No. 23-6804

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN DOUGLAS RICHARDSON,

***Petitioner*,**

v.

STATE OF NORTH CAROLINA,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION

JOSHUA H. STEIN
ATTORNEY GENERAL

Teresa M. Postell
Special Deputy Attorney General
Counsel of Record

North Carolina
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6558
tpostell@ncdoj.gov

CAPITAL CASE

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution require state courts to consider unreliable hearsay during the step one inquiry set forth in B*atson v. Kentucky,* 476 U.S. 79 (1986)?

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OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 891 S.E.2d 132.[1]

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on September 1, 2023. Petitioner invoked this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Equal Protection Clause of the U.S. Const. amend. XIV

INTRODUCTION

Batson requires that courts consider at step one of its inquiry, "all relevant circumstances," to determine whether the proponent of a *Batson* challenge has made a prima facie showing of purposeful discrimination during jury selection. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). *Batson* and its progeny identify types of relevant information that should be considered, which undoubtedly can include relevant history of a prosecutor's peremptory strikes in past cases. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). But *Batson* has never required that state trial courts

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[1] The only page numbers which appear on the appendix to the petition for Petitioner's Exhibit A, which is the lower court's opinion in this case, are page numbers reproduced from copying the opinion from the Southeast Reporter. Therefore, the State will cite directly to the North Carolina Supreme Court's opinion, rather than to the appendix.

consider every conceivable form of evidence or information whatsoever, including that which is both inherently unreliable and inadmissible under state law.

What the North Carolina Supreme Court held in this case was that it would not reverse "the trial court's decision to sustain the State's hearsay objection" to an affidavit containing conclusions of two out-of-state researchers. *Richardson*, 891 S.E.2d at 205. Petitioner did not seek consideration of, nor did he attach copies to the affidavit of, previous trial transcripts, records or files, court opinions or filings, testimony or any other information available from prior trials or people involved in those trials. And Petitioner admits "a rule that – as a matter of state law – the rules of evidence apply at *Batson* proceedings . . . might be permissible." *See* Pet. 15. Thus certiorari is not warranted in this case and the petition should be denied.

STATEMENT OF THE CASE

1. "The uncontradicted evidence" at Petitioner's trial showed that in 2010, Petitioner: "volunteered to take care of Taylor[2]," a four year old child, "while [Taylor's mother,] Reyes was away;" "within an hour of gaining total control of Taylor purchased materials to install a padlock on the outbuilding [where Petitioner lived] to prevent Taylor from being able to open the only door of the structure from the inside;" "over the next ten days was the only person who had access to Taylor;"

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[2]A pseudonym is used for the child murder and sexual assault victim as was required in the North Carolina Supreme Court by N.C. R. App. P. 42(b).

"brought Taylor to a hospital emergency room in a hypothermic and near-death condition with" "at least 144 separate injuries that appeared to have been inflicted at different points over a ten-day period" "including signs of vaginal and anal sexual trauma, numerous lacerations," "tiny pieces of metal wire" "embedded" under her skin," "more than five dozen bite marks—some of which involved the removal of flesh," including one of her nipples, "lacerations to the external buttocks and intergluteal folds plus lacerations to the vaginal area in various states of healing," "injuries from the buttocks to the vaginal area that displayed a multiple kind of pattern and repetitive injuries consistent with the child being restrained or being . . . unable to move," "vaginal injuries consistent with penetrating trauma supporting a diagnosis of sexual abuse," "a rectal fissure," "removal of a fingernail," "two broken forearm bones," "and head trauma which had rendered Taylor's brain function minimal and ultimately led to her death." *Richardson*, 891 S.E.2d at 151, 175, 183, 188, 199. There was "overwhelming evidence [Petitioner] intentionally inflicted all of these injuries to Taylor over an extended period of time and caused the child great pain and suffering, as well as being responsible for her death." *Id.* at 199.

2. In 2014, a North Carolina jury convicted Petitioner of Taylor's murder "premised upon the theories of murder by torture and the felony murder rule based upon the felonies of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious bodily injury." *Id.* at 155. "The jury also found [Petitioner] guilty of . . . first-degree kidnapping, sexual offense with a child, and

felony child abuse inflicting serious bodily injury." *Id.* "[T]he jury found: the existence of all three aggravating factors which were submitted;" "the existence of three of the forty-six mitigating factors submitted to it;" "unanimously found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstance[s] and recommended a sentence of death as the appropriate punishment." *Id.* "[T]he trial court entered a judgment and commitment including the imposition of a death sentence." *Id.*

3. During jury selection, Petitioner raised an objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to the prosecutor's peremptory strike of a Black woman on the bases of race and gender. *Id.* at 200. Regarding Petitioner's race based objection, Petitioner argued strike rates by the State during the jury selection in this case and "that one of the appropriate considerations upon a *Batson* challenge is the particular strike rates of the particular prosecutors involved." *Id.* Rather than referencing or providing trial transcripts of jury selection in other cases, legal opinions reviewing prior cases, record evidence of any kind from other cases, information obtained from or produced by the prosecution in prior cases or the like, Petitioner "offer[ed] an affidavit (the M[ichigan] S[tate] U[niversity] affidavit) that was from two academic researchers who had studied jury selection in North Carolina capital cases tried between 1990 and 2009." *Id.* Petitioner contended the affidavit "showed that the prosecutor who stated that he planned to strike [the challenged

prospective juror in this case,] had, in four prior capital cases, disproportionately excused Black jurors using peremptory challenges." *Id.*

