No. 22-5359

In the

Supreme Court of the United States

ORIGINAL

KAREEM MURRAY, Petitioner

vs.

JULIE M. WOLCOTT, Superintendent,
Attica Correctional Facility,

Respondent.

On Petition for a Writ of Certiorari to

the United States Court of Appeals

for the Second Circuit

Petition for Writ of Certiorari

Kareem Murray
Petitioner, Pro Se
Attica Correctional Facility
DIN 15A2756
639 Exchange Street
P.O. Box 149
Attica, NY 14011-0149

Questions Presented for Review

1. Whether a state trial court's granting of a prosecutor's challenge to a defendant's use of a peremptory strike, without following the three-step procedure for deciding such challenges required by Batson v. Kentucky, 476 U.S. 79 (1986), and Purkett v. Elem, 514 U.S. 765 (1995); and/or without any reasonable finding that the striking party is motivated in substantial part by discriminatory intent; gives rise to a cognizable claim on habeas corpus review under 28 U.S.C. § 2254.

2. If the answer to Question 1 is "Yes," whether the trial court below's granting of the prosecutor's challenge to Petitioner's use of peremptory strikes, and/or the appellate court's affirmance thereof:

A. was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, entitling Petitioner to habeas corpus relief under 28 U.S.C. § 2254(d)(1); and/or

B. was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, entitling Petitioner to habeas corpus relief under 28 U.S.C. § 2254(d)(2).

Parties

All parties appear in the caption of the case on the cover page. Pursuant to Supreme Court Rule 35.3, Julie M. Wolcott, the current Superintendent of Attica Correctional Facility, has been automatically substituted for Joseph H. Noeth, the prior Superintendent who was respondent below

Related Cases

Murray v. Noeth, No. 20-3136-pr, U.S. Court of Appeals for the Second Circuit. Judgment entered Apr. 26, 2022.

Murray v. Noeth, No. 9:19-cv-00224-JKS, U.S. District Court for the Northern District of New York. Judgment entered Aug 19, 2020.

People v. Murray, 155 A.D.3d 1106, Supreme Court of the State of New York Appellate Division, Third Department. Judgment entered Nov 2, 2017.

People v. Murray, 35 N.Y.3d 1015, New York Court of Appeals. Judgment entered Apr. 10, 2018.

Table of Contents

Table of Authorities

Statutes

U.S. Supreme Court

Other Federal Courts

State Court

Opinions Below

The decision of the U.S. Court of Appeals for the Second Circuit appears at Appendix A and is reported at Murray v. Noeth, 32 F.4th 154 (2d Cir. 2022).

The decision of the U.S. District Court for the Northern District of New York appears at Appendix B and is unreported but is available in Westlaw at Murray v. Noeth, 2020 WL 4815972.

The decision of the Supreme Court of the State of New York Appellate Division, Third Department appears at Appendix C and is reported at People v Murray, 155 A.D.3d 1106 (N.Y. App. Div., 3d Dept. 2017).

The decision of the New York Court of Appeals denying Petitioner leave to appeal appears at Appendix D and is reported at People v. Murray, 31 N.Y.3d 1015 (N.Y. 2018).

Jurisdiction

The judgment of the U.S. Court of Appeals for the Second Circuit was entered April 26, 2022 and no petition for rehearing was filed.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves Section 1 of Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves subsection (d) of section 2254 of title 28 of the United States Code, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Statement of the Case

During jury selection for a trial in County Court of Albany County, New York the prosecutor accused counsel for petitioner Kareem Murray and his codefendant Russell Palmer of abusing peremptory strikes to discriminate against men on the venire. After a cursory inquiry the court found the defense had provided "no gender-neutral reason" for two strikes and denied them E308-312.[1] Mr. Murray was convicted of second degree murder and related offenses and sentenced to an aggregate term of 39 years to life in prison.

On direct appeal Mr Murray argued the court had failed to follow the procedure required by Batson v. Kentucky, 476 U.S. 79 (1986), and Purkett v. Elem, 514 U.S. 765 (1995), for deciding whether peremptory strikes are discriminatory, and that the strikes were legitimate. The Appellate Division of the New York State Supreme Court agreed that the defense's reasons were gender-neutral, but nevertheless "inferred" that the trial court had found the reasons pretextual and affirmed the convictions. 155 A.D.3d at 1109-1110 (C1-4). The New York Court of Appeals denied leave to appeal. 31 N.Y.3d 1015 (D1).

Mr. Murray then sought federal habeas review, contending among other claims not at issue here that the trial court's denial of the two peremptory strikes, and the Appellate Division's affirmance, were contrary to or an unreasonable application of Batson and Purkett, and that any factual finding of discrimination was unreasonable.

The District Court found the record "troubling" and could support a conclusion that the trial court had a "fundamental misunderstanding" of how to

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[1] E308-312 refers to pages 308-312 of jury selection transcripts reproduced in full as Appendix E. D1 refers to Appendix D page 1, and so on.

decide challenges to peremptory strikes under Batson and Purkett, B16-17, but deferred to the Appellate Division's "inference" that the trial court had found the gender-neutral reasons for the strikes pretextual and denied the writ. B19. It did, however, issue a certificate of appealability on that claim. B21, 22.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed denial of the writ but for different reasons: It held that claims that a trial court denied peremptory strikes without following the Batson-Purkett procedure are not cognizable on habeas review under 28 U.S.C. § 2254, and that such errors, do not, without more, violate a defendant s federal constitutional rights. 32 F.4th at 158-60. In doing so, it disagreed with the Seventh Circuit's contrary holding in Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003). Id. at 159 n. 2 (A5).

