No. 22–5679

In the Supreme Court of the United States

DWANDARRIUS JAMAR ROBINSON,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Arizona Supreme Court correctly apply *Batson*[1] when it affirmed the trial court's denial of Robinson's challenges to the State's peremptory strikes?

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

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The Arizona Supreme Court affirmed Dwandarrius Jamar Robinson's convictions and sentences in an opinion reported at *State v. Robinson,* 509 P.3d 1023 (2022), and included in the Appendix filed with Robinson's petition for writ of certiorari. Petition Appendix ("App.") 1a–026a.

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered its judgment on May 24, 2022. App. 1a. Robinson timely filed the instant petition on September 21, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

PROVISION INVOLVED

The Fourteenth Amendment, as relevant here, provides:

> **Section 1.** .... No State shall ... 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

On July 18, 2012, Robinson beat, bound, and set on fire his nine-months-pregnant girlfriend, Shaniqua Hall ("S.H."), in the master bedroom of their shared apartment, killing both her and their unborn child Baby Hall ("B.H."). App. 9a, ¶ 2. Robinson then placed a 9-1-1 call to report a fire at the apartment, where emergency responders discovered S.H.'s partially burned body lying face down on the bedroom floor with her feet and hands bound, wrists handcuffed, mouth and eyes covered with duct tape, and a folded cloth lodged in her mouth. *Id.*

A search of Robinson's backpack found inside the apartment revealed a partially used roll of duct tape, an unopened roll of duct tape, pieces of crumpled duct tape, a matchbook with at least one match missing, and a receipt reflecting purchases of duct tape and a bottle of lighter fluid earlier that day. *Id.* Police also found a handcuff key in Robinson's pocket. *Id.*

The medical examiner determined that S.H.'s death was the result of homicidal violence, with the manner of death likely being either asphyxia from smothering or strangulation, blunt force trauma, ligature restraint, or some combination thereof, although he could not definitively say whether S.H. was alive at the time of the fire. *Id.* at ¶ 3. B.H.'s gestational age was 38 weeks and thus considered full term, and the examiner attributed her death to the lack of blood supply caused by S.H.'s death. *Id.*

Robinson was charged with two counts of first-degree murder, one count of arson of an occupied structure, and one count of kidnapping. *Id.* at ¶ 4. The jury

found Robinson guilty on all counts. *Id*. at ¶ 5. During the aggravation phase, the jury found the seven alleged aggravators proven beyond a reasonable doubt. The State alleged the same three aggravators as to each murder—that Robinson: (1) had a prior conviction for a serious offense; (2) was convicted of one or more homicides committed during the commission of the offense; and (3) killed each victim in an especially heinous, cruel or depraved manner. *Id*. at ¶ 4. For the seventh aggravator, the State alleged that Robinson was an adult and B.H. was an unborn child at the time of the murder. *Id*.

After receiving mitigation evidence including "the violence, poverty, and abuse that purportedly pervaded his childhood home and hometown," the jury returned death verdicts on both murders. *Id*. at ¶ 5. Additionally, the trial court sentenced Robinson to a concurrent 15-year sentence on the arson conviction and a consecutive 15-year sentence on the kidnapping conviction. *Id*. The Arizona Supreme Court affirmed the convictions and death sentences, finding that the jury did not abuse its discretion. *Id*. at ¶ 75. The Arizona Supreme Court denied Robinson's motion for reconsideration. App. 27a.

REASONS FOR DENYING WRIT

This Court grants certiorari "only for compelling reasons," U.S. Sup. Ct. R. 10, and Robinson has presented no such reason. Robinson has not established that the state court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c). Nor has he demonstrated that the state court's resolution of his *Batson* challenge "conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10(b). Rather, Robinson "assert[s] error consist[ing] of … the misapplication of a properly stated rule of law," for which this Court "rarely grant[s]" certiorari review. U.S. Sup. Ct. R. 10. Because Robinson's claims are not matters of nationwide importance and he merely seeks correction of the Arizona state court's perceived error in denying his *Batson* challenges, this Court should deny certiorari.

