No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC WRIGHT,

Petitioner,

v.

KRISTIN K. MAYES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender

* DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
* *Counsel of Record*

Sent by FedEx Overnight Delivery: June 6, 2024 (originally May 28, 2024)

QUESTION PRESENTED

Did the court of appeals' refusal to grant Mr. Wright habeas corpus relief in respect to his claim of unlawful racial discrimination in the selection of his trial jury conflict with the principles set forth by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny?

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings: *State v. Wright*, No. CR 2014-121475-001 (Maricopa County Superior Court); *State v. Wright*, No. 1 CA-CR 15-0661 (Ariz. Ct. App.); *State v. Wright*, No. CR-17-0097-PR (Ariz. Sup. Ct.); *Wright v. Arizona*, No. CV-21-01754-PHX-SPL (ESW) (D. Ariz.); *Wright v. Mayes*, No. 22-15654 (9th Cir.).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes & Rules

Constitutional Provisions

Other

Petitioner Eric Wright respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 27, 2024. App. A.

OPINIONS BELOW

The court of appeals' memorandum is designated Not for Publication, but is available at 2024 WL 810437 and 2024 U.S. App. LEXIS 4466.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over Mr. Wright's petition for habeas corpus under 28 U.S.C. § 2254. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 27, 2024. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> 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, * * *.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> * * * 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

A. In Mr. Wright's 2014 state-court trial, the judge summarily overruled Mr. Wright's objection to the prosecutor's use of a peremptory strike to remove the sole remaining African-American from his jury.

Eric Steven Wright is a 58-year-old African-American man. In 2014, Mr. Wright was charged in Maricopa County Superior Court—an Arizona trial court based in Phoenix—with one count of possession of a dangerous drug for sale in violation of Arizona law. Mr. Wright pleaded not guilty and invoked his right to a jury trial. His case went to trial in April of 2015.

At the outset of jury selection there were two black members of the jury venire. One was Juror 7, a woman who was unsure that she could be fair to both parties in light of her son's experience being prosecuted for the sale and possession of marijuana. She was struck for cause, with the assent of both parties.

The other was Juror 43. Juror 43—a man named Joel Reece (the record does not confirm this spelling)—had worked as a maintenance technician for Intel for four years. His wife had worked for ten years at Bank of America, where she was lead process technician. He had three children, aged 14, 16, and 18. He had experience on three prior juries, two criminal and one civil. The juries in the two criminal cases had convicted in one, and acquitted in the other. The jury in the civil case, he explained, had "found for the plaintiff."

After the prospective jurors had provided general information during group questioning, and a few had been struck for cause, the judge brought the remaining jurors into the courtroom one-by-one for follow-up questioning. During this process, the judge asked Juror 43 whether he had thought of anything further "you think we should know before selecting a jury?" Juror 43 mused, "Your Honor, everyone has a member in their family that's been affiliated or had an issue with drugs," adding, "I am no different, but that's just life." But when the judge asked him whether anyone in his "immediate" family had been "touched by drugs," he answered, "[n]o." He confirmed that the nature of the case would not impede his ability to be fair, and that he could be fair to both parties.

The judge invited both counsel to ask Juror 43 questions. Mr. Wright's counsel had none. The prosecutor had several, relating mostly to Juror 43's prior jury service. The prosecutor later used a peremptory strike to remove Juror 43, ensuring that no African-Americans would sit on Mr. Wright's jury.

Mr. Wright's counsel "raise[d] a Batson challenge," noting that Juror 43 was "the only black member of the panel that we had left in using our strikes." The judge directed the prosecutor to identify a race-neutral reason for the strike. The prosecutor responded that Juror 43 was "the only respondent who was still on our panel who had returned a not guilty verdict in a criminal case," and added that Juror 43's "elaboration and his reasoning" for the acquittal had given him "further cause to make that strike."

Mr. Wright's counsel asked to respond. The judge permitted her to do so "[b]riefly." Mr. Wright's counsel observed that Juror 1, a "white male," had described sitting on a jury that returned a "split verdict" in a criminal case, "indicating he had acquitted someone in California." She further noted that Juror 27, a "white female," had sat on a jury that found someone "not liable at a civil trial." Noting that these "white jurors were not struck from the panel," Mr. Wright's counsel argued that the strike of Juror 43 "should not stand under Batson."

