No.

IN THE

SUPREME COURT OF THE UNITED STATES

KAMAU DAVIS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent

On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Eight

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the voir dire transcript that identifies jurors for the most part by a seat number, which number keeps changing as peremptories are exercised (making it impossible to conduct comparative analysis), violates the due process right to a meaningful appeal when there were five objections under *Batson v. Kentucky,* 476 U.S. 79, 88 (1986)?

RELATED PROCEEDINGS

Los Angeles County Superior Court

People v. Davis, Case No. NA091042

Court of Appeal, Second Appellate District, Division Eight

People v. Davis, Case No. B293205

California Supreme Court

People v. Davis, Case No. S264384

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PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION EIGHT

Petitioner, KAMAU DAVIS, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Eight, filed on August 12, 2020.

OPINION BELOW

The opinion of the Court of Appeal of the State of California was filed on August 12, 2020. The decision is unpublished. (Appendix A.) The order of the California Court of Appeal denying rehearing is attached as

Appendix B. The order of the California Supreme Court denying review is attached as Appendix 3.

JURISDICTION

The judgment of the California Court of Appeal was filed on August 12, 2020, affirming petitioner's assault convictions. (Appendix A.) The California Court of Appeal denied rehearing on August 31, 2020. (Appendix B.) The California Supreme Court denied the petition for review on November 18, 2020. (Appendix C.) This petition for certiorari is due for filing on April 17, 2021. Order of March 19, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment (pertinent part)

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, section 237(a)(2):

> Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided in this section.

STATEMENT OF THE CASE

A. The transcript of the voir dire in Petitioner's case identified the jurors by seat number, making it impossible to figure out who was who

During jury selection at Petitioner's trial, the trial attorney made five *Wheeler/Batson*[1] objections. The prosecutor gave explanations for all five and the trial court ruled on the objection. On appeal, the record of the voir dire identified the jurors for the most part by their seat number, which number kept changing as peremptories were exercised.

As voir dire got underway, the trial court asked the members of the jury pool who wished to be excused to provide the last four numbers on the jury badge. (2 RT 246.) As each juror said the four numbers, the court also said the seat number of the juror: "Prospective juror no. 9592: 9592. The court: No. 14." (2 RT 246.) When it excused several jurors for financial or other hardship, the court did not use the four digit badge number and instead said: "Juror No. 2; Juror No. 4, a college student; Juror No. 5, because of medical issues, Juror No. 7, financial hardship" and so on. (2 RT 269.)

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[1] *People v. Wheeler,* 22 Cal.3d 258 (1978); *Batson v. Kentucky,* 476 U.S. 79, 88 (1986).

Later on, the court excused more jurors and said the four digit badge number but also the seat number. "Juror 3486, otherwise known as 57; juror 4363, otherwise known as 58; juror 2209,also 59;" and so on. (2 RT 354.)

After the initial excuses, the court said the four digit juror number and indicated which seat number they were in. "Juror 4608, you're juror no. 2, juror 2948, you're in seat no. 3," and so on. (2 RT 356.)

As the jurors began to answer the standard questions as to background information (area of residence, occupation, marital status, children, prior jury experience, etc.) (2 RT 357-359), the transcript no longer reports the four digit juror badge number but only "Prospective Juror No. 1; Prospective Juror No. 2" and so on. (2 RT 360-366, 370-377.)

After the jurors answered the standard questions the court began to ask the seated 18 jurors, what experiences they had with law enforcement. (2 RT 378.) The record reflects only "Prospective Juror No. 2" and so on. (2 RT 379-398.)

As the prosecutor and defense counsel began questioning the jurors, the record continues to identify the jurors only by seat number. (2 RT 399-448.)

When the parties began to argue which jurors should be struck for cause, they use only the seat number. (2 RT 448-453.) Similarly, when

the parties begin exercising peremptories, the jurors are identified only by seat number. (2 RT 454-455.)

The court then replaced the first seven jurors who had been excused with seven more people from the jury pool. At this point, the record becomes even more muddy:

> "We will be replacing the seven jurors who have been excused with jurors from the audience.
> So, Juror 7444, you will be juror no. 7 now.
> As Juror 13 in the first row, juror no. 9767.
> Juror 0374, you will be juror 14.
> Juror 3926. 3926, you are here .... that's juror 15.
> Juror 0447 from the audience, you will be juror 16." (2 RT 455-456.)

During the rest of the voir dire the four digit badge number is used to call a new juror into the box, but then the record identifies jurors only by seat number. As jurors are excused by the parties, then jurors are reassigned seat numbers. For example: "Defense would ask the court to please excuse prospective juror no. 3. The court: Juror No. 3, thank you. You are excused. And Juror 15, you become juror 3." (2 RT 631.) "People ask the court to thank and excuse juror no. 9: The Court: Juror no. 9, thank you. You are excused. And juror 16, take his place." (3 RT 631.)

B. Petitioner argued that his right to a meaningful appeal was violated by the way the jurors were identified in the transcript

On appeal, given the five *Batson* objections, Petitioner requested that the record be augmented for the actual juror identifying information. The Court of Appeal ordered the superior court to transmit the juror information to it under seal but did not share it with appellate counsel. Petitioner argued, *inter alia*, that his due process and equal protection rights to an adequate record on appeal were violated by the incomprehensible state of the voir dire record. See e.g. *People v. Rogers*, 39 Cal.4th 826, 857 (2006) (right to adequate record of voir dire) citing e.g. *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956) (indigent right to free transcript on appeal).

The Court of Appeal disagreed, holding that it was possible to figure out who was who by going through the record using post-it notes as the trial attorneys had done, without acknowledging that the trial lawyers not only knew who the jurors were but witnessed the movement of these jurors right in front of them

Because the trial lawyers used a "post-it note system to keep track of jurors during voir dire," the Court of Appeal said "there is no reason appellate counsel could not work through the reporter's transcript using such

a system." (Appendix A at 7.) In a footnote, the court describes the post-it note system:

> A common method of using post-it notes would involve creating a chart with three rows of six seats, with the rows being numbers 1 through 6, numbers 7 through 12 and numbers 13 through 18. When voir dire began, a post-it note would be placed in each box with the JID and initial seat number of the prospective juror. When a prospective juror was excused, his or her post-it note would be removed from the numbered box, and the appropriate post-it note for a prospective juror from the 13 through 18 section would be moved to the open box and annotated with the new seat number. As new prospective jurors were called from the audience, a fresh post-it note with the juror's JID and initial seat number would be placed in the appropriate box.

(Appendix A at 7, n.6.)

The Court of Appeal failed to acknowledge that even if appellate counsel could chart out the nearly 300 pages of relevant voir dire transcript using the post-it note system, appellate counsel could never be sure that it was accurate. This is highlighted by the opinion's own observation that as to the juror in the first *Wheeler/Batson* objection, "It is not possible to identify this unspecified 'first' juror." (Appendix A at 8.)

Furthermore, the California Supreme Court, this Court, as well as the federal courts on habeas review, all of whom take an active interest in *Batson* issues, could not possibly review the record in this case and figure out what was going on. The issue is not simply whether appellate counsel could

come up with a chart that allowed him or her to intelligently guess who was who, but rather such a chart would not be part of the record on appeal.

Quoting the opinion as to the record of the voir dire shows just how confusing the record is.

> The trial court clearly explained and followed its system for seating and identifying prospective jurors for voir dire. It is quite straightforward to track each juror from the point of being seated through the point of being excused, challenged or accepted onto the jury. (Appendix A at 4.)
>
> Initially, the court called 18 prospective jurors from the audience and seated them in seats numbered 1 through 18 for questioning by the court, the prosecution, and the defense. As the jurors were called from the audience, they were initially identified by the last four numbers of their JID. Once seated, the juror was referred to by his or her seat number. Although the jurors full names are not reflected in the reporters transcript of voir dire, the court and defense counsel specified each jurors last name when the ethnicity of the name was part of the challenge. Court and counsel had a list associating the jurors names with their JIDs. (Appendix A at 5.)
>
> Once seated in the jury box, only two movements were possible for a prospective juror: (1) jurors in seats 13 through 18 could move to a seat in the 1 through 12 number range as it became vacant due to challenges; and (2) jurors in seats 1 through 12 could leave the jury box. Thus, each prospective juror could have at most two seat numbers, the first being 13 through 18 and the second 1 through 12. (Appendix A at 5.)
>
> Some jurors might have only one seat number. The first 12 jurors seated by the court in seats 1 through 12 would have only their initial seat number. Jurors seated in seats 13 through 18 were the subject of challenges for cause immediately after questioning, and so some jurors in those seats might be excused

for cause without moving from their original seat. (Slip opn. at p.5, n.3)

