No.

IN THE SUPREME COURT OF THE UNITED STATES

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

JIMMY MARTIN, Warden,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

At a jury trial in an Oklahoma criminal case involving an African-American defendant, the State prosecutor attempted to use peremptory challenges to strike all African-Americans from the jury venire, but was stopped from doing so by the trial court, which did not require the prosecutor to provide race-neutral reasons for the strikes, nor did the prosecutor offer any such reasons. The Tenth Circuit found this was error under the first prong of *Batson v. Kentucky*, 476 U.S. 79 (1986), but instead of granting habeas relief, the Tenth Circuit remanded to the district court for a "*Batson* reconstruction hearing" nine years after the trial, where the State had not made any attempt, at any time, to offer any reasons for the strikes, choosing instead to argue that no error occurred at all. The questions presented are:

-1-

Do the normal rules of waiver apply in a situation like this to preclude a reconstruction hearing where the State has failed to offer any reasons for its strikes, either at trial or at any subsequent stage of state or federal appellate litigation?

-2-

Are "*Batson* reconstruction hearings" authorized by the precedents of this Court at all, especially in a case like this one where the jury trial occurred almost a decade ago?

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Alonzo Cortez Johnson petitions respectfully for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit decided this case by published opinion filed July 2, 2021. *See* attached Appendix "D."

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered July 2, 2021. Appendix "D." Petitioner sought rehearing which was denied on September 13, 2021. Appendix "E." The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides, in part:

> No State shall...deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves the prosecution of multiple defendants in a murder case in Tulsa County, Oklahoma. It began on May 12, 2010, when the State of Oklahoma charged Terrico Bethel with Murder in the First Degree and Conspiracy to Commit Murder. Mohammed Aziz and Petitioner Alonzo Johnson were also charged with Conspiracy to Commit Murder.

The charging document was amended on May 14, 2010, alleging that Aziz committed Murder in the First Degree, Solicitation of Murder, and Conspiracy to Commit Murder. The charges morphed again on July 1, 2010, this time charging two more defendants, Fred and Allen Shields, with Conspiracy to Commit Murder, and Fred Shields with Murder.[1]

As to the charges against Petitioner Johnson specifically, an eighth Amended Information was filed on November 5, 2010, charging Johnson with Conspiracy to Commit Murder (Count 4), and Murder in the First Degree (Count 10).

Jury trial for Johnson commenced on December 3, 2012, before the Hon. Tom C. Gillert. At the conclusion of the evidence, the jury returned verdicts of guilty on both counts, and

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[1] Allen Shields also had other criminal charges pending against him at the time, including two counts of Trafficking, and he opted for a plea deal in this case. Concerning the plea deal, he explained, "[The criminal charges against him] get dismissed. Or not dismissed, but I get probation for them." P.H. Tr. 119. On October 29, 2010, Allen Shields pled guilty to Conspiracy to Commit Murder. He was given a ten-year suspended sentence for that crime. *Id*.

recommended sentences of Life Imprisonment on both counts.[2] Johnson was sentenced formally on January 4, 2013, to Life Imprisonment per the recommendation of the jury, the sentences to run consecutively. Johnson lodged a direct appeal to the Oklahoma Court of Criminal Appeals which denied relief in a written, but unpublished opinion, filed July 17, 2014. *See* Appendix "F."

Thereafter, Johnson sought post-conviction relief in the district court of Tulsa County, and on October 6, 2015, the Hon. William D. LaFortune denied relief. Johnson appealed, again, and the Oklahoma Court of Criminal Appeals again denied relief on April 7, 2016, in another written, but unpublished opinion. *See* Appendix "G."

Johnson sought habeas relief in the federal district court, which denied relief on September 17, 2019, as well as a Certificate of Appealability. *See* Appendix "A." Johnson sought a Certificate of Appealability in the United States Court of Appeals for the Tenth Circuit, which issued an order granting the COA on August 5, 2021. *See* Appendix "C." The Tenth Circuit thereafter issued a published opinion in this matter on July 2, 2021. *See* Appendix "D."

Johnson sought rehearing in the Tenth Circuit, which was denied on September 13, 2021. *See* Appendix "E."

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[2] The co-defendants fared no better than Johnson. Terrico Bethel had a jury trial, was found guilty of Murder in the First Degree, and sentenced to Life without the Possibility of Parole. Fred Shields was convicted of Murder in the First Degree, and Conspiracy, and also sentenced to Life without the Possibility of Parole. Mohammad Aziz pled guilty to Solicitation of Murder and was sentenced to 35-years.

