No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JAMES ROSE,

Petitioner,

-v-

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Superior Court, Maricopa County

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court developed a three-step inquiry to determine whether a party's peremptory strikes were unconstitutionally motivated by discriminatory purpose. The Supreme Court of Arizona and the Ninth Circuit are split on whether a judge can deviate from this process with judicial speculation about the prosecutor's proffered reasons for a strike. This petition implicates this split and presents the question of whether a court can use its own speculation to supplant facts necessary to make findings at each step.

PARTIES TO THE PROCEEDING

The petitioner (defendant-appellant below) is Edward James Rose.

The respondent (petitioner-appellee below) is the State of Arizona.

STATEMENT OF RELATED PROCEEDINGS

- *State v. Edward James Rose*, No. CR2007-149013-002 DT, Superior Court of Maricopa County, AZ. Conviction and sentence of death entered Oct. 21, 2010. Judgment in post-conviction proceedings entered Aug. 17, 2020.
- *State v. Edward James Rose*, No. CR-10-0362-AP, Supreme Court of Arizona. Judgement entered April 4, 2013.
- *State v. Edwards James Rose*, No. CR-20-0299-PC, Supreme Court of Arizona. Judgment entered Nov. 3, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward James Rose respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Arizona in Maricopa County.

INTRODUCTION

At Mr. Rose's trial, the State used nine out of ten of its peremptory strikes on female prospective jurors. Many of these jurors were substantially similar to male jurors who were ultimately seated to decide Mr. Rose's fate. In resolving Mr. Rose's claim that trial counsel were ineffective for failing to object under *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the court below used its own speculation about the state's reasons for striking the women. The court did so without hearing evidence from the prosecution on whether gender-neutral reasons might support the strikes. The Arizona Supreme Court has sustained denials of *Batson* claims on a similar basis, failing to require explicit findings under the *Batson* three-step process, allowing a court to assume a finding was made.

The Arizona Supreme Court's precedents, as exemplified in this case, conflict both with the precedents of this Court and the Ninth Circuit. "Equal Justice under law requires a criminal trial free of [gender] discrimination in the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019); *id.* at 2243 (citing *J.E.B.*, 511 U.S. at 129) ("*Batson* now applies to gender discrimination."). The integrity of the judicial process that this protection brings is particularly important in capital cases. Allowing judges to sidestep the *Batson* inquiry will hamstring the

ability of litigants and prospective jurors alike to protect their constitutionally protected interests. This Court should grant review and reaffirm that judicial speculation about what a prosecutor's reasons might have been cannot supplant a factual inquiry into the prosecutor's actual reasons for exercising a peremptory strike.

OPINIONS BELOW

The November 3, 2021 order of the Supreme Court of Arizona denying Mr. Rose's petition for review is unpublished and provided in the Appendix, App. at 29a–31a, as is the unpublished August 14, 2020 order of the Superior Court of Arizona, Maricopa County. App. at 1a–28a.

STATEMENT OF JURISDICTION

The Supreme Court of Arizona denied review on November 3, 2021. On January 10, 2022, Justice Kagan extended the time to file until March 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides in full: "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 defence."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "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."

STATEMENT

A. Legal Background

This Court has safeguarded the jury process from "state-sponsored group stereotypes rooted in, and reflection of, historical prejudice." *J.E.B.*, 511 U.S. at 128; *see also Powers v. Ohio*, 499 U.S. 400, 404 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991); *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). This principle of non-discrimination embraces gender as "an unconstitutional proxy for juror competence and impartiality." *J.E.B.*, 511 U.S. at 129. To prove a *Batson/J.E.B.* challenge, a defendant must first make a prima facie case "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94. The threshold to make a prima facie case is low, and a litigant only needs to "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). After a prima facie case has been made, the prosecution must offer a neutral basis for the strike in question. *See Foster v. Chatman*, 578 U.S. 488,

499 (2016). Finally, the third step of the analysis is the court's determination whether the defendant has shown purposeful discrimination. *Id.*

B. Factual Background

After a week of using methamphetamine and drinking, Edward James Rose fatally shot police officer George Cortez while attempting to cash a forged check. *See State v. Rose*, 297 P.3d 906, 909–10 (Ariz. 2013); App. at 4a. Mr. Rose pled guilty to two counts of first-degree murder as well as eight other related felony counts. *Rose*, 297 P.3d at 909.

