APPENDIX "A"

Opinion and Order filed August 8, 2023 (N.D. Okla.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALONZO CORTEZ JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 16-CV-433-TCK-CDL**
	)	
WILLIAM "CHRIS" RANKINS, Warden,[1]	)	
	)	
Respondent.	)	

OPINION AND ORDER

The United States Court of Appeals for the Tenth Circuit remanded this case for further proceedings as to Petitioner Alonzo Cortez Johnson's claim that he is in state custody in violation of the United States Constitution because the prosecution violated the Fourteenth Amendment's Equal Protection Clause, as interpreted in *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising peremptory strikes in a racially discriminatory manner to excuse prospective jurors. *Johnson v. Martin*, 3 F.4th 1210, 1217, 1225, 1235-36 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1189, 212 L. Ed. 2d 55 (2022), and *cert. denied*, 142 S. Ct. 1350, 212 L. Ed. 2d 55 (2022). For the reasons discussed below, the Court concludes that it would be impossible and unsatisfactory to hold a meaningful *Batson* reconstruction hearing. The Court therefore conditionally grants Johnson's petition for writ of habeas corpus as to the *Batson* claim and directs Respondent to release Johnson from state custody unless the State grants Johnson a new trial within 120 days from the entry of this Opinion and Order.

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[1] Johnson presently is incarcerated at the Great Plains Correctional Center (GPCC) in Hinton, Oklahoma. Dkt. 70, at 7. The Court therefore substitutes the GPCC's acting warden, William "Chris" Rankins in place of Rick Whitten as party Respondent. Rule 2(a), *Rules Governing Section 2254 Cases in the United States District Courts*. The Clerk of Court shall note this substitution on the record.

I. Background

More than a decade ago, a Tulsa County jury convicted Johnson of first-degree murder and conspiracy to commit murder for his role in a murder-for-hire plot that resulted in the killing of Neal Sweeney, a prominent Tulsa business man. *Johnson*, 3 F.4th at 1217; Dkt. 8, at 10-12; Dkt. 12, at 4-9.[2] Johnson's case proceeded to trial in 2012, and the jury found him guilty of first-degree murder and conspiracy to commit murder and recommended a life sentence for each conviction. *Id.* at 8. The trial court sentenced Johnson accordingly and ordered that he serve the life sentences consecutively. *Id.* The Oklahoma Court of Criminal Appeals (OCCA) affirmed Johnson's judgment and sentence in 2014. *Id.* at 9. Two years later, the OCCA affirmed the state district court's denial of Johnson's application for postconviction relief. *Id.*

Johnson then filed a petition for writ of habeas corpus, under 28 U.S.C. § 2254, asserting seven claims: (1) a *Batson* claim; (2) a Confrontation Clause claim challenging the admission of recorded statements; (3) a due process claim challenging the sufficiency of the evidence; (4) a due process claim challenging the admission of gruesome photographs and testimony; (5) a due process claim alleging juror misconduct; (6) a claim that the trial court's evidentiary rulings violated his constitutional right to present a defense; and (7) a due process claim alleging that cumulative errors rendered the trial fundamentally unfair. Dkt. 1; Dkt. 8, at 2-4. In 2019, this Court denied Johnson's petition for writ of habeas corpus as to all seven claims, entered judgment in Respondent's favor, and declined to issue a certificate of appealability. Dkts. 23, 24.

Johnson appealed, and the Tenth Circuit granted a certificate of appealability to consider four of his claims: (1) the *Batson* claim; (2) the gruesome-evidence claim; (3) the juror-misconduct claim; and (4) the cumulative-error claim. *Johnson*, 3 F.4th at 1217. The Tenth Circuit affirmed

[2] Unless otherwise noted, the Court's citations refer to the CM/ECF header pagination.

the denial of habeas relief as to the latter three claims, reversed the denial of habeas relief as to the *Batson* claim, and remanded for further proceedings as to the *Batson* claim. *Id.* at 1235-36.

II. Discussion

Johnson's sole remaining claim is that the prosecution violated the Fourteenth Amendment, as interpreted in *Batson*, by exercising five of six peremptory strikes in a racially discriminatory manner to excuse minority prospective jurors. But the threshold question for this Court is whether the passage of time since Johnson's 2012 trial or any other circumstances make it either impossible or unsatisfactory to conduct a meaningful evidentiary hearing on Johnson's *Batson* claim. *Johnson*, 3 F.4th at 1210. The Court's consideration of this question proceeds in four parts. First, the Court discusses the legal framework for assessing a *Batson* claim. Second, the Court discusses Johnson's claim as it was raised and ruled upon at trial. Third, the Court discusses the OCCA's rejection of the *Batson* claim, this Court's denial of habeas relief as to that claim, and the Tenth Circuit's reversal and remand for further proceedings as to that claim. Fourth, and finally, the Court discusses the feasibility of holding a *Batson* hearing in this case over a decade after Johnson's trial.

A. Legal framework

"*Batson* held that the 'Equal Protection Clause prohibits the prosecution's use of peremptory challenges to exclude potential jurors on the basis of their race.'" *Johnson*, 3 F.4th at 1219 (quoting *Saiz v. Ortiz*, 392 F.3d 1166, 1171 (10th Cir. 2004)). *Batson* established a three-step, burden-shifting framework for trial courts to consider a claim that a prosecutor has used peremptory challenges in a racially discriminatory manner. *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003).

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made,

> the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Id. at 328-29 (internal citations omitted). At the second step, the proffered nondiscriminatory reason need not be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Rather, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)). At the third step, "the persuasiveness of the justification becomes relevant" because the third step requires the trial court to assess whether the opponent of the strike has met his or her burden to show purposeful discrimination. *Id. See also Purkett*, 514 U.S. at 768 (noting that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike").

Appellate courts considering a *Batson* claim apply this same framework and, like the trial court, must consider "all of the circumstances that bear upon the issue of racial animosity" in determining, at the third step, whether the opponent of the strike has shown purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). But an appellate court must give a trial court's factual "findings great deference" and sustain the trial court's "ruling on the issue of discriminatory intent . . . unless it is clearly erroneous." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019). This is so because trial courts play a "pivotal role" in discerning discriminatory intent at *Batson*'s third step—the step that requires the trial court to assess the credibility of the prosecutor's stated reasons for striking a prospective juror—based on the trial court's "firsthand observations" of the demeanor of both the prosecutor and the prospective juror who has been stricken. *Snyder*, 552 U.S. at 477; *see also Flowers*, 139 S. Ct. at 2243 ("[T]he job of enforcing *Batson* rests first and foremost with trial judges.").

Federal courts considering a *Batson* claim on habeas review also apply the three-step framework, but a federal habeas court reviewing a state court's factual findings and its ultimate decision regarding a *Batson* claim must view those findings and the state court's decision with even more deference than an appellate court. *See Collins*, 546 U.S. at 343-44 (Breyer, J., concurring) (discussing *Batson* and noting that "considerations of federalism require federal habeas courts to show yet further deference to state-court judgments"). A federal habeas court's review of a *Batson* claim is guided by 28 U.S.C. § 2254(d)(2)'s requirement that the state-court's factual determination must be unreasonable considering the evidence presented in state court and by 28 U.S.C. § 2254(e)(1)'s presumption that a state court's factual findings are presumed correct absent clear and convincing evidence to the contrary. *Grant v. Royal*, 886 F.3d 874, 949-50 (10th Cir. 2018).

B. Johnson's *Batson* challenge at trial

At trial, the State was represented by two prosecutors from the Tulsa County District Attorney's Office, Tim Harris and Doug Drummond, and Johnson was represented by defense attorney Mark Lyons. Dkt. 13-24, Tr. Trial vol. 1, at 10.[3] Tulsa County District Court Judge Tom Gillert, who is now retired, presided over Johnson's trial. Dkt. 66, at 9. According to Lyons, Johnson's trial "was racially charged from the beginning" because Johnson is African American, and he conspired with other minorities (three African Americans and one Pakistani) to murder a "prominent white man." Dkt. 67, at 15. During jury selection, Harris exercised the State's first six peremptory challenges in the following order: (1) Dr. Tawil, (2) Professor Dickens, (3) Ms. Aramburo de Wassom, (4) Ms. L. Wilson, (5) Ms. Carranza, and (6) Ms. Martinez. Dkt. 13-25,

[3] When citing original transcripts of state court proceedings, the Court refers to the CM/ECF header pagination followed by the original pagination, in brackets, if the original page number differs from the CM/ECF header pagination.

Tr. Trial vol. 2, at 179-82 [219-22].

After Harris used his second peremptory challenge to strike Professor Dickens, the trial court—without any *Batson* challenge from Johnson—immediately asked for a "race neutral reason." Dkt. 13-25, at 180 [220]. Drummond responded, "Judge, he has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people, Ph.D.'s in liberal arts, on the jury. We think they're too exacting at times, too liberal." *Id.* The trial court then stated, "Well, I'll determine there's a race neutral reason. There are other prospective African Americans on the jury." *Id.*

After Harris exercised the State's sixth peremptory challenge to excuse Ms. Martinez, Johnson raised a *Batson* challenge:

> MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. [Martinez], and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.[4]
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> THE COURT: Well, I don't think that this establishes a pattern. Again, in terms of - - Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently - - she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here. And we'll note your exception.

Id. at 181-82 [221-22]. Harris waived the State's seventh peremptory challenge then attempted to exercise its eighth challenge to excuse Ms. Williams. *Id.* at 182-83 [222-23]. This time, without any objection from Johnson or any request from the trial court for a race-neutral reason, Harris explained:

> MR. HARRIS: Judge, the State of Oklahoma would excuse Ms. Williams. I understand she's African American, but our race neutral reason for her is she's a

[4] In listing the five prospective jurors stricken by the State, Lyons twice referred to Ms. Carranza. In context, however, it appears Lyons intended to refer to Ms. Martinez the second time. Dkt. 13-25, at 181 [221].

> pastor. I think pastors traditionally are very, very forgiving, have trouble with judgment. She's worked with drug addicts and counseled them in the past showing the State of Oklahoma a propensity towards treatment rather than judgment. For those reasons - -
>
> THE COURT: Well, you would have effectively eliminated all the African Americans and I'm not going to do that.
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> MR. HARRIS: Okay.
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> THE COURT: So you can exercise some other challenge if you choose.

Dkt. 13-25, at 182-84 [223-24]. Harris then used his eighth peremptory challenge to excuse Ms. Nichols and waived the State's ninth peremptory challenge. *Id.* at 184 [224]. It appears there were three prospective jurors who could have served as alternate jurors: Ms. Sweet, Ms. Malsam, and Ms. Ismert. *Id.* at 184-86 [224-26]. Harris used a peremptory challenge to excuse Ms. Ismert. *Id.* at 185 [225]. Johnson did not raise a *Batson* challenge when Harris excused either Nichols or Ismert. *Id.* at 184-85 [224-25].

C. State appellate and federal habeas rulings on the *Batson* claim

Johnson raised a *Batson* claim on direct appeal, reasserting his view that the "prosecutor systematically removed minorities from the jury," and the OCCA rejected it. *Johnson*, 3 F.4th at 1220. The OCCA found no *Batson* violation, reasoning, in relevant part, (1) "that the trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented," and (2) that Johnson "ultimately failed to establish purposeful discrimination on the part of the State." Dkt. 12-4, at 3.[5] When Johnson reasserted his *Batson* claim in his federal habeas petition, this Court

[5] Johnson also raised his *Batson* claim in his application for postconviction relief, but the state district court and the OCCA concluded that consideration of that claim on postconviction review was barred by res judicata. *Johnson*, 3 F.4th at 1220.

reviewed that claim within the confines of § 2254(d)[6] and denied habeas relief. Dkt. 23, at 3-7.

The Tenth Circuit reversed this Court's decision as to the *Batson* claim. First, the Tenth Circuit concluded that this Court "erred by treating his *Batson* claim as aimed at the third step of *Batson*." *Johnson*, 3 F.4th at 1222-23. Next, the Tenth Circuit concluded that § 2254(d) did not bar habeas relief because the OCCA's decision was (1) based on an unreasonable determination of the facts and (2) involved an unreasonable application of *Batson*. *Id.* at 1223-25. As to the first point, the Tenth Circuit reasoned that the OCCA "expressly approved of the trial court's determination that the prosecutor's '*explanations* for excusing *each* of the minority jurors were legitimate race-neutral *reasons*," even though the "record plainly shows that the trial court only determined that *one* explanation offered by the prosecutor for excusing *one* minority juror [Dickens] was a legitimate race-neutral reason" before the trial court then offered "its *own* reasons for the strikes, speculating as to what the prosecutor's reasons might have been." *Id.* at 1223 (emphases in original). As to the second point, the Tenth Circuit reasoned, "to the extent that the OCCA considered the trial court's sua sponte speculation about potential race-neutral reasons as part of the *Batson* analysis, doing so was an unreasonable application of *Batson*" because *Batson*'s second step requires a trial court to "ask the prosecutor to provide reasons, rather than merely speculating about what such reasons might be." *Id.* at 1224.

Reviewing the *Batson* claim de novo, the Tenth Circuit determined, at *Batson*'s first step, that Johnson "made a prima facie showing of racial discrimination" based on the prosecution's

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[6] Section 2254(d) imposes preconditions to federal habeas relief. *Fry v. Pliler*, 551 U.S. 112, 119 (2007). Specifically, a federal court "shall not" grant habeas relief as to a federal claim that was adjudicated on the merits in state court unless the petitioner first shows that the state court's adjudication of that claim resulted in a decision that either "(1) was contrary to, or involved an unreasonable application of, clearly established Federal law, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Hancock v. Trammell*, 798 F.3d 1002, 1010 (10th Cir. 2015).

"clear pattern of strikes against five of six minority jurors." *Id.* at 1225-27. In making that determination, the Tenth Circuit rejected the State's contention "that there is no inference of discrimination here because Johnson 'did not even make a record as to the races' of each of the jurors at issue," noted that "neither the trial court nor the prosecutor objected to defense counsel's representation that the prosecutor had used five of six strikes against minorities," and concluded that "the absence of a record as to the specific racial makeup of the five minority jurors is not fatal to Johnson's prima facie case of discrimination." *Id.* Ultimately, the Tenth Circuit concluded that the trial court erred at *Batson*'s second step because instead of asking the prosecution to provide race-neutral reasons for each strike, the trial court "rel[ied] instead on its own speculation as to what might have been the prosecutor's reasons." *Id.* at 1227 (alteration added) (quoting *Paulino v. Castro*, 371 F.3d 1083, 1092 (9th Cir. 2004)).

But the Tenth Circuit further concluded that the trial court's error did "not automatically entitle Johnson to habeas relief" because "the State has never presented evidence of the prosecutor's actual, nondiscriminatory reasons for striking the five minority jurors." *Id.* The Tenth Circuit thus determined that the appropriate remedy was to remand the case for a "*Batson* reconstruction hearing." *Id.* "A *Batson* reconstruction hearing is 'an evidentiary hearing that takes place some[]time after the trial, where the prosecutor testifies to [his or] her actual reasons for striking the venire[]members in question, or the State presents circumstantial evidence of those reasons.'" *Id.* (alterations in original) (quoting *Paulino v. Harrison*, 542 F.3d 692, 700 (9th Cir. 2008)). However, the Tenth Circuit expressly stated that "[b]efore conducting such a hearing, [this Court] should consider whether the passage of over eight years since Johnson's trial or any other circumstances have made such an inquiry 'impossible or unsatisfactory.'" *Id.* (quoting *Jordan v. Lefevre*, 206 F.3d 196, 202 (2d Cir. 2000)). The Tenth Circuit instructed that if this Court

"concludes that a *Batson* reconstruction hearing is impossible or unsatisfactory, it must grant habeas relief in the form of an order that Johnson be released from custody unless the State grants him a new trial within 120 days from the entry of the district court's order." *Id.*

D. Feasibility of a *Batson* reconstruction hearing

While the Tenth Circuit did not elaborate on the criteria for determining whether a *Batson* reconstruction hearing would be impossible or unsatisfactory, the propriety of holding such a hearing is within the discretion of this Court. *Jordan*, 206 F.3d at 202. After the Tenth Circuit issued its mandate, this Court directed the parties to brief the issues that must be addressed on remand. Dkt. 48. On consideration of those briefs (Dkts. 49, 50), the Court determined that it was necessary to expand the record so that this Court could adequately assess whether it would be possible or satisfactory to reconstruct a *Batson* hearing. The Court thus directed the parties to engage in discovery and develop a record that would be sufficient for this Court to make that assessment. *Id.* After the close of discovery, each party submitted a post-discovery brief, along with supporting exhibits. Dkts. 66, 67.[7] The parties strongly disagree as to whether the passage of time or any other circumstances render it impossible or unsatisfactory to reconstruct a *Batson* hearing.

Johnson objects to a reconstruction hearing on three grounds. First, he contends a hearing would be unsatisfactory because the State has forfeited or waived its right to a *Batson* hearing. Dkt. 67, at 11-13. Specifically, Johnson contends that "[a]llowing the State to manufacture *post*

[7] Respondent's exhibits include an affidavit from an agent with the Oklahoma Attorney General's office, the prosecutors' contemporaneous notes from jury selection, documentary evidence establishing the racial makeup of all 33 members of the jury pool, and transcripts of the depositions of both prosecutors who represented the State at trial, Johnson's trial counsel, and the trial judge. Dkts. 66-1 through 66-6. Johnson also submitted the transcripts of the same four depositions. Dkts. 67-1 through 67-4.

hoc reasons for its racially discriminatory strikes over eleven years after the fact seems fundamentally unfair to Johnson." *Id.* at 12. Second, he contends the Supreme Court has never "recognized that [a] 'reconstruction hearing' is a legitimate legal mode of analysis to salvage a *Batson* claim when an error is found at any of the three steps" and that the Supreme Court has been critical of federal courts that rely on a prosecutor's "after-the-fact explanations for strikes" in assessing *Batson* claims. *See id.* at 14 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), for the proposition that the validity of a challenged strike "must 'stand or fall' on the plausibility of the explanation given for it at the time"). Third, he contends that even if Supreme Court precedent permits *Batson* reconstruction hearings, the depositions submitted by both parties demonstrate testimony that a *Batson* hearing "cannot be reconstructed under the facts and circumstances of this case." *Id.* at 15, 21-25.

Respondent counters that a reconstruction hearing is "undeniably feasible" in this case. Dkt. 66, at 41. Respondent contends the evidence that "was unearthed during discovery" shows that, despite the passage of time, Respondent would be able to (1) present direct evidence of the prosecution's actual reasons for exercising the State's peremptory challenges through Harris's testimony, (2) present circumstantial evidence of those reasons through contemporaneous notes created by both prosecutors regarding jury selection and testimony from Drummond and Judge Gillert, and (3) establish the racial and ethnic makeup of the jury pool. *Id.* at 34-40.

Having carefully considered the transcripts of voir dire, the parties' post-discovery briefs and supporting exhibits, and applicable law, the Court concludes that it would be both impossible and unsatisfactory to reconstruct a meaningful *Batson* hearing in this case. As previously discussed, the Tenth Circuit determined that Johnson made a prima facie showing that a pattern of discrimination existed based on the prosecution's decisions to strike five prospective jurors:

(1) Dr. Tawil, who self-identifies as white, was born in Syria, speaks Arabic as his first language, and speaks English fluently; (2) Professor Dickens, who self-identifies as African American, speaks English as his first language, and speaks Spanish proficiently; (3) Ms. Aramburo de Wassom, who is identified on her driver's license as white, self-identifies as Mexican, speaks Spanish as her first language, and had been speaking English for 15 years at the time of trial; (4) Ms. Carranza, who is identified as white on her driver's license and, according to the transcript from voir dire, speaks English as a second language; and (5) Ms. Martinez, who self-identifies as white and speaks English as her first language. Dkt. 66-1, at 2-3, 5-6; Dkt. 13-25, at 12 [52].[8] Any reconstruction hearing would therefore require this Court to focus, at step two, on ascertaining the State's proffered reasons for excusing these five jurors, and, at step three, on determining whether, under all relevant circumstances, those reasons are either plausible or pretext for purposeful discrimination. *Id.* at 1227-28.

Arguably, it would not be impossible or unsatisfactory to reconstruct that portion of a *Batson* hearing that pertains to step two. At trial, the prosecution provided a reason for striking one of these five jurors: Professor Dickens. *Johnson*, 3 F.4th at 1219. Drummond explained that the prosecution was "concerned about [Dickens] being a Professor of Liberal Arts" and that, generally, the prosecution "does not keep those type of educated people," i.e., those who have Ph.D.s in Liberal Arts, on the jury. *Id.* Through his sworn deposition testimony, Harris provided

[8] An agent with the Oklahoma Attorney General's office obtained driver's license information for all members of the jury pool and contacted all members of the jury pool to ascertain their self-identified races and/or ethnicities and their languages but was unable to contact Ms. Carranza. Dkt. 66-1, at 1. Twenty-nine prospective jurors were white; three were black or African American; and one was American Indian. *Id.* at 1-6. It does not appear, either from the original or the expanded record, that Ms. Martinez identifies herself as anything other than white. However, at trial the State did not object when Johnson identified Martinez as a minority and the Tenth Circuit considered Martinez a minority at *Batson*'s step one. *Johnson*, 3 F.4th at 1220 n.6.

additional reasons for striking Dickens[9] and provided reasons for excusing the four remaining minority jurors. Dkt. 66-5. Respondent also provided this Court with contemporaneous notes both prosecutors made during jury selection and documentary evidence regarding the races of all 33 members of the jury pool, and in some instances, the ethnicities of prospective jurors.[10] Dkts. 66-1, 66-2. As Respondent contends, these exemplify the types of evidence that courts may consider when attempting to reconstruct a *Batson* hearing. *See* Dkt. 66, at 30-32 (citing cases).

But it would be both impossible and unsatisfactory to reconstruct that portion of a *Batson* hearing that pertains to *Batson*'s third step. Even assuming without deciding that Harris's stated reasons for striking each minority juror subject to the *Batson* challenge are his actual reasons for the strikes—i.e., that those proffered reasons are untainted by Harris's thorough review of transcripts of voir dire[11]—this Court cannot sufficiently reconstruct all relevant circumstances in a way that would permit this Court to meaningfully apply *Batson*'s third step. At that step, this Court would be obligated to decide, based on all "relevant circumstances that bear upon the issue

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[9] Harris testified that, after preparing for his deposition, he remembered additional reasons for striking Dickens. Specifically, he testified that "[Dickens] also said that he likes to use his communication ability teaching to help college students find their way, their way in life. And I looked at that and said, you know what, that's tantamount to doing social work. Very admirable, okay, but not necessarily what I wanted in a juror." Dkt. 66-5, at 18. Harris further recalled that he was concerned when defense counsel asked if Dickens "recognize[d] the difference between not guilty and innocent" and Dickens, an English professor, responded, "absolutely." *Id.* Harris explained that this response was concerning because, in Harris's view, "most people would struggle with the difference between innocent and not guilty." *Id.*

[10] Twenty-nine prospective jurors were white; three were black or African American; and one was American Indian. *Id.* at 1-6.

[11] Harris testified that he "probably, from beginning to end, went over [the transcripts of voir dire] three full times" and that "for some of the individuals highlighted in this appeal, spent extra time looking at their responses to [his] questions and Mr. Lyons' questions, making notes of pages in the transcript that [he] thought supported [his] position of race neutral strikes." Dkt. 66-5, at 8.

of racial discrimination," *Flowers*, 139 S. Ct. at 2243, whether Johnson has met his "ultimate burden of showing purposeful discrimination," *Johnson*, 3 F.4th at 1228. However, the Court in this case must attempt to reconstruct those circumstances as they existed at the time the *Batson* challenge was made—more than ten years ago. Moreover, the Court must assess the real intent for the peremptory strikes, and Johnson—who carries the burden of persuasion at each step—should be permitted to offer evidence to rebut the stated reasons for excusing minority jurors. *See Hardcastle v. Horn*, 368 F.3d 246, 259-60 (3d Cir. 2004) (explaining that after prosecutor asserts race-neutral reasons for peremptory challenges, defendant raising *Batson* challenge "should be afforded the opportunity to show any weaknesses he may find with the justifications for the strikes"). Critically though, Harris's stated reasons for striking two prospective jurors, rely, in part, on circumstances that cannot be reconstructed. For example, Harris testified that he primarily excused Dr. Tawil based on Harris's perception that comments between Tawil and Dr. V. Wilson regarding whether they knew each other while both attended medical school at Wake Forest signaled to Harris that there might be "trouble in paradise" between these two prospective jurors. Dkt. 66-5, at 17.[12] Harris also cited his "visual observation" of Dr. Tawil's "facial expression" in response to a question from Johnson's attorney and explained that Tawil's expression led Harris to believe that Tawil was prejudging the evidence in Johnson's favor and did not "like the State." *Id.* Similarly, Harris testified that he exercised the State's sixth peremptory challenge against Ms.

[12] When Respondent's counsel asked Harris to explain his reasons for exercising the State's fourth peremptory challenge against Ms. L. Wilson, Harris testified he could "definitely" remember his reason as "the Wilson/Tawil combo" and explained that his "impression of her is she was upset with the fact that Dr. Tawil did not recognize her as his attending physician" and her "employment at St. John Hospital" and the possibility that she might know Harris's wife, who is also a doctor at St. John Hospital. Dkt. 66-5, at 19. Respondent's counsel clarified that she had asked about the strike against Ms. L. Wilson, not Dr. V. Wilson, the latter of whom was part of the "Tawil/Wilson combo" and was excused by Johnson, not the State. *Id.*

Martinez because she had previously been called for jury duty, had served as a juror one time, and, in his view, her "attitude from the get-go" and her "tone" "telegraphed" to Harris that Martinez did not want to serve on the jury. Dkt. 66-5, at 20-21. Harris also testified that, "other times in the trial, [Martinez] wasn't even paying attention to some of the other stuff that was going on" leading Harris to think, "okay, you have to get involved in this." *Id.* These "[d]emeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination." *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012); *cf. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2190-91 (June 29, 2023) (Thomas, J., concurring) (recognizing that is "error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination" and explaining that "judicial skepticism is vital" because "[h]istory has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct"). And the circumstances for assessing the plausibility of these demeanor-based explanations for a strike are particularly impossible to reconstruct at an evidentiary hearing that takes place over ten years

after the trial.[13] Regardless of how credible this Court might find Harris's hearing testimony about his memory of the facial expressions or attitudes of prospective jurors who were stricken over ten years ago, this Court's firsthand observation of Harris's responses to questions from counsel on direct and cross-examination at a hearing over a decade after the trial is no fair substitute for the trial court's "firsthand observations" of both (1) Harris's demeanor at trial as he explained (or in this case should have explained) in real time why he was striking a prospective juror and (2) the prospective juror's demeanor. *See Snyder*, 552 U.S. at 477 ("[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's firsthand observations of even greater importance"); *Hernandez*, 500 U.S. at 365 (stating that the "evaluation of the prosecutor's state of mind based on demeanor and credibility

[13] To be fair, when the trial judge improperly supplied the State's reason for dismissing Ms. Martinez, the trial court stated that Martinez was "hardly involved in the process." *Johnson*, 3 F.4th at 1222. On one hand, the trial court's comment could be viewed as evidence from 2012 that supports Harris's reason for excusing Martinez that he first identified in 2023. On the other hand, given the passage of time since the trial and Harris's testimony that he extensively reviewed trial transcripts to prepare for his deposition, the trial court's comment could be viewed as creating the basis for Harris's memory of his reason for striking Martinez. *See* Dkt. 66-5, at 8 (Harris testifying that he "probably, from beginning to end, went over [the transcripts of voir dire] three full times" and that "for some of the individuals highlighted in this appeal, spent extra time looking at their responses to my questions and Mr. Lyons' questions, making notes of pages in the transcript that I thought supported my position of race neutral strikes"); *Sanchez v. Roden*, 808 F.3d 85, 93 (1st Cir. 2015) (Thompson, J., concurring) (noting that "[w]hen defense counsel first raised a *Batson* challenge in state court way back in September of 2006, the trial judge was ready with an immediate (and inappropriate) response" and that "it should come as no surprise that nearly eight years later, when finally called upon to explain why he struck that particular juror, the prosecutor seized upon the juror's 'youth'" and "[i]n doing so, the prosecutor did nothing more than parrot back the trial judge's unprompted suggestion"). This provides a prime example of why it is both impossible and unsatisfactory to reconstruct a *Batson* hearing in this case.

lies peculiarly within a trial judge's province").[14] Put simply, it would both impossible and unsatisfactory to reconstruct a *Batson* hearing in this case because this Court can neither reasonably expect Johnson to "show any weaknesses" in Harris's demeanor-based justifications for striking at least two minority jurors nor meaningfully assess whether these same justifications are plausible "in light of all of the relevant facts and circumstances" or, instead, are merely pretext for purposeful discrimination. *Flowers*, 139 S. Ct. at 2243.

III. Conclusion

For the reasons stated, the Court concludes it would be both impossible and unsatisfactory to reconstruct a *Batson* hearing in this case. As directed by the Tenth Circuit, the Court therefore conditionally grants Johnson's petition for writ of habeas as to the *Batson* claim and directs Respondent to release Johnson from state custody unless the State grants him a new trial within 120 days from the entry of this Opinion and Order. *Johnson*, 3 F.4th at 1227.

IT IS THEREFORE ORDERED that Johnson's petition for writ of habeas corpus (Dkt. 1) is **conditionally granted** as to the *Batson* claim asserted in ground one.

IT IS FURTHER ORDERED that Respondent shall release Johnson from state custody unless the State grants Johnson a new trial within 120 days from the entry of this Opinion and Order.

[14] Notably, Johnson's trial attorney, Mark Lyons testified through his deposition that he raised a *Batson* challenge at trial because the prosecutors made a "series of peremptory strikes on jurors that were all minorities" and that he felt it "was obvious" from the "atmosphere in the courtroom" and the "demeanor of the assistant district attorneys" that the strikes were purposeful and discriminatory. Dkt. 67-1, at 25. Again, in an ordinary case, courtroom atmosphere and the demeanor of the prosecutors would be highly relevant to a trial court's evaluation of purposeful discrimination at *Batson*'s third step. But it would be difficult, if not impossible for this Court to fairly reconstruct these circumstances in this case through a decades-later evidentiary hearing.

IT IS FURTHER ORDERED that Respondent shall file a status report no later than 30 days after the entry of this Opinion and Order, and every 30 days thereafter, until the 120-day period expires or the State complies with the conditional grant of relief, whichever occurs first. Respondent shall file a notice of compliance no later than 14 days after the State complies with the conditional grant of relief.

IT IS FURTHER ORDERED that the Clerk of Court shall note the substitution of William "Chris" Rankins, Acting Warden, in place of Rick Whitten as party Respondent.

IT IS FURTHER ORDERED that a separate judgment shall be filed in this matter.

DATED this 8th of August 2023.

TERENCE C. KERN
United States District Judge

APPENDIX "B"

Tenth Circuit Opinion filed June 11, 2024

FILED
United States Court of Appeals
Tenth Circuit

June 11, 2024

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON, Petitioner - Appellee, v. WILLIAM "CHRIS" RANKINS, Respondent - Appellant.	No. 23-5095 (D.C. No. 4:16-CV-00433-TCK-CDL) (N.D. Okla.)

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:16-CV-00433-TCK-CDL)

Tessa L. Henry, Assistant Attorney General (Gentner F. Drummond, Attorney General, with her on the brief), Oklahoma Office of the Attorney General, Oklahoma City, OK, for the Respondent - Appellant.

James L. Hankins, Law Office of James L. Hankins, Edmond, OK, for the Petitioner - Appellee.

Before **PHILLIPS**, **MORITZ**, and **EID**, Circuit Judges.

PHILLIPS, Circuit Judge.

In 2021, a panel of this court reviewed state prisoner Alonzo Cortez Johnson's petition for federal habeas relief under 28 U.S.C. § 2254. *Johnson v. Martin*, 3 F.4th 1210, 1216 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1350

(2022). Johnson (a Black man) asserted that he was being held in violation of his constitutional rights because the state court had failed to follow the appropriate procedural steps under *Batson v. Kentucky*, 476 U.S. 79 (1986). We reviewed Johnson's *Batson* claim de novo and agreed that the state court had bungled *Batson*'s procedural framework after Johnson alleged that the prosecutor had exercised peremptory strikes based on race. *Johnson*, 3 F.4th at 1225–27. To remedy this error, we remanded the case with instruction for the district court to hold a *Batson* reconstruction hearing if doing so would not be impossible or unsatisfactory. *Id.* at 1227. Otherwise, we ordered the court to grant Johnson conditional habeas relief, unless the state granted him a new trial within 120 days. *Id.*

On remand, the district court granted Johnson conditional habeas relief because it decided that holding a *Batson* reconstruction hearing would be "both impossible and unsatisfactory." *Johnson v. Rankins*, — F. Supp. 3d. —, 2023 WL 5055491, at *6 (N.D. Okla. Aug. 8, 2023). That is the decision on review: Did the district court abuse its discretion in assessing that a *Batson* reconstruction hearing would be "impossible or unsatisfactory" in this case? We conclude that, yes, this was an abuse of discretion, and so we reverse and remand to the district court to hold a *Batson* reconstruction hearing.

BACKGROUND

Johnson was convicted of first-degree murder and conspiracy to commit first-degree murder in Oklahoma state court. Those facts are laid out in this

court's prior opinion. *See Johnson*, 3 F.4th at 1217. After his conviction, Johnson exhausted his state remedies for postconviction relief to no avail. He next sought federal habeas relief from the district court under § 2254. The district court denied Johnson's § 2254 petition and his request for a certificate of appealability (COA). Johnson then sought a COA from this court, which we granted in part. 28 U.S.C. § 2253(c)(1)(A). The partially granted COA allowed Johnson to appeal the district court's denial of his *Batson* claim.[1]

We reviewed Johnson's *Batson* claim under the confines of the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA erects a procedural hurdle that a state prisoner must clear before a federal court may resolve his claim on the merits. 28 U.S.C. § 2254(d). Johnson had to show either that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or that the state court had made "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* Johnson showed that the Oklahoma Court of Criminal Appeals (OCCA) had failed in both respects.[2]

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[1] The COA was also granted for Johnson's claims alleging the unfair introduction of gruesome evidence at trial, juror misconduct, and cumulative error. Those issues were resolved in this court's previous opinion. *Johnson v. Martin*, 3 F.4th 1210, 1228–36 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022).