Prospective jurors in the 13 through 18 section would not normally be subject to peremptory challenges during most of voir dire. The reason for this is clear: The prospective jurors in seats 1 through 12 when both sides accepted the panel would become the actual jury. Any prospective jurors remaining in seats 13 through 18 would be at most potential alternate jurors. Thus, until the very end of voir dire, there was no reason for either party to use a peremptory challenge on jurors in seats number 13 through 18. (Appendix A at 5, n.3.)

Voir dire of a prospective juror took place when the juror was newly seated, and therefore used the jurors initial seat number. (Slip opn. at pp. 5-6.)

The movement of prospective jurors occurred in an orderly and predictable manner. After questioning of newly seated prospective jurors concluded, the court heard challenges for cause at sidebar. If a prospective juror in seats 1 through 12 was excused for cause, the prospective juror in seat 13 would be moved to that empty seat. (Appendix A at 6.)

If two jurors in seats 1 through 12 were excused, jurors 13 and 14 would be moved, and so on. (Appendix A at 6, n.4.)

Peremptory challenges then began. These challenges were directed at prospective jurors in seats 1 through 12. (Appendix A at 6.)

Occasionally, as a prospective juror started to move from the 13 to 18 section to 1 through 12 section, one of the parties would state its intent to "save a trip" and excuse the juror before he or she formally changed seats. (Appendix A at 6, n.5.)

> After each peremptory challenge, a prospective juror from the 13 through 18 section would be moved to the vacated seat in the 1 through 12 section. Prospective jurors were moved in numerical order: Juror in seat 13, then juror in seat 14, and so on. Once the juror in seat 18 was moved to the 1 though 12 section, one additional peremptory challenge was allowed, and then the jury box was refilled. (Appendix A at 6.)
>
> The jury box was refilled by seating the first prospective juror from the audience in the vacant seat in the 1 through 12 section and the next six prospective jurors in seats 13 through 18. The newly seated prospective jurors were questioned, and then a new round of challenges for cause and peremptory challenges took place. This cycle repeated until both sides accepted the panel of prospective jurors in seats 1 through 12. (Appendix A at 6-7.)

Petitioner also raised a *Batson* issue on appeal as to all five objections. The Court of Appeal denied the *Batson* claim based on its post-it note methodology (and presumably by perusal of the sealed juror identifying information). (Appendix A at 11-32.)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DECIDE WHETHER IDENTIFYING JURORS IN AN APPELLATE TRANSCRIPT BY THEIR SEAT NUMBER, WHICH NUMBER KEEPS CHANGING, DENIES THE DUE PROCESS RIGHT TO A MEANINGFUL APPEAL

When litigating *Wheeler/Batson* error on appeal, the appellate court "looks at the same factors as the trial judge, but is necessarily doing so on a paper record." *Flowers v. Mississippi*, ___ U.S. ___, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019). The California Supreme Court has cautioned that the record of voire dire must be "accurate and adequately developed." *People v. Gutierrez*, 2 Cal.5th 1150. 1157,1172 (2017).

> Though we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson/Wheeler* rulings, we can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. *It is the duty of courts and counsel to ensure the record is both accurate and adequately developed.*

People v. Gutierrez, 2 Cal.5th 1150, 1172 (2017) *(*emphasis added.)

In 1992, California Code of Civil Procedure 237(a)(2) was first enacted to seal juror identifying information after a verdict is rendered. In Los Angeles County, the appellate transcript began identifying jurors by their badge number. In 1996, the Court of Appeal issued Miscellaneous Order 96-1, requiring transcripts transmitted to the Court of Appeal to redact the jurors' names. *People v. Goodwin*, 59 Cal.App.4th 1084, 1087, n. 1 (1999). In response, the Los Angeles County Superior Court issued a memorandum to all judicial officers requiring jurors to be identified by the last four numbers of their juror badge number. This practice was implemented to make it easier on the court reporters so that they would not have to spend countless hours redacting the voir dire transcripts in what was then believed to be a "staggering" amount of cases. *Id.* at 1087, n. 2.