Jury selection began on July 13, 2010, and after initial for cause challenges, forty-one jurors remained in the venire. App. at 36a. This group included fourteen men and twenty-seven women.[1] App. at 110a–184a. In off-the-record proceedings, the prosecutor used nine of its ten peremptory strikes to remove women from Rose's jury, a ninety-percent strike rate. App. at 62a, 109a. Trial counsel did not object to the state's peremptory strikes under *Batson/J.E.B.*

The characteristics of the struck women varied. The women struck were single, (Prospective Jurors 12, 21, 243), married (Prospective Jurors 18, 115, 181, 222), and divorced (Prospective Jurors 27, 62). App. at 111a, 121a, 131a, 141a, 150a, 159a, 168a, 176a, 184a. Among them were a school teacher (Prospective Juror 21), a receptionist/ambulance dispatcher (Prospective Juror 115), a hairdresser (Juror

[1] Prior to the peremptory strikes, the court removed two additional jurors for hardship reasons. App. at 38a–39a.

181), and a stay-at-home mother (Prospective Juror 18). App. at 122a, 132a, 160a, 169a. Their ages also varied. Two women were in their 30s. App. at 111a, 150a. Five women were in their 40s. App. at 121a, 131a, 141a, 176a, 184a. Two women were in their 50s. App. at 159a, 168a. Some Prospective Jurors had no law enforcement ties. App. at 113a–14a, 123a–24a, 133a–34a, 151a–52a. Others struck had close connections to law enforcement. Prospective Juror 115 had experience working and volunteering for the Maricopa County Sherriff's Office. App. at 161a. Prospective Juror 243 had an uncle who worked for Border Patrol and Homeland Security and a niece who was a first responder. App. at 186a. Prospective sJuror 222's spouse worked as a deputy in the Maricopa County Sheriff's Office. App. at 177a.

Of the nine women struck, the State made a for-cause challenge to only three. App. at 46a, 53a-54a, 59a. And during voir dire these three women all confirmed that they could consider death as a potential sentence and follow the law. App. at 43a–44a, 50a, 56a–57a. Other struck prospective jurors (Nos. 12, 18, 21, 62, and 222) gave answers that were identical to the seated jurors on questions concerning their willingness to return a death sentence. *Compare* App. at 115a–17a, 125a–29a, 135a–39a, 153a–57a, 178a–82a *with* App. at 193a–97a, 199a–203a.

After the close of the penalty phase, the jury deliberated over the course of three days before, on October 19, 2010, sentencing Mr. Rose to death. App. at 65a–66a, 68a–69a, 71a–72a, 74a–75a. The Arizona Supreme Court affirmed Mr. Rose's conviction and sentence on April 4, 2013. *Rose,* 297 P.3d 906.

In post-conviction proceedings, Mr. Rose raised a claim that the State's use of nine of its ten peremptory strikes on women, established a prima facie case of discrimination, an issue that trial counsel had a duty to raise. App. at 1a, 99a–110a; 106a–07a. Trial counsel admitted they had not been tracking gender during voir dire, and therefore could not lodge a *J.E.B.* challenge. App. at 90a–91a.