[2] First, the OCCA relied on an unreasonable factual determination by "purport[ing] to approve the trial court's acceptance of the prosecutor's multiple race-neutral reasons for his strikes," when in fact "the trial court

(*footnote continued*)

Johnson, 3 F.4th at 1224–25. Because the OCCA proceedings resulted in "an unreasonable application of *Batson*" and an "unreasonable factual determination to reject Johnson's *Batson* challenge," we proceeded to review de novo Johnson's *Batson* claim. *Id.*

Batson establishes a tripartite burden-shifting framework for courts to detect racial discrimination in the exercise of peremptory challenges. 476 U.S. at 96–98. First, the defendant bears the burden to make a prima facie case that prospective jurors have been excluded based on their race. *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019); *see Johnson v. California*, 545 U.S. 162, 168 (2005) (stating that a prima facie case is established "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" (citation omitted)). Second, if that showing is made, the burden shifts to the prosecution to provide a race-neutral reason for the objected-to strike(s). *Flowers*, 588 U.S. at 298. Third, the court "determine[s] whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Id.*

Johnson's habeas petition alleged that the trial court had erred at *Batson*'s second step: the trial judge never prompted the state to give race-neutral justifications for six peremptory strikes that Johnson challenged. During

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accepted only one such reason . . . and merely speculated as to the other[s]." *Johnson*, 3 F.4th at 1224. Second, "the OCCA's reliance on the trial court's sua sponte speculation about the prosecutor's reasons was an unreasonable application of *Batson*." *Id.* at 1225.

voir dire, Johnson asserted a *Batson* challenge after the state's sixth peremptory strike. Of the state's previous five strikes—excluding prospective jurors Tawil, Dickens, de Wassom, Wilson, and Carranza—Johnson perceived that four were minorities. Johnson calculated that those strikes, plus the sixth strike against prospective juror Martinez (another perceived minority), created "a pattern . . . of striking all minorities off th[e] jury." App. vol. I, at 229. At that point, the trial judge jumped in. *Id.* Preemptively reading the *Batson* tea leaves, the trial judge stated that he saw no discriminatory pattern in the state's strikes because Martinez was "hardly involved in the process" and Carranza and de Wassom both spoke English as their second language.[3] *Id.* at 229–30.

Petitioning this court for habeas relief, Johnson alleged that the trial court's erroneous application of *Batson* violated his Fourteenth Amendment rights under the Equal Protection Clause. *Johnson*, 3 F.4th at 1216, 1219; *see Powers v. Ohio*, 499 U.S. 400, 404 (1991) ("Although a defendant has no right to a petit jury composed in whole or in part of persons of the defendant's own race, he . . . does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." (cleaned up)). Johnson contended that

[3] The trial judge asked the state to give a race-neutral reason for only one of its strikes: the second one against juror Dickens—one of the few Black prospective jurors in the venire pool. App. vol. I, at 228. The state obliged, explaining that Dickens's Ph.D. raised "concern[s]" about his potential to be "too exacting." *Id.* But the state never volunteered any race-neutral reasons for the other five stricken jurors, after the trial judge had interjected with his own. *See id.* at 229–30. Johnson never objected to the trial judge's interjection or his not asking the state for race-neutral explanations.

the state's lopsided exercise of peremptory strikes toward venirepersons of color satisfied his burden at *Batson* step one, yet the trial court never proceeded to step two. *Johnson*, 3 F.4th at 1219–20, 1222–23. We agreed that Johnson's initial showing was "more than sufficient to require [the] trial court to proceed to step two of the *Batson* procedure." *Id.* at 1226–27. Because it never did, we established that the trial court had misapplied *Batson*. *Id.* at 1227.

But that error wasn't enough to entitle Johnson to habeas relief. *Id.* Due to the trial court's lapse at *Batson* step two, "the State ha[d] never presented evidence of the prosecutor's actual, nondiscriminatory reasons for striking the five minority jurors." *Id.* Thus, no court had ever evaluated those reasons to determine if the strikes were racially motivated and therefore if Johnson's constitutional rights had been violated. *See id.*; *see also Hernandez v. New York*, 500 U.S. 352, 360 (1991) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). So we decided that the appropriate remedy was to reverse the district court's denial of Johnson's habeas petition and to remand for the district court to hold a *Batson* reconstruction hearing, giving the state a chance to satisfy its obligations at *Batson* step two. *Id.* Given "the passage of over eight years since Johnson's trial," we remanded on an "impossible or unsatisfactory" standard. *Id.* That is, we directed the district court to hold the *Batson* reconstruction hearing only if the court determined that doing so would not be "impossible or unsatisfactory." *Id.* If the court decided otherwise, we instructed, then the court

should instead grant Johnson habeas relief conditional on the state's not granting him a new trial within 120 days. *Id.*

On remand, the district court surmised that it would be premature "to decide whether a hearing will be impossible or unsatisfactory" because the court "lack[ed] the circumstantial information necessary to contextualize the prosecutor's stated reasons for the challenged strikes." App. vol. VII, at 2047. For example, the court balked at the record's missing information about the racial makeup of the venire pool, "much less, the race of five of the six jurors the prosecutors attempted to strike." *Id.* To fill in these gaps, the court ordered the parties to conduct discovery that would facilitate the court's "reconstruct[ing] the relevant circumstances bearing on the prosecutor's use of peremptory strikes at the time they were made." *Id.* at 2050.

The parties completed discovery and filed supplemental briefs with the district court. Discovery comprised the state's contemporaneous, handwritten notes from voir dire; the prospective jurors' driver's licenses; an affidavit from the Oklahoma Attorney General's Office with information about each juror's self-identified race, ethnicity, and English-language proficiency; secondary-source research on the meaning of "race"; and depositions conducted with now-retired Judge Tom Gillert (then state trial judge), now-Judge Doug Drummond (then assistant prosecutor), Mark Lyons (defense attorney), and Tim Harris (lead prosecutor).

Despite this evidence, the district court concluded that "it would be impossible and unsatisfactory to hold a meaningful *Batson* reconstruction hearing." *Johnson*, 2023 WL 5055491, at *1. The court acknowledged that, "[a]rguably," proceeding to *Batson*'s second step would not be "impossible or unsatisfactory" considering the evidence adduced during discovery. *Id.* at *6. But the court concluded that moving to *Batson*'s third step would be impossible. *Id.* at *7. Because even if Harris's "stated reasons" for each disputed strike were his "actual reasons," the court reasoned that it could not "sufficiently reconstruct all relevant circumstances in a way that would permit [the court] to meaningfully apply *Batson*'s third step." *Id.* On that basis, the district court entered judgment granting Johnson conditional habeas relief, according to our remand instructions. *Id.* at *8.

William "Chris" Rankins, proceeding in his official capacity as Acting Warden of the Great Plains Correctional Center, timely appealed the judgment on behalf of the state. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we reverse and remand.[4]

STANDARD OF REVIEW

We review the district court's decision to deny an evidentiary hearing for an abuse of discretion. *See Marquez v. City of Albuquerque*, 399 F.3d 1216,

[4] This court granted a motion by the appellant to stay pending appeal the district court's order that conditionally granted Johnson habeas relief and ordered his release from state custody unless the state granted him a new trial.

1224 (10th Cir. 2005). Of that ilk is the decision to hold a *Batson* reconstruction hearing. *See, e.g.*, *Dolphy v. Mantello*, 552 F.3d 236, 240 (2d Cir. 2009).

DISCUSSION

Our focus here is singular. We consider whether the district court abused its discretion in declining to hold a *Batson* reconstruction hearing under an "impossible or unsatisfactory" standard. *Johnson*, 3 F.4th at 1227 (quoting *Jordan v. Lefevre*, 206 F.3d 196, 202 (2d Cir. 2000)). Principally, this standard asks the district court to consider whether the "passage of time" or "other circumstances" would inhibit the court's ability to hold a reconstruction hearing. *See id.* (quoting same); *see also Snyder v. Louisiana*, 552 U.S. 472, 486 (2008) (ascertaining that, "more than a decade after petitioner's trial," there was no "realistic possibility" of reconstructing the "subtl[ties]" surrounding the prosecutor's motives to strike); *United States v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009) (remanding "for the district judge to make findings of fact" on the *Batson* issue, unless "the passage of time preclude[d] the district court from [doing so]"); *Riley v. Taylor*, 277 F.3d 261, 294 (3d Cir. 2001) (recognizing that a new trial may be appropriate in lieu of a reconstruction hearing depending on "the passage of time" (citation omitted)). The merits of Johnson's *Batson* claim do not weigh on this narrow issue. Our previous opinion establishes as law of the case (1) that Johnson satisfied *Batson*'s first step by making a prima facie case of racially motivated

peremptory strikes and (2) that the district court erred when it failed to formally conduct *Batson*'s second step. *Johnson*, 3 F.4th at 1226–27; *see United States v. Trent*, 884 F.3d 985, 994 (10th Cir. 2018) ("Under the law of the case doctrine, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (cleaned up)). Those issues being resolved, we pick this case up where we left off: the possibility of holding a *Batson* reconstruction hearing on this case record. *Johnson*, 3 F.4th at 1227. Having studied the record, we conclude that the court abused its discretion in deciding that a reconstruction hearing would be "impossible and unsatisfactory." *Johnson*, 2023 WL 5055491, at *1. The discovery conducted at the district court's behest yielded sufficient information for the court to hold a *Batson* reconstruction hearing at step two.

To start, the state acquired data about the racial and ethnic identities of all venirepersons, which the district court sought specifically in its discovery order. The state gathered the driver's licenses of all 33 venirepersons and telephoned most of them (some were unreachable) to ask about their self-identified race, ethnicity, and English-language proficiency. This investigation revealed that, of the 33 venirepersons, three were Black, one was Native American, and the remainder were white, according to their driver's licenses. Of those listed as "White" on their driver's licenses, a few identified with other racial or ethnic identities. App. vol. VIII, at 2101–06. For the six stricken jurors, the state obtained the following information:

1. Tawil: Driver's license reports his race as "White," he self-identifies as white, and he speaks English fluently as his second language, *id.* at 2135;
2. Dickens: Driver's license reports his race as "Black or African American," he self-identifies as "African American," and he speaks English as his first language, *id.* at 2102, 2114;
3. de Wassom: Driver's license reports her race as "White," she self-identifies as "Mexican," and she speaks English as her second language, *id.* at 2105, 2136;
4. Wilson: Driver's license reports her race as "White," she self-identifies as white, and she speaks English as her first language, *id.* at 2138;
5. Carranza: Driver's license reports her race as "White," she could not be reached by phone to self-report her racial or ethnic identity, and she stated during voir dire that she speaks English as her second language, *id.* at 2112;
6. Martinez: Driver's license reports her race as "White," she self-identifies as white, and she speaks English as her first language, *id.* at 2122.

As to the remaining venirepersons, the demographic information produced by the state shows that one of the Black prospective jurors (Williams) was empaneled after the trial court rejected the state's peremptory strike,[5] one of the Black prospective jurors (Sweet) served as an alternate, the sole Native

[5] When Harris moved to strike prospective juror Williams, Harris stated preemptively: "I understand she's African American, but our race neutral reason for her is she's a pastor." App. vol. I, at 231. The trial judge rejected this strike, which he thought "would have effectively eliminated all African Americans" from the jury. *Id.* The trial judge later acknowledged at sentencing that this rationale for keeping Williams on the jury had been an error to the detriment of the state. On direct appeal, the OCCA determined that the trial judge's error did not warrant reversal because the Williams strike had nevertheless been supported by a race-neutral reason. This determination by the OCCA factored into our previous decision that the OCCA had "plainly misapprehended or misstated the record" when it said the trial court had accepted the state's proffered race-neutral reasons for its strikes. *Johnson*, 3 F.4th at 1224 (cleaned up).

American prospective juror (Nichols) was stricken on the state's eighth peremptory challenge with no protest from Johnson, and one of the prospective jurors (Perez) who self-identifies as "Hispanic" was empaneled with no challenge from the state. App. vol. VIII, at 2104. The discovery confirms that the rest of the empaneled jury was racially white, both according to their driver's licenses and self-identification. This thorough reporting should have allayed the district court's concerns about "lack[ing] the circumstantial information necessary to contextualize the prosecutor's stated reasons for the challenged strikes." App. vol. VII, at 2047. The court asked for context, and it appears that the state delivered.

Next, we consider Harris and Drummond's contemporaneous, handwritten notes from voir dire. Even though the trial judge never prompted the prosecution for race-neutral reasons, a record was nevertheless created through the prosecutors' notes. *See Paulino v. Harrison*, 542 F.3d 692, 700 (9th Cir. 2008) ("Evidence of a prosecutor's actual reasons may be direct or circumstantial."). Bringing these notes to life, Harris and Drummond's deposition testimonies explained the significance of certain notations, such as marking a prospective juror's name with a "?" (to indicate concern and a possible desire to strike) or designating a juror's name with the letter "J" (to signal prior jury service). App. vol. VIII, at 2197, 2213. Unlike other cases where courts (rightly) refuse to speculate about a prosecutor's actual reasons for striking a prospective juror, the district court had access to handwritten

notes seldom available ten-plus years after trial. *See Paulino*, 542 F.3d at 700 (concluding that the state's mere speculation about its race-neutral reasons without any recollection or record from the prosecutor failed *Batson*'s second step); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (determining that the state's "speculation," based on the voir dire transcript, about the prosecutor's actual reasons for striking a juror was inadequate).

Finally, the state obtained depositions from all the major players in Johnson's trial: now-retired Judge Gillert (then state trial judge), now-Judge Drummond (then assistant prosecutor), Lyons (defense attorney), and Harris (lead prosecutor). Not only were all available to testify, a rarity in itself, but all deponents recalled the case in great detail. The trial's prominence in the Tulsa community and notable publicity made Johnson's trial a standout in some of the deponents' memories. For example, in his deposition Harris testified that the trial was memorable because the case was high-profile, he had effectively tried the case three separate times against different codefendants, and he had faced threats to his life during the trial—all facts that would be relevant to an assessment of Harris's credibility and his purported motivations for striking jurors at a *Batson* hearing. Specifically as to the peremptory strikes, Harris testified thoroughly about his race-neutral reasons for striking each of the six

challenged jurors.[6] Harris described the jurors' demeanors, facial expressions, and other factors (i.e., profession, education level, English-language proficiency) that contributed to his decision in exercising the strikes.

Despite Harris's vivid recollections, the court identified several specific "circumstances" as being ill-suited to reconstruction. *Johnson*, 2023 WL 5055491, at *7. These included Harris's "perception[s]" about the dynamic between certain jurors, "visual observation[s]," remarks about jurors' "facial expression[s]," "attitude[s]," and "tone," along with other "[d]emeanor-based explanations." *Id.* In the court's mind, even if Harris testified to his subjective impressions at a reconstruction hearing, its ability to assess Harris's credibility ten years after the fact would be no match for the trial court's firsthand observations. *Id.* Because ten years had passed since Johnson's trial, the court concluded that Johnson could not be "reasonably expect[ed] . . . to 'show any weaknesses' in Harris's demeanor-based justifications" at a *Batson* reconstruction hearing, just like the court could not be reasonably expected to "meaningfully assess" whether Harris's stated justifications were "merely pretext for purposeful discrimination." *Id.*

This discussion suggests that the district court misdirected the "impossible or unsatisfactory" inquiry to the wrong step of *Batson*. The court's

[6] Johnson claimed that the six strikes established a *pattern*, though a pattern is not required to satisfy *Batson*'s first step, only an inference of discriminatory intent must be shown. *Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1088 (10th Cir. 2023).

concerns all pertained to its ability to make a ruling at step three, not the possibility of holding a hearing at step two.[7] *Cf. Purkett v. Elem*, 514 U.S. 765, 768 (1995) (determining that the circuit court "erred by combining *Batson*'s second and third steps into one" because the plausibility of the state's race-neutral explanations do not "become[] relevant" "until the *third* step"). The district court even recognized that a reconstruction hearing at step two was "[a]rguably" possible based on the discovery. *Johnson*, 2023 WL 5055491, at *6. By focusing on the feasibility of making credibility determinations, the district court put the step-three cart before the step-two horse.

Similarly, Johnson argues that several circumstances of the trial "cannot be reconstructed," such as Harris's "personal perceptions" about jurors' facial expressions, attitude, and tone, as well as the racially charged atmosphere in

[7] Before the district court, Johnson argued that the state had waived its right to a *Batson* reconstruction hearing and that no Supreme Court decision had recognized reconstruction hearings as "a legitimate legal mode of analysis to salvage a *Batson* claim." App. vol. VIII, at 2265. Johnson raised these same arguments to this court in his petition for rehearing and before the Supreme Court in his petition for certiorari. He makes these points again in this appeal. Our previous decision remanding the case with instruction for the district court to hold a *Batson* reconstruction hearing demonstrates our disagreement with Johnson on the legitimacy of that procedure. *See Johnson*, 3 F.4th at 1227. That and the previous dispositions in this case resolve Johnson's waiver arguments. *See Est. of Cummings by & through Montoya v. Cmty. Health Sys., Inc.*, 881 F.3d 793, 801 (10th Cir. 2018) ("A lower court is bound to carry the mandate of the upper court into execution and cannot consider the questions which the mandate laid to rest." (cleaned up)); *cf. Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1140 (10th Cir. 2009) (noting that "[w]e depart from the [law of the case] doctrine only in . . . exceptionally narrow circumstances" (citation omitted)).

the courtroom which, according to Lyons in his deposition, made the discriminatory nature of the strikes "obvious." Resp. Br. at 26, 28. We are equally unconvinced by these arguments. Both Harris and Lyons would be available to testify at a reconstruction hearing about these subtleties. From that testimony, the district court could weigh the credibility of Harris's testimony about the jurors' demeanors against Lyons's testimony about the trial atmosphere.

The district court's (and Johnson's) concerns about reconstruction are misplaced. "[W]here a prosecutor can generally recall the trial, review contemporaneous transcripts or notes, and articulate race-neutral explanations for the challenged strikes, the issue of intent is . . . well within the province of the [district] court." *Harris v. Haeberlin*, 752 F.3d 1054, 1059 (6th Cir. 2014). With all of those ingredients present in the record, the court was well-equipped to weigh the evidence and make a call. In fact, the inordinate amount of record evidence available in this case, plus the availability of the original trial judge, prosecutor, and defense attorney, leaves us hard-pressed to imagine a case better suited to a reconstruction hearing. If a reconstruction hearing is not possible in this case, then it's hard to conceive of one where it would be. By finding a *Batson* hearing "impossible" on this case record, the district court's decision threatens to create a per se rule that reconstruction hearings are never possible years after trial. We decline to impose such a strict rule. Given the

ample evidence in the record, the district court applied the "impossible or unsatisfactory" standard too harshly.

All told, if a *Batson* hearing can be reconstructed at step two, then it must be, and only then does the court concern itself with step three. *See Purkett*, 514 U.S. at 768 ("[T]o say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious.").

Once the court reaches the final step of the *Batson* gauntlet, it's nearly home free. The district court is "best situated to evaluate . . . the credibility of the prosecutor who exercised [the peremptory] strikes." *Davis v. Ayala*, 576 U.S. 257, 273–74 (2015). These credibility determinations are nearly ironclad on appeal absent "exceptional circumstances." *See id.* at 274 (quoting *Snyder*, 552 U.S. at 477). Though a *Batson* reconstruction hearing conducted ten-plus years after trial presents its challenges, that does not make the procedural function of holding the hearing impossible when the record contains adequate evidence of the prosecutor's race-neutral explanations for issuing the peremptory strikes. *See Miller-El v. Dretke*, 545 U.S. 231, 231 (2005) (recognizing that the only order of business at *Batson* step two is for "the State to come forward with a neutral explanation"); *Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1083 (10th Cir. 2023) ("At [*Batson*'s] second step, nearly any race-neutral explanation will suffice, even if it is not 'persuasive, or even

plausible.'" (quoting *Purkett*, 514 U.S. at 767–68)). As was the case here. *Compare Barnes v. Anderson*, 202 F.3d 150, 157 (2d Cir. 1999) (ordering a new trial instead of remanding for a *Batson* reconstruction hearing when the trial judge had passed away), *with Bryant v. Speckard*, 131 F.3d 1076, 1078 (2d Cir. 1997) (ruling that the state trial court had adequately reconstructed a *Batson* challenge by hearing testimony from the prosecutor about his "subjective" reasons for striking jurors and accessing "the trial court clerk's voir dire minutes"). The district court was armed with racial data about each venireperson, the prosecutors' contemporaneous notes from voir dire, and depositions from the trial counsel and judge, which made a *Batson* reconstruction hearing possible at step two. What the district court does at step three with the state's race-neutral reasons once they're presented, we leave to the court's discretion.

CONCLUSION

We reverse and remand for further proceedings in accordance with this opinion.

APPENDIX "C"

Tenth Circuit Opinion Denying Rehearing filed July 29, 2024

FILED
United States Court of Appeals
Tenth Circuit

July 29, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner - Appellee,

v.

WILLIAM "CHRIS" RANKINS,

Respondent - Appellant.

No. 23-5095
(D.C. No. 4:16-CV-00433-TCK-CDL)
(N.D. Okla.)

ORDER

Before **PHILLIPS**, **MORITZ**, and **EID**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk