No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

PAUL WESLEY BAKER,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

When the defense challenges a prosecutor's exercise of a peremptory strike of a prospective juror under *Batson v. Kentucky,* 487 U.S. 79, 106 S.Ct. 1712 (1986), the trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" (*Batson*, 487 U.S. at 106, S.Ct. at 1721 (1986); accord, *Thaler v. Haynes* 559 U.S. 43, 48, 130 S.Ct. 1171, 1174 (2010.)) The California Supreme Court instead requires a trial court in a *Batson* situation to make "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered" by the prosecutor for dismissing a minority prospective juror. (*People v. Ward,* 36 Cal.4th 186, 200, 30 Cal. Rptr.3d 464, 475 (2005.)) While California's standard may appear to be in accord with this Court's exacting "sensitive inquiry" standard, in application it is not. In the great majority of California cases involving a *Batson* error issue, as here, the trial court's perfunctory finding of no discrimination is upheld by the reviewing Court. Thus, the following important question arises:

> What of-record showing must a trial court make to demonstrate that it has made *Batson*'s "sensitive inquiry" into the prosecutor's explanations for dismissing a minority prospective juror?

PARTIES AND CORPORATE DISCLOSURE STATEMENTS

Paul Wesley Baker is the petitioner in this case and was represented in the Court below by John F. Schuck. The State of California was represented in the Court below by the California Attorney General's Office and Deputy Attorney General E. Carlos Dominguez. No parties are corporations.

RELATED PROCEEDINGS

People v. Paul Wesley Baker, California Supreme Court case no. S170280, February 1, 2021; and *People v. Paul Wesley Baker,* Los Angeles County Superior Court case no. LA045977, judgment entered on January 16, 2009.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul Wesley Baker prays that a writ of certiorari be granted to review the judgment of the California Supreme Court in *People v. Baker* case no.S170280, decided February 1, 2021. (The Opinion of the California Supreme Court is attached as Appendix A.)

OPINION BELOW

The opinion of the California Supreme Court affirming Mr. Baker's convictions and death sentence on direct appeal, *People v. Baker*, 10 Cal.5th 1044 (2021) is attached as Appendix A.

JURISDICTION

The California Supreme Court affirmed Mr. Baker's convictions and death sentence on February 1, 2021. This Court has jurisdiction under 28 U.S.C. section 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution, which provides in relevant part: "No person shall ... be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution, which provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right to ... an impartial jury ..."

The Fourteenth Amendment to the United States Constitution, which provides, in relevant part: "No state may deprive any person of life [or] liberty ... without due process of law"; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 19, 2008, petitioner was convicted of first degree murder.[1] The jury

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[1] Petitioner was also convicted of several other non-capital offenses.

found two special circumstances to be true. (6CT 1397-1410; 49 RT 7648-7655.)[2] On April 9, 2008, after a penalty phase trial, the jury returned a verdict of death as the punishment. (6CT 1504-1507; 61 RT 8630-8632.) On January 16, 2009, petitioner was sentenced to death. (36CT 9463-9485; 62 RT 8704-8734.)

On February 1, 2021, the California Supreme Court affirmed the judgment. (App. A.)

HOW THE FEDERAL QUESTION WAS PRESENTED

In his briefing on appeal to the California Supreme Court, petitioner contended, inter alia, that his rights under the Federal Constitution had been violated by the prosecutor's discriminatory exercise of two peremptory challenges to dismiss two Black prospective jurors. (AOB 97-122; ARB 1-6.) The California Supreme Court rejected the contention that his due process right to an impartial jury, his rights to a fair trial, a reliable determination of guilt and penalty, a representative jury, equal protection, and fundamental fairness had been violated. (App. A., p.30-51.)

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

In *Batson v. Kentucky, supra,* 476 U.S. at 93, 106 S.Ct. at 1721, this Court stated:

> [O]ur cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." In deciding if the defendant has carried his burden or persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent

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[2] Citation to "CT" refers to the Clerk's Transcript on appeal and "RT" refers to the Reporter's Transcript on appeal, which were part of the record on appeal in the California Supreme Court.

as may be available." (Citations omitted.)

California purports to meet this Court's "sensitive inquiry" standard by requiring a trial court to make what is termed a "sincere and reasoned" attempt at evaluating the prosecutor's claimed non-discriminatory reasons for excluding minority prospective jurors. In practice, however, California's rule fails to live up to this Court's demanding standard. As Justice Liu stated in his concurring opinion in the instant case, "I see little in the way of meaningful appellate review when we assume, in the absence of any explicit record of reasoned analysis, that the trial court discharged its duty to undertake such [a sincere and reasoned] analysis." (Conc. op., p.1.) To bring California's criminal procedure into conformity with the fundamental constitutional principles laid down in *Batson*, certiorari should be granted.

B. AS APPLIED, CALIFORNIA'S "SINCERE AND REASONED" STANDARD DOES NOT MEET CONSTITUTIONAL REQUIREMENTS.

In discussing discriminatory peremptory challenges, this Court in *Flowers v. Mississippi*, ____ U.S. ____, 139 S.Ct. 2228, 2242-2243 (2019) stated:

> Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.
>
> In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding.

As noted, when ruling on a *Batson* discriminatory strike motion, the trial court "must undertake 'a sensitive inquiry'" into the issue. (487 U.S. at 93.) In doing so, the trial court must consider "all of the circumstances that bear upon the issue of racial animosity.'" (*Foster v. Chatman,* ____ U.S. ____, 136 S.CT 1737, 1748 (2016).) In conducting this "sensitive inquiry," the trial court must "'take into account all possible explanatory factors.'" (*Thaler v. Haynes,* 559 U.S. 43, 48, 130 S.Ct. 1171, 1174 (2010).) "Where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the jurors that the judge was able to make during the voir dire." (Id.) In such a situation, "a sensitive assessment of jurors' demeanor" is necessary. (*Davis v. Ayala,* 576 U.S. 257, 273, 135 S.Ct. 2187, 2201 (2015).) A "trial court is required to provide more than a conclusory estimation of counsel's credibility." (*Morgan v. City of Chicago,* 822 F.3d 317, 328 (7th Cir.2016).)

In the instant case, the trial court failed to observe the above-stated elements of a "sensitive inquiry." After the prosecutor had peremptorily dismissed the only two Black prospective jurors in the venire, petitioner objected on *Batson* grounds. The trial court found a prima facie case of racial discrimination. After listening to the prosecutor's explanation for dismissing the two minority jurors, including their views on the death penalty and a general reference to a prospective juror's "body language" (see App., pg.30-37), with no stated reasoning or analysis of the record, the trial court, in a curt statement, denied the *Batson* motion:

> THE COURT: The Court does find a prima facie case based upon the sheer numbers of both African American or black jurors being excused; however, in listening to the explanations given by counsel, I presume they would be the same.
>
> MS. FORD [prosecutor]: Yes.

> THE COURT: They appear to be race neutral.
>
> There are no racial issues in this case that I am aware of, which doesn't necessarily defeat a *Wheeler Batson* motion, but I find that Ms. Ford is credible, that her observations are based on race neutral reasons that are proper challenges – or proper preemptory challengers. (9RT 1728-1729.)

The trial court subsequently stated:

> THE COURT: the only reason I found a prima facie case was sheer numbers. There were only two African American jurors in the venire, but this is a race neutral case. There are no racial issues, to my knowledge.
>
> I do accept the People's reasons for exercising peremptories as to these two jurors as being race neutral and properly and credibly founded. (9RT 1738-1740.)

The trial court's perfunctory denial of petitioner's motion does not come close to the "sensitive inquiry" into all the facts and circumstances required by *Batson* and its progeny, and the fact that this largely unreviewable finding is good enough under California's "sincere and reasoned" review standard only underscores how out of step that California standard is with federal constitutional law. The California Supreme Court in the instant matter tacitly recognized this fact when it stated that "the trial court certainly 'could have done more to make a fuller record,'" (App. A., p.42), and that "... courts ... have a role to play in building a record worthy of deference." (Id.) And, citing *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008), the Court further noted "'[a] more detailed colloquy' than occurred here may also prove useful." (App. A., p.42.)

Nevertheless, in this case, the problem is not that the trial court could have done more to "build a record worth of deference"; the problem is that it did virtually nothing. The California Supreme Court claimed that "[t]he law ... does not require a court in all

circumstances to articulate and dissect at length the proffered non-discriminatory reasons for a strike." (App. A., p.43.) Even if that were true, it is clear that *Batson* demands more from a trial court than avoiding articulating *any* detail its reasons for denying a *Batson* motion, thereby sidestepping its obligation to conduct a "sensitive inquiry."

The failure to apply the "sensitive inquiry" standard is further shown by the California Supreme Court's analysis of the trial court's ruling in the instant case. The trial court's bald ruling is exacerbated by the misleading and incorrect statements the prosecutor made in stating his reasons for the strikes. For example, the prosecutor claimed that prospective juror RT "expressed extreme difficulty in imposing that death penalty." (9RT 1727-1728.) But, as the Court recognized, RT never expressed any extreme difficulty. The Court acknowledged as such by claiming that the prosecutor's reason was a "somewhat strong characterization of RT's answers," but nevertheless claimed that this "strong characterization "does not reveal that the stated reason for the strike was pretextual." (App. A., p.46.) At another point, the California Supreme Court concedes the prosecutor's description of RT's views are "slightly inaccurate." (App. A., pp.46-47 n.2). However, by characterizing a false, unsupported claim by the prosecutor as mere "strong characterizations," or "slight inaccuracies," the Court obscures the trial court's actual disregard of its duty to sensitively inquire into the prosecution's reasons.[3]

