No. 23-7837

IN THE

SUPREME COURT OF THE UNITED STATES

FIDEL ALCANTAR SOTO — PETITIONER
(Your Name)

vs.

STATE OF CALIFORNIA — RESPONDENT(S)

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

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Fidel Alcantar Soto, CDC# AX-1464
(Your Name)
Valley State Prison, C4-21-3U
P.O. BOX 96
(Address)

Chowchilla , CA 93610
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did the Trial Court erred when it denied Mr. Soto's constitutional objection to the prosecution's dismissal of the african-american female jury venire member identified as N.G., and the court of Appeal erred when it applied deferential review despite the trial court's failure, in the third stage of the Batson/Wheeler inquiry, to make a sincere and reasoned effort to evaluate the credibility of the prosecutor's explanation for the dismissal?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The parties to the Proceeding below were the Petitioner, Fidel Alcantar Soto, and respondent the People of the State of California, represented by the office of the Attorney General of the State of California.

RELATED CASES

Petitioner was convicted on June 26, 2015 in the Superior Court of California, County of Yolo, People V. Fidel Alcantar Soto, Case No. CRF14704, and a copy of the Abstract of Judgment appears at Appendix G.

The California Court of Appeal affirmed on Nov. 2, 2016 in an Unpublished Opionion. People V. Soto, Nov. 2, 2016, No. C079705, 2016 Cal. App.Unpub. LEXIS 7864, and a copy of the decision appears at Appendix F.

The California Supreme Court Denied Review in an Unpublished decision on Jan. 11, 2017, People V. Soto, Jan. 11, 2017, No. S238743, LEXIS 346, and a copy of the decision appears at Appendix E.

The United State District Court, Eastern District of California denied the Petition on Feb. 7, 2023, Soto V. Spearman, 2023 U.S. Dist. LEXIS 21488, (E.D. Cal. Feb.7,2023), and a copy of the decision appears at Appendix B.

The United States Court of Appeals for the Ninth Circuit denied the request for a Certificate of Appealability on Apr. 22, 2024, Soto V. Spearman, 2024 U.S. APP. LEXIS 9714(9th Cir. Cal.Apr.22,2024), and a copy of the order appears at Appendix A.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is
[X] reported at soto v. Spearman,2024 u.s.App.LEXIS 9714 (9th Cir. Cal. Apr.22,2024); or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is
[X] reported at soto v. spearman,2023 u.s.Dist.LEXIS 21488, (E.D. Cal. Feb.7,2023); or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is
[X] reported at peole v. soto, Jan.11,2017,No.s238743, LEXIS 346; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the California Court of Appeal,Third Dis. court appears at Appendix F to the petition and is
[X] reported at peole v. soto, Nov.2,2016,No.C079705, 2016 Cal.App.Unpub. LEXIS 7864; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 22, 2024.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable causes, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution:

section 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.

STATEMENT OF THE CASE

On March 30, 2015, the Yolo County District Attorney filed a four-count amended information charging appellant Fidel Alcantar Soto as follows: in count 1, Mr. Soto was charged with committing a sexual act with a child 10 years old or younger (oral copulation), in violation of section 288.7, subdivision (b), a felony; in count 2, Mr. Soto was charged with committing a lewd or lascivious act upon a child under age 14 (identified as "A.A."), in violation of section 288, subdivision (a), a felony; in count 3, Mr. Soto was charged with committing a lewd or lascivious act upon a child under age 14 (identified as "A.V."), in violation of section 288, subdivision (a). (CT 72-73.) In count 4, the information charged Mr. Soto with abusing or endangering the health of a child, in violation of section 273a, subdivision (b), a misdemeanor. (CT 73-74.) The amended information alleged that Mr. Soto committed the acts alleged in counts 2 and 3 against more than one victim, within the meaning of section 667.61, subdivision (e)(4). (CT 74.)

On March 30, 2015, this matter came on for jury trial. (CT 77-81.) On April 1, 2015, the trial court denied a defense *Batson-Wheeler* motion and later denied a defense motion for mistrial based on the court's refusal to grant the defense additional peremptory challenges as requested. (CT 87-90; Aug. RT 173-182, 223-228.)

On April 3, 2015, the jury reached its verdicts, finding Mr. Soto guilty on all four counts and finding the special allegation to be true. (CT 133, 139-144.)

On May 13, 2015, Mr. Soto filed a motion asking the court to dismiss count 3 and the enhancement pursuant to Penal Code section 667.61, subdivision (e)(4), on ex post facto grounds. (CT 163-164.) The prosecution filed its opposition to the motion to dismiss on June 4, 2015. (CT 166-182.) The defense submitted supplemental points and authorities in support of the motion to dismiss on June 24, 2015. (CT 185-188.)

On June 26, 2015, the court granted the defense motion to dismiss count 3 and set aside the true finding as to the enhancement. (CT 206.) On the same day, the court sentenced Mr. Soto to 15 years to life imprisonment for his conviction of violating section 288.7, subdivision (b), in count 1; the court also imposed the midterm of six years imprisonment for Mr. Soto's conviction of violating section 288, subdivision (a), in count 2, which the court ordered stayed pursuant to section 654. (CT 204-207.) The court imposed a concurrent sentence of 180 days in county jail for Mr. Soto's misdemeanor conviction of violating section 273a, subdivision (b), in count 4. (CT 204-207.)

On June 30, 2015, Mr. Soto filed his timely notice of appeal. (CT 208.)

STATEMENT OF THE FACTS

The Kitchen Incident

The incident at issue in this case took place on Fourth Street in Woodland on November 24, 2014. (1 RT 67-69.) Sometime between 8:00 and 9:00 a.m. that morning, Alberto Alcantar, Mr. Soto's son, was walking from his bedroom and looked towards the kitchen, where he "saw my dad with my niece. And I saw that they were doing something inappropriate." (1 RT 107, 110-112, 121.)

Alberto could see his father's pants were halfway down from his waist. (1 RT 112.) Alberto saw "my niece's mouth on my dad's penis." (1 RT 112.) Once Mr. Soto saw Alberto, he "removed [Alberto's] niece" and pulled his pants up. (1 RT 112.) Alberto estimated that the incident he observed lasted about six seconds. (1 RT 113-114.)

Alberto's niece, Angelina, left the room and went into the living room to play with other children. (1 RT 112-115.)[2] Alberto asked Mr. Soto what he was doing and "he didn't say nothing. And he just like looked away from me," and Alberto walked towards the living room in a state of shock. (1 RT 113.) Angelina did not appear to have been bothered by what happened. (1 RT 115.)

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[2] Angelina was born on April 7, 2009. (1 RT 95.) Three other young children were in the living room during this incident. (1 RT 115.)

Mr. Soto came up to Alberto in the living room and asked if he wanted anything to eat and Alberto told him, "'No.'" (1 RT 116.) Alberto's mother returned home around 10:00 a.m. (1 RT 122.) When Mr. Soto left for work around 2:50 p.m., Alberto told his mother what he had seen. (1 RT 118.) Alberto did not remember if Mr. Soto had been drinking that morning, though he testified that Mr. Soto usually drank Bud Light. (1 RT 122.)

Alberto, who was 16 years old and in the 11th grade at the time of trial, testified that witnessing the incident between his father and Angelina caused him distress, for which he had been seeking weekly treatment with a counselor. (1 RT 108, 116-118.)

Woodland Police Officer Tamara Pelle was dispatched to the house on Fourth Street in Woodland. (1 RT 69.) Pelle took photos, spoke to witnesses, and collected forensic evidence. (1 RT 69-72.) Pelle arranged for a multidisciplinary interview ("MDIC") of Angelina. (1 RT 72-75.) Marie Flores conducted the MDIC interview in English; it lasted about half an hour. (1 RT 75-76,78, 89.)

The Prior Alleged Incident

Rosalina Alcantar, married to Mr. Soto for 28 or 29 years at the time of trial, testified that she had observed Mr. Soto engage in inappropriate activity with her daughter, Anna Valdez, when Anna was six or seven years old. (1 RT

98-103.)[3] Ms. Alcantar testified that she saw Mr. Soto touch Anna's vagina. (1 RT 102-103.) Ms. Alcantar "went on top of [Mr. Soto] and I hit him." (1 RT 103.) Mr. Soto told her "he had done it because he had been drinking." (1 RT 103.)

Ms. Alcantar testified that Mr. Soto was "always drunk," that he "likes to drink, always," and she could tell he had been drinking on that particular occasion. (1 RT 103-104.) Mr. Soto told Ms. Alcantar that "he would never do it again." (1 RT 104.) Ms. Alcantar did not report Mr. Soto to the police, in part because she had only been in this country for a very short time and did not know that the police could help them. (1 RT 104.) Ms. Alcantar believed Mr. Soto when he said it would not happen again. (1 RT 105.) Anna, who was 26 years old at trial, testified that she did not recall any incident when Mr. Soto touched her inappropriately. (1 RT 95, 106.)

When Ms. Alcantar learned about the incident involving Angelina, she asked Anna to go with her to the police station. (1 RT 105.) At the police station, Officer Miriam Cortes arranged for a pretext telephone call to take place between Ms. Alcantar and Mr. Soto. (1 RT 153-155.) The audiotape of the pretext call was played at trial. (1 RT 158-161.)[4]

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[3] Anna was born on August 4, 1988. (1 RT 106.)

[4] Elizabeth Fernandez, a legal secretary for the Yolo County District (continued...)

In the pretext call, Ms. Alcantar told Mr. Soto that Alberto had told her he had seen Mr. Soto doing something with Angelina. (Supp. CT 16-17.) Ms. Alcantar pressed Mr. Soto to tell her in his own words what he had done with Angelina. (Supp. CT 17-18.) Mr. Soto told her "I don't know what fucking happened" and he agreed with Ms. Alcantar when she told him he was "not well." (Supp. CT 17.)

Mr. Soto told Ms. Alcantar that Angelina "got near me you know how she is she attaches to the legs hangs on the legs" and he admitted pulling down his sweat pants and that "she took the pant down she touch it with her mouth." (Supp. CT 18-21.) Mr. Soto told Angelina "to suck it," referring to his penis. (Supp. CT 23.) Mr. Soto told his wife that he had not done this with Angelina before. (Supp. CT 18.)

Mr. Soto's Arrest and Interview

Mr. Soto was arrested at work on the night of the incident. (1 RT 81.) When the clothes Mr. Soto had worn at the time of the incident and when he

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[4](...continued)
Attorney's office, was fluent in Spanish and occasionally did Spanish translations. (1 RT 137-139.) Ms. Fernandez transcribed the pretext telephone call between Mr. Soto and his wife. (1 RT 145-146.) Miriam Franco, who also worked at the Yolo County District Attorney's Office and was fluent in Spanish, translated that nine-minute call. (1 RT 145, 148-150.) The written transcript of the pretext call was marked and received as People's Exhibit 10. (1 RT 150.) That transcript appears at Supp. CT 16-26.

was arrested were examined, no forensic evidence was found. (1 RT 80-81.) Officer Cortes interviewed Mr. Soto following his arrest, and the recording of that interview was played at trial. (1 RT 162, 166.)[5]

Officer Cortes advised Mr. Soto of his *Miranda* rights at the beginning of the interview. (1 RT 162.) Mr. Soto told Cortes he had been born on February 23, 1961. (Supp. CT 1.) In the interview, Mr. Soto described how he told Angelina to suck his penis and said that she did so for about one minute. (Supp. CT 2-4.) Cortes testified that she asked Mr. Soto how far his penis went into Angelina's mouth and he indicated, in the words of the judge, that it was about "two and a half inches." (1 RT 166-167.)

Mr. Soto told Cortes that this was the only time he had done this with Angelina. (Supp. CT 4-5.) Cortes asked Mr. Soto what he said to Angelina to get her to do what she did and he told her, "I only told her that. Suck it and

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[5] Elizabeth Fernandez reviewed the recording of Mr. Soto's interview by Officer Cortes and translated it into English. (1 RT 139–140.) Ms. Fernandez prepared part of the written transcript that was marked and received as People's Exhibit 8. (1 RT 139, 162.) That transcript appears at Supp. CT 1-15.

Defense counsel questioned Cortes on various parts of the transcripts of the pretext call and her interview with Mr. Soto. (1 RT 200-211, 214-220.) He was able to get Cortes to admit to certain inaccuracies in the transcript, which she corrected on the stand. (1 RT 200-211, 214-220.)

that's it," nothing else. (Supp. CT 12.) Mr. Soto said "I felt good" when Angelina was sucking his penis. (Supp. CT 12.)

Officer Cortes asked Mr. Soto if he had touched his other children and he denied doing so. (Supp. CT 7.) However, he then admitted touching his daughter, Anna, "[m]any years ago," telling Cortes that "we played too." (Supp. CT 7.) Mr. Soto told Cortes that he played with Anna with his penis on her behind, but only "outside," usually when he had been drinking. (Supp. CT 9-12.) Mr. Soto told Cortes that Anna was about seven years old when he touched her over her clothes six or seven times. (Supp. CT 9-10.)

Mr. Soto told Cortes that, when he was in Mexico, "there was a girl who did the same to me when I was little." (Supp. CT 12.) When that happened, the girl was about 16 years old and Mr. Soto was seven years old. (Supp. CT 12.)

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REASONS FOR GRANTING THE PETITION

I. THE TRIAL COURT ERRED WHEN IT DENIED MR. SOTO'S CONSTITUTIONAL OBJECTION TO THE PROSECUTION'S DISMISSAL OF THE AFRICAN-AMERICAN FEMALE JURY VENIRE MEMBER IDENTIFIED AS N.G., AND THE COURT OF APPEAL ERRED WHEN IT APPLIED DEFERENTIAL REVIEW DESPITE THE TRIAL COURT'S FAILURE, IN THE THIRD STAGE OF THE *BATSON/WHEELER* INQUIRY, TO MAKE A SINCERE AND REASONED EFFORT TO EVALUATE THE CREDIBILITY OF THE PROSECUTOR'S EXPLANATION FOR THE DISMISSAL. Batson V. Kentucky 476 U.S. 79(1986); People V. Wheeler 22 Cal. 3d 258(1978).

A. Introduction

The issue presented in this petition concerns Mr. Soto's contention that the trial court denied him his rights to equal protection under the Fourteenth Amendment and to a trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution when it upheld the prosecution's exercise of a peremptory challenge against N.G., a female, African-American prospective juror. (Opn. 1-4.) Mr. Soto specifically "asserts the trial court did not fulfill its duty in the third stage of the *Baxter/Wheeler* proceeding because the prosecutor's stated reasons for striking a female African-American prospective juror were unsupported by the record or inherently implausible, thereby triggering an obligation on the part of the trial court to make detailed findings" supporting its ruling. (Opn. 2.)[3]

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[3] The Court of Appeal summarized the relevant proceedings (continued...)

The Court of Appeal rejected Mr. Soto's *Batson/Wheeler* challenge, holding that "the record adequately supports the prosecutor's explanation of the race-neutral reasons that collectively led him to exercise a peremptory challenge against N.G." (Opn. 8-9.) The Court of Appeal held that the prosecutor's attributing statements made by a different juror to N.G. was "a genuine mistake" and "a race-neutral reason" for excluding her and that, under the circumstances presented, "the trial court did not abuse its discretion in declining to make more detailed findings or denying defendant's *Batson/Wheeler* motion." (Opn. 9.)

As Mr. Soto will explain, *post*, the Court of Appeal erred in holding that the trial court made a sincere and reasoned effort to evaluate the credibility of the prosecutor as to the reasons why he excused N.G. from the jury, resulting in the appellate court's erroneous application of a deferential standard of review. Properly viewed without deference, the trial court's decision to uphold the peremptory challenge of N.G. violated Mr. Soto's Fourteenth Amendment right to equal protection and his California constitutional right to a jury drawn from a representative cross-section of the community.

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[3](...continued)
during jury selection at Opn. 2-4.

B. The Court of Appeal Erred When It Held That the Trial Court Properly Engaged the Prosecutor on the Evidence as to His Proffered Race-Neutral Reasons for Dismissing N.G. From the Jury.