Mr. Murray now timely seeks review by this Court.

Reasons for Granting the Writ

In the proceedings below, the trial and appellate courts plainly failed to comply with this Court's settled precedents, in Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, controlling how to decide objections that peremptory strikes are being abused to perpetrate invidious discrimination The federal District Court and Court of Appeals decisions disregard the broad societal purposes those precedents serve, and create a split between the Second and Seventh Circuits on the scope of habeas review. If the decisions below are allowed to stand, they will upset the delicate balance this Court has struck between rights to and limitations on the use of peremptory strikes, and enable new forms of discrimination that are both highly potent and difficult to detect and defeat. This Court therefore must grant review.

A. The Batson framework for deciding whether peremptory strikes are discriminatory is clearly established Federal law

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial. Prior cases had left peremptory strikes "largely immune from constitutional scrutiny," id. at 92-93, which had led to "widespread" and "deeply entrenched" discrimination in jury selection. Flowers v. Mississippi, ___ U.S. ___, ___, 139 S. Ct. 2228, 2239 (2019). "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." Id. at 2242-43

"In the decades since Batson, this Court's cases have vigorously enforced

and reinforced the decision, and guarded against any backsliding." Id. at 2243 (citing cases). It has been extended to strikes by a defendant, Georgia v. McCollum 505 U.S. 42, 59 (1992), and to gender discrimination, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994).

Batson requires a three-step process for deciding whether a peremptory strike is discriminatory. Flowers, 139 S. Ct. at 2241; Batson, 476 U.S. at 97-98.

First, the objecting party "must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" Johnson v. California, 545 U.S. 162, 168 (2005) (quoting Batson, 476 U.S. at 93-94). "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose." Id. (quotation marks and footnote omitted). An objecting party "satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Id. at 170.

Second, the striking party must come forward with a neutral explanation. This "does not demand an explanation that is persuasive, or even plausible. 'At this second step of the inquiry, the issue is the facial validity of the [striking party's] explanation. Unless a discriminatory intent is inherent in the [party's] explanation, the reason offered will be deemed . . . neutral.'" Purkett v. Elem, 514 U.S. 765, 767-68 (1995) (modification marks omitted) (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion)). "Even if the [striking party] produces only a frivolous or utterly nonsensical justification for its strike, the case does not end — it merely proceeds to step three." Johnson, 545 U.S. at 171. "[T]o say that a trial judge may

choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral [or gender-neutral] reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding . . . motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768 (emphasis in original). A "neutral" step two reason "is not a reason that makes sense, but a reason that does not deny equal protection." Id. at 769.

Third, the trial judge must determine whether the asserted reasons are a pretext for discrimination. "The trial court must consider the [step two] explanations in light of all the relevant facts and circumstances, and in light of the arguments of the parties. * * * The trial judge must determine whether the [striking party's] proffered reasons are the actual reasons or whether the proffered reasons are pretextual and the [party] instead exercised peremptory strikes on the basis of race [or gender]. The ultimate inquiry is whether the [party] was 'motivated in substantial part by discriminatory intent.'" Flowers, 139 S. Ct. at 2244 (quoting Foster v. Chatman, 578 U.S. 488, 513 (2016)).

This Court has "made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear on the issue of racial [or gender] animosity must be considered." Snyder v. Louisiana, 552 U.S. 472, 478 (2008); Flowers, 139 S. Ct. at 2250. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." Foster, 578 U.S. at 501. "[W]e must examine the whole picture." Flowers, ibid. Parties may present "a variety of evidence" at the third step, including but not limited to "statistical evidence", "disparate

questioning and investigation" of jurors, "side-by-side comparisons" of jurors, and "a prosecutor's misrepresentation of the record." Id. at 2244 (citing cases).

B. The decisions below are unsustainable in light of this Court's controlling precedents

Each of the decisions below failed to follow clearly established Federal law and warrants review by this Court.

1. The trial court

Mr. Murray was jointly tried with a codefendant, Russell Palmer. Each was represented by independent counsel; Mr. Murray by Joseph Meany and Mr. Palmer by P.J. Blanchfield. E1. New York law provided for 20 peremptory strikes, N.Y. Crim. Proc. L. ("CPL") § 270.25(2), each of which the attorneys had to agree on to use, CPL § 270.25(3).

Jury selection took three rounds: Panels 1 and 2 had 21 prospects, E30, 163; and Panel 3 had 9, E318.

After preliminary voir dire, E30-74, Panel 1 had 12 women: Jurors 1, 2, 4, 6, 8, 9, 12, 13, 15, 16, 20 and 21; and 9 men: Jurors 3, 5, 7, 10, 11, 14, 17, 18 and 19. E119-121. There were no prosecution challenges for cause. E159. The defense made for-cause challenges to 2 women: Jurors 2 and 13; and 1 man: Juror 14; the challenge to Juror 2 was allowed and the challenges to Jurors 13 and 14 were denied. E159-161.

The prosecutor then peremptorily struck 2 men: Jurors 7 and 11; and 2 women: Jurors 2 and 21. E162. The defense struck 7 men: Jurors 3, 5, 10, 14, 17, 18 and 19; and 5 women: Jurors 1, 6, 9, 13 and 16. Id. Both the prosecutor and defense made their challenges for cause and peremptory strikes in seat number sequence. Id.