The judge rejected the challenge summarily, declaring, "[o]bjection is overruled," and then summoning the jury and beginning the trial.

B. Following a three-day trial, Mr. Wright was convicted and sentenced to ten years of incarceration.

Mr. Wright's trial lasted three days. Glendale Police Detective Rochelle Thomas testified that on May 6, 2014, she had been surveilling a house from which police suspected drugs were being sold. She saw two black males walk from the house to a tan Cadillac and drive away. She followed in an unmarked vehicle and saw the Cadillac turn without signaling. She notified Glendale Police officer Shaun Hardesty of the violation, intending for Officer Hardesty to conduct a traffic stop that would identify the suspects.

Officer Hardesty testified that he followed the Cadillac and activated his police lights. Eventually the Cadillac pulled into a parking lot and stopped. Officer Hardesty approached the Cadillac, directed the driver to get out, and patted him down, finding no weapons. Officer Hardesty identified the driver as Mr. Wright.

Mr. Wright told Officer Hardesty that his driver's license was suspended. Officer Hardesty confirmed this on his computer, then told Mr. Wright that he would receive a citation and that the Cadillac would be towed. Officer Hardesty then conducted what he characterized as an inventory search of the Cadillac. Next to the seatbelt buckle inside the driver's door he noticed a plastic bag, inside of which were smaller plastic bags containing a white crystal substance he believed to be methamphetamine. Officer Hardesty arrested Mr. Wright and searched him, finding two bundles of bills totaling $4,220 in his pants pocket.

An Arizona Department of Public Safety Criminalist testified that the substance in the plastic bags was tested and identified as 12.3 grams of methamphetamine, divided into portions ranging from 1.38 to 4.32 grams. A member of the Glendale Police Department's Special Investigations Unit narcotics squad testified that the quantities and packaging of the methamphetamine, as well as the quantity, denominations, and bundling of the money, tended to suggest that Mr. Wright possessed the drugs for sale, rather than consumption. The state then rested its case.

Mr. Wright called a Glendale Police Department crime scene technician who testified that she attempted to lift fingerprints from the plastic bags, but found none. Mr. Wright then rested his case.

In his closing argument, the prosecutor argued that Mr. Wright's actions showed that he "knew he was in trouble" when Officer Hardesty signaled him to pull over, and that the evidence indicated that Mr. Wright intended to the sell the

methamphetamine found in the Cadillac. Mr. Wright's counsel argued that the Mr. Wright had simply been "in the wrong car, at the wrong time." The jury returned a verdict of guilty later that day. The trial then entered a brief second phase in which the jury found that Mr. Wright had acted for pecuniary gain—an aggravating factor that raised the maximum sentence. At a sentencing conducted four months later, the judge sentenced Mr. Wright to ten years of incarceration.

C. The Arizona Court of Appeals affirmed the trial judge's denial of Mr. Wright's *Batson* objection, without addressing his substantive *Batson* argument.

Mr. Wright appealed his conviction to the Arizona Court of Appeals, pressing the *Batson* claim. The Arizona Court of Appeals affirmed Mr. Wright's conviction in a memorandum decision issued in January of 2017. The court of appeals rejected Mr. Wright's challenge to the prosecutor's strike of Juror 43 for two reasons: (1) the prosecutor's proffered reason for striking Juror 43 "was facially race-neutral and thus satisfied the prosecutor's burden," and (2) the judge was not required to make "detailed findings" in overruling a *Batson* objection.

Mr. Wright filed a petition for review in the Arizona Supreme Court, arguing that the court of appeals "undertook an inadequate analysis of the issue" by "sidestepping" the question of whether the prosecutor's strike of Juror 43 had been shown to be discriminatory. The Arizona Supreme Court summarily denied the petition. Mr. Wright pursued additional efforts to secure relief in the state courts, some pro se and some with counsel, but none was successful.

D. Mr. Wright sought habeas corpus relief in the District of Arizona, which applied AEDPA deference and found the Arizona Court of Appeals' decision reasonable.

On October 15, 2021, Mr. Wright filed a pro se habeas corpus petition in the United States District Court for the District of Arizona. After the court directed him to correct formal defects in the petition, Mr. Wright filed an amended petition that included his challenge to the strike of Juror 43, as well as other claims. The government filed a response arguing that the non-*Batson* claims were procedurally defaulted, and that the *Batson* claim should be rejected on the merits. Mr. Wright, still pro se, filed a reply.

The magistrate judge issued a report and recommendation recommending that Mr. Wright's petition be denied. (App. C.) The magistrate judge found that Mr. Wright's non-*Batson* claims were procedurally defaulted, and recommended that Mr. Wright's *Batson* claim be denied on the merits. The magistrate judge reviewed the decision of the Arizona Court of Appeals—the "last reasoned state court decision" in Mr. Wright's case. Applying the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) (AEDPA), the magistrate judge reasoned that the Arizona Court of Appeals' rejection of Mr. Wright's *Batson* challenge was neither "contrary to, or an unreasonable application of, *Batson*" nor "based on an unreasonable determination of the facts," because "[t]he record d[id] not show that Jurors 1 and 27 were so similar to Juror 43 as to compel the conclusion that the trial court erred in overruling the *Batson* challenge."

Mr. Wright filed objections to the report and recommendation that referenced his *Batson* claim, and the state filed a response. In April of 2022 the district court entered an order and judgment adopting the report and recommendation in full, denying Mr. Wright's habeas petition, and denying him a certificate of appealability. (App. B.) Mr. Wright filed motions requesting a certificate of appealability in the district court and the court of appeals. The court of appeals granted a certificate of appealability, and an Assistant Federal Public Defender was appointed to represent Mr. Wright in his appeal.

E. The court of appeals affirmed the district court's judgment in an unpublished memorandum.

The court of appeals affirmed the district court's denial of Mr. Wright's habeas corpus petition in an unpublished memorandum. (App. A.) The court held that the Arizona Court of Appeals had adjudicated Mr. Wright's *Batson* claim on the merits, meaning that the court's holding was subject to deference under AEDPA. Pursuant to this standard, the court held that the Arizona Court of Appeals' rejection of Mr. Wright's *Batson* claim was not based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

REASON FOR GRANTING THE WRIT

The court of appeals' refusal to grant relief for the racial discrimination in the selection of Mr. Wright's trial jury represented a clear departure from the principles set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny.

For well over a century, this Court has "been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which

members of his or her race have been excluded by the State's purposeful conduct." *Powers v. Ohio*, 499 U.S. 400, 404 (1991). The Court has recognized that racial discrimination in jury selection inflicts a wide range of harms not only on the defendant, but also on the excluded juror, the court, racial minorities generally, and the broader society. Such discrimination denies the defendant "the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. It subjects the excluded juror to "a profound personal humiliation heightened by its public character." *Powers*, 499 U.S. at 413–14. It jeopardizes the integrity of the court by inviting cynicism respecting the jury's neutrality and undermining public confidence in adjudication. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (*Miller-El II*). And it harms racial minorities generally by establishing state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. *Id.* at 237–38.

To prevent these harms, this Court has devised a three-step analysis to be applied when a party objects to the racially motivated use of a peremptory strike. First, the judge must determine whether the objecting party has made a prima facie showing that a peremptory challenge has been exercised on the basis of race. *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008). Second, the judge must assess whether the prosecutor has proffered race-neutral reasons for striking the juror in question. *Id.* Finally, the judge must consider the parties' submissions and determine whether the objecting party has shown purposeful discrimination. *Id.* At this third step, the judge must consider "all of the circumstances that bear upon the issue of racial animosity." *Id.* at 478.

An appellate court addressing a claim that the trial judge erred in overruling a *Batson* objection applies separate standards of review to each of these three prongs of the *Batson* analysis. Where—as here—the trial judge ruled on the ultimate question of intentional discrimination in overruling the objection, the first step of the *Batson* analysis (the prima facie case) is moot, and the appellate court does not address it. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). The appellate court reviews de novo whether the prosecutor proffered a facially race-neutral reason for exercising the strike at the second step of the *Batson* analysis. *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002). The appellate court reviews for clear error the trial judge's ruling as to whether the prosecutor struck one or more jurors with discriminatory intent at the third step of the *Batson* analysis. *Snyder*, 552 U.S. at 477.

The standard of review applied by a federal habeas court to a state appellate court's denial of relief on a *Batson* claim depends on whether the claim was "adjudicated on the merits" by the state appellate court. 28 U.S.C. § 2254(d). If it was not, the federal habeas court applies de novo review to the state appellate court's ruling. *Cone v. Bell*, 556 U.S. 449, 472 (2009). If it was, the federal habeas court grants relief if the state appellate court's adjudication of the claim either "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" (*id.* § 2254(d)(1)), or "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" (*id.* § 2254(d)(2)).

Assuming the Arizona Court of Appeals' holding could be deemed an adjudication on the merits of Mr. Wright's substantive *Batson* claim, and thus the district court was correct in applying AEDPA deference to that claim, the district court's denial of relief on this claim was still erroneous, because the Arizona Court of Appeals' rejection of it "was 'based on an unreasonable determination of the facts in light of the evidence presented.'" *Currie v. McDowell*, 825 F.3d 603, 610 (9th Cir. 2016) (*quoting* 28 U.S.C. § 2254(d)(2)); *see also Miller-El II*, 545 U.S. at 240, 266 (finding state court's acceptance of prosecutor's purported race-neutral reasons for challenged strikes unreasonable under § 2254(d)(2)).

The court of appeals' inquiry into whether the Arizona Court of Appeals' rejection of Mr. Wright's *Batson* claim was based on an "unreasonable determination of the facts" proceeds in two steps. *Sifuentes v. Brazelton*, 825 F.3d 506, 518 (9th Cir. 2016).

First, the Court "review[s] the relevant portions of the record and use[s] ordinary analytic tools to evaluate the prosecutor's race-neutral explanations." *Id.* "To determine, at stage three, whether a prosecutor's professed race-neutral reasons for striking a juror were pretextual, *Batson* requires an inquiry into the totality of the relevant facts about a prosecutor's conduct." *Currie*, 825 F.3d at 610 (internal quotation marks omitted). This analysis includes an examination of whether the prosecutor's purported explanations for the strike are "contrary to the evidence in

the record," "implausible or fantastic," "based on mischaracterizations of a prospective juror's testimony," or "belied by a comparative juror analysis." *Sifuentes*, 825 F.3d at 518 (internal quotation marks omitted). Pursuant to comparative juror analysis, "[w]hen a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Flowers v. Mississippi*, 588 U.S. 284, 311 (2019) (internal quotation marks omitted).

Second, the court asks whether, in light of its analysis, "the state appellate court was objectively unreasonable in upholding the trial court's determination." *Sifuentes*, 825 F.3d at 518.

Here, this analysis confirms that the Arizona Court of Appeals' rejection of Mr. Wright's substantive *Batson* claim was unreasonable.

A. The record shows that the prosecutor's proffered race-neutral reasons for striking Juror 43 were pretextual.

When the prospective jurors were asked to provide basic information, including their prior jury service, Juror 43 responded as follows:

> [Juror 43]: Juror Number 43. I work—I am a maintenance technician. I work for Intel, been there for four years, married three children ages 18, 16, and 14. My wife works for Bank of America. She's been there about ten years. She is the lead process lead, lead process technician.
>
> And I sat on three juries, two criminal, one civil, two criminal. Was all here. The two criminal, one was guilty one was not guilty. The civil we found for the plaintiff.

At the end of the group questioning, the judge called each remaining prospective juror into the courtroom individually for additional questioning. When

Juror 43 was called in, he indicated that someone in his non-immediate family had "had an issue with drugs," and that this would not affect his impartiality. The judge then invited both counsel to ask Juror 43 questions. Mr. Wright's counsel declined, but the prosecutor questioned Juror 43 about his earlier answer regarding prior jury service:

> [PROSECUTOR]: Yeah, I was just curious. You said you were on three juries, three [*sic*] criminal and one civil. Do you remember about when those were?
>
> [JUROR 43]: All within the last eight years.
>
> [PROSECUTOR]: About the criminal ones, one of them was a conviction and one was the acquittal. Do you remember what kind of trial the conviction was?
>
> [JUROR 43]: The conviction was a DUI and—
>
> [PROSECUTOR]: Were you the foreman?
>
> [JUROR 43]: No.
>
> The acquittal was, I don't know how you would characterize it. He was speeding, ran into a car, someone died.
>
> [PROSECUTOR]: And you guys ended up finding him not guilty.
>
> [JUROR 43]: The person made a left turn and he ran into, the person that was speeding ran into someone making a left-hand turn.
>
> [PROSECUTOR]: Criminal case.
>
> [JUROR 43]: Yes.

Later, when Mr. Wright's trial counsel raised a *Batson* objection to the prosecutor's strike of Juror 43, the trial judge directed the prosecutor to identify a "neutral explanation" for the strike. The prosecutor responded as follows:

> [PROSECUTOR:] My race neutral reason, Your Honor, one of the most important things I look is at prior jury experience. He noted that he had been on three criminal trials, or three trials, two of which were criminal, and he was the only respondent who was still on our panel who had returned a not guilty verdict in a criminal case. Specifically, the way he described the case, it appeared to be a manslaughter case. It was a case that involved a death. He specifically said that he was part of a jury that did not convict the motorist that was on trial because he noted that the victim had made a left-hand turn.
>
> Your Honor, the very fact of the acquittal is the first basis or the—his elaboration and his reasoning for the not guilty verdict gave the State further cause to make that strike.

Liberally construed, this response identified two purported race-neutral reasons for the strike: (1) the fact that Juror 43 had served on a jury that acquitted a criminal defendant, and (2) Juror 43's "elaboration" and "reasoning" with respect to that acquittal. Neither of these purported race-neutral reasons for the strike survives scrutiny.

(1) Juror 43's service on a jury that acquitted a criminal defendant

It is evident, for two reasons, that the prosecutor's purported concern about Juror 43 having sat on a jury that acquitted a criminal defendant was pretextual.

(a) This purported race-neutral reason is belied by comparative juror analysis.

First, non-black jurors 1, 6, 12, and 27 all made comments implicating this purported concern to the same or a greater degree as Juror 43, and yet the prosecutor "accepted" these jurors for Mr. Wright's jury "with no evident reservations." *Miller-El II*, 545 U.S. at 244.

Juror 1. Juror 1 offered a confusing response to the question about prior jury service, indicating that he had sat on either one or two criminal juries addressing charges of murder, assault, and battery—not all of which apparently resulted in a guilty verdict:

> [JUROR 1:] Yes, I have been on a jury before. I believe it was criminal. It was a murder case in Santa Ana, California, and the other one was assault and battery case in Santa Ana, California.
>
> THE COURT: Did it go to verdict?
>
> [JUROR 1]: Yes.
>
> THE COURT: Were you the foreperson in either case?
>
> [JUROR 1]: No.
>
> THE COURT: Do you remember any of the verdicts?
>
> [JUROR 1]: Yes.
>
> THE COURT: And they were?
>
> [JUROR 1]: The murder was guilty and the assault was split 'cause assault and that battery. I didn't realize it's two different things.

Had the prosecutor truly been concerned about a prospective juror having been willing to acquit a criminal defendant, he would at the very least have asked Juror 1 to explain this confusing answer. And yet, when given the opportunity, the prosecutor declined to ask Juror 1 a single question.

The prosecutor thus did not care to understand what Juror 1 meant about the verdict or verdicts having been "split." This is remarkable, because Juror 1's answer was so ambiguous that it was not even clear whether he had sat on one criminal jury or two. He said he had been on "a" jury, and he believed "it" was criminal. He

described "it" as a "murder case" in Santa Ana, California—and then mysteriously referred to "the other one" as "assault and battery case," also in Santa Ana, California. This may have reflected that he sat on two different Santa Ana juries, one of which addressed a murder charge and another that addressed assault and battery charges—or that he sat on one Santa Ana jury that addressed murder, assault, and battery charges. By the same token, his reference to the assault verdict as "split" may have indicated that in a single trial the jury convicted on murder but acquitted on assault (and perhaps battery as well)—or that the jury in the murder trial convicted while the jury in the assault case acquitted (on assault and/or battery), or something else entirely. "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 (internal quotation marks omitted). Had membership in a prior jury that returned a not-guilty verdict truly been important to the prosecutor, he would have asked this non-black juror to explain. He did not.

Juror 6. Juror 6 went out of her way to express her reluctance to convict the defendant in a forgery case, even though the law apparently required his conviction:

> [Juror 6:] I have sat on a jury before. I guess it would be a criminal, a forgery case.
>
> THE COURT: All right.
>
> [Juror 6]: I did not believe the gentleman should have been guilty but according to the law, he was guilty so we voted him he was guilty.

Once again, when the prosecutor was invited to ask this non-black juror follow-up questions, he declined.

The prosecutor thus did not care to know why this non-black juror "did not believe" that this legally guilty criminal defendant "should have been guilty." Her reason for this "belie[f]" might well have been substantially more pertinent to Mr. Wright's case than Juror 43's prior jury experience. Forgery is a specific-intent crime, and thus more similar to Mr. Wright's drug-possession charge than the vehicular manslaughter charge on which Juror 43's jury had acquitted. Moreover, rather than simply reporting the verdict, Juror 6 went out of her way to note that she disagreed with it. Juror 6's evidently strong reluctance to convict a guilty forgery defendant likely would have had more relevance to Mr. Wright's trial than Juror 43's membership in a jury that acquitted a defendant of vehicular manslaughter. Had his purported concern been genuine, the prosecutor would have asked Juror 6 to explain. He did not.

Jurors 12 and 27. Jurors 12 and 27 both stated that they had sat on juries that returned "not guilty" verdicts in what they described as "medical malpractice" cases. (2-ER-207, 210.) Of course, it is possible that these jurors simply did not understand that the term "not guilty" does not apply to a civil verdict. But it is also possible that one or both of them correctly described the "not guilty" verdicts, and instead erred in describing a criminal charge—such as reckless manslaughter involving medical care—as "medical malpractice." Had the prosecutor truly been as

concerned as he claimed to be about seating a juror who had acquitted a criminal defendant, he would have asked these jurors to explain. He did not.

Non-black jurors 1, 6, 12, and 27 all sat on Mr. Wright's jury, never having been asked a single question by the prosecutor about their answers regarding prior jury service. Juror 43, by contrast—Mr. Wright's last chance to see a fellow African-American on the jury, after Juror 7 was struck for cause—was extensively questioned by the prosecutor—and then struck, purportedly because his prior jury service made him unacceptable. This constitutes clear evidence that the strike of Juror 43 was "motivated in substantial part by discriminatory intent." *Foster v. Chatman*, 578 U.S. 488, 513 (2016) (internal quotation marks omitted).

(b) The prosecutor failed to explain how Juror 43's prior jury service impaired his fitness to serve on Mr. Wright's jury.

Second, the prosecutor failed to show how his purported concern rendered Juror 43 "unsuitable for the jury," or how it was "'related to the particular case to be tried.'" *Kesser v. Cambra*, 465 F.3d 351, 364 (9th Cir. 2006) (en banc) (*quoting Batson*, 476 U.S. at 98). Mr. Wright's trial involved a charge of possession for sale of methamphetamine. The trial in which Juror 43's jury acquitted evidently involved a charge in the nature of vehicular manslaughter. These charges are so different that it is unclear—and the prosecutor did not explain—how striking Juror 43 for this reason would have any "basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *see also Flowers*, 139 S. Ct. at 2250 ("the State did not explain how [the black prospective juror's] 13-year-old, paid-off debt to Tardy Furniture

could affect her ability to serve impartially as a juror in this quadruple murder case").

In short, the prosecutor's first proffered race-neutral reason for striking Juror 43—his service on a jury that acquitted a criminal defendant—was evidently pretextual. Moreover, the pretextual nature of this proffered reason for the strike constitutes evidence that the prosecutor's other proffered race-neutral reason was pretextual as well, because a prosecutor's proffer of a single pretextual explanation for a strike "naturally gives rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485.

(2) Juror 43's "elaboration" and "reasoning" for the acquittal

The prosecutor's second purported race-neutral reason for the strike was Juror 43's "elaboration" and "reasoning" with respect to the acquittal in the vehicular manslaughter case. It is evident, for five reasons, that this was yet another pretext for striking the last black person from Mr. Wright's jury.

(a) The prosecutor failed to explain the significance of this factor.

First, the prosecutor failed to explain what it was about Juror 43's "elaboration" and "reasoning" that rendered him "unsuitable for the jury." *Kesser*, 465 F.3d at 364. An "underdeveloped" proffered reason for a strike cannot pass muster under *Batson* (*id.*)—and the prosecutor's inscrutable reference to Juror 43's "elaboration" and "reasoning" is about as "underdeveloped" as it could be. *See Batson*, 476 U.S. at 98 n.20 ("[T]he prosecutor must give a clear and reasonably

specific explanation of his legitimate reasons for exercising the challenges.") (internal quotation marks omitted).

(b) In the Arizona Court of Appeals, the State offered an "implausible" and "fantastic" explanation of this factor's significance.

Second, assuming—as the State argued in the Arizona Court of Appeals—that the prosecutor's concern was that Juror 43 believed "that the act of turning left eliminates any protection against reckless drivers," this purported concern is patently "implausible or fantastic." *Sifuentes*, 825 F.3d at 516. The record contains no support for the notion that the prosecutor, who the record shows to be an intelligent and skilled attorney, could have believed that Juror 43—a father of four who had been a maintenance technician for Intel for four years, spoke clearly and intelligently, and was married to a lead process technician at Bank of America—as well as all eleven of his fellow jurors in the vehicular manslaughter case, entertained such an absurd belief regarding the legal implications of turning left. Indeed, such a notion would have been hard to square with the fact that Juror 43 used exactly the right legal terminology to describe his criminal and civil verdicts, describing the verdicts in the criminal cases as "guilty" and "not guilty," and the verdict in the civil case as, "we found for the plaintiff." *See Johnson v. Vasquez*, 3 F.3d 1327, 1330 (9th Cir. 1993) (prosecutor's proffered concern that juror was "uneducated" undermined by transcript showing juror "spoke excellent English, gave intelligent responses, and chose her words well"). This relatively sophisticated understanding of legal terminology was in notable contrast to non-black Jurors 12

and 27, both of whom stated that they had returned "not guilty" verdicts in medical malpractice cases.

(c) The manner in which the prosecutor articulated this purported reason for the strike "reeks of afterthought."

Third, the timing and manner of the prosecutor's articulation of this purported concern—tacked on mid-sentence, apparently spontaneously, at the tail end of his response to the *Batson* objection—"reeks of afterthought" (*Miller-El II*, 545 U.S. at 246):

> He specifically said that he was part of a jury that did not convict the motorist that was on trial because he noted that the victim had made a left-hand turn.
>
> Your Honor, the very fact of the acquittal is the first basis or the—his elaboration and his reasoning for the not guilty verdict gave the State further cause to make that strike.

Because an inscrutable, seat-of-the-pants, tacked-on justification such as this one is self-evidently "makeweight," rather than a genuine explanation for a strike, it constitutes affirmative evidence of pretext. *Miller-El II*, 545 U.S. at 246.

(d) The prosecutor failed to question Juror 43 about the significance of the victim's left-hand turn.

Fourth, if the prosecutor had truly been concerned about the relation between the victim's left-hand turn and the acquittal, he would have asked Juror 43 to explain it. A single follow-up question—*e.g.*, "What was it about the victim's left-hand turn that led you to acquit?"—might have revealed, for example, that the victim was making an illegal left-hand turn across five lanes of traffic when he was hit; or that the jury was given an instruction that caused the victim's left-hand turn

to establish a defense; or that Juror 43 and his fellow jurors actually did seriously misunderstand the governing law. But the prosecutor did not ask Juror 43 a single question about the significance of the victim's left turn. A prosecutor truly concerned about the "reasoning" behind the acquittal would not have behaved in this fashion. *See Miller-El II*, 545 U.S. at 244 (noting that, if prosecutor's purported race-neutral concern had been genuine, he "would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike"); *id*. at 250 n.8 (noting that prosecutor's failure to question struck juror about purported race-neutral concern "undermines the persuasiveness of the claimed concern").

(e) This purported reason for the strike is belied by comparative juror analysis.

Fifth, here again the prosecutor's proffered race-neutral motivation for the strike does not survive comparative juror analysis. Assuming the prosecutor's concern was that Juror 43's comment suggested a failure to understand criminal law, the prosecutor notably did not manifest this concern when non-black prospective jurors made comments that suggested difficulty understanding the law. Juror 1 indicated that he "didn't realize" that assault and battery were "two different things"—and he even seemed unsure as to whether murder was a crime: "Yes I have been on a jury before. I believe it was criminal. It was a murder case . . ." Juror 6 stated that she did not believe that a forgery defendant "should have been guilty," even though, "according to the law, he was guilty"—and she seemed unsure as to whether forgery was a crime: "I have sat on a jury before. I

guess it would be a criminal, a forgery case." And as noted above, Jurors 12 and 27 both stated that they sat on juries that returned "not guilty" verdicts in "medical malpractice" cases.