The trial court sustained on hearsay grounds the State's objection to admission of the affidavit, which had included a challenge to the affidavit's relevance. *Id.* After Petitioner's argument on his race based objection and the State's response, Petitioner addressed his gender based objection. *Id.* The trial court ruled that Petitioner "at this time, has failed to establish a prima facie showing of either racial or gender discrimination in its use of peremptory challenges." *Id.* at 201.

4. Petitioner argued on appeal to the North Carolina Supreme Court that the trial court erred by declining to admit and consider the hearsay affidavit during step one of the *Batson* inquiry because he claimed "evidentiary rules do not strictly govern *Batson* proceedings." *Id.* at 203-04. The state high court rejected defendant's argument. *Id.* at 205. Specifically, the North Carolina Supreme Court "decline[d] to create such an exception to the general applicability of the evidentiary rules during trial proceedings based on the facts presented here with regard to the MSU affidavit." *Id.* In so holding, the state high court noted the inherent weakness and general inadmissibility of affidavits, as well as some of the reasons for those concerns. *Id.*

In reviewing Petitioner's arguments on appeal, and all the relevant facts before the trial court, the North Carolina Supreme Court rejected Petitioner's arguments, including his claim that the trial court erred by concluding Petitioner failed to make a prima facie showing of jury discrimination. *Id.* at 206. The state high court also

noted: "there were no apparent racial concerns raised by the racial and ethnic backgrounds of [Petitioner,] Taylor, or any of the key witnesses in this case," Petitioner "is white, that the victim was white and of El Salvadorian background and most, if not all of the key witnesses in this case are either from El Salvador or white;" "it was relatively early in the jury selection process and only three Black prospective jurors had been individually questioned;" "strike statistics showed that the State had struck Black potential jurors at a higher rate than white potential jurors," given that the State had peremptorily stricken two Black potential jurors and accepted one Black potential juror with a resulting strike rate of 67% and stricken three of sixteen potential white jurors with a resulting strike rate of 19%; and "the prosecutors statements and questions during voir dire did not appear to be racially motivated" as the trial court had "carefully reviewed and considered the voir dire process in this case thus far and ha[d] considered its observations of the prosecutors' conduct and method of voir dire" and determined "the prosecutors' statements and questions during voir dire" were "consistent and even handed throughout." *Id.* at 200-01, 205. (internal quotations omitted).

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant certiorari to consider whether "regardless of . . . lack of probity," the state trial court in this case was required to consider at step one of a *Batson* inquiry, an unreliable, inadmissible, hearsay affidavit accompanied by a law review article. *See* Pet. 3-4, 19. Petitioner wrongly claims the

decision in this case conflicts with this Court's precedent because he asserts utilizing "evidentiary concepts" will result in an "arbitrary" "sort of unconstitutional regime." *See* Pet. 12, 15-16, 20. There is no conflict. Indeed, Petitioner only claims there was a misapplication of settled law. *See* Pet. pp i, 20. This is particularly evident in Petitioner's proposed question presented as well as his requests that this Court grant certiorari "to provide" what he characterizes as "remedial instruction" and summary reversal. *See* Pet. 20. Petitioner even concedes that whether "as a matter of state law – the rules of evidence apply at *Batson* proceedings . . . might be permissible." *See* Pet. 15. Further, this case is not a good vehicle to address the question presented. This is so because the state high court specifically limited its state law holding "based on the facts presented here with regard to the MSU affidavit." *Richardson*, 891 S.E.2d at 205. The North Carolina Supreme Court properly affirmed the trial court, which correctly applied this Court's precedent and considered all relevant circumstances bearing on whether Petitioner presented a prima facie case of purposeful discrimination. This Court's intervention is not warranted.

I. The North Carolina Supreme Court's decision does not conflict with any decision of this Court.

There is no conflict between this Court's decisions and the decision in this case by the North Carolina Supreme Court. In the minimal three paragraph argument Petitioner devoted to his attempt to construe a conflict, Petitioner was unable to reference any case which poses an actual conflict. *See* Pet. 13-15.

In his perfunctory showing, Petitioner cites *Batson*, 476 U.S. at, 95-95, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2245, (2019), and *Miller-El v. Cockrell*, 537 U.S. 322, 346-47 (2003). Pet. 13-15. These cases reaffirm that historical evidence of racial discrimination by a prosecutor is a type of relevant circumstance to be considered during step one of a *Batson* inquiry. *Flowers*, 139 S. Ct. at 2245; *Miller-El*, 537 U.S. at 334-36, 346-47. But these cases do not require that a state trial court conducting a *Batson* inquiry consider unreliable hearsay as proof of that circumstance.

In *Batson,* this Court explained that "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93. But this Court explicitly declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99. Instead, this Court clarified it made "no attempt to instruct these courts how to best implement our holding today." *Id.* at 99 n.24. Since *Batson* was decided this Court has reaffirmed that "[i]t remains for the trial courts to develop rules" to address "legitimate and well-founded objections to the use of peremptory challenges." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

In *Flowers*, 139 S. Ct. 2228, 2245, the historical evidence of the prosecutor's previous actions was garnered directly from the record in the defendant's own case from four of the defendant's previous trials. Because there was "no record evidence

from [Flowers] fifth trial regarding the race of the prospective jurors," there was no review of historical evidence from that trial. *Id.*

In *Miller-El*, 537 U.S. at 334-35, the defendant presented two documents produced by the District Attorney's Office as well as testimonial evidence, all directly recounting first-hand knowledge of the prosecutorial policies of racially discriminatory practices involving jury selection.

Here however, Petitioner did not present direct or record evidence, no jury selection transcripts, any sort of information from a prosecutorial source, documentation from a Clerk's official file, or legal opinions addressing *Batson* issues. Instead, Petitioner proffered a hearsay affidavit to show the opinions of people altogether unrelated to the prosecution of this or any other case. Therefore, Petitioner has not shown the North Carolina Supreme Court's decision in his case is in conflict with this Court's precedent; it isn't.

II. Petitioner merely asserts a misapplication of settled law, and he admits application of state rules of evidence might be permissible.

Petitioner argues the North Carolina Supreme Court misapplied a settled rule, which pursuant to Supreme Court Rule 10(a), is not a ground for certiorari. Specifically, Petitioner claims that the North Carolina Supreme Court possesses a "fundamental misapprehension about *Batson"* law. *See* Pet. 19. He blames the state high court for that supposed misapprehension based upon an entirely different case wherein the North Carolina Supreme Court pointed out that the study which is the subject of the hearsay affidavit in this case, purported to establish purposeful

discrimination using cases where no *Batson* objection was raised or argued and even cases that held no *Batson* violation occurred. *See* Pet. 18.

It is Petitioner who has fallen into a misapprehension of the law. Petitioner argues that "[u]nder the opinion in this case, a court is permitted to seek guidance from evidentiary concepts and decide not to hear relevant information at step one." *See* Pet. 16. He follows that misconception with another, that such a discretionary decision, reversible only upon a showing of clear error, is an "unconstitutional regime," which will result in "inviting even more arbitrary rulings." *See* Pet. 16. Yet Petitioner flatly admits that during step one of a *Batson* inquiry, excluding hearsay in conformity with the rules of evidence "might be permissible." *See* Pet. 15. The conclusion by the state high court demonstrates no misunderstanding of this Court's *Batson* jurisprudence; nothing in *Batson* or its progeny requires that state courts accept and consider unreliable or inadmissible evidence as proof of a relevant circumstance.

Petitioner has nothing to support his baseless claim that the state high court's decision in this case permitting the trial court to seek guidance from evidentiary concepts in deciding what forms of information to consider at step one is tantamount to unconstitutionality. Instead, Petitioner mistakenly relies on this Court's opinion in *Foster v. Chatman*, 578 U.S. 488 (2016), where evidence considered was derived from "the prosecution's jury selection file and notes," rather than from an outside source that was arguably, or even as in this case decidedly, is unreliable. In

furtherance of his argument, Petitioner then points to his also mistaken reliance on state cases involving evidence of a prosecutor's own statements or what appears to be altogether unchallenged evidence. *See* Pet. 18. Ultimately, all Petitioner has is his inability to locate an opinion by this Court that has previously applied the rules of evidence to exclude a form of information about a type of circumstance "relevant to a *Batson* inquiry," which does nothing to support his requested petition. *See* Pet. 16.

III. This case is a poor vehicle to resolve the question presented.

The North Carolina Supreme Court's decision in this case was explicitly limited "based on the facts presented here" in this case involving a particular hearsay affidavit. *Richardson*, 891 S.E.2d at 205. Moreover, it was also only a decision in which the state high court chose not to "create" "an exception" to the state evidentiary rules. *Id.* For these reasons, this case is a poor vehicle to address the question presented in the petition, which the state high court expressly declined to rule upon. Therefore, granting review in this case would require this Court to resolve an issue that was not expressly ruled upon by the court below.

Furthermore, Petitioner's requested summary reversal is also not appropriate here either. The North Carolina Supreme Court correctly affirmed the decision of the trial court, which abided by this Court's precedents and correctly considered all relevant circumstances in determining that Petitioner failed to make a prima facie showing of jury discrimination in this case. All parties agree that racial

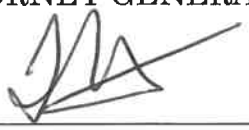
discrimination is unacceptable, particularly in the context of jury selection. *E.g.*, *Powers*, 499 U.S. at 411. However, no such discrimination occurred in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted, this the 16th day of May, 2024.

JOSHUA H. STEIN
ATTORNEY GENERAL



Teresa M. Postell
Special Deputy Attorney General
**Counsel of Record*

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Raleigh, North Carolina 27602
Telephone: (919) 716-6558
tpostell@ncdoj.gov