No. _____

IN THE

Supreme Court of the United States

DARRYL BURGHARDT,

Petitioner,

v.

TAMMY L. CAMPBELL, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
DEVON L. HEIN*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2936
Facsimile: (213) 894-0081
Devon_Hein@fd.org

Attorneys for Petitioner
DARRYL BURGHARDT
* *Counsel of Record*

QUESTIONS PRESENTED

(1) Whether Petitioner Darryl Burghardt's trial counsel performed deficiently by refusing to raise, and thereby waiving, a meritorious *Batson*[1] objection, despite Burghardt urging him to raise the issue, where the prosecution used its very first peremptory strike to strike one of only two Black potential jurors, and where, by all accounts, said juror would have been favorable to the prosecution but for an assumption otherwise due to her being Black?

(2) Whether Petitioner's trial court violated Petitioner's due process and/or equal protection rights by refusing to hear the *Batson* challenge described above when Petitioner attempted to raise it himself?

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

LIST OF PARTIES

All parties to this proceeding are listed in the caption.

RELATED PROCEEDINGS

1. *Darryl Burghardt v. Tammy Campbell*, case no. 21-56183 (9th Cir. Jun. 30, 2023)
2. *Darryl Burghardt v. Jeffrey Beard*, case no. 2:14-cv-04677-JAK-DFM (C.D. Cal. Sept. 23, 2021)
3. *In re Darryl Burghardt on Habeas Corpus*, case no. S256954 (Cal. Feb. 11, 2020) (Counseled Habeas Exhaustion Petition)
4. *People of the State of California v. Darryl Burghardt*, case no. TA109929 (L.A. Cty. Super. Ct. Jul. 16, 2019) (Petition for Juror Identifying Information)
5. *In re Darryl Burghardt on Habeas Corpus*, case no. B298164 (Cal. Ct. App. Jun. 19, 2019) (Counseled Habeas Exhaustion Petition)
6. *People of the State of California v. Darryl Burghardt*, case no. TA109929 (L.A. Cty. Super. Ct. May 6, 2019) (Counseled Habeas Exhaustion Petition)
7. *In re Darryl Burghardt on Habeas Corpus*, case no. S216481 (Cal. Apr. 16, 2014) (Pro Se Habeas Petition)
8. *In re Darryl Burghardt on Habeas Corpus*, case no. B250418 (Cal. Ct. App. Aug. 7, 2013) (Pro Se Habeas Petition)
9. *People of the State of California v. Darryl Burghardt*, case no. TA109929 (L.A. Cty. Super. Ct. Jun. 17, 2013) (Pro Se Habeas Petition)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

TABLE OF AUTHORITIES

Page(s)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINIONS BELOW

Darryl Burghardt ("Burghardt" or "Petitioner") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's memorandum affirming the district court's final judgment denying habeas relief is unreported. Petitioner's Appendix ("Pet. App.") A-1-8. The district court's order granting a certificate of appealability (Pet. App. B-9-10), final judgment (Pet. App. C-11), its order accepting the magistrate judge's report recommending the denial of relief and the dismissal of Burghardt's habeas action with prejudice (Pet. App. D-12), and said report and recommendation are unreported. Pet. App. E-13-49. The California Supreme Court's order denying Petitioner's counseled state habeas petition is unreported. Pet. App. F-50. The Los Angeles County Superior Court's oral denial of Petitioner's motion for juror identifying information is unreported. Pet. App. G-51. The California Court of Appeal's order denying Petitioner's counseled state habeas petition is unreported. Pet. App. H-60. The Los Angeles County Superior Court's order denying Petitioner's counseled state habeas petition is unreported. Pet. App. I-61-63. The California Supreme Court's order denying Petitioner's pro se state habeas petition is unreported. Pet. App. J-64. The California Court of Appeal's order denying

Petitioner's pro se state habeas petition is unreported. Pet. App. K-65. The Los Angeles County Superior Court's order denying Petitioner's pro se state habeas petition is unreported. Pet. App. L-66-70.

