No. 22-

IN THE

Supreme Court of the United States

DWANDARRIUS JAMAR ROBINSON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Dwandarrius Robinson is a black man who was sentenced to death by a jury that the State scrubbed clean of all but one minority juror. The State used its peremptory strikes to improperly remove four minority jurors—two who were Black, one who was Hispanic, and one who was Native American. When Mr. Robinson challenged these strikes pursuant to *Batson*, the State justified all four of the racially motivated strikes with misstatements of the record.

On direct appeal, the Supreme Court of Arizona chose to disregard the significant disparate impact the State's peremptory strikes had on prospective minority jurors. The court also minimized the State's misstatements of the record made in support of those strikes. The court did not consider the cumulative nature of these misstatements when determining whether the State was motivated in substantial part by racially discriminatory intent.

Must a court reviewing a *Batson* challenge consider both a substantial disparate impact on minority jurors and the cumulative nature of the State's misstatements of fact?

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The Supreme Court of Arizona's opinion affirming Mr. Robinson's convictions and death sentences is reported at 509 P.3d 1023 (2022). Pet. App. 1a–26a. The Supreme Court of Arizona's order denying Mr. Robinson's motion for reconsideration is unreported but is reproduced in the appendix. *Id.* at 27a–28a.

JURISDICTION

The Supreme Court of Arizona issued its decision on May 24, 2022. Petitioner's timely motion for reconsideration was denied on June 23, 2022. Petitioner filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> 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 Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

Dwandarrius Robinson is a Black man who was convicted after a jury trial of two counts of first-degree murder, one count of arson of an occupied structure, and one count of kidnapping. The jury found the existence of three aggravating circumstances as to one victim and four aggravating circumstances as to the other. The jury sentenced Mr. Robinson to death as to both counts of first-degree murder, with concurrent and consecutive fifteen-year sentences on the other counts.

At the close of voir dire, after all challenges for cause had been made but before the parties used their peremptory strikes, the panel of 36 potential jurors included 8 members of racial minority groups, making up approximately 22 percent of the panel. The State used its peremptory strikes to remove half those jurors that were members of racial minority groups but struck only 20 percent of the White jurors. With respect to Black jurors specifically, the State struck two of the three Black jurors on the panel leaving only one Black juror on the selected jury and—after the selection of alternates—zero Black jurors on the deliberating jury. As a result of the State's racially motivated peremptory strikes,

Mr. Robinson was sentenced to death by a deliberating jury consisting of 11 White jurors and 1 Hispanic juror.

Mr. Robinson raised *Batson* challenges to the State's peremptory strikes of two Black jurors (Jurors 1445 and 358), one Hispanic juror (Juror 260), and one Native American juror (Juror 300). The State's proffered "race neutral" reasons for striking each of the four minority jurors included multiple misstatements of the record.

On direct appeal, the Supreme Court of Arizona affirmed Mr. Robinson's convictions and sentences. In particular, the court chose to disregard the significant disparate impact on minority jurors versus White jurors. The court also excused the State's multiple misstatements of the record, casting them as "expected embellishments" that fell short of the "outright fabrications" and "fantastical … concerns" that the Arizona Supreme Court apparently believes must exist before finding a *Batson* violation. The court rejected Mr. Robinson's remaining arguments on appeal.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. Both the substantial disparate impact of the State's peremptory strikes on minority jurors and the cumulative nature of the State's omissions and misstatements of the record must be considered when assessing the credibility of the proffered explanations for peremptory strikes against minority prospective jurors pursuant to *Batson*.

Mr. Robinson and the minority prospective jurors on the panel were denied their equal protection rights when the State used its peremptory strikes to improperly remove four minority prospective jurors. The disparate impact of the State's strikes on minority jurors and the cumulative nature of the State's omissions and misstatements of the record indicate that these strikes were racially motivated. The State's actions denied Mr. Robinson a constitutionally compliant trial with an impartial jury of his peers. U.S. Const. amend. V, VI, VIII, XIV.

The United States Constitution guarantees a defendant the right to a fair and impartial jury. Voir dire plays a critical role in assuring this right. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Further, as a matter of public policy, the criminal court system has a responsibility to provide the public with confidence in jury verdicts. *See Powers v. Ohio*, 499 U.S. 400, 413, 111 S. Ct. 1364, 1372 (1991) ("The purpose of the jury

system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."). "The State denies a [B]lack defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposely excluded." *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

A. The State's peremptory strikes created a significant disparate impact on minority jurors that cannot be ignored.

A review of the State's use of peremptory strikes in Mr. Robinson's trial reveals a substantially disparate impact on minority jurors versus White jurors. The State struck only 21 percent or 6 out of the 28 White prospective jurors on the panel. But it struck 50 percent or 4 out of 8 minority prospective jurors on the panel.