Panel 2 was then brought in, and after preliminary voir dire, E164-252, had 15 women: Jurors 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 15, 16, 18, 20 and 21; and 6 men: Jurors 1, 5, 7, 14, 17 and 19. E277-279. There were again no prosecution challenges for cause. E304. The defense challenged 4 women: Jurors 4, 6, 9 and 10, for cause; Jurors 6 and 10 were excused "by stipulation," and the challenges to Jurors 4 and 10 were denied. E305-306.

The prosecutor then peremptorily struck 2 men: Jurors 1 and 14; and 4 women: Jurors 11, 12, 16 and 21. E307. The defense then sought to strike 2 women: Jurors 4 and 9; and 1 man: Juror 5. E308. Again all challenges for cause and peremptory strikes were made in seat number sequence. E305-307.

The prosecutor objected to the strike of Panel 2 Juror 5, asserting he was "the eighth straight male that the defense has excused for a peremptory." E308. The defense had actually struck 7 men and 7 women in seat number sequence. E162, 305-307. What the prosecutor apparently meant was that Panel 2 Juror 5 was the eighth venireman the prosecutor had not struck himself: From Panel 1 the prosecutor had struck 2 men and the defense 7; and from Panel 2, which had 6 men, the prosecutor struck 2 and the defense had (with Juror 5) sought to strike a third, thus bringing the defense total to 8.

That objection led to the defense being arbitrarily denied the strikes of Panel 2 Jurors 5 and 17, as follows:

> THE COURT: Do the defendants wish to exercise any of their remaining eight peremptories?
>
> MR. BLANCHFIELD: I want to make sure. I know 4.
>
> THE COURT: I'm sorry. Is that 4?
>
> MR. BLANCHFIELD: Yes. 4, 5, 9.
>
> MR. GALARNEAU: Your Honor, I'm going to object to the removal of Juror Number 5 as the eighth straight male that they have -- the

defense has -- Mr. Petrecky is the eighth straight male that the defense has excused for a peremptory.

THE COURT: I'm sorry?

MR. GALARNEAU: It's the eighth straight male.

THE COURT: I will note that is the eighth male that you have challenged peremptorily, and I'm going to ask you to give me a gender-neutral reason why, on Mr. Petrecky, you are challenging him.

MR. BLANCHFIELD: Our concern was based on his background of not only conservative, but based on his dealing with Plug Power and that type of corporation, when he hears expert testimony, that he would automatically side for testimony regarding forensic, regarding DNA, regarding a lab in general.

MR. MEANY: Could I be heard?

THE COURT: Yes.

MR. MEANY: Body language was extremely troubling. He appeared to be shaking his head. And I would submit that Mr. Galarneau also challenged, and we're fine with, other males that have been -- take number 14.

THE COURT: Well, we're not there yet.

MR. MEANY: Then maybe, Judge, my request would be if you could reserve on this until we're done with the totality of the panel. I think the pattern -- it will be clear there's no pattern once the panel is done.

MR. GALARNEAU: Eight males in the first panel. I just used one. They used seven.

MR. MEANY: We don't --

THE COURT: I've got seven in the first panel that you challenged.

MR. MEANY: There was legitimate reasons.

THE COURT: I'll reserve on that.

MR. BLANCHFIELD: So you have 4, 5 -- reserving on 5. 9 and 13, which is a woman. Could we have one moment judge? 19.

MR. GALARNEAU: The juror in Seat Number 19 is a male.

THE COURT: I know. What's your -- I'm going to ask you for a gender-neutral reason for Number 19 as well. There's clearly a pattern.

MR. BLANCHFIELD: We kept --

THE COURT: I'm aware of what you've kept.

MR. BLANCHFIELD: His work with the Division of Parole was what concerned me, you know, knowing how the system works and how -- dealing with the Division. And if it comes out that our clients have any violations, any criminal history.

MR. MEANY: Court-martial experience in the Marine Corps. He's from -- appears to be a textbook-prosecution type juror. Doesn't have anything to do with his sex.

THE COURT: And you're otherwise satisfied?

MR. MEANY: How many do we have?

THE COURT: You still have three peremptories available to you. We have right now 2; 3, 7, who is a male; 8; 10; 15; 17; and 20. So we have 12 jurors right now, and we need to, with the remaining eight and possibly this afternoon with about 20, get the alternates.

MR. MEANY: Can we have a moment to talk, Judge?

THE COURT: You challenged 6 for cause.

MR. MEANY: That was by stip.

THE COURT: Yes, by stip.

MR. BLANCHFIELD: We need a moment. Could we have a minute?

THE COURT: Yes.

MR. MEANY: Judge, we would exercise a peremptory challenge on Number 17. Do you need race-neutral reason for that? He's a white male. Do you need a race-neutral reason for that?

THE COURT: That would be your tenth male.

MR. MEANY: Not to be -- obviously we haven't exercised all of our challenges on males. We're looking for profiles of people who are likely to vote against our clients' interest, you know. I can't think of any reason why a male would be more likely than a female to vote -- you know, I don't believe that the pattern really exists.

And with regard to that specific juror, again, he appears to fit the profile of a conservative-prosecution vote, and I have concerns about his experience in Greene County that he spoke about, Federal Government employee. You know, I think that we're not -- we're certainly not exercising a challenge on the basis of his sex at all.

MR. GALARNEAU: It's disproportionate with the males. 10 out of 11. They have agreed to keep one male out of 11. It's less than 10 percent.

MR. BLANCHFIELD: But an equal number of men and women on the panel.

MR. GALARNEAU: I think there's a disproportionate number of them.

THE COURT: I believe that you are excluding males and you have shown a pattern. I see no gender-neutral reason for 5 or 17. I do see a gender-neutral reason for 19, and I'm going to allow the People's challenge as to 5 and 17.