The Superior Court denied relief on this claim on the sole basis that the *Batson/J.E.B.* claim would fail. The court reasoned that "the prosecutor had readily available information that would have provided obvious non-discriminatory explanations for most of the State's strikes." App. at 9a. In support of its finding, the court then selected language from the voir dire transcript and developed its own gender-neutral reasons for striking each juror. App. at 9a–10a. For example, the court recounted how the state had inquired about Juror 62's views on mental health testimony, implying that her views on ADHD, Bipolar Disorder, and PTSD might have been the reason for the strike. App. at 9a. Likewise, the court emphasized Juror 222's experience as a nurse and her willingness to be "empathetic to medical conditions . . . and [her being] very analytical." App. at 10a. The court undertook this process for each of the nine women the state struck. App. at 9a–10a. However, the Court equivocated on whether its own proffered reasons sufficed for *all* of the jurors, stating instead that it had uncovered potential reasons for "most" of the jurors. *Id.* The record does not include any of the prosecution's claimed reasons for the strike.

On November 3, 2021, the Supreme Court of Arizona denied review without a written opinion. App. at 30a–31a.

REASONS FOR GRANTING THE PETITION

The post-conviction court found Mr. Rose's *Batson/J.E.B.* claim meritless only by skipping step two of the *Batson* process and instead using its own speculation to find gender-neutral reasons for the State's nine strikes. This practice is contrary to *Batson* and its progeny and implicates a conflict between the Supreme Court of Arizona and the Ninth Circuit. Given the importance of *Batson*'s protection and the stakes at issue, the Court should grant this petition.

I. THE COURT BELOW ERRONEOUSLY SUBSTITUTED ITS OWN SPECULATION IN PLACE OF SCRUTINIZING THE STATE'S REASONS FOR ITS STRIKES

With Mr. Rose having presented the court with a prima facie case of discrimination, the court below should have moved on to steps two and three of the *Batson* process.[2] Although women only made up 69% of the venire after for cause challenges were complete, 90% of the State's strikes were against women. The

[2] Mr. Rose's claimed counsel was ineffective due to its failure to raise a *Batson/J.E.B.* claim, the court applied *Strickland*'s analysis. *See Strickland v. Washington*, 466 U.S. 688 (1984). Ultimately, Mr. Rose's *Strickland* claim was denied because the court found his *J.E.B./Batson* claim meritless. App. at 9a ("Even assuming that trial counsel unreasonably failed to raise a *Batson* challenge, the prosecutor had readily available information that would have provided obvious non-discriminatory explanations for most of the State's strikes. The explanations would have been fatal to a *Batson* challenge.")

consistency of the State's strikes against women is in stark contrast to the varied characteristics of the struck prospective jurors. They came from vastly different backgrounds, but all said they would be able to impose a death sentence. The majority of them gave responses that were strikingly similar to those of seated jurors. The strike rate regarding female prospective jurors who were otherwise diverse and similarly situated to seated jurors in crucial ways satisfied the low threshold for proving a prima facie case in *Batson*'s first step. *Johnson*, 545 U.S. at 171 (describing the first two steps as an opportunity to collect information, not to consider the persuasiveness of the claim). Courts duly applying *Batson* and *J.E.B.* have found that similar disproportionate strike rates support a prima facie showing of discrimination. *See e.g.*, *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995), *overruled on other grounds Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc) (finding prima facie case of discrimination where Blacks comprised 30% of venire and prosecutor used 56% of strikes on Black potential jurors); *see also Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (finding prima facie case where prosecutors used ten of fourteen strikes to exclude Black potential jurors).

Because Mr. Rose made a prima facie showing of discrimination on the basis of gender, *Batson* required the "production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim" by hearing the prosecution's stated reasons for exercising the strikes. *Johnson*, 545 U.S. at 171. However, the court failed to do this.

In determining whether Mr. Rose's *Batson* claim was meritorious the court short-circuited the *Batson* analysis. Instead of engaging in step two of the *Batson* approach and hearing any proffered reasons from the prosecutor, the court speculated on what it considered to be reasons for the strikes, pulling quotes from the voir dire transcript. App. at 9a–10a. This is in clear contravention of this Court's precedents, which warn against the "imprecision of relying on judicial speculation to resolve plausible claims of discrimination." *Johnson*, 545 U.S. at 173. "The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 172.