JURISDICTION

The Ninth Circuit's memorandum affirming the district court's denial of habeas relief was filed on June 20, 2023. Pet. App. A-1-8. The district court had jurisdiction under 28 U.S.C. § 2241 and 28 U.S.C. § 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed under United States Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

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.

U.S. Const. Amend. XIV, § 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.

28 U.S.C. § 2254 (a)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (d)

(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

A. Facts Material to the Consideration of the Question Presented

As noted above in the Questions Presented, this petition centers around Burghardt's jury selection, where there were only two Black potential jurors in the

venire, the prosecution immediately struck one of the two, and Burghardt's trial counsel immediately struck the second, leaving Burghardt with a panel with no Black potential jurors. Pet. App. N-86. Burghardt's counsel and the trial court rebuked his requests for a *Batson* hearing. On this record both trial counsel and the trial court erred, and subsequent decisions supporting their decisions were erroneous.

1. Voir Dire

Burghardt's voir dire began with the trial court introducing the parties and informing the potential jurors of the charges: attempted murder, shooting at an inhabited dwelling, assault with a firearm, and battery, plus gun and gang enhancements. Pet. App. Q-100-101. The court then seated the first twelve potential jurors for questioning. Pet. App. Q-104. The Black potential juror at issue here was the first potential juror seated as juror number nine, with the badge number ending in 3305 ("Juror 3305").

When answering the court's standard voir dire questions, Juror 3305 stated that she was a married stay-at-home mother who live in Harbor City. Pet. App. Q-173-174. Her husband was an advising executive and she was previously a controller for a cosmetics firm. Pet. App. Q-174. She had previously served on a civil jury trial that reached a verdict. Pet. App. Q-174.

She also had "yes" answers to the court's request for jurors who were (1) close to someone who had been a victim of crime, (2) close to someone who had committed a crime, and (3) close to someone in law enforcement.

First, Juror 3305's mother had been attacked, beaten, stabbed, and "left for dead" when Juror 3305 was thirteen years old. Pet. App. Q-176-177. She was in a coma for a week but survived. Pet. App. Q-177. Though the case was never solved, Juror 3305 confirmed that she had no "quarrel" with the sheriff's department because they did not solve the case and that she believed the sheriff's department "did what they could." Pet. App. Q-177.

Second, Juror 3305 reported having a boyfriend who was arrested for a DUI thirty years prior. Pet. App. Q-178. She stated that "he was drunk," "he deserved it," and she believed he "was treated fairly" by the sheriff's department and the court system. Pet. App. Q-179.

Third, Juror 3305 reported that her good friend's husband was the captain of a detectives department in Torrance, and that she saw her good friend almost every day and the captain once every two months. Pet. App. Q-180. She agreed with the court that law enforcement start with the same level of credibility as any other witness in the courtroom. Pet. App. Q-180.

When asked, Juror 3305 confirmed that she could give both sides a fair trial. Pet. App. Q-180.

During Burghardt's trial attorney's questioning, Juror 3305 admitted that she did not want to serve on the jury, but also said she would do so faithfully if chosen. Pet. App. Q-199. She also confirmed that she would not just go with what everyone else wanted if she felt the "evidence wasn't there," but also that she would listen to other jurors and that, if she felt they were right, she would have to change

her mind and vote accordingly. Pet. App. Q-200-202. The prosecution did not directly question any of the jurors in this set. Pet. App. Q-204. After both sides passed for cause, the court indicated that the first peremptory lied with the prosecution, and the prosecutor used his first peremptory to strike Juror 3305. Pet. App. Q-204. Petitioner's trial counsel then struck the juror then seated as juror number 6, with the badge number ending in 7875. Pet. App. Q-104, 208.