STATEMENT OF THE FACTS

This case concerns the death of Mr. Neal Sweeney.

On September 4, 2008, Terrico Bethel shot Sweeney in the head. Sweeney died the next day. The story was told to the jury mainly by co-defendants who were flipped by the State. The first of these was Mohammed Aziz.

A. TRIAL EVIDENCE

Aziz had developed an "intense hatred toward Neal Sweeney." This prompted Aziz to seek out someone to murder Sweeney, and the person he asked to help him find a hitman was Allen Shields.

Aziz admitted during the trial to his part in soliciting the murder of Sweeney, and for his part he was rewarded by the State by being allowed to plead guilty to solicitation of murder, instead of the actual murder and conspiracy counts faced by everyone else, in exchange for a sentence of 25-35 years.

The next defendant flipped by the State was Allen Shields. He secured an even more favorable deal than Aziz. In exchange for his testimony, Shields was allowed to plead guilty to conspiracy and receive a 10-year suspended sentence. However, although Shields testified at the preliminary hearing in this case, he subsequently killed himself prior to trial.

The State's theory of the case was that Fred Shields and Petitioner Alonzo Johnson (who were cousins) were also involved in the murder of Sweeney. Specifically, the State alleged that Johnson's role in the scheme was that he had supplied the van used by Terrico Bethel to commit the murder. The State's evidence was circumstantial, and there was no evidence at all that Johnson had participated directly in the murder itself.

The crime originated with Aziz. He owned three convenience stores in and around the Tulsa area. These stores were supplied with fuel by a company owned by the decedent Sweeney.

A conflict developed between Aziz and Sweeney because Aziz would not pay the fuel bills for his convenience stores. The dispute ended up in litigation, with Sweeney obtaining a default judgment against Aziz to the tune of almost a quarter of a million dollars.

As one might imagine, this did not sit well with Aziz, who by all accounts became consumed with hatred of, and anger toward, Sweeney. Aziz acted on his hatred by enlisting the assistance of a person named Allen Shields, who was a local drug dealer who owned a body shop near one of the convenience stores owned by Aziz. Aziz wanted Allen Shields to help him find someone to murder Sweeney.

As it turned out, Allen Shields had a brother named Fred Shields, who agreed to handle the matter of finding a hitman for the job. Fred Shields settled on a price of $10,000.00 for the murder, Aziz agreed to pay it, and Bethel ended up being recruited to carry out the actual murder of Sweeney (Shields and Bethel had met in jail previously).

The jury heard of a meeting on September 2, 2008, in which Alonzo Johnson, who was a cousin of the Shields brothers, met with Shields in their backyard to discuss how to acquire a van from a man named Billingsley, who worked at a detail shop in Muskogee where the owner had three white commercial vans. Billingsley testified and told the jury that he obtained the key to one of the vans for Johnson, who arrived with Fred Shields to pick it up. Fred Shields drove the van back to Tulsa, Billingsley never saw the van again, and it was reported as stolen by its owner.

The State tied Fred Shields, Bethel, and Johnson together loosely by showing that they communicated with cell phones. Bethel simply drove the van to Sweeney's office and shot him in

the head with a gun provided to him by Fred Shields. The gun was never recovered. However, witnesses at the scene saw Bethel drive away in a white commercial van with no markings. The State conducted DNA tests on the van, which yielded no results, nor any usable fingerprints.

Things unraveled quickly from there. Allen Shields went to Aziz for the payment. Aziz said that he did not have it all, but paid $5,000.00. Allen Shields asserted that he gave that money to Johnson, and that Bethel was paid $5,000.00 for murdering Sweeney.

The break for law enforcement came when Fred Shields admitted to his involvement in the crime in an effort to make a deal for himself. No deal was to be had, however, and Fred Shields ended up going to trial, being convicted of murder and conspiracy, and sentenced to consecutive sentences of life imprisonment and life without parole; this was a fate that also befell Bethel.

Thus, the State's case against Johnson was tenuous, lacking any direct evidence of involvement in the murder of Sweeney, and supported entirely by the testimony of co-defendants who flipped in exchanged for deals with the State.

B. *BATSON*.

Johnson is an African-American.

As it relates to this Petition, the relevant facts surround jury selection, where the prosecutors in this case utilized the State's peremptory challenges to kick off as many minorities as they could. Defense counsel watched this, and let some of it go, until it came time for the prosecutor to use a peremptory challenge against venireman Prof. Wayne Dickens.