I. THE ARIZONA SUPREME COURT CORRECTLY APPLIED *BATSON V. KENTUCKY*, AND THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER ROBINSON'S ROUTINE, FACT-INTENSIVE QUESTION.

Robinson asks this Court to review the Arizona Supreme Court's decision that the trial court did not commit clear error when denying Robinson's *Batson* challenges. This is an inherently fact-bound inquiry unworthy of certiorari review. *See* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Moreover, Arizona has now eliminated peremptory strikes in all cases, thus *Batson* challenges are no longer at issue in the state. *See*

Ariz. R. Crim. P. 18.4 (allowing only challenges to the panel and challenges for cause). Certiorari is unwarranted because the record plainly establishes that the Arizona trial court did not commit clear error in denying Robinson's *Batson* challenges, and the Arizona Supreme Court's decision does not conflict with this Court's established precedent.

Robinson contends that the State's peremptory strikes created a significant disparate impact on minority jurors and that the Arizona Supreme Court gave the significant disparate impact on minority jurors no weight, or even consideration. Petition at 14. However, on direct appeal, Robinson instead argued that the trial court abused its discretion when it found that the State's proffered reasons for its peremptory strikes of four minority jurors were race-neutral, alleging that the strikes were "obviously pretextual" and that none of the jurors "disclosed anything that would prevent or substantially impair the performance of their duties as a juror." (Opening Brief at 41–74.) It was only in his reply brief that Robinson alleged a disparate impact caused by the State striking a statistically significantly higher percentage of African-American versus Caucasian jurors, thus preventing the State from addressing or rebutting this claim.

The Arizona Supreme Court analyzed Robinson's race-neutrality argument, limiting its "review to each of the trial court's determinations." App. 10a–11a, ¶¶ 7, 10. The court also stated it would not infer error based on statistical disparity alone, citing *(Dionisio) Hernandez v. New York*, 500 U.S. 352, 359–60 (1991). App. 10a, ¶¶ 9, 10. Notably, of the State's 10 peremptory strikes, only four were members of a

racial minority. R.T. 2/8/18 at 122. After the State's peremptory strikes, three minority jurors remained on the panel. *Id*. at 129.

In *Batson*, this Court set forth a three-step procedure for examining claims of racial discrimination in a State's exercise of its peremptory strikes. First, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge on the basis of race. 476 U.S. at 96–97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question. *Id.* at 97–98. And third, the trial court must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98.

The Arizona Supreme Court focused its inquiry on *Batson's* third step. App. 10a, ¶ 8. The court found that the trial court did not err in accepting the prosecutor's race-neutral reasons for its peremptory strikes of four minority jurors—two of them Black (Jurors 145 and 358), one Hispanic (Juror 260), and one Native American (Juror 300). *Id*. at ¶ 7.

Juror 145.

The court found that the trial court did not clearly err in denying Robinson's *Batson* challenge to the State's peremptory strike of Juror 145. The prosecutor provided the following explanation for the State's strike:

> He indicated -- when he was being questioned about the ability to impose the death penalty, he said: It is terrifying for me to consider what we are even talking about.
>
> That alone was of concern to the State. He did indicate that he did feel the death penalty could be appropriate, but that this decision terrifies

him. And that is of great concern to the State.

App. 11a, ¶ 11. The state court noted that Robinson's trial counsel did not respond directly to these reasons but instead drew the trial court's attention to the racial makeup of the jury if all four strikes were permitted to stand. *Id*. On appeal, however, Robinson called the justification "demonstrably pretextual" because of its deliberate misconstruction of Juror 145's responses to voir dire questioning. *Id*.

The state supreme court found that, in fact, the prosecutor had "recapped Juror 145's words almost verbatim," and that the juror had told defense counsel "that it was 'terrifying to consider what we're talking about'—that 'what' being the choice between the death penalty and a life sentence." *Id*.

The state court found that the trial court did not err in accepting the prosecutor's reasons and had assessed those reasons in light of the relevant facts, circumstances and arguments of the parties. *Id*. at ¶13. In fact, the trial court had observed that there were a number of minority jurors who could potentially have been challenged for cause by either the State or the defense but were not. *Id*.

Juror 358.

The state supreme court found the trial court did not clearly err in upholding the State's peremptory strike of Juror 358. App. 013a, ¶ 21. The prosecutor's explanation for this peremptory strike was that the juror said she "was treated unfairly by the police when they pulled her over," that she said "she must have DNA or a witness when it comes to the evidence that she wants," and that she wanted "video, a witness, or DNA was what she said kind of the State had to have

in its case." *Id.* at ¶ 15. Lastly, the prosecutor expressed apprehension concerning Juror 358's apparent anxiety issues. *Id.*

The state court found that Juror 358's negative experience with law enforcement "lends at least some support to the State's decision to strike her," and that the juror's questionnaire responses indicated a preference for more than circumstantial evidence. *Id.* at ¶¶16, 17. The court found that when read "as a whole, Juror 358's questionnaire responses lend ample support to the prosecutor's perspective and, by extension, give us no reason to second-guess the trial court's credibility assessment." *Id.* at ¶ 18. Finally, the court found that the record supported the prosecutor's stated concerns regarding Juror 358's anxiety because, the questionnaire indicated she had had an anxiety attack in the past and had been prescribed medication. *Id.* at ¶ 19. The prosecutor stated that Juror 358's anxiety posed a concern "because the State 'had to excuse a juror who was having anxiety issues' in another capital murder case." *Id.* Although Juror 358 denied taking any medication or having a condition that might affect her ability to serve as a juror, that did not "render fantastical the prosecutor's concerns about the potential disruptiveness of her admitted anxiety," and thus the strike did not reveal a discriminatory purpose. *Id.* Ultimately, the supreme court found that the trial court did not clearly err in upholding the State's peremptory strike of Juror 358 given the broader relevant context including the reasonableness of the prosecutor's stated concerns, the racial makeup of the jury panel before and after the State's peremptory strikes, together with the good faith shown by counsel throughout voir

dire. *Id*. at ¶ 21.

Juror 260.

The prosecutor, responding to Robinson's *Batson* challenge, noted that Juror 260 indicated that he was writing letters to inmates through a program in his church and that "part of that mission [was] to give inmates uplift, to say hello, to share the message of the gospel and the messages they might like." *Id*. Additional reasons the prosecutor provided for his peremptory strike were that Juror 260 said that there was a time he felt the state's laws were too harsh and that "he has had problems with people sentenced to the death penalty, only to find out later a person was innocent of the crime." *Id*. The supreme court found the prosecutor's concern that the juror's "prior distaste for Arizona's criminal laws and experience corresponding with inmates might make him sympathetic to Robinson" was sufficient. *Id*. The court further found it was not clear error for the trial court to credit the prosecutor's stated concerns as race-neutral and, after uncovering no indicia of prosecutorial duplicity, to deny Robinson's *Batson* challenge to the State's peremptory strike of Juror 260. App. 14a, ¶ 24.

Juror 300.

The prosecutor's stated reasons for his peremptory strike of Juror 300 included that the juror's starting belief was that "we are all ingrained to do morally good, even in the worst conditions," and that committing crime "is not the core of any one of us," a person has "to be conditioned to do it." *Id*. at ¶ 25. The prosecutor offered additional reasons for the peremptory strike—the juror had relatives who

had been in prison, and had indicated that the autopsy and other graphic photographs may be an issue for her. *Id*. The prosecutor also stated that the juror indicated "it would be a hard decision for her whether or not she could impose the death penalty." *Id*.

The supreme court found that the prosecutor's concern that Juror 300 "might come to credit Robinson's unenviable childhood for S.H.'s and B.H.'s murders provide[d] a legitimate basis for exercising a peremptory strike." *Id* at ¶ 28. It also found that the juror's relatives' prior criminal convictions provided an additional race-neutral rationale, as did her "admitted discomfort with graphic photographs." The supreme court held that the trial court did not clearly err in accepting the prosecutor's stated reasons for striking Juror 300, and Robinson had not shown clear error in the trial court's analysis. *Id*. at ¶ 30.

The prosecutor provided race-neutral reasons for his peremptory strikes of Jurors 145, 260, 300, and 358. Accordingly, the supreme court correctly found that the trial court did not commit clear error in denying Robinson's *Batson* challenges.

II. ROBINSON HAS WAIVED ANY ARGUMENT THAT, IN THE *BATSON* CONTEXT, THE PROSECUTOR'S ALLEGED MISSTATEMENTS OF THE RECORD MUST BE CONSIDERED CUMULATIVELY.

Robinson for the first time argues that courts reviewing a *Batson* challenge must consider the "cumulative nature of the State's omissions and misstatements of the record" when assessing the credibility of the prosecutor's proffered explanations for peremptory strikes. Petition at 8–9. This argument was neither raised nor briefed below, and the state court had no opportunity to address this claim.

Accordingly, this Court should not consider Robinson's argument. *See Rosemond v. U.S.*, 572 U.S. 65, 83 (2014); *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 455 (2007).

Regardless of waiver, the record does not reflect that the prosecutor repeatedly misstated the record. First, Robinson asserts that the State's explanation for striking Juror 145 was demonstrably pretextual, and the prosecutor's reason for striking the juror–that he was "'terrified' of imposing the death penalty"'—was not what the juror stated. Petition at 9–11. However, the state supreme court found that the prosecutor "recapped Juror 145's words almost verbatim," and that the prosecutor's "own explanation acknowledged Juror 145's stated open-mindedness." App. 11a, ¶ 12. Given Juror 145's comments to defense counsel that it was "'terrifying to consider'" the matter at hand, i.e., the appropriateness of the death penalty, the prosecutor was "justified in construing the same words as an expression of hesitancy toward, or personal discomfort with, the idea of imposing the death penalty." *Id*.

Next, Robinson argues that 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." Petition at 11–14. The supreme court found that although Juror 358 responded negatively when asked "whether proof beyond a reasonable doubt requires the State to produce 'scientific evidence, such as DNA or fingerprint evidence,' or to present 'eyewitness testimony or a confession of guilt,'" her explanations tended to validate the State's concern that circumstantial evidence

may not be enough for her.

> Regarding scientific evidence, Juror 358 wrote: "It would help prove the case[;] however, if witness saw the crime or there is video this can impact my thoughts." As to eyewitness testimony or confessions, she added: "If there is video or DNA take [sic] can change my view." Read together, these responses reasonably suggest that, though perhaps she didn't require both scientific evidence and eyewitness testimony, a video or a confession, she did prefer one or the other.

App. 12a, ¶ 17. The state court acknowledged that the prosecutor's use of words such as "'must'" and "'had to have'" cast the responses as more categorical than they were, but "these expected embellishments while paraphrasing stop well short of the outright fabrications typical of purposeful discrimination." *Id.*, citing *Flowers v. Mississippi*, 139 S.Ct. 2228, 2250 (2019). This Court pointed out in *Flowers* that "...the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That it is entirely understandable, and mistaken explanations should not be confused with racial discrimination." 139 S.Ct. at 2250. The state court ultimately concluded that read as a whole, Juror 358's questionnaire responses lend ample support to the prosecutor's perspective and, by extension, gave them "no reason to second-guess the trial court's credibility assessment." App. 12a, ¶ 18.

Regarding Juror 260, Robinson contends that while not as blatant as "the misrepresentations" made regarding Jurors 145 and 358, the prosecutor nonetheless "distorted the record" when providing the reasons for striking Juror 260. Petition at 15. For example, Robinson takes issue with the fact that the prosecutor stated 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." Petition at 16.

As recited previously, concerning Juror 260, the prosecutor told the trial court that "this was the individual who indicated that he was writing letters through a letter program" with his church, and that "he indicated it was his mission -- or part of that mission to give inmates uplift, to say hello, to share the message of the gospel and the messages they might like." App. 12a, ¶ 17. Additionally, the prosecutor pointed out that the juror at one time felt the laws in Arizona were too harsh, had problems with people sentenced to the death penalty only to later find out the person was innocent, and had some confusion regarding the burden of proof. *Id*. The supreme court specifically found that "Juror 260's prior distaste for Arizona's criminal laws and experience corresponding with inmates might make him sympathetic to Robinson" were sufficient race-neutral reasons, noting that *Batson* "does not compel a prosecutor to furnish a complete pros and cons list for each peremptory strike–only a race-neutral reason." *Id*. at ¶ 23, citing *Batson*, 476 U.S. at 98. Ultimately, the court held "it was not clear error for the trial court to credit the prosecutor's stated concerns as race-neutral and, after uncovering no indicia of prosecutorial duplicity, to deny Robinson's Batson challenge." App. 14a, ¶ 24.

Finally, Robinson argues that the prosecutor conflated Juror 300's answers concerning the subject of graphic photographs, and difficulty in imposing the death penalty, and inserted race while questioning Juror 300 by referencing Native

American customs. Petition at 16–17. In relation to photographs, Robinson contends that while Juror 300 did state she thought viewing graphic photographs would naturally be hard, she also stated that she could do so. *Id*. Robinson also asserts that contrary to what the prosecutor claimed, she never stated it would be hard to impose the death penalty. *Id*. at 17.

However, the supreme court held that the record supported the prosecutor's strike of Juror 300. As grounds for his peremptory strike, the prosecutor stated that the juror "clearly had issues, indicating that we are all ingrained -- and this is her words -- we are all ingrained to do morally good, even in the worst conditions. And that is her starting belief." App. 14a, ¶ 25. The court found the prosecutor's concerns that Juror 300 "might come to credit Robinson's unenviable childhood for S.H.'s and B.H.'s murders," a legitimate basis for exercising a peremptory strike. *Id*., ¶ 28.

Although the prosecutor stated in support of his strike of Juror 300, that "it would be a hard decision for her whether or not she could impose the death penalty," the court found that the record showed the juror neither opposed nor preferred the death penalty and felt personally capable of returning a death verdict. App. 14a, ¶¶25, 27. However, the court also found that the prosecutor's concern that Juror 300 might credit Robinson's unenviable childhood for the murders was a legitimate race-neutral basis for a peremptory strike, as were her relatives' prior

criminal convictions and her admitted discomfort with graphic photographs.[2] App. 15a, ¶¶ 28, 29.

The court further stated that "[w]illingness to impose the death penalty does not negate possible apprehension. Nor, more importantly, does it detract from the overall accuracy of the prosecutor's account of Juror 300's voir dire responses." *Id*. at ¶ 29. The court concluded that to "the extent the prosecutor misstated those responses, we find it 'entirely understandable.'" *Id*. at ¶ 29, citing *Flowers*, 139 S.Ct. at 2250 (The "back and forth of a *Batson* hearing can be hurried and prosecutors can make mistakes when providing explanations...").

The prosecutor provided race-neutral reasons for his peremptory strikes of Jurors 145, 260, 300, and 358. Moreover, the prosecutor did not repeatedly misstate the record when explaining the reasons for the peremptory strikes. The supreme court correctly found the trial court did not commit clear error in denying Robinson's *Batson* challenges.

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[2] On Juror 300's questionnaire, when asked if viewing graphic photographs showing the victim's injuries or autopsy photographs would "affect [her] ability to serve as a fair and impartial juror," Juror 300 responded "Yes." R.O.A. 669, Juror 300 Questionnaire, Question 77, at 23. When asked to explain her answer, Juror 300 wrote, "[P]hotographs do not state the defendant committed the crime." *Id*.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully ask this Court to deny Robinson's petition for writ of certiorari.

Respectfully submitted,

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