The *Goodwin* court observed that voir dire transcripts are not part of the normal record on appeal pursuant to Cal. Rules of Court.[2] "Most criminal appeals do not involve jury voir dire issues, and in only a small percentage of cases is the transcript of the jury voir dire produced." *Goodwin*,

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[2] Unlike the federal courts where the parties are required to put the appellate record together, Rule 30, Federal Rules of Appellate Procedure (Appendix to the Briefs), in California, the superior court clerk will prepare the official record consisting of a Clerk's Transcript and Reporter's Transcript. Rule 8.320, California Rules of Court, details what documents must be in the normal record on appeal.

59 Cal.4th at 1092. "Accordingly, the Los Angeles Superior Court may at some time wish to revisit this issue and promulgate new and different guidelines for the trial courts and the reporters." *Ibid.*

Over the years, the various California appellate courts have identified jurors in different ways. In *People v. Silva*, 25 Cal.4th 345, 385 (2001), the California Supreme Court held that when there is a *Batson* objection, the "trial court has a duty to determine the credibility of the prosecutor's proffered explanations." The opinion refers to the jurors by their first name and first initial of the last name: "Jose M.," "Jose C." "Armida S.," "Rosalinda R." and "Ernestina R." *Id*. at 376-383.

In *People v. Gutierrez*, 2 Cal.5th 1150 (2017) the California Supreme Court reversed a conviction for *Batson* error. When the voir dire was conducted in the superior court the jurors' names were used. However, on appeal the names were redacted and replaced with their badge numbers. *Id*. at 1157, n.3.

By contrast, in *Flowers v. Mississippi,* in granting *Batson* relief, this Court identified the jurors by their full names. 139 S.Ct. at 2247-2250.

The opinion in Petitioner's case demonstrates that figuring out who the jurors were in the record of the voir dire is like doing a complicated

jigsaw puzzle. This is hardly the "accurate and adequately developed" record contemplated by *Gutierrez*. (2 Cal.5th at p. 1172.)

It is inconceivable that this Court's decision in *Flowers v. Mississippi* would have been possible if the record of the voir dire was similar to that in Petitioner's case. The confusion rampant in Petitioner's transcript as to who the jurors are made it impossible to conduct comparative analysis. *See e.g. Flowers v. Mississippi; Miller-El v. Dretke,* 545 U.S. 231, 241 (2005) (comparative analysis performed for the first time on appeal); *People v. Gutierrez,* 2 Cal.5th at 1174 (appellate court erred by refusing to perform comparative analysis on appeal).

On appeal, Petitioner did not argue that the jurors had to be identified by their true names. But he did complain that because the jurors were not identified consistently by their badge number in the record, he was denied his due process rights to a meaningful appeal. Anonymous juries are a controversial but increasingly frequent phenomenon. See e.g. Christopher Keleher, "The Repercussions of Anonymous Juries," 44 U.S.F.L. Rev. 531 (2010). The trial lawyers, however, usually know who the jurors are. However, when the transcript does not reveal who the jurors are except by ever changing seat number – and appellate counsel is not privy to the same

information as the trial lawyer – it is virtually impossible to competently litigate jury issues on appeal.

There is absolutely no reason why the trial courts should be relieved of the responsibility of ensuring that the jurors are identified during voir dire by at a minimum their badge number. If an issue arose as to the juror's specific race or ethnic background that could not be discerned from the extant record the name of the juror could be obtained under seal. This would make it possible to identify who is who not only for appellate counsel for all the higher courts ultimately called upon to review the case.

Moreover, there is no reason why the voir dire cannot be conducted using the jurors' true names so that the court reporter can provide an accurate transcript to the appellate lawyers that is not part of the public record.

Petitioner's case is the perfect vehicle for this Court to set down some guidelines for the production of voir dire transcripts that allow the parties and the courts to thoroughly and fairly review *Batson* error on appeal.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant the petition for certiorari.

DATED: April 9, 2021

Respectfully submitted,

VERNA WEFALD

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