In this case, Mr. Rose made a prima facie case of discriminatory intent and was therefore entitled to an evidentiary hearing where the court "would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated." *Johnson*, 545 U.S. at 170 (noting that in *Batson*, the case was remanded for additional proceeding given that the trial court did not receive an explanation from the prosecutor where "evidence supported an *inference* of discrimination"). However, the court failed to apply step two of the *Batson* process and engage in the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93.

Instead, the court stepped into the shoes of the prosecutor and came up with its own potential gender-neutral reasons for "most" of the strikes. App. at 9a. Of course, "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system" and requires reversal. *J.E.B.*, 511 U.S. at 142 n.13. And the court's failure to, in the face of a prima facie case of gender discrimination, require the state to provide reasons for its strikes violated this Court's precedents and cannot stand.

II. THE DECISION BELOW IMPLICATES A SPLIT BETWEEN THE SUPREME COURT OF ARIZONA AND THE NINTH CIRCUIT

In denying review, the Supreme Court of Arizona allowed the court in Mr. Rose's case to sidestep the *Batson/J.E.B.* inquiry in contravention of this Court's clear requirements. That denial was in line with other Arizona Supreme Court decisions, which contradict *Batson* by allowing judges to substitute speculation for key aspects of the *Batson* process. These decisions conflict with the Ninth Circuit's treatment of the same, and this Court's intervention is needed to bring uniformity to this federal constitutional issue. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.9 (11th ed. 2019) (an "established reason for the grant of certiorari is the presence of a direct conflict between the decision of a court of appeals and that of the highest court of a state where that conflict concerns a federal question.").

For example, in *State v. Porter*, 491 P.3d 1100 (Ariz. 2021) the defendant raised a *Batson* challenge after the state used its peremptory strikes to remove the

only African American venire members. *Id. at* 1103. The trial court found a prima facie case had been made, and the prosecutor responded that she struck Prospective Juror 20 because their brother had been convicted in a similar crime and she was not sure about whether she could be impartial. *Id.* According to the prosecutor, Prospective Juror 2 was struck because she had been a foreperson in a previous criminal case where the defendant was acquitted. *Id.* Prospective Juror 2, however, said she could follow the rules provided by the court. *Id.* The trial court denied the *Batson* challenge finding the prosecutor had offered "reasonable race-neutral explanations for its peremptory strikes." *Id.* at 1103. On appeal, Arizona's intermediate appellate court remanded, directing the trial court to "make the necessary findings relative" to the credibility and neutrality of the prosecution's stated reasons regarding Prospective Juror 2, or to retry the case. *Id.* at 1103–04.

The state petitioned for review to the Supreme Court of Arizona, and that court reversed. It held that a trial court need not make "express findings" on the credibility of a prosecutor's stated reasons for a peremptory challenge. *Id.* at 1107. Instead, the court allows reviewing courts "to defer to an implicit finding that a reason was non-discriminatory even when the trial court did not expressly rule on the third *Batson* factor." *Id.* The Arizona Supreme Court reasoned that "the lack of an express finding regarding the prosecutor's demeanor-based explanation is consequential only if the record clearly indicates that the other proffered reason was pretextual," *id.* at 1106, a holding in keeping with its prior decisions on the issue.

See State v. Canez, 42 P.3d 564, 577–78 (Ariz. 2002) (affirming the court's implicit finding under step three in denying the *Batson* challenge); *State v. Lynch*, 357 P.3d 119, 139 (Ariz. 2015) (same); *State v. Medina*, 306 P.3d 48, 61 (Ariz. 2013) (same).