According to the prosecutor, Prof. Dickens "has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people[.]" The trial judge accepted this explanation as race-neutral, at which point defense counsel made the

following observation on the record:

> MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.

The trial court disagreed that this constituted a pattern.

However, the trial court was clearly concerned about it, because rather than asking the prosecution to offer race-neutral explanations for excusing minorities with every peremptory challenge, the trial court itself provided *sua sponte* explanations of the State's behavior: (Ms. Martinez was "hardly involved in the process"; Ms. Carranza had difficulty with English; so did Ms. Aramburo de Wassom).

But, in case there was any doubt, when the State exercised its eighth peremptory challenge to excuse Ms. Williams–the *last* African-American left on the panel– even the trial judge noticed that doing so would "effectively eliminate all the African-Americans and I'm not going to do that." The trial court refused to allow the State to strike Ms. Williams. The State picked up on this cue from the trial judge and waived exercise of its ninth and final peremptory challenge.

Thus, we have a situation where the prosecutors were excusing one African-American after the other with peremptory challenges, defense counsel noticed the pattern, objected to it, the trial court failed to direct the State to proffer race-neural explanations, choosing instead to offer its own, and when the State attempted to kick the last African-American off the panel, the trial judge refused to let them do it–even though the prosecutor offered another nonsensical reason (that she was a pastor).

The other African-Americans that were excused by the State were clearly qualified to serve

as jurors. Dr. Tawil was a physician, and had promised to listen to all the facts before making a judgment. Rena Carranza understood the process, answered appropriately regarding her opinion of the crime of conspiracy, and stated that she would be able to analyze the evidence presented. Ms. De Wassom had no trouble weighing the truthfulness of the witnesses.

Nor did Prof. Dickens have any trouble with any aspect of the trial procedure; nor did Ms. Williams, other than being "a pastor." Particularly instructive is the background of Prof. Dickens, who had a sister who had been a detective on the Tulsa Police Department, and his own father had been a police officer. This educated man would seem to be an ideal juror for the State.

All of this points to a clear pattern of racial discrimination by the State to use peremptory challenges to exclude African-American jurors from the panel in a case where an African-American male was on trial for murder.

The Tenth Circuit found constitutional error under this Court's precedent of *Batson v. Kentucky*, 476 U.S. 79 (1986), concluding that, contrary to the decision of the lower courts, Johnson had made out a prima facie showing of racial discrimination by the prosecutor during jury selection. Appendix "D" at 22. Johnson agreed with this finding.

However, the Tenth Circuit decided on the remedy of remanding to the district court to conduct a "*Batson* reconstruction hearing" the apparent purpose of which is to afford the State–nine years after the fact–the opportunity to address the second and third prongs of the *Batson* inquiry (the reasons for the strikes of the prosecutor and a judicial determination of whether those reasons were racially motivated). *Id*. 23.

Johnson objects to any remand as unauthorized under *Batson*, and asserts that the State waived any error by not asserting its reasons at the time of trial.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to: 1) decide whether the usual rules of waiver apply to the State in this situation where it has never asserted or proffered, at any stage of this case, that any race-neutral reasons exist for its attempts to strike every single African-American from the jury pool; and 2) whether a "reconstruction" hearing is feasible even if not waived by the State when over nine years have passed since the trial.

A. Waiver.

The Tenth Circuit asserted that because no court later held an evidentiary hearing, "the State has never presented evidence of the prosecutor's actual, nondiscriminatory reasons for striking the five minority jurors." Appendix "D" at 23. This is true because the State has never in the history of this litigation made any attempt to do so.

Petitioner's jury trial was in 2012. The State had plenty of opportunity to correct this error and to have an evidentiary hearing if it wanted one, but chose instead to argue over the better part of a decade during which time Johnson has been in prison that it had committed no error at all.

The Oklahoma Court of Criminal Appeals rejected this claim in summary fashion on direct appeal on July 17, 2014, just two years after trial; and then again on post-conviction appeal on April 7, 2016.

Yet, here we are in 2021, and the panel of the Tenth Circuit believes that the State of Oklahoma never had a chance to develop the record on this claim. The State lawyers never once asked to develop the record on this claim during the last nine years, and the State courts never even noticed the error at all, much less the need for an evidentiary hearing.

To say that the State is somehow now entitled to manufacture *post hoc* reasons for its racially

discriminatory strikes seems fanciful to Johnson, especially in light of the fact that he and his counsel did their part. They noticed the racially-based strikes and objected to them at trial. Johnson cannot control what the state trial court judge did in not following *Batson*, nor the state prosecutor who at trial could have made a record of the reasons for the strikes but chose not to do so, nor the state post-conviction court nor the Oklahoma Court of Criminal Appeals, which gave short-shrift summary rejection of Johnson's *Batson* claim *twice*.