Just after the jury was sworn, but before they were instructed, Burghardt asked: "Excuse me, you honor. May I address the court?" Pet. App. Q-361. The court responded: "No, you can't. Just wait until the jurors leave and then you can explain it to Mr. Leonard what you want and then you can talk to me." Pet. App. Q-361-62. Burghardt then conferred with trial counsel while the court gave the jury initial instructions. Pet. App. Q-362-68. Once the jury was dismissed, the court asked Burghardt's attorney Mr. Leonard if he (the attorney) wanted to say something. 4 Pet. App. Q-369. Burghardt interjected: "I can speak for myself. I'm not comfortable with the jury panel." Pet. App. Q-369. He asked why he could not have a jury of his "peers," including those of his "ethnicity." Pet. App. Q-369. The court responded: "That doesn't count. That's what a jury of your peers is considered to be. . . . [Mr. Leonard] knows what an appropriate jury is. He has accepted this jury panel, and this is the jury we're going to proceed with." Pet. App. Q-369. Burghardt repeated that he was "not comfortable," to which the court responded "You don't have to be comfortable. Mr. Leonard is comfortable with it." Pet. App. Q-370. The court asked

if anyone had anything else, and Mr. Leonard responded "No, I have nothing else, judge." Pet. App. Q-370.

The next day, Burghardt renewed his objection to the jury composition, asking again why he could not have a jury of his peers. Pet. App. P-95. The court stated that he was not going to give Burghardt "case decisions on why this is a lawful jury" because Burghardt's attorney was very experienced and that was his purpose. Pet. App. P-95-96.

2. Burghardt's Motion for a New Trial

At trial, Burghardt was found guilty on all counts. Pet. App. E-13-14. Burghardt then filed (1) a motion for a new trial (Pet. App. O-89-92) and (2) a supplement to that motion (Pet. App. N-83-88), both regarding, inter alia, his desire for a new jury panel. Burghardt explained that "[t]he panel consisted of two African-Americans" and "[t]he prosecutor and defense attorney used their first two peremptory challenges to dismiss the only African American jurors off of the panel." Pet. App. N-86. He stated that he raised this "*Batson* motion" to the court, but the court never addressed the issue and never asked the attorneys to explain their reasons for the strikes. Pet. App. N-86. He also cited Paulino v. Castro, 371 F.3d 1083 (9th Cir. 2004), for the proposition that California courts too stringently construe *Batson*'s standard for showing a prima facie case of discrimination. Pet. App. N-85.

Burghardt further expanded on his argument at the hearing on his motion and for sentencing. Pet. App. M-73-82. Burghardt stated that there was no reason for the attorneys to remove all the Black potential jurors from the jury, and that the

Black potential jurors answered the questions the same way as the other jurors that were already on the panel. Pet. App. M-76-77. Burghardt further argued that if he had a panel with more Black potential jurors, he believed the outcome of his trial would have been different "because it's like part of everyday lives." Pet. App. M-77. The court responded: "So Black people can tell when Black people are lying. But Hispanics, whites, Asians, they can't tell?" Pet. App. M-77. Burghardt repeated that having no Black potential jurors was not having a jury of his peers, and raised the concern that there was no one his age on the jury either. Pet. App. M-78. The court told him that he did have a jury of his peers and denied his motion. Pet. App. M-78-79. The Court then sentenced him to sixty days in county jail followed by twenty years to life in state prison, with a fifteen-year minimum sentence before parole eligibility. Pet. App. M-79-82.

3. Direct Appeal and Pro Se State Habeas Proceedings

Burghardt's direct appeal proceedings did not concern the issues in this petition but did result in his gang enhancements being vacated. Pet. App. E-14. After this direct appeal proceedings were complete, Burghardt filed a habeas petition in the trial court arguing that his conviction was based on unconstitutionally suggestive identifications and that trial counsel was ineffective for failing to challenge Burghardt's jury. Pet. App. E-14. Regarding Burghardt's ineffective assistance claim, the court, specifically the same judge that presided over Burghardt's voir dire, trial, and motion for a new trial, stated:

> As to the claim of ineffective assistance of trial counsel. Petitioner has failed to show that but for counsel's allegedly deficient performance, there is a reasonable

> probability that a more favorable outcome would have resulted. It is not enough to speculate about possible prejudice to the accorded relief. Petitioner has failed to show that the prejudicial effect of counsel's errors was a "demonstrable reality."

Pet. App. L-66. Burghardt then filed substantially similar petitions in the California Court of Appeal and the California Supreme Court that were summarily denied. Pet. App. J-64; Pet. App. K-65.

4. Federal Habeas Proceedings, State Exhaustion, and Burghardt's Motion for Juror-Identifying Information

Burghardt then filed a pro se federal habeas petition raising the same claims as his state petitions. Pet. App. E-15. The petition was initially dismissed as untimely but was reinstated after the state court issued an intervening judgement restarting Burghardt's AEDPA clock. Pet. App. E-15. Burghardt was also appointed counsel who reviewed the record, identified additional claims and the need for record development, and moved for a stay to exhaust those claims and any relevant facts adduced. Pet. App. E-15-16. The stay motion was granted and Burghardt returned to state court. Pet. App. E-16.

In superior court, Burghardt raised several new claims but also re-argued his *Batson* claim with additional factual and legal support. But rather than directing Burghardt's petition back to his trial judge, the petition was reviewed by a different judge that mistook the section listing Burghardt's grounds for appeal as his habeas claims and therefore denied the petition as consisting only of claims that had already been reviewed and denied either on direct appeal or by prior habeas petition. Pet. App. E-16-17; Pet. App. I-61.

Burghardt next filed a substantially similar petition in the California Court of Appeal, but also simultaneously filed a motion for juror identifying information in superior court so that Petitioner could acquire his venire's DMV photos to conduct statistical and comparative juror analysis consistent with *Batson*'s step one. Pet. App. E-32-33. The California Court of Appeal denied Burghardt's petition before the motion for juror identifying information was heard or decided. Pet. App. H-60.

The motion for juror identifying information was then heard by Burghardt's trial judge and argued by undersigned counsel, a Black woman. Pet. App. G-51-59. At the hearing, the following colloquy occurred:

> Court: Ms. Hein, why do you think that the *Batson-Wheeler*[2] issue -- this claim of *Batson-Wheeler* issue was never raised on appeal?
> Counsel: I would assume because the appellate counsel . . . chose not to raise it. At the same time, ineffective assistance of counsel claims are not required to be brought on appeal, nor are they always proper to. So it also might have been in the appellate [counsel's] judgment that the record required expansion in order to bring [the claim] in this case, which is what we did. . . .
> Court: The D.A., did you know he was Black?
> Counsel: Yes.
> Court: You did know that?
> Counsel: Yes.

Pet. App. G-55.

The court next reasserted earlier statements that Petitioner's *Batson* claim was speculative in nature and denied that a prima facie case of discrimination could ever be supported by a single peremptory strike:

[2] *People v. Wheeler*, 22 Cal.3d 258 (1978).

Court: This is pure speculation about the ethnicity of these jurors. The fact that there's -- the only evidence is the defendant's statement "I want a jury of my peers," and it not being raised on appeal, I believe that there is insufficient good cause and your motion's denied.

Counsel: Well, your honor, if I may. The issue here isn't one of juror misconduct, so it's not a situation where we're looking to --

Court: But there has to be good cause to disclose it. There's no -- you haven't established good cause.

Counsel: Well, I suppose -- your honor, do you recall if there were any Black members of the jury?

Court: How many Black members are supposed to be on the jury of 12?

Counsel: An objection as to even one Black juror can . . . support[] . . . a *Batson-Wheeler* claim [and] is sufficient to get relief in federal court.

Court: How is one Black juror excused -- how is that a prima facie case?

Counsel: The Ninth Circuit says that you can have a prima facia case with the dismissal of one Black juror, your honor. So hence, when my client makes the contention that there were no Black jurors –

Court: Didn't he say -- he said he –

Counsel: . . . [H]e said that there were no Black jurors. That both Black jurors were dismissed. And that's also apparent from the record -- or at least apparent from his statements on the record to this Court . . . as I believe [was] pointed out at the time of sentencing.

And so I don't -- I don't think that it's fair to say that there's no evidence that there were no Black jurors. But I'm also . . . wondering why it's not . . . prudent to grant the motion, because there's no harm to be done from granting it. The petitioner can't make his federal claim without being able to recompose the jury composition. He's now severely mentally ill, so we cannot use his testimony alone to establish [it], and we need it in order to argue the composition of the jury to support the claim.

Court: The reason is because there's insufficient good cause. Your motions denied.

Pet. App. G-56-57.

Again, Burghardt filed a substantially similar petition in the California Supreme Court and received a summary denial. Pet. App. F-50.

5. Burghardt's Return to Federal Court

Burghardt then returned to federal court and amended his petition to reflect the exhaustion proceedings. Pet. App. E-17. After receiving the answer and the traverse, the magistrate judge issued a Report and Recommendation to deny the Petition and dismiss Burghardt's habeas action with prejudice. Pet. App. E-13-49. Petitioner only discusses the analysis relevant to the instant petition here.

As an initial matter, the court opined that the superior court erroneously misread Burghardt's counseled petition, but that there was no evidence the California Court of Appeal and the California Supreme Court did the same. Pet. App. E-23. The court therefore "assume[d] that the California Supreme Court's summary denial rested on different grounds" and, to determine those grounds, either referred to the superior court's 2013 denial of Burghardt's pro se habeas petition or searched the record for any reasonable basis for denying the claim where no reasoned opinion had ever disposed of it. Pet. App. E-24-48.

Regarding Petitioner's stand-alone *Batson* claim, the court applied the "any reasonable basis" standard and opined that the California Supreme Court may have found that (1) Petitioner's pro se request for a more representative jury did not rise to the level of a *Batson* challenge, (2) that Petitioner's motion for a new trial argued the issue too late, (3) that a petitioner represented by counsel did not have the right to raise a *Batson* challenge on his own, or (4) that there was insufficient evidence to

raise an inference of discrimination. Pet. App. E-34-38. In finding no inference of discrimination, the court did not address the fact that the prosecutor's *first strike* was against a Black juror, or that said juror constituted 50% of the jury pool. Pet. App. E-36-38. The court also did not point to any characteristics about Juror 3305 that might have made a prosecutor want to strike her -- indeed, the court later opined that Juror 3305 was such a good juror for the prosecution that the defense could not risk having her impaneled by raising a *Batson* challenge. Lastly, regarding the juror Petitioner highlighted as being similar to but worse for the prosecution, the court opined that "the prosecution could have viewed Juror No. 5334's participation in a trial that reached a verdict and acceptance of responsibility for his past crime as favorable characteristics in a juror." Pet. App. E-37-38. The court also explained in a footnote why it was not taking the trial court's statements at the juror information hearing into account:

> In denying Petitioner's 2019 Petition for Personal Juror-Identifying Information, the trial court arguably implied that an African-American prosecutor would be less likely to violate *Batson* and that excusing a single African American juror could not support a prima facie *Batson* case. The court does not condone these comments, but neither are they relevant to the question presented: whether the California Supreme Court had a reasonable basis for denying Petitioner's *Batson* claim.

Pet. App. E-36-37.

Regarding Petitioner's ineffective assistance claim for failing to assert Petitioner's requested *Batson* challenge, the court concluded that trial counsel could have had a strategic reason for not raising the claim, but the only reason the court gave was, as mentioned above, that Juror 3305 would have been good for the

prosecution and not for the defense. Pet. App. E-46-47. The court's only citation in favor of this principle was a 2007 district court case from New York. Pet. App. E-46-47. The court did not address the prejudice prong of the ineffective assistance analysis.

The district court judge subsequently adopted the magistrate judge's report (Pet. App. D-12), granted a certificate of appealability only regarding whether the California Supreme Court's summary denial relied on the erroneous superior court denial below or was a silent denial on the merits (Pet. App. B-9-10), and entered judgment denying the petition and dismissing Burghardt's action with prejudice (Pet. App. C-11). On appeal, the Ninth Circuit held that the California Supreme Court's summary denial was a silent denial on the merits but also that the district court should have used the "any reasonable basis" standard for assessing Burghardt's claims. Pet. App. A-1-3. The court also construed Burghardt's renewed discussion of his ineffective assistance claim on the *Batson* issue as a motion for a certificate of appealability on the merits of that issue and denied said motion. Pet. App. A-4.

This petition for writ of certiorari now follows.

REASONS FOR GRANTING THE WRIT

A. It is impermissible for an attorney to waive a meritorious *Batson* claim, and because Burghardt's *Batson* claim was meritorious here, his counsel's refusal to raise it was ineffective assistance.

The district court held that Burghardt's trial counsel was not ineffective for failing to raise a *Batson* claim (1) impliedly, by way of the court's denial of Burghardt's stand-alone *Batson* claim, because there was not sufficient evidence to

support a prima facie case of discrimination, and (2) because it would have hurt the case for the juror at issue to be seated. Both of these conclusions are erroneous, however, because the district court (1) ignored salient evidence of discrimination, (2) gave no reason, real or imagined, for the prosecution to strike Juror 3305, and (3) misapprehended the law when it assumed Burghardt's trial attorney could choose not to address a *Batson* violation to avoid having the challenged juror seated when there are other remedies – namely calling a new panel, specifically contemplated by *Batson*. This Court should therefore overturn the Ninth Cirtcit's denial of Burghardt's petition and remand for an evidentiary hearing on his ineffective assistance claim and underlying *Batson* claim.

1. Applicable Law

a. *Batson* Principles

This Court has long held that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race[.]" *Powers v. Ohio*, 499 U.S. 400, 409 (1991). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude [B]lack persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *see also Powers*, 499 U.S. at 404, 406–08; *Drain v. Woods*, 595 F. App'x 558, 567 (6th Cir. 2014) ("Use of peremptory strikes based impermissibly on race affects the rights of each impermissibly stricken venireperson as well as the rights of the criminal defendant.") When a *Batson* violation occurs,

"[a] trial court *must* implement an adequate remedy to cure the jury of the taint of selection by impermissible racial discrimination." *Drain*, 595 F. App'x at 567-68. (emphasis added) (citing *Batson*, 476 U.S. at 99, n. 24). With respect to a trial attorney's decision not to raise, or indeed to commit, a *Batson* violation, "[c]alling the lawyer's actions 'strategic' does not help . . . . [A]ssuming arguendo that] defense counsel can waive the [*Batson*] rights of his client, . . . he has no authority to waive the other rights implicated by *Batson*." *Winston v. Boatwright*, 649 F.3d 618, 631 (7th Cir. 2011).

In *Batson*'s three steps, the defense must first "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). This burden of proof is "not an onerous one." *Boyd v. Newland*, 467 F.3d 1139, 1151 (9th Cir. 2006) (citing *Johnson*, 545 U.S. at 169). Indeed, *Johnson* was decided specifically to correct California courts' overly onerous burden at *Batson*'s step one. *Johnson*, 545 U.S. at 170. In determining whether this burden is met, a court considers "all relevant circumstances, including a pattern[, if any] of strikes against [B]lack jurors and the questions and statements made by the prosecutor during voir dire." *Drain v. Woods*, 595 F. App'x 558, 569 (6th Cir. 2014).). At the same time, no such pattern is required because striking even a single juror for a discriminatory purpose violates the Constitution. *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009) (citations omitted). Even a single racially motivated peremptory strike by the prosecutor requires relief. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). A prima

facie showing may also be made based solely on statistical evidence that peremptory strikes disproportionately affected jurors of a particular race. *See Miller–El v. Cockrell*, 537 U.S. 322, 343, 345 (2003); *Hernandez v. New York*, 500 U.S.352, 363 (1991). At all stages of *Batson* inquiry, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

If a prima facie case for purposeful discrimination is made, the court *must* require the prosecution to give their purportedly race neutral reasons for the challenged strikes, and if the given reasons are indeed race neutral, the burden shifts back to the defendant to show, based on the totality of the circumstances, both on and off the present record, that it is more likely than not that the prosecutor strike was based on race. *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016).

b. *Strickland* Principles As Applied to *Batson*

It is true that an ineffective assistance claim regarding *Batson issue* is still governed by *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that (1) counsel performed deficiently and (2) prejudice resulted. But,

> Because a *Batson* violation constitutes a structural error, the failure to object and to remedy the error constitutes error per se. Where counsel's ineffective representation lets stand a structural error that infects the entire trial with an unconstitutional taint, there is no question that Petitioner and our system of justice suffered prejudice.

