supports the Arizona Supreme Court's outright refusal to even consider the comparative analysis evidence. And the result of the Arizona Supreme Court's analysis was a complete inversion of *Foster* and *Snyder*. Although this Court independently analyzed the record in each, the Arizona Supreme Court relied upon them to refuse the exact same examination.

The Ninth Circuit has thus ruled that comparative juror analysis, while not mandated, is "an important tool that courts *should* use on appeal." *Boyd v. Newland*, 467 F.3d 1139, 1148-49 (9th Cir. 2006) (emphasis original); *Murray v. Schriro*, 745 F.3d 984, 1004 (9th Cir. 2014) ("Thus, we have long held that a comparative juror analysis is an important tool at the disposal of a trial or appellate judge for evaluating the totality of the relevant facts and exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (quotation marks and citation omitted)).

The Arizona Supreme Court should not be permitted to flip this Court's jurisprudence on its head and refuse to consider comparative juror evidence that is properly before them. Their refusal to consider the comparative juror evidence departs from this Court's conduct in cases like *Miller-El*, *Foster*, and *Snyder*. And at a minimum, it conflicts with the Ninth Circuit's recognition in *Boyd* and *Murray* that comparative juror analysis is a valuable tool that appellate courts should use—even if not required—when assessing whether the trial court properly considered the totality of the evidence at *Batson*'s third step.

CONCLUSION

For the reasons offered in the Petition and herein, Mr. Smith asks this Court to grant the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED on March 11, 2021.

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