In Johnson's view, the State is not entitled to such a hearing because it has waived its right to one and to this day still claim there was no error at all. The State lawyers and the state courts have failed to follow constitutional law as outlined by this Court, and now it seems that the entity being punished is Johnson. The State has forfeited its right to such a hearing by not creating the record at trial when it had a chance, not requesting such a hearing or offering any justification for the strikes during direct appeal, state post-conviction proceedings, or the appeal of the state post-conviction denial.

The chief complaint of Johnson here is that the Tenth Circuit panel seemingly believes that the prosecutor at trial is entitled to ignore *Batson* and was somehow prevented from offering race-neutral reasons at trial. The prosecutor could have made such a record, but did not.

Had Johnson or any criminal defendant failed to do this, he would have to defend against plain error review and show cause why his claim had not been forfeited; yet, the State has had now at least five judicial fora in which to present such reasons (if it has them at all) spread out over nine years, but has failed to do so. This Court should grant review to address the issue of whether waiver rules apply to the State in this context.

Johnson asserts that they must.

The primary authority cited by the Tenth Circuit panel with regard to the "*Batson* reconstruction hearing" appears to be *Hardcastle v. Horn*, 368 F.3d 246 (3rd Cir. 2004). However, in *Hardcastle*, unlike Johnson's case, the prosecutor offered to state the reasons for the strikes at trial immediately following *voir dire* and had sought a hearing on the matter at various points in the state court litigation. *Hardcastle*, 368 F.3d at 255 (Commonwealth not precluded from a hearing to offer its reasons when it has requested the opportunity to do so).

The reason why the Third Circuit was persuaded to remand for a hearing was because the prosecutor had tried *at trial* and at subsequent hearings to make a record of, and offer, the reasons for the strikes. *Hardcastle*, 368 F.3d at 260 ("[W]e are persuaded [to remand for a hearing] by the fact that, despite the prosecutor's offer to state the bases for her peremptory strikes on the record immediately following *voir dire* and her subsequent request for some form of hearing, the Commonwealth has never been provided with either a state or federal forum in which to present evidence in defense of its actions in this case.")

The Tenth Circuit panel also cited *Paulino v. Harrison*, 542 F.3d 692 (9th Cir. 2008) ("*Paulino II*"), but in Johnson's view the more salient opinion is *Paulino v. Castro*, 371 F.3d 1083 (9th Cir., 2004) ("*Paulino I*"). In *Paulino I*, the Ninth Circuit found first-prong *Batson* error under circumstances similar to Johnson's case, and remanded the case to the district court for an evidentiary hearing so that the State could proffer its reasons for the strikes.

However, in doing so, the Ninth Circuit panel noted that the trial court never *required* the prosecutor to offer reasons for the strikes; but Johnson notes that neither did the trial court *prevent* the prosecutor from doing so. *See Paulino I*, 371 F.3d at 1092.

Finally, the third case cited by the Tenth Circuit panel in support of a remand is *Madison v.*

Comm'r, Ala. Dept. of Corr., 677 F.3d 1333 (11th Cir. 2012) (*per curiam*). However, *Madison* is inapposite in Johnson's view because the State suffers essentially the same fate as in *Hardcastle*.

In *Madison*, defense counsel asserted a *prima facie* claim under *Batson*, and the trial court asked the prosecutor to provide a race-neutral explanation for the peremptory strikes of black jurors. *Madison*, 677 F.3d at 1337. However, the prosecutor *refused to do so*, choosing instead to argue the first-prong of *Batson* and assert that the defense did not even make a *prima facie* case (which, it turned out, was error). *Id*.

Thus, Johnson has no problem with the rule of *Hardcastle*, that when the prosecutor makes some effort at trial to proffer race-neutral reasons in the face of a *Batson* challenge but is prevented from doing so, then it is generally fair to allow the State that opportunity at some point in appellate litigation.

However, the same cannot be said for *Madison*, *Paulino*, or the State of Oklahoma in Johnson's case. The Tenth Circuit panel failed to consider the waiver or inaction of the prosecutor in Johnson's case in failing to make a record of the reasons for the strikes at trial. This is the principal consideration of the Third Circuit in *Hardcastle*, and the principal reason why, in Johnson's view, the Ninth and Eleventh Circuits got it wrong in *Paulino* and *Madison*.