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[3] The prosecutor's claim that the two dismissed African American jurors "expressed extreme difficulty in imposing that death penalty" (4RT 1727-1728) is incorrect and is more than a mere "strong characterization." RT never expressed any "extreme difficulty." She stated she was open to both types of penalties. Her answer that she did not know whether she would be comfortable or scared in finding for death (4RT 882-884) was in response to the prosecutor's question whether she would be "comfortable" imposing death "looking at the defendant here and now." In any event, being uncomfortable and scared is a natural reaction for any prospective juror in a capital case. So was her answer that it was a "possibility" it would be difficult to impose the death penalty; as a matter of common sense, such a momentous decision is never easy, but always difficult. She agreed that she would weigh all applicable factors and that it would not be impossible for her to "impose...death." (4RT 884.) RT expressed the normal

Similarly, the trial court here flatly announced the prosecutor's explanations were "credible," with no reasoning or analysis as to why that was the case. (9RT 1728-1729.) *Batson* requires more, but the California Supreme Court does not:

> "Under our precedent, "[w]hen the trial court has inquired into the basis for an excusal, and a nondiscriminatory explanation has been provided, we ... *assume* the court understands, and carries out its duty to subject the proffered reasons to sincere and reasoned analysis, taking into account all the factors that bear on their credibility. (App. A., p.39; emphasis added; (citations omitted.))

The California Supreme Court embraces an *assumption* that cannot be squared with *Batson*'s "sensitive inquiry" standard. The bare fact of a ruling does not, under *Batson*, imply that the trial court took all of the necessary steps to make it. Nor does merely "assum[ing]" the trial court did so. The very point of *Batson* is to ensure a multi-step process that produces more transparency, not less. This case demonstrates the danger, as well as the invalidity, of that assumption. Assuming that a result contains within it all of the reasoning needed to produce it, in the instant case the California Supreme Court blithely declares that the trial court's credibility finding "relfect[s], at least implicitly, that [the trial court] had considered whether the prosecutor's stated reasons were factually supported." (App. A. at p.41) (citations omitted).) But under *Batson*, to find the prosecutor's reasons credible, the trial court must do more than imply proclaim them to be so.

Finally, the Court noted that the prosecutor had dismissed RT because of her "body

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feelings of any person being called upon to pass judgment on the life of a defendant. As the dissent stated in *United States v. Fell* (2nd Cir.2009) 571 F.3d 264, 291, "it is common in capital cases for jurors to be conflicted about whether they could, if asked, sentence another person to death. Until called for jury duty and questioned in court about whether they could vote in favor of death, few people have given the question serious, focused thought." RT did not express extreme difficulty with the job she was being called upon to undertake. The prosecutor's reason for dismissal of RT was pretextual.

language." (App. A., p.47.) But, no description or explanation of this "body language" was ever provided. The California Supreme Court made short shrift of this potentially pretextual reason by stating that it was enough that "the court and the parties ... could observe her demeanor." (Id.) Again, such is hardly the sensitive inquiry required by *Batson.* This Court condemned such an unreasoned conclusion in a similar situation in *Snyder v. Louisiana, supra,* 552 U.S. at 479: "Rather than making a specific finding on the record concerning [the prospective juror's] demeanor, the trial judge simply allowed the challenge without explanation."

California courts have equated "sincere and reasoned" with *Batson*'s "sensitive inquiry" requirement. (See, e.g., *People v. Lenix*, 44 Cal.4th 602, 614, 80 Cal.Rptr.3d 98, 114-115 (2008).) But, although the two standards may sound similar in their formulations, in their application they are far apart. In practice, California's standard fails to meet *Batson*'s exacting standard, as the instant case demonstrates. And, as Justice Liu stated in his concurring opinion in the instant case, "I continue to believe the better rule is to require the trial court to affirmatively demonstrate on the record that it has made a sincere and reasoned effort to evaluate the prosecutor's explanations for a contested strike. I see little in the way of meaningful appellate review when we assume, in the absence of any explicit record of reasoned analysis, that the trial court discharged its duty to undertake such analysis." (App. A., Conc. op. p.1.) This view of the *Batson* situation is in accord with federal law, i.e., "[t]he trial court must ... provide us with something to review." (*Morgan v. City of Chicago, supra,* 822 F.3d at 329.) And, as stated in *United States v. Perez,* 35 F.3d 632, 636 (1st Cir.1994):

> [D]istrict courts should articulate the bases of their factual findings related to *Batson* challenges more clearly than occurred here. ... Indicating these findings on the record has several salutary effects. First, it fosters confidence in the administration of justice without racial animus. Second, it eases appellate review of a trial court's *Batson* ruling. Most importantly, it ensures that the trial court has indeed made the

> crucial credibility determination that is afforded such great respect on appeal.

Although *Batson*'s "sensitive inquiry" requirement may not require the full extent of Justice Lui's "rule," nevertheless California's "sincere and reasoned" test, as applied, does not rise to the level required by *Batson* and its Federal progeny. Considering the trial court's truncated, unexplained ruling denying petitioner's *Batson* motion/objection, it is clear that California courts have been backsliding (*Flowers, supra*) regarding the exercise of allegedly discriminatory peremptory challenges.

CONCLUSION

As explained, this Court should issue its writ of certiorari and reverse petitioner's convictions and death sentence.

Dated: March 31, 2021

Respectfully submitted,

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(Appointed by the Court)