Arizona's endorsement of denying a *Batson* claim without making credibility findings on the prosecutor's stated reasons directly conflicts with the Ninth Circuit's holdings on the issue. In *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004), the Ninth Circuit reversed a denial of habeas relief, finding that the state trial court failed to follow the process *Batson* requires by offering "sua sponte, its speculation as to why the prosecutor may have struck the five potential jurors in question." *Id.* at 1090. The defendant in *Paulino* objected after the prosecutor used five of its six peremptory strikes against black prosecutor jurors. *Id.* at 1088. The trial court denied the objection explaining, "[the prosecutor] knows her case better than I do. And I find that there were objective reasons for all of these jurors to be excused." *Id.* at 1089. The Ninth Circuit noted *Batson*'s three-step approach, and that the process used by the trial court "clearly contravened the procedure outlined in *Batson*." *Id.* The Ninth Circuit remanded the case, instructing the district court to "hold a hearing so the state will have an opportunity to present evidence as to the prosecutor's race-neutral reasons for the apparently-biased pattern of peremptories, and determine whether the prosecutor violated *Batson*." *Id.* at 1092 (citations omitted).

Similarly, in *United States v. Alanis*, 335 F.3d 965 (9th Cir. 2003), the Ninth Circuit held that "it is necessary that the district court make a deliberate decision whether purposeful discrimination occurred," when evaluating step three. *Id.* at 969. In *Alanis*, as in *Porter*, the trial court had rejected a *Batson* decision with limited reasoning concluding simply, "It appears to the court that the government has offered a plausible explanation based upon each of the challenges discussed that is grounded other than in the fact of gender of the person struck." *Id.* at 968–69. However, in contrast to the court in *Porter*, the Ninth Circuit found this analysis insufficient. *Id.* at 969. The Ninth Circuit explained that "the district court erred by failing to proceed to step three to evaluate meaningfully the persuasiveness of the prosecutor's gender-neutral explanations." *Id.* Regarding the third step in the *Batson* approach, the Ninth Circuit explained "[a]t a minimum, this procedure must include a clear record that the trial court made a deliberate decision on the ultimate question of purposeful discrimination. *Alanis*, 335 F.3d at 968, n.2.

Just as the court in Mr. Rose's case invented the prosecutor's reasoning in *Batson*'s step two, the Arizona Supreme Court allows appellate courts to concoct the trial judge's reasoning in *Batson*'s step three. This approach to *Batson* conflicts with this Court's precedents as well as the Ninth Circuit's requirement to apply each step of *Batson*, for the court to hear the prosecutors' motivations for peremptory challenges, and then only after that make "a clear record" regarding the judge's

decision in step three. This Court should grant this petition to bring uniformity in the application of *Batson.*

III. THIS PETITION PRESENTS A GOOD OPPORTUNITY TO ADDRESS THIS QUESTION

This Court has "reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory[.]" *J.E.B.*, 511 U.S. at 128. Guiding courts to correctly apply *J.E.B.* and *Batson* is necessary to ensure that discrimination does not "'cast[] doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). This petition represents an opportunity for the court to deliver needed guidance to courts applying these cases.

The post-conviction court's resolution of the claim below turned exclusively on the merits of the underlying *J.E.B.* violation. Resolution of that question, in turn, hinged on the post-conviction court's willingness to manufacture reasons on the prosecutor's behalf. Thus, even though the *J.E.B.* violation was raised in post-conviction and as part of an ineffective assistance of trial counsel claim, those glosses present no barriers to resolution of the question in this case.[3]

[3] In its Order, the Court rejected Mr. Rose's argument that given the nature of the claim, ineffective assistance of counsel due to failure to raise *Batson* claims should be presumed prejudicial. App. at 9a. Nonetheless the court reached its decision by erroneously applying *J.E.B/Batson*, and this Court does not need to reach this question in resolving this case.

Beyond the compelling interests protected by *J.E.B.* and *Batson*, the stakes at issue the case warrant this Court's review. Mr. Rose's jury deliberated for three days before sentencing him to death, confirming that jury composition and impartially had profound implications on the outcome. Additionally, granting and ruling for Mr. Rose will allow him to vindicate his right to effective counsel as a capital defendant.

No state law grounds would frustrate this Court's review of the issue squarely presented in the post-conviction court's order. Granting review would not only correct a wrongly imposed capital sentence, but also offer much needed guidance and uniformity when applying *Batson*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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