And you're otherwise satisfied? And you can take exception to the Court's determination and decision. Are you otherwise satisfied? You haven't indicated whether you were challenging 20.

MR. MEANY: We'll challenge 20.

THE COURT: So we have 2, 3 -- 2, 3, 5, 7, 9, 10, 15, 17. So we have a jury.

MR. MEANY: Judge, I think we want to revisit our challenges since, you know, we're not being allowed to exercise the -- with regard to the people that you have made the Batson ruling on. I think we want to go back and discuss that changes the dynamic of the jurors that we potentially exercised peremptory challenges with regard to some of the --

THE COURT: Right here, right now.

MR. MEANY: We need a minute to consult.

THE COURT: Right here, right now.

MR. MEANY: The defense would want to absolutely challenge 10. I thought she had already been challenged.

Who else? How many peremptories are remaining at this juncture?

THE COURT: I think you have two.

THE CLERK: I'd have to pull out --

MR. MEANY: That's what I have. There's two.

THE COURT: I have 4, 9 -- 4, 9, 10, 13, 19, and 20. So six. Are you satisfied?

MR. MEANY: Yes.

THE COURT: All right. So we have 11. We need one and three alternates.

E308-314.

The Appellate Division and U.S. District Court correctly found that the trial court's pronouncement that the defense had articulated "no gender-neutral reason" for its strikes was erroneous. C3, B17. And this record

shows the trial judge did no "sensitive inquiry into such circumstantial evidence of intent as may be available", Foster, 578 U.S. at 501, did not "take[] into account all possible explanatory factors", Batson, 476 U.S. at 95, and ignored "relevant facts and circumstances", Flowers, 139 S. Ct. at 2244; Snyder, 552 U.S. at 478.

Instead of "examin[ing] the whole picture" and the "variety of evidence" available, Flowers, id. at 2243, 2250, the court skipped Batson's third step, apparently to get jury selection over with "right here, right now." E313. The evidence permits no reasonable finding that the defense was "motivated in substantial part by discriminatory intent." Flowers, 139 S. Ct. at 2244.

First, the court disregarded that all peremptory strikes had to be made by agreement of two independent attorneys. NY CPL § 270.25(3). Discrimination here would have required a conspiracy.

Second, men are hardly a group with a long history of being discriminated against. Rather "our Nation has had a long and unfortunate history" of discrimination against women, including "total exclusion" from juries. J.E.B., 511 U.S. at 136.

Third, the defense explicitly denied discriminating or even being able to "think of any reason" why it would make sense to exclude men. E311. Nothing in the record cast any doubt on these attorneys' credibility.

Fourth, the court either missed basic details or knowingly relied on a prosecutorial misrepresentation: The prosecutor asserted there were "[e]ight males on the first panel. I just used one [strike]. They used seven." E309. There actually were 9 men on Panel 1, E119-121, and the prosecutor struck 2 of them, E162.

Fifth, the court relied on the Panel 1 strikes, but gave no opportunity to explain them, even after the defense protested they had "legitimate reasons"

and the court said it would "reserve on that." E309. Considering that the Panel 1 strikes were legitimate would have supported the Panel 2 strikes. Snyder, 552 U.S. at 478. As did the defense being "fine" with other veniremen. E309. Flowers, 139 S. Ct. at 2248.

Sixth, the prosecutor's claim the defense strikes were "disproportionate" with the males, 10 out of 11. * * * I think there's a disproportionate number of them", E312, was nonprobative at best. What a prosecutor "think[s]" is not evidence, and the prosecutor struck 4 of the original 15 veniremen himself before the defense could strike anyone. In any event, striking a higher percentage of men than women does not by itself establish discriminatory motive, especially with unbalanced panels: Panels 1 and 2 combined had 27 women and 15 men. E119-121, 277-279.[2] Batson does not require a jury to have the same gender ratio as the venire. Indeed making strikes based on gender to effect venire-jury gender ratio parity would itself be discriminatory. Cf., Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("racial balancing . . . is patently unconstitutional").

Finally, the court itself seems not to have believed discrimination occurred. It denied the defense strikes of Panel 2 Jurors 5 and 17 two sentences after the prosecutor's "10 out of 11" comment, declaring "I believe that you are excluding males and you have shown a pattern." E312. Had that been genuine, the court would have been alert for any continuation of that "pattern." But when the defense struck Panel 3 Juror 2, the prosecutor commented "Number 2 is a male. So it's 10 out of 13", E353; and though the

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[2] E278 records the prosecutor addressing Panel 2 Juror 16 as "Mr. Harshearger." This is either a transcription error or the prosecutor misspoke. Panel 2 Juror 16 was Melissa Harshearger, a woman. E221.

court treated the same comment about Panel 2 Juror 19 as an objection, E310, in Panel 3 the court merely noted "2 is a male" and allowed the strike. E353.

The court's haste and lack of analysis, and the absence of any evidence showing discriminatory motive, Flowers, 139 S. Ct. at 2243, permit only two reasonable readings of the record: The trial court either (1) skipped Batson step 3 after finding the defense had given "no gender-neutral reason"; or (2) seized on the prosecutor's objection to make a spurious pronoucement of a Batson violation, without any genuine belief that discrimination had occurred, to get jury selection over with "right here, right now." E313.

It is thus manifest that the trial court's handling of the Batson inquiry was "contrary to, or involved an unreasonable application of," Batson and Purkett, 28 U.S.C. § 2254(d)(1); and that any factual finding that the defense strikes were "motivated in substantial part by discriminatory intent", Flowers, 139 S. Ct. at 2244, to the extent one was made at all, was "unreasonable in light of the evidence presented", § 2254(d)(2).