Thus, there appears to be a split among the Circuit Courts of Appeals, or at least some unrealized tension, regarding the legal effect of State/government inaction in proffering race-neutral reasons for peremptory strikes. The Third Circuit appears to require that the State make some effort to proffer race-neutral reasons in order to be entitled to a reconstruction hearing at a later time, but the Ninth, Eleventh, and now the Tenth Circuits appear to not impose any penalty upon the State in this regard.

B. Reconstruction Hearings.

Johnson objects to the lawfulness of reconstruction hearings in cases like this, and asserts that there is no support for such hearings under the precedent of this Court. Review is necessary to examine this fundamental question in the *Batson* area of the law.

The validity of a strike challenged under *Batson* must, we are told by this Court, "stand or fall" on the plausibility of the explanation given for it at the time, not new *post hoc* justifications. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("*Miller-El II*"). Allowing prosecutors to proffer after-the-fact explanations for strikes–nearly a decade after trial–would "reek of afterthought." *Id*. 246.

The authority from the circuits regarding the legal viability for reconstruction hearings appears to fall within a range between the Third Circuit's rule in *Hardcastle* that such a hearing is authorized when the prosecutor tried to proffer reasons for strikes at trial during *voir dire* but was prevented from doing so, and thereafter sought evidentiary hearings to do so later but again was denied; and the treatment of such hearings by the Eleventh Circuit in *Madison*, which allowed a remand even when the prosecutor was asked by the trial court to provide race-neutral reasons but refused to do so and instead argued a different point of law.

A sort of middle-ground was reached by the Ninth Circuit in *Paulino I*, where the Ninth Circuit noted that, as in Johnson's case, the trial court never required the prosecutor to offer reasons for the strikes; however, the Ninth Circuit never really considered whether the prosecutor was prohibited from making such a record.

As Johnson pointed out below, there is nothing unusual about making such a record. Defense lawyers make "offers of proof" and protect the record all the time in this manner (or, their clients get

punished by appellate courts when they do not). Johnson sees nothing inherently unfair to holding government lawyers to similar standards.

Thus, in Johnson's view, the inter-circuit authority cited by the Tenth Circuit panel appears to be inconsistent, specifically with regard to whether, and to what extent, the action/inaction of the prosecutor in the trial court must impact the necessity of such hearings.

In *Hardcastle*, the Third Circuit appeared to require at least some effort on the part of the prosecutor to make a record of the reasons for the strikes. This seems to Johnson to be a sensible rule because it would prevent what is happening to Johnson where the State lies behind the log year after year, making no effort at either trial, post-conviction, or direct appeal to proffer reasons for strikes, and then when it gets a result it does not like from this Circuit it then gets an opportunity to imagine the reasons it would have given nearly a decade ago. There is no fairness or justice in this.

Johnson petitions this Court to adopt a legal standard in these types of cases similar to the rationale of the Third Circuit in *Hardcastle* which takes into account the fact that the prosecutor at least had to make some effort to proffer race-neutral reasons at trial and make more attempts during any subsequent appellate litigation.

Johnson has found no case from this Court directly remanding a case for such a reconstruction hearing, nor any indication that this Court would authorize such a hearing.

The precedents of this Court appear to hold the opposite, that the prosecutor is stuck with the explanations she gives on the record during trial. *See Miller-El v. Dretke*, 545 U.S. 231 (2005) (the validity of a strike under *Batson* must "stand or fall" on the plausibility of the explanation given at the time). What happens in a case where, through no fault of the accused, and where the accused has made a *prima facie* case of racial discrimination, the prosecutor gives no explanation for her strikes

at the time of trial? Who bears the burden of the results of that?

These are unanswered questions that need resolution by this Court. In Johnson's view, it cannot be the accused, because he has done all that he can do by making the *prima facie* claim. The trial court and the government lawyer bear some responsibility here, and that responsibility is to make some effort at proffering race-neutral reasons at the earliest opportunity.

There is no Tenth Circuit authority nor any authority from this Court authorizing an after-the-fact *Batson* reconstruction hearing nearly a decade after a jury trial. Johnson thus petitions this Court to accept review of his case in order to adjudicate the contours of the *Batson* inquiry.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DATED this 11th day of December, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. Hankins, certify that I have this 11th day of December, 2021, served a copy of Petitioner's *Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*, by depositing the copy in the United States Mail, first-class postage pre-paid thereon, addressed to:

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All parties required to be served have been served.

James L. Hankins