Laid bare, the prosecutor in Mr. Robinson's trial was two and half times more likely to strike a minority juror than a White juror. The disparate impact on Black and Native American prospective jurors is even more egregious. The prosecutor struck Black jurors at a rate more than three times higher than White jurors and struck Native American jurors at a rate almost five times that of White jurors. As noted by the

Court in *Miller-El I*, "Happenstance is unlikely to produce this disparity." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 342 (2003).

Although not conclusive, "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent." *Hernandez v. N.Y.*, 500 U.S. 352, 362 (1991); *see also, Miller-El I*, 537 U.S. at 343 (acknowledging statistical analysis relevant to determining prosecutor's intent). Here, however, the Arizona Supreme Court gave the significant disparate impact on minority jurors no weight, or even consideration.

B. The prosecutor's multiple misstatements of the record when explaining its peremptory strikes of four different minority jurors must be considered cumulatively as it demonstrates the State's discriminatory intent and lack of credibility.

While reviewing courts generally give deference to a trial court's factual findings, they may not do so if the *Batson* determination was clearly erroneous. *Hernandez*, 500 U.S. at 369; *Miller-El I*, 537 U.S. at 340. Further, deference does not equate to abdication of judicial review; if the factual premise provided by the State is incorrect upon a review of the record, then this Court must consider that the trial court's decision was unreasonable. *Miller-El I*, 537 U.S. at 340. "When the prosecutor

misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019).

1. Juror 145

At trial, the State asserted that the proffered reason for striking Black Juror 145—that he was "terrified" of imposing the death penalty—was "facially race-neutral." But this is not what Juror 145 actually said. In fact, Juror 145 stated that imposing either a life or death sentence were "equal options." He further explained that under the right circumstances he believed imposing a death sentence could be appropriate: "[W]ith aggravation and no mitigation or not enough of preponderance of mitigation, then I think [the death penalty] would be appropriate."

Juror 145 was then asked about a comment made by *another juror* who stated that the death penalty was the "most harsh punishment" and that he could only impose the death penalty if "something that really emotionally affected me to go that way." Juror 145 was very clear that while this was an obviously weighty and difficult decision, he would not let emotion be part of his decision-making process: "I don't know if I

would include the emotional aspect of it, although it is terrifying to consider what we're talking about." Juror 145 then stated that the death penalty could be appropriate: "the idea of it just being an option of the two options, then there's the aggravation and then, you know, there's mitigation. So that's what I mean by it could be appropriate." Juror 145 then went on to again confirm that he could impose the death penalty.

Here, taking the entire exchange into consideration and looking at the context within which the questions were posed to Juror 145, the State's explanation for striking Juror 145 is demonstrably pretextual. The comment in question was merely an acknowledgment of the gravity of a capital case, not an expression of any apprehension in imposing the death penalty if merited under the facts presented at trial. Accordingly, it was error for the trial court to deny Mr. Robinson's *Batson* challenge to Juror 145. *See Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) ("When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.").

On review, the Arizona Supreme Court ignores the omissions of the prosecutor's proffer which provide context to Juror 145's statements. These statements did not occur in a vacuum; under *Batson*, they must be considered in context with all relevant evidence. 476 U.S. at 96–97. "The rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 251–52 (2005). The Arizona Supreme Court simply assumed that despite the State's omissions, the trial court recalled and considered those omissions when evaluating the credibility of the State's proffer. *Robinson*, 509 P.3d at 1031–32, ¶ 13. A reviewing court's determination that a defendant has received a constitutionally compliant trial should not rest on assumptions. Rather, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

2. Juror 358

When asked to provide its reason for using a peremptory to strike Black Juror 358, the State said its most "concerning" reason was because

Juror 358 "said that she must have DNA or a witness when it comes to the evidence that she wants. . . . And she also wants video. It was actually, I believe, video, a witness, or DNA was what she said kind of the State had to have in its case, all three, which we're lacking, which goes heavily towards a guilt determination in his case, Judge." This might be a valid concern if it were what Juror 358 said or wrote, but it was not. At no point did Juror 358 indicate that the State had to have a video, witness, or DNA—much less all three—to meet its burden of proof.

In response to Question 52 in the questionnaire, "Do you believe that in each case the State must present scientific evidence, such as DNA or fingerprint evidence, to prove guilty beyond a reasonable doubt?", Juror 358 responded "No," and further explained, "It would help prove the case however, if the witness saw the crime or there is video this can impact my thoughts." In response to Question 53, "Do you believe that in each case the State must present eyewitness testimony or a confession to prove guilty beyond a reasonable doubt?", Juror 358 responded "No," and further explained, "If there is video or DNA take [sic] can change by veiw [sic]."