Assuming the prosecutor's purported concern related to comments reflecting a misunderstanding of the law, this concern evidently was not triggered by the comments of these non-black jurors, all of whom sat on Mr. Wright's jury. *Cf. Foster*, 578 U.S. at 511 (state's reliance on struck black juror's apparent confusion regarding question relating to willingness to impose death penalty unconvincing because "a white juror who showed similar confusion served on the jury"). Instead, it was reserved for Juror 43 alone.

The district court reasoned that the prosecutor's proffered race-neutral explanation for striking Juror 43 survived *Batson* scrutiny because "[a]lthough Jurors 1, 27, and 43 all had prior jury experience, only Juror 43 found a criminal defendant not guilty on all charges." But this Court has stressed that "a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 139 S. Ct. at 2249. Such a rule would "leave *Batson* inoperable," because "potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n.6. The pertinent question is not whether the non-struck jurors were identical, but rather whether the "prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve." *Id.* at 241; *see also Flowers*, 139 S. Ct. at 2249 (state's purported concern that black prospective juror had connections to

34 people involved in case undermined by fact that white prospective jurors with connections to 31, 27, and 18 people connected to the case were not questioned on the matter); *Foster*, 578 U.S. at 505–06 (state's purported concern that struck black juror was too young deemed unconvincing where struck juror was 34, "and the State declined to strike eight white prospective jurors under the age of 36").

Moreover, the district court's myopic focus on a single aspect of the comparison to Jurors 1 and 27 overlooks all of the other indications of the pretextual nature of the prosecutor's proffered race-neutral reasons for the strike discussed above—including the prosecutor's treatment of Jurors 6 and 12, his failure to question non-black jurors about his purported concerns, his failure to explain the relevance of his purported concerns, and his articulation of patently implausible purported concerns.

In short, the "ordinary analytic tools" used to assess *Batson* claims (*Sifuentes*, 825 F.3d at 518) confirm that the trial judge unreasonably failed to recognize the pretextual nature of the prosecutor's proffered race-neutral reasons for striking Juror 43.

B. The Arizona Court of Appeals' rejection of Mr. Wright's substantive *Batson* claim on this record was unreasonable.

Assuming AEDPA deference is applicable, a habeas court asks "whether the state appellate court was objectively unreasonable in upholding the trial court's determination." *Sifuentes*, 825 F.3d at 518. Pursuant to this standard, even if the habeas court would have reached a different conclusion, it "may not grant the habeas petition unless the state court's decision was not merely wrong, but actually

unreasonable," because the habeas court must "give the state appellate court the benefit of the doubt." *Id*. (internal quotation marks omitted).

In this case, however, the Arizona Court of Appeals' rejection of Mr. Wright's *Batson* claim includes no on-point reasoning to which the "benefit of the doubt" may be given. The court of appeals' reasoning was that the prosecutor's purported race-neutral explanation of the strike "was facially race-neutral and thus satisfied the prosecutor's burden." This would have been a reasonable ground for rejecting a claim based on step *two* of the *Batson* test, but it is no finding at all regarding—and thus is a patently a patently unreasonable ground for rejecting—the *Batson*-step-*three* claim that Mr. Wright raised in his appeal. *Green v. LaMarque*, F.3d 1028, 1030 (9th Cir. 2008) (noting that *Batson*-step-three analysis requires examining "not only whether the reasons stated are race-neutral," but also whether they are "relevant" and "genuine").

It thus evident that the Arizona Court of Appeals' rejection of Mr. Wright's substantive *Batson* claim was objectively unreasonable. "[W]here the state court should have made a finding of fact but neglected to do so . . . the state-court factual determination is perforce unreasonable and there is nothing to which the presumption of correctness can attach." *Taylor v. Maddox*, 366 F.3d 992, 1000–01 (9th Cir. 2004), *overruled on other grounds as noted in Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014); *accord* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 32.4 (Lexis+, through December 2022, Release No. 14) ("a court can grant relief under section 2254(d)(2) if . . . [t]he state

court failed to make a factual determination that should have been made"). Even under AEDPA's deferential standard, therefore, Mr. Wright is entitled to relief on this claim. Because "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose," *Flowers*, 139 S. Ct. at 2244, the prosecutor's unlawful strike of Juror 43 entitles Mr. Wright to a new trial before a properly selected jury.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

Respectfully submitted on June 6, 2024
(originally May 28, 2024).

JON M. SANDS
Federal Public Defender

s/*Daniel L. Kaplan*
*DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
* *Counsel of Record*