2. The Appellate Division

"An appeals court looks at the same factors as the trial judge . . . ." Flowers, 139 S. Ct. at 2244. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." Snyder, 552 U.S. at 477.

The Appellate Division agreed Mr. Murray "provid[ed] gender-neutral reasons for his peremptory challenges on juror Nos. 5 and 17." C3. But it affirmed anyway, holding:

> [E]ven though it appears that County Court effectively compressed steps two and three of the Batson test, the court's consideration of pretext can be inferred from the record. We note that, while both parties bear a responsibility to ensure the development of an adequate record, when trial judges are satisfied that unlawful discrimination has been employed by either side, there should be no artificial

procedural barriers to their taking firm and prompt action. Id. (citations and quotation marks omitted). It should have found the trial court violated Batson and Purkett.

Purkett held that "combining Batson's second and third steps" is error, 514 U.S. at 768, and Purkett is no "arbitrary procedural barrier." "Compliance with Batson is essential . . . ." Foster, 578 U.S. at 523 (ALITO, J., concurring in judgment).

"And "[a]n 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" Johnson, 545 U.S. at 168 n. 4 (quoting Black's Law Dictionary 781 (7th ed. 1999)). There was no factual basis for the trial court to find the defense's neutral reasons pretextual, and thus none for the Appellate Division to "infer" such a finding was made.

3. The District Court and Court of Appeals

The District Court and Court of Appeals made similar errors, both in identifying the claims in this case and answering whether they are cognizable and warrant relief. The short version is that the courts asked the wrong questions and so reached the wrong result. The clearest way to see this, though, is to address the correct questions and answers first.

Preliminarily, however, the District Court's conclusion that "the Appellate Division could reasonably infer from the transcript of the proceedings that the trial court simply did not believe that the proffered reasons were the defense's true reason" for the strikes, Bl7, is incorrect. A federal court reviewing a claimed Batson (or here, reverse-Batson) violation must consider the "totality of the relevant facts" to determine whether state courts reasonably resolved Batson objections. Miller-El v. Dretke, 545 U.S.

231, 239 (2005). The AEDPA makes that review deferential, 28 U.S.C. § 2254, but it cannot be blind. The District Court founded its conclusion on what it characterizes as an "independent review of the voir dire transcript", B17, but the decision has no more analysis or reasoning than the Appellate Division's. If the decision has any rationale, it is not articulated.

That said, we can proceed to the "main event": Whether claims that a defendant was denied peremptory strikes in purported reliance on Batson are cognizable and warrant relief on habeas review.

a. How the District Court and Court of Appeals construed the claims

The District Court construed Mr. Murray's petition as claiming "that he was denied his right to freely exercise his peremptory challenges." B13. The Second Circuit construed it to make "a federal constitutional claim" that "the state court conflated the second and third steps of the Batson analysis" in violation of Purkett, and thus, "improperly disallowed peremptory strikes which are creatures of state law, not of federal law." A4. Both courts denied the petition-as-construed citing precedent that peremptory strikes are not fundamental rights. A4, B13.

b. How the Batson line prevents discriminatory peremptory strikes

The basic flaw in the District Court's and Second Circuit's logic is that it analyzes the problem at the wrong level of generality and from the wrong perspective: Reverse-Batson errors do not violate any federal "right" to peremptory strikes; there is no such right. But reverse-Batson errors do exceed the limits of authority conferred on the court by Batson itself, and in the process violate long-settled constitutional prohibitions against unjustifiable race-based and gender-based classifications. This is manifestly

undeniable by examining how Batson actually enables courts to block discriminatory strikes.

As a general matter, peremptory strikes are unrestrained; they can be exercised "for any reason at all" without any scrutiny or required approval. Batson, 476 U.S. at 89. They are not required by the Constitution, and it generally is neutral on the entire subject. Id. at 91.

The Constitution, however, does impose one basic rule as a starting point: Courts may not treat peremptory strikes differently on account of a juror's race or gender. A court could not, for example, have a rule for no particular reason that strikes of white jurors have to be explained and approved by the court, but strikes of black jurors do not. Absent a justification that can survive "strict scrutiny," subjecting strikes of some jurors to more scrutiny than strikes of others on account of race would be an unconstitutional race-based classification. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

Batson of course prohibits prosecutors from making racially discriminatory strikes. McCollum extended this to strikes by defendants, and J.E.B. to gender discrimination.

Batson operates against the government directly via the Constitution. But since private parties are generally not bound by the Constitution, McCollum extended the holding of Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), that civil litigants are "state actors" when making peremptory strikes, to criminal defendants. 505 U.S. at 50-55.

The resulting outline is by now familiar: Contingent on finding prima facie evidence that a party is using a peremptory strike to discriminate, a court has authority to subject that strike to extra scrutiny to determine whether the party is, in fact, discriminating. If so, it has the further authority -- on account of the combination of the juror's race or gender and

the party's motive -- to refuse to enforce the strike. Id. at 54.

Underlying this all is a little-discussed but critically-important fact: The Batson line did not spring forth ex nihilo: It applied the long-settled law that preceded it prohibiting unjustifiable classifications, in a novel way, to extend its reach: Holding striking parties are state actors bound them to obey the Constitution. But to give courts the ability to police peremptory strikes for discrimination the Constitution forbids, the Batson line also established and relied on a second rule of law: That subjecting an otherwise-peremptory strike to extra scrutiny to determine whether the party's motive is discrimination, and classifying a juror as unstrikable if so, satisfies the "strict scrutiny" test for race-based classifications, and the "exceedingly persuasive justification" test for gender-based classifications, J.E.B., 511 U.S. at 141 n. 12.

This Court has since refined both the procedures and substantive standards that govern the exercise of Batson-conferred authority. But its basic rules of law remain the same.

c. Reverse-Batson errors raise questions of Federal law

Having the above understanding of Batson's mechanics at hand makes it easy to see where the District Court and Second Circuit went awry: They overlooked that being not affirmatively required to permit a peremptory strike is not the same thing as being permitted to deny it.

Batson does not confer plenary authority over peremptory strikes, but a narrow, conditional authority: To deviate from state law upon a finding of discrimination to enforce the Constitution. Discrimination is the sine qua non of a lawful exercise of Batson authority by a court.

If a court takes a strike under scrutiny, and finds no discrimination,

Batson confers no authority to do anything; the strike must be allowed to return to its normal course. If the court reclassifies the juror as unstrikable anyway -- if it "denies the peremptory strike" -- it has erroneously cited Batson as authority to do what Batson does not actually permit.

If a court denies a peremptory strike for some reason that has nothing to do with Batson -- say, because it miscounts how many a party has made -- that is a matter for the state courts. But if it cites Batson as the authority for denying a strike, it is purporting to exercise authority conferred by this Court which is ultimately founded in and implements the Constitution -- which is a federal matter. Not because there is any freestanding constitutional "right" to peremptory strikes, but because the court is purporting to deviate from state law pursuant to federal authority.

This is true whether a reverse-Batson error claim is "one of procedure" or "one of substance". A5. Batson authorizes deviations from state law only upon a finding of discrimination, which must be found by procedures carefully calibrated to ensure the many competing interests -- parties, jurors, the government, and society at large -- are protected from erroneous results.

Further, reverse-Batson errors can have constitutional consequences. Placing a strike under scrutiny on account of the juror's race or gender and suspicion of discrimination satisfies the "strict scrutiny" and "exceedingly persuasive justification" tests. Proceeding to block the strike even if discrimination is not found satisfies neither -- it is on account of the juror's race or gender alone, or at best an irrebuttable presumption of discrimination that turns solely on race or gender.

d. Contrary to the decisions below, reverse-Batson errors are cognizable and can warrant relief on habeas review

That reverse-Batson errors are fundamentally errors in a court's exercise of federally-conferred authority makes them straightforwardly cognizable on habeas review. And as lawful exercise of that authority requires a predicate factual finding of discrimination arrived at by sufficient procedures, errors can be remediable under either or both of 28 U.S.C. §§ 2254(d)(1) and (d)(2), subject to ordinary habeas considerations.

Procedural errors that nevertheless end in a factually reasonable result can potentially be harmless. Davis v. Ayala, 576 U.S. 257, 267-70 (2015). But substantive errors -- denying a strike based on an unreasonable finding of discrimination, or without making a finding at all -- cannot be harmless, because they lead to an unjustifiable race-based or gender-based classification, Batson, 476 U.S. at 84; J.E.B., 511 U.S. at 141 n. 12.

If a petitioner can meet the AEDPA's standards for demonstrating harmful error, 28 U.S.C. § 2254, relief is thus required.

e. Mr. Murray's petition raises cognizable claims that warrant relief

The District Court and Second Circuit erred by construing Mr. Murray's petition to merely claim he was denied his state right to make peremptory strikes. Rather it raises the following claims:

First, the trial court exceeded the narrow authority conferred on it by Batson by denying the peremptory strikes of Panel 2 Jurors 5 and 17 -- that is, classifying Jurors 5 and 17 as unstrikable -- without following the procedure mandated by Batson and its progeny including Purkett, and the Appellate Division affirmed that error, authorizing relief under 28 U.S.C. § 2254(d)(1).

Second, any factual finding of discrimination by the trial court, and the Appellate Division's finding that any such finding was not clearly erroneous, was unreasonable in light of the evidence, authorizing relief under 28 U.S.C. § 2254(d)(2).

Third, the result of those errors was Panel 2 Jurors 5 and 17 being classified as unstrikable on the basis of their gender alone, or on the basis of an irrebuttable presumption of discrimination on account of their gender, in violation of Mr. Murray's due process, equal protection, and fair cross-section[3] rights, authorizing relief under 28 U.S.C. §§ 2254(d)(1) and (d)(2).

The record demonstrates habeas relief on these claims is warranted.

f. The Second Circuit's reliance on Rivera is misplaced

The Second Circuit cited Rivera v. Illinois, 556 U.S. 148 (2009), to "not decide whether the state court properly followed the Batson analysis or otherwise erred in disallowing Mr. Murray's two proposed strikes," 32 F.4th at 155 (A2), in two ways:

First, it held Mr. Murray "[l]ike the defendant in [Rivera], . . . complains that his state trial court improperly disallowed peremptory strikes that were creatures of state law, not of federal law." Id. at 158 (A4). Such a claim it said is "squarely foreclosed by Rivera." Id.

Second, it found Aki-Khuam factually distinguishable and unpersuasive as not "consistent with the Supreme Court's later holding in Rivera that a state court's denial of state-created peremptory strikes does not, on its own, violate a defendant's federal constitutional rights." Id. at 159 n. 2 (A5) (citing 556 U.S. at 158).

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[3] Taylor v. Louisiana, 419 U.S. 552, 530 (1975).

Rivera supports neither of these conclusions.

1. Rivera is distinguishable

The defendant in Rivera did not make the same claims as are made here, nor could he have given the facts of that case.

Initially Mr. Rivera claimed deprivation of a "liberty interest in [his] state provided peremptory challenge rights," 556 U.S. at 157, but no such liberty interest exists, id. at 158.

He also asserted both procedural and substantive Batson violations, centered on the fact that the trial court had raised the discrimination issue sua sponte, and found it, based on what the Illinois Supreme Court ultimately found was unpersuasive evidence. Id. at 152, 154-55. That did not raise any viable claim.

The Illinois Supreme Court found the discrimination issue should not have been raised sua sponte, and disagreed with the trial judge's factual findings. But procedurally, all three Batson steps were followed. This Court held in Hernandez, 500 U.S. at 359, that:

> Once a prosecutor has offered a race-neutral explanation for its challenges and the trial court has ruled on the ultimate issue of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

And though the trial judge initially failed to identify either the type of discrimination he suspected or why, or give reasons for his ultimate finding, the Illinois Supreme Court remanded to develop the record before reaching a final decision. This was within its "flexibility in formulating appropriate procedures to comply with Batson[.]" Johnson, 545 U.S. at 168. The trial court arguably committed a Batson procedural error, but the Illinois Supreme Court corrected it, and also found it harmless. Rivera, 556 U.S. at 154-55.

Substantively, the trial judge's rationale for finding gender discrimination was based, in part, on counsel's statement that he wanted to strike a woman "to get some perspective from possibly other men in the case." Id. It is hard to find fault in that logic. While ultimately the Illinois Supreme Court was not persuaded by the evidence that persuaded the trial court, that boils down to a difference of opinion between the trial and appellate courts.

Rivera thus broke no new ground; it merely rearticulated and applied what by then was already clearly established: There is no fundamental constitutional right to peremptory strikes; states must follow the three Batson steps but have flexibility in how to do so; and federal courts will not arbitrate intrastate judicial disputes over which of multiple reasonable views of the evidence should prevail.

None of that is what happened here, so Rivera is not on point.

2. Rivera would not have precluded the result in Aki-Khuam

The Second Circuit reasoned Aki-Khuam was not persuasive after Rivera because Aki-Khuam found a federal constitutional violation based on loss of state peremptory challenge rights. But that was not the only basis for its decision.

The trial court there "sua sponte instructed counsel for each party to present its peremptory challenges along with a 'neutral reason' for each." 339 F.3d at 523. It then blocked five defense strikes not objected to by the prosecution. This, the Seventh Circuit held, "replaced the first step of the Batson analysis with the court's presumption of purposeful discrimination, thereby saddling Petitioner with the burden of overcoming that presumption", and thereby "impermissibly upset" the "delicate balance" the Batson procedure

strikes between the various competing interests at stake in peremptory strikes. Id. at 527-28.

That this "deprived [Aki-Khuam] of his statutory right to exercise peremptory challenges", id. at 529, is immaterial post-Rivera. 556 U.S. at 152. But Batson did not then, and does not now, permit courts to presume discrimination or "deviate significantly" from its procedural requirements, 339 F.3d at 529, so Aki-Khuam's result is correct.

C. The Courts of Appeals are divided on the questions presented

The Second Circuit's decision directly conflicts with the Seventh Circuit's decision in Aki-Khuam.

The Second Circuit is correct that the Seventh Circuit's finding of a federal constitutional violation premised on the loss of a state peremptory challenge right is unviable post-Rivera. 32 F.4th at 159 n. 2 (A5-6). But the remainder of Aki-Khuam's reasoning -- that relief was warranted because the state court presumed discrimination and "deviated significantly from the Batson line of cases . . . and such deviation violated [Aki-Khuam's] due process and equal protection rights under the Fourteenth Amendment," 339 F.3d at 529 -- remains sound after Rivera. If the Second Circuit was correct, Aki-Khuam would have had no habeas remedy.

Notably, the Second Circuit cited no Court of Appeals decision, from any Circuit, that has reached a result similar to its own. Rivera neither explicitly held nor implied that reverse-Batson errors are categorically unreviewable by federal habeas courts, nor could it have -- Rivera was a direct review case. 556 U.S. at 154. If such a far-reaching holding is to be made, it is this Court's prerogative to make it explicitly, not the Second Circuit's to make by interpretation.

D. The questions presented have National importance

If the Second Circuit's holding is allowed to stand it will have broad and damaging repercussions.

1. Proper interpretation of Batson and the habeas statute is vital to criminal law

The meaning and proper application of the Batson line, and the scope of federal habeas review as to the types of claims that are cognizable and warrant relief, and under what circumstances, are self-evidently matters of National importance to criminal law. It is harmful to erroneously hold in a particular case that relief is not authorized or warranted. It is even more so to say that no case of its kind will even be heard.

2. The broad societal interests in Batson disputes being resolved correctly requires that defendants and prosecutors be entitled to equal procedures and reviewability

The Second Circuit's all-sweeping pronouncement will substantially upset the balance of competing interests this Court has meticulously struck, in the unbroken line of cases beginning with Batson in 1986 and continuing as recently as Flowers in 2019, in refining both the procedures and standards that courts must follow in deciding Batson objections.

The Second Circuit recognized that "regardless of whether it is a prosecutor or a defendant who challenges a peremptory strike, a trial court must follow the same three-step analysis outlined in Batson and clarified in Purkett." 32 F.4th at 159 (A5). But it then declares:

> [T]he reason that courts follow the same three-step framework . . . is not to protect the defendant's constitutional rights [but] to separately vindicate a juror's right to not be unconstitutionally excluded from jury service as a result of invidious discrimination, and the interests of the community at large.

Id.

That is simply not correct: As explained above, see, supra at 20-21, the three-step framework does protect a defendant's constitutional rights -- not in making peremptory strikes, but against unjustifiable race-based and gender-based classifications. And as discussed below, see, infra at 29, it also protects fundamental fairness. The Second Circuit's decision declares the defendant's interests are not deserving of protection.

3. Reverse-Batson errors being unreviewable could lead to new forms of discrimination

Further, though the issue is somewhat speculative (but nevertheless plausible), the Second Circuit's decision is a potential hazard to this Court's multi-century "commitment to eradicate invidious discrimination from the courtroom." J.E.B., 511 U.S. at 137. Immunizing erroneous reverse-Batson denials of peremptory strikes from federal review could spawn a novel and insidious form of "discrimination by proxy" that would be both exceedingly challenging to identify and nearly impossible to police: Discriminatory objections to legitimate strikes of jurors other than the race or gender the discriminator wants to exclude.

If a prosecutor lobbed baseless objections at legitimate strikes of white jurors, each success would have the effect of excluding not just a particular black venire member, but every black venire member, from filling that seat. Even if the prosecutor had no genuine prima facie case, as already explained this Court held in Hernandez that deficiencies in prima facie proof are moot once an ultimate ruling on discrimination has been made. 500 U.S. at 359. Combined with the Second Circuit's holding that erroneous denials of peremptory strikes pose no federal issue, prosecutors with "a mind to discriminate", Batson, 476 U.S. at 96, in a "more covert and less overt" way,

Flowers, 139 S. Ct. at 2240, could turn to discriminatory seatings.

This Court has recognized that "accepting one black juror" can "obscure [an] otherwise consistent pattern of opposition to seating black jurors." Id. at 2246 (quotation marks omitted). Packing the jury with jurors preferred for discriminatory reasons by thwarting legitimate strikes would be even more effective and cause far more harm.

The Second Circuit's decision thus could lead to parties on both sides of the prosecution-defense line being able to perpetrate discrimination by imposturing legitimacy, defaming their adversaries as discriminators in the process, with near-impunity. While the Second Circuit covers only New York, Connecticut and Vermont, if this Court does not intervene the Second Circuit's decision will be able to propagate to other Circuits, including those that govern "state court[s] in the South [which] are 'familiar objects of this Court's scorn,' especially in cases involving race." Flowers, 139 S. Ct. at 2254 (quoting U.S. v. Windsor, 570 U.S. 744, 795 (2013)).

In effect, the Second Circuit's decision could turn Batson against itself, leading to an unchecked resurgence of discrimination this Court has spent the last 150 years trying to eradicate. Id. at 2238-43.

4. Immunizing reverse-Batson errors from federal review will fundamentally disadvantage defendants

Finally, the Second Circuit's holding that reverse-Batson errors are federally unreviewable will also place defendants at a subtle but real and fundamentally unfair disadvantage in jury selection procedures.

What might be called "standard" Batson claims -- those that allege a court erroneously found the prosecutor did not discriminate in making a peremptory strike -- are well-established to be thoroughly reviewable. Flowers, for

example, reversed the defendant's sixth trial, based on a discriminatory strike by the prosecutor, after the Mississippi Supreme Court reversed the third trial for the same prosecutor violating Batson. 139 S. Ct. at 2236-38, 2251. That prospect of scrutiny up to and including by this Court gives courts powerful incentive to handle standard Batson objections with care, both in making their decisions and creating a record to justify them, lest they be publicly reversed.

The Second Circuit's decision will remove that prospect of reversal as a motivator for courts to treat strikes by defendants with the same level of sensitivity, both at the trial and appellate levels. This will place defendants at a greater risk of having their peremptory strikes deemed discriminatory, whether by good-faith errors or the influence of Batson-irrelevant factors such as the trial court here's apparent desire to get jury selection over with "right here, right now." E313. It could also cause defense counsel to be less attentive to unconscious bias, be less careful in selecting which jurors to strike, or make less effort to defend strikes they do make -- from frustration at legitimate strikes being denied unreviewably. It could also disparage the defense bar as being more likely than prosecutors to discriminate, as even baseless findings of discrimination will send damaging messages "to all those in the courtroom, and all those who may learn of the discriminatory act . . . ." J.E.B., 511 U.S. at 142.

Reverse-Batson errors being federally unreviewable would thus upset the defendant's fundamental right that "between him and the state the scales are to be evenly held." Batson, 476 U.S. at 107 (MARSHALL, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

CONCLUSION

A state trial court's authority under Batson to deviate from state law and block a peremptory strike -- more precisely, to classify a juror who would otherwise be strikable under state law as unstrikable pursuant to Batson -- is contingent on the court making a finding, in compliance with Batson's procedural requirements, that the strike is discriminatory. Although the effect of a court's error may to the defendant be the loss of a peremptory strike which is provided for by state law, the error itself is one of federal law, because it amounts to the court exceeding the narrow authority conferred on it by Batson to enforce the Constitution and results in an unjustifiable classification.

Contrary to the decisions below, Mr. Murray is entitled to habeas relief. Further, the decisions will upset the careful balance of interests this Court has struck with Batson and its progeny, enable new forms of discrimination, and place defendants at a fundamentally unfair disadvantage in jury selection.

Therefore this Court should GRANT the petition, REVERSE the decisions of the courts below, REMAND for a new trial, and GRANT such other and further relief as is just and proper.

Respectfully,

Date: July 18, 2022

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