

No. 17-1392

IN THE
Supreme Court of the United States

H.A.S. ELECTRICAL CONTRACTORS, INC.,
Petitioner,

v.

HEMPHILL CONSTRUCTION COMPANY, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of Mississippi**

**HEMPHILL CONSTRUCTION CO., INC.'S
BRIEF IN OPPOSITION**

DAVID W. MOCKBEE
DAVID B. ELLIS
Counsel of Record
MOCKBEE HALL & DRAKE, P.A.
125 S. Congress St., Ste. 1820
Jackson, MS 39201
(601) 353-0035
dmockbee@mhdllaw.com
dellis@mhdllaw.com
Counsel for Respondent

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QUESTIONS PRESENTED

A. Whether the state courts of Mississippi misapplied *Batson* in upholding two peremptory strikes of veniremen made by Respondent.

B. Whether the trial court's factual finding that Respondent's strikes were not racially motivated was clearly erroneous.

CORPORATE DISCLOSURE

Hemphill Construction Company, Inc. has no parent corporation and no publicly held company owns 10% or more of Hemphill Construction Company, Inc. stock.

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OPINIONS BELOW

The Mississippi Supreme Court's first opinion can be found at *H.A.S. Elec. Contrs., Inc. v. Hemphill Constr. Co.*, No. 2015-CA-00596-SCT, 232 So.3d 117, 2016 LEXIS 234, 2016 WL 3091754 (Miss. June 2, 2016) (*H.A.S. I*).

The *opinion* of the Mississippi Supreme Court after remand for a limited *Batson* hearing is reported at *H.A.S. Elec. Contrs., Inc. v. Hemphill Constr. Co.*, 232 So.3d 117 (Miss. 2017) (*H.A.S. II*).

JURISDICTION

The Mississippi Supreme Court issued its *Opinion* in *H.A.S. II* on October 12, 2017. H.A.S. Electrical Contractors, Inc.'s ("H.A.S.") Petition for Rehearing was denied on January 11, 2018 (Pet. App. 47a-48a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The only constitutional provision at issue in this case is the Equal Protection Clause set forth in the Fourteenth Amendment of the United States Constitution, which states:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Petitioner incorrectly argues that the Sixth Amendment applies but, since this is a civil case, the Sixth Amendment is inapplicable. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Sixth Amendment is limited to providing rights to an accused in criminal cases).

STATEMENT OF THE CASE

In 2008, Hemphill Construction Co., Inc. ("Hemphill") contracted with the Bureau of Building and Grounds for the State of Mississippi to construct a significant clean-up/expansion project at Buccaneer State Park in Waveland, Mississippi. Hemphill subcontracted with H.A.S. for the electrical portion of the project. The parties disagreed what, if anything, was owed to H.A.S. after the project was finished. Following a jury trial in the Circuit Court of Rankin County, Mississippi, Defendant/Respondent, Hemphill Construction Co., Inc. ("Hemphill"), prevailed on both the claims asserted

against it by H.A.S. and Hemphill's counterclaim against H.A.S. Hemphill was awarded its attorney's fees and expenses as the prevailing party pursuant to an attorney's fees provision in the parties' subcontract. H.A.S. appealed the trial court's judgment to the Mississippi Supreme Court on the grounds that (a) the trial court allegedly erred in granting two peremptory strikes of potential jurors made by Hemphill, and (b) the trial court allegedly erred by enforcing the attorney's fees provision in the parties' contract.

During voir dire, H.A.S. challenged Hemphill's use of two peremptory strikes based on *Batson v. Kentucky*, 476 U.S. 79 (1986). The first challenged strike was used on Juror 7, an African American male, who was sixty-three (63) years old at the time, which Hemphill struck because of his "age" and because Hemphill preferred "not to have an older jury panel." *H.A.S. I*, 232 So.3d at 121. The next two potential jurors tendered to Hemphill were also African Americans which Hemphill accepted. *Id.* Later in voir dire, Hemphill used a peremptory strike on Juror 13, an African American male who listed Labor-Ready as his employer. *Id.* at 121-122. H.A.S. lodged a second *Batson* challenge as to Hemphill's strike of Juror 13. *Id.* The trial court overruled that challenge after Hemphill stated that it struck Juror 13 because of his employer, and H.A.S. offered no evidence in rebuttal. *Id.* at 122.

In *H.A.S. I*, the Mississippi Supreme Court analyzed the *Batson* issues only. *Id.* The Mississippi Supreme Court found no error as to the trial court's application of *Batson* as to Juror 13, the second Hemphill strike challenged by H.A.S., because the trial court properly applied all three steps of *Batson*. *Id.* at 125. Specifically, Hemphill's reason for striking Juror 13 was

because of his employment with Labor-Ready, a part-time labor service provider. *Id.* at 124. As noted in *H.A.S. I*, this case involved issues of part-time and temporary workers. *Id.* Further, H.A.S. offered no evidence of pretext as to this strike. *Id.* at 125.