This court has summarized the nature of the proceedings on a *Batson/Wheeler* challenge in the following manner:

> The now familiar *Batson/Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must make out a prima face case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination.

(*People v. Scott* (2015) 61 Cal.4th 363, 383.)

In the case before this court, "only the third step is at issue." (Opn. 5.) As this court has stated, at this stage of the *Batson/Wheeler* inquiry, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) In making that determination, "'[t]he trial court has a duty to determine the credibility of the prosecutor's proffered explanations' [citation], and it should be suspicious when presented with reasons that are unsupported or otherwise implausible." (*People v. Silva* (2001) 25 Cal.4th 345, 385.)

As the Court of Appeal stated, after the trial court found that defense counsel had "made a prima facie showing," satisfying the first prong of the *Batson/Wheeler* test, the court asked the prosecutor to respond to "explain his reasons for excusing N.G." (Opn. 3.)

The prosecutor told the court that he believed that N.G. "'has very little life experience'" and "'seems very young'"; then he noted "'for the record, and this is unseenly [*sic*], [N.G.]is morbidly obese. Extremely obese.'" (Opn. 3.) The prosecutor explained: "'Generally, I have concern about people who are morbidly obese, how they might interact with other jurors, what motivates them. It's my own -- it's my own thing.'" (Opn. 3.) The prosecutor told the court that he was not challenging N.G. because she was African-American. (Opn. 3.)

The record demonstrates that the trial court made no serious inquiry of the prosecutor concerning his proffered reasons for excusing N.G. from the jury panel. (Opn. 3-4.) The Court of Appeal employed the deferential "substantial evidence" standard of review, relying on *People v. Lenix*, *supra*, 44 Cal.4th at p. 613. (Opn. 5.) This court did state in *Lenix*: "Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*Lenix*, at p. 613.) In the same paragraph, however, this court noted an important qualification: "'*So*

long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*Id.* at p. 614, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864, emphasis added; accord, *People v. Johnson* (2015) 61 Cal.4th 734, 755.)

The Court of Appeal quoted the *Burgener* passage as well and acknowledged that the trial court "did not make explicit findings regarding the prosecutor's stated reasons for striking N.G." (Opn. 5.) The trial court did not have to make such findings, according to the Court of Appeal, because Mr. Soto "has not demonstrated that the prosecutor's explanation was implausible or unsupported by the record such that more detailed findings by the trial court were required." (Opn. 6.)

Mr. Soto explained to the Court of Appeal, and will reiterate below, the reasons why the prosecutor's explanation *was* implausible and, in part, unsupported by the record. But even if it were not, the trial court's ruling—"I do not find that the evidence and arguments supports a conclusion that there has to be purposeful discrimination in exercising the challenge against [N.G.]; therefore, the Wheeler/Batson challenge is denied" (Aug. RT 182)—was

inadequate to satisfy the constitutional prohibitions against racial discrimination in jury selection.[4]

Once a *Batson/Wheeler* proceeding reaches the third stage, the trial court is required to make a record which allows an appellate court to discern "that 1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (*People v. Lenix, supra*, 44 Cal.4th at p. 625.) One cannot reasonably discern those things from the trial court's terse ruling.

"Although a judge considering a *Batson* challenge is not required to comment explicitly on every piece of evidence in the record, some engagement with the evidence considered is necessary as part of step three of the *Batson* inquiry." (*Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 289; see also *United States v. McMillon* (4th Cir. 1994) 14 F.3d 948, 953, fn. 4 [if court determines in second step that prosecutor's stated reasons are race-neutral, "the court then

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[4] "Aug. RT" refers to the augmented reporter's transcript which was added to the record on appeal on March 3, 2016.

addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion."].) In the instant case, the record reflects no such engagement with, or addressing of, the evidence on the trial court's part.

The court did not, for example, follow up on defense counsel's statements that at least three jurors who were younger than N.G. went unchallenged by the prosecutor. (Aug. RT 181-182.) It should have done so. "Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised. [Citations.] The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason." (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1221.)

Nor did the court address the prosecutor's statement that he felt that N.G. "wasn't fully answering the questions." (Aug. RT 180.) The court did not ask the prosecutor what questions N.G. was not "fully answering"; the court asked the prosecutor nothing at all. Just as concerning is the trial court's failure to address what defense counsel properly characterized as a "suspicious reason" relating to N.G.'s apparent obesity. (Aug. RT 182.) The prosecutor's

stated reason that he had a "concern about people who are morbidly obese, how they might interact with other jurors, what motivates them" (Aug. RT 180) warranted an inquiry by the court, yet none was forthcoming. "Trial courts fail to engage in the required analysis when they "fail[] to examine all of the evidence to determine whether the State's proffered race-neutral explanations [a]re pretextual." (*Coombs v. Diguglielmo* (3d Cir. 2010) 616 F.3d 255, 262.)

The need for a trial court to evaluate the credibility of a prosecutor's race-neutral explanation in light of all the circumstances is especially great when, as here, the prosecutor offers reasons which (1) are contradicted by the record, or (2) which describe juror characteristics that seem unlikely to either hurt the prosecution or help the defendant, or (3) which apply equally to one or more white venire members (where the allegedly disfavored group is African-Americans, as here) whom the prosecutor has not challenged.

In *Snyder v. Louisiana* (2008) 552 U.S. 472, for example, a black defendant convicted of murder argued that the prosecution had exercised two of its peremptory challenges against particular prospective jurors because they, too, were black. (*Id.* at pp. 474-477.) As to the juror on whom the Supreme Court focused, Mr. Brooks, the prosecutor offered two race-neutral explanations: (1) that Brooks "'looked very nervous to me throughout the

questioning'" and (2) that Brooks, a college senior and student teacher, had said the trial would cause him to miss class, which made the prosecutor concerned that "'he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase.'" (*Id.* at p. 478.) "Defense counsel disputed both explanations, [citation], and the trial judge ruled as follows: 'All right. I'm going [to] allow the challenge. I'm going to allow the challenge,' [citation]." (*Id.* at p. 479.)

As to the prosecutor's first explanation, in light of the trial court's terse ruling, Justice Alito wrote for the seven justices in the majority that "we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." (*Snyder v. Louisiana, supra*, 552 U.S. at p. 479.) The court explained: "Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor." (*Ibid.*)

Regarding the second explanation, the Supreme Court set out what happened after Brooks expressed concern about missing school: the trial court learned, and conveyed to Brooks, that his college dean did not think the jury service would cause any problem and would work with Brooks on it. (*Snyder v. Louisiana, supra*, 552 U.S. at pp. 480-481.) Brooks expressed no further

concern, but the next day, the prosecutor struck him. (*Id.* at p. 481.) Considering those facts along with the brevity of the trial (the guilt and penalty phases were complete two days after Brooks was struck from the jury), which was anticipated during voir dire, and the fact that trying to shorten the trial by convicting on a lesser offense could not work unless other jurors also favored the lesser offense, the high court concluded that "the prosecutor's second proffered justification for striking Mr. Brooks is suspicious." (*Id.* at pp. 482-483.)

The Supreme Court added that "[t]he implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'." (*Snyder v. Louisiana, supra*, 552 U.S. at p. 483.) For example, it was "hard to see why the prosecution would not have had at least as much concern regarding Mr. Laws," a white juror who had demanding family and business obligations which "seem substantially more pressing than Mr. Brooks'"; however, the prosecutor had declined to exercise a peremptory strike against Mr. Laws. (*Id.* at pp. 483-484.) The court concluded that the prosecution had offered a "pretextual explanation" which "naturally gives rise to an inference of discriminatory intent." (*Id.* at p. 485.)

The *Snyder* court then turned back to the prosecutor's first explanation, and in light of all the circumstances, "including absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous," the Supreme Court held that "the record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone." (*Snyder v. Louisiana, supra*, 552 U.S. at p. 485.) The court reversed the Louisiana Supreme Court's judgment affirming the conviction, noting the absence of any "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after" the trial. (*Id.* at p. 486.)

The age-related aspects of the prosecutor's peremptory challenge of N.G. in the instant case resemble a very recent United States Supreme Court decision, *Foster v. Chatman* (2016) ___ U.S. ___ [136 S.Ct. 1737], which held (by a seven-to-one vote, with Chief Justice Roberts writing for the majority) that the race-neutral reasons given by Georgia prosecutors for challenging two black jurors in a murder trial were pretexts and that the true reason for exercising peremptory challenges against them was their race. (*Id.* at pp. 1742, 1747, 1755.)

One of the 11 reasons the prosecution in *Foster* offered for striking one of those jurors, Marilyn Garrett, was that she was too young. (*Foster v.*

Chatman, supra, 136 S.Ct. at p. 1750.) "Yet Garrett was 34, and the State declined to strike eight white prospective jurors under the age of 36. [Citations.] Two of those white jurors served on the jury; one of those two was only 21 years old." (*Id.* at pp. 1750-1751.) The Supreme Court stated that the prosecution's supposed concerns with Ms. Garrett's being young and being divorced were "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror." (*Id.* at p. 1751.)

The record in the instant case does not show the ages of N.G. or any of the other venire members. The prosecutor did not dispute defense counsel's assertion that several of the venire members whom the prosecutor had not challenged were younger than N.G.. More importantly, the trial court never stated whether it concluded that N.G.'s youth and the other race-neutral reasons offered by the prosecutor were the true reasons for her exclusion.

The second reason offered by the prosecutor for the contested challenge in the instant case—that N.G. was "morbidly obese" (Aug. RT 180)—is the kind of reason that justifiably raises suspicion, because weight seems to have nothing to do with either a person's ability to serve effectively as a juror or the likelihood that the person would convict or acquit a criminal defendant. The Court of Appeal noted that the prosecutor characterized this reason "as

unseemly," but it rejected completely Mr. Soto's challenge to this reason as "a suspicious justification," characterizing it as being "supported by the record and not inherently implausible." (Opn. 8.)

Mr. Soto's trial counsel was correct when he observed that "it seems like a suspicious reason." (Aug. RT 182.) As the Second Circuit Court of Appeals asked: "Which side is favored by skinny jurors?" (*Dolphy v. Mantello* (2d Cir. 2009) 552 F.3d 236, 239.) In *Dolphy*, "the prosecution used a peremptory challenge to strike the only African-American in the jury pool. Dolphy, who is African-American, objected through counsel on *Batson* grounds. The explanation given by the prosecution was that the juror was obese. The trial judge denied the *Batson* objection on the ground: 'I'm satisfied that is a race neutral explanation.'" (*Dolphy*, at p. 237.) On federal habeas review, the appellate court held that the state trial court had not fulfilled its duty to make clear whether it believed the prosecutor's race-neutral explanation for the strike, "especially since (i) the judge's words suggested that the proffer of a race-neutral explanation was itself enough," which it was not, "and (ii) the explanation given here lends itself to pretext." (*Id.* at p. 239.)

In the case at bar, the trial court failed to exercise its responsibility to determine the credibility of the prosecutor's proffered race-neutral reasons for dismissing N.G. from the jury. The trial court had a duty to address defense

counsel's statements that there were other overweight prospective jurors and at least three jurors who were younger than N.G., none of whom were challenged by the prosecutor, yet the trial court failed to do so. (Opn. 4.) Likewise, the court should have specifically addressed prosecutor's assertion that he felt that N.G. "'wasn't fully answering the questions.'" (Opn. 3.) Merely stating that it found that "'the evidence and arguments [did not support] a conclusion that there has to be purposeful discrimination in exercising the challenge'" against N.G. (Opn. 4) was not enough.

A meaningful inquiry of the prosecutor and scrutiny of the prosecutor's reasons by the trial court was required. The Court of Appeal erred when it held that "the record adequately supports the prosecutor's explanation of the race-neutral reasons that collectively led him to exercise a peremptory challenge against N.G." (Opn. 9.) This court should grant Writ to address whether such a cursory trial court ruling on the third stage of a *Batson/Wheeler* motion (1) is entitled to deferential review by an appellate court and (2) ultimately passes constitutional muster.

Rose V. Mitchell, 443 U.S. 545,556 (1979); Ballard V. United States, 329 U.S. 187,195 (1946).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Fidel Alcantar Soto
In Pro Se
Date: June 14, 2024