Drain v. Woods, 595 F. App'x 558, 583 (6th Cir. 2014). Accordingly, trial counsel cannot ignore a *Batson* complaint that would survive step one.

2. Analysis

Here, Petitioner's trial attorney's failure to raise a *Batson* challenge does not comport with the *Batson* framework or its tenets, and the district court's reasoning does not support its finding to the contrary.

First, the prosecutor used his first strike against Juror 3305. Doing so meant that he was striking 50% of the Black potential jurors, despite them comprising a small portion of the venire (two out of all the potential jurors). In addition, it is reasonable to infer at *Batson*'s step one that he made this strike so quickly to avoid the other Black potential juror being struck first, which would leave him striking the *only* Black potential juror, *i.e* 100% of the Black potential jurors. These statistical disparities weigh in favor of a *Batson* challenge.

Second, the district court did not identify, nor does the record reflect, *a single race-neutral reason* for the prosecution to strike Juror 3305. As reviewed above, she was a Black woman. She served on a civil trial that reached a verdict. Her mother had suffered an act of violence, as did one of the victims of a similar age and family status in Petitioner's case. When discussing interactions with the police, Juror 3305 never gave an inkling of discord or reservation. She said she was confident law enforcement had done all they could in her mother's case, and that her boyfriend who had been charged with a DUI in the past deserved it and was treated fairly.

Lastly, a *Batson* violation must be remedied, and that remedy is not limited to seating the challenged juror. *Drain v. Woods*, 595 F. App'x 558, 583 (6th Cir.

2014) ("Where counsel's ineffective representation lets stand a structural error that infects the entire trial with an unconstitutional taint, there is no question that Petitioner and our system of justice suffered prejudice.").

Had counsel made the requested *Batson* challenge, the prosecution would have had to provide a race-neutral reason to strike her that did not conflict with the prosecutorial leanings noted above or any other juror's seating over Juror 3305. That no court has supplied one is good reason to believe a *Batson* challenge would have survived step one.

B. The trial court likewise had no justification for dismissing Petitioner's *Batson* claim.

In addition to the circumstances described above, when the trial court heard Petitioner's *Batson* claim, the court chose to ignore him. This is in direct contravention of Burghardt's federal constitutional rights, given that any and all *Batson* violations should be remedied.

Given the facts discussed above, it appears the only reason the trial court denied Burghardt the *Batson* process he sought was because the court did not fully understand *Batson*. This is shown by the court's assertion that Black prosecutors do not discriminate and that that a single strike cannot support a *Batson* claim. Given that, per the cases discussed above, a *Batson* claim cannot be waived without the client's consent and a court must remain vigilant about *Batson* claims, Petitioner's case warrants remand and an evidentiary hearing.

This Court should therefore reverse the panel's decision.

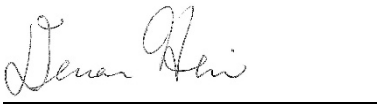
CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: September 28, 2023

By: 

DEVON L. HEIN*
Deputy Federal Public Defender

Attorneys for Petitioner
DARRYL BURGHARDT
**Counsel of Record*

INDEX TO APPENDICES

No. _____

IN THE

Supreme Court of the United States

DARRYL BURGHARDT,

Petitioner,

v.

TAMMY L. CAMPBELL, WARDEN,

Respondent.

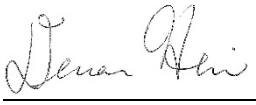
On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I, Devon L. Hein, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that the **PETITION FOR A WRIT OF CERTIORARI** in the above-captioned case contains 5,842 words, excluding the parts of the petition that are exempted by United States Supreme Court Rule 33.1(d).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: September 28, 2023

By: 

DEVON L. HEIN*
Deputy Federal Public Defender

Attorneys for Petitioner
DARRYL BURGHARDT
**Counsel of Record*