Just as with Black Juror 145, the State misstated the record when explaining its strike of Black Juror 358. "The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury." *Flowers*, 139 S. Ct. at 2250; *Miller-El II*, 545 U.S. at 240, 245. Juror 358 made it quite clear in her questionnaire that she did not believe the State was required to present such evidence to meet its burden.

Another reason proffered by the State was that Juror 358 had anxiety attacks. What Juror 358 honestly admitted in her questionnaire was that she had one anxiety attack in the past. She also stated that she currently had no emotional problems that would affect her ability to be a juror.

In addition, the State proffered that Juror 358 was "treated unfairly by the police when they pulled her over." Put in context, responding to a question about being treated unfairly by law enforcement, Juror 358 wrote in the questionnaire, "Racial profiling by cops pulling over the car. Assuming we did not own it or live in my area." But, in response to a later question, Juror 358 wrote that she did not have hostility or negative feelings about law enforcement.

If the State truly was so concerned about these issues, one would expect that the State would follow up on Juror 358's questionnaire answers during voir dire. But the State did not inquire about any of these supposedly concerning answers. "A 'State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" *Flowers*, 139 S. Ct. at 2249 (quoting *Miller-El II*, 545 U.S. 231, 246 (2005)).

Finally, the fact that Juror 358 was a victim of racism by a government actor should not be permitted as a valid ground for a peremptory strike. Otherwise, that prospective juror becomes a victim of the government yet again. A denial of a juror's right to equal protection should not serve as a legally valid excuse to deny them the right to equal protection a second time.

On review, the Arizona Supreme Court cast the prosecutor's misstatements as "expected embellishments" rather than evidence of purposeful discrimination. *Robinson*, 509 P.3d at 1033, ¶ 18. Not only is the Arizona Supreme Court's conclusion extremely concerning, it also disregards the fact that all of the State's proffers originated from answers

in the questionnaire. That the prosecutor had access to the juror's answers in black and white right in front of them and yet still misstated the record mitigates against the probability that all three misstatements were simply innocent mistakes. Rather, all of these circumstances lead to the conclusion that the prosecutor's proffered reasons for striking Black Juror 358 were pretextual.

3. Juror 260

Though not as blatant as the misrepresentations made regarding Black Jurors 145 and 358, the State nonetheless distorted the record when providing its reasons for striking Hispanic Juror 260, further calling into question the State's credibility. First, while the State cited Juror 260's answer that he felt some laws were too harsh in the past, the State neglected to mention that the juror also stated he currently believed Arizona's criminal laws are appropriate. Second, the State claimed that Juror 260 was confused about the burden of proof. While Juror 260 had initially not understood Question 90 on the juror questionnaire regarding the different burdens of proof for aggravation and mitigation, when the State explained this question during voir dire, Juror 260 said that he agreed with and understood the State's

explanation. Finally, the State also claimed that Juror 260 was part of a letter writing program involving inmates and that it was his "mission" to uplift inmates, when actually Juror 260 stated that the extent of his participation was writing two or three relatively banal letters and that he had received one or two letters in response.

Again, the Arizona Supreme Court assumed that the trial court was aware of the State's mischaracterizations of the juror's answers when evaluating the credibility of the State's proffer. *Robinson*, 509 P.3d at 1034–35, ¶¶ 23–24. If, however, the trial court was not aware that the State's proffer was inaccurate, then the Arizona Supreme Court's conclusion that the trial court "weighed the strikes against the totality of the relevant circumstances" must be called into question. As the record does not reflect that the trial court was aware of the State's numerous misstatements and omissions, the trial court's conclusions pursuant to *Batson* are not entitled to the deference given by the reviewing court.

4. Juror 300

With respect to Native American Juror 300, the State conflated her answers regarding two different subjects. While Juror 300 did state she thought viewing graphic photographs would naturally be hard, she also

stated that she could do so. And contrary to what the State claimed, Juror 300 never stated that it would be hard for her to impose the death penalty. In fact, all her responses to questions in the juror questionnaire about imposing the death penalty indicated she could do so and that it would not be a problem for her.

The State itself inserted race into the voir dire of Juror 300 by referencing Native American customs and referring to "you guys." Until that point, Juror 300 had never referenced her race as an impediment to being an impartial juror.

On review, the Arizona Supreme Court makes no statement regarding the State's insertion of race into voir dire. Instead, the court simply finds that because some of the State's reasons were not based on race that the prosecutor had no racial motivation in striking Juror 300 and that the trial court had "no reason to doubt the prosecutor's sincerity." *Robinson*, 509 P.3d at 1035–36, ¶¶ 27–30. But the State's multiple misrepresentations of the record and insertion of race into the questioning are further evidence of the State's lack of credibility and the racial motivation behind the State's use of a peremptory strike on Juror 300.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED, this 21st day of September, 2022.

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