However, the Mississippi Supreme Court found that, regarding Juror No. 7, the trial court failed to fully develop the third step of *Batson* analysis, “whether Hemphill’s stated reason for striking [Juror 7] was race-neutral or merely a pretext for purposeful discrimination.” *Id.* at 124. Accordingly, the Mississippi Supreme Court remanded the case to the trial court for a *Batson* hearing as to Hemphill’s strike of Juror 7. *Id.*

Upon remand, at the *Batson* hearing, the trial court once again upheld the peremptory strike as to Juror 7, finding no purposeful discrimination by Hemphill. *H.A.S. II*, 232 So.3d at 131. In doing so, the trial court allowed both parties to develop their arguments, and issued a ruling thereafter. *Id.* at 134-138. That ruling was affirmed in *H.A.S. II*. at 141.

Hemphill’s stated reasons for striking Juror No. 7 were “age” and preferring “not to have an older jury panel.” *Id.* at 137. The only purported evidence H.A.S. offered in response to Hemphill’s race-neutral reasons was that Hemphill had accepted two other jurors in their 60’s who were white. *Id.* No other evidence was brought forth by H.A.S. at the trial court level at trial, nor at the *Batson* hearing on remand. *Id.* at 138. As held by the Mississippi Supreme Court in *H.A.S. II*, there was ample evidence in the record supporting Hemphill’s position that its strike was not racially motivated, including the following:

1. After Hemphill struck Juror 7, Hemphill accepted the next two jurors, both of which were black.
2. Henry Schepens, H.A.S.'s President and star witness, was 79 years old at the time of trial and two months post-stroke.
3. No other person over the age of 55 was selected by Hemphill after Juror 7 was struck.
4. Hemphill achieved an age-balanced jury panel: one juror in her 20's; three jurors in their 30's; three jurors in their 40's; three jurors in their 50's; and two jurors in their 60's.

Id. at 134, 137.

ARGUMENT

I. THE MISSISSIPPI COURTS PROPERLY APPLIED *BATSON* AND ITS PROGENY TO THE PEREMPTORY STRIKES MADE BY HEMPHILL.

As this Court well knows, *Batson* violations are analyzed using a three-step process:

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; and third, in light of the parties' submission, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-477, 120 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (internal citations omitted). Further, “the opponent of the strike bears the burden of persuasion regarding racial motivation, and a trial court finding regarding the credibility of an attorney’s explanation of the ground for a peremptory challenge is entitled to great deference.” *Davis v. Ayala*, 135 S.Ct. 2187, 2199, 192 L.Ed.2d 323 (2015) (internal citations and quotation marks omitted).

H.A.S. argues that the trial court and the Mississippi Supreme Court erred in applying *Batson* because those courts allegedly failed to perform a comparative juror analysis. However, the only authority for the proposition that a comparative juror analysis is required cited by H.A.S. is a death penalty case from a Mississippi federal district court, *Chamberlain v. Fisher*, 2:11-cv-72-CWR, 2015 WL 1485901, at *17-23 (S.D. Miss. 2015). However, the Fifth Circuit in *Chamberlain v. Fisher*, 2018 U.S. App. LEXIS 7006, *12-13 (5th Cir. 2018), expressly reversed the district court on the issue of whether a comparative juror analysis was required. Specifically, the Fifth Circuit held that, “*Miller-El II* did not clearly establish any requirement that a state court conduct a comparative jury analysis at all, let alone *sua sponte* . . . this is especially true where, as here, the defendant never sought a comparative juror analysis.” *Id.* Therefore, comparative juror analyses are not required as a matter of law even in death penalty cases, much less civil cases.

In any event, while neither the trial court nor the Mississippi Supreme Court was required to perform a comparative juror analysis, the courts did consider whether Hemphill’s stated reasons of age and not wanting an older jury panel were pretextual in light of

the fact that there were two older white jurors allowed to serve. See *H.A.S. II*, 232 So.3d at 136-139.

In light of the fact that the trial court and the Mississippi Supreme Court properly applied all three steps of the *Batson* analysis, there is no misapplication of federal law requiring a reversal.

II. THE TRIAL COURT'S FACTUAL FINDINGS THAT HEMPHILL'S STRIKES WERE NOT RACIALLY MOTIVATED SHOULD BE LEFT UNDISTURBED BECAUSE THEY WERE NOT CLEARLY ERRONEOUS.

Since Hemphill provided race-neutral reasons for their strikes of Juror 7 and Juror 13, the only factual finding which could be disputed by H.A.S. is whether Hemphill's stated reasons for striking the jurors were pretextual, the real reason for the strikes being intentional discrimination on the basis of race. This Court has held that the trial court should look at "the totality of the relevant facts" and "all relevant circumstances" when making this determination. *Miller-El v. Dretke*, 545 U.S. 231, 239, 240 (2005)(internal citations omitted).

In the case at bar, the trial court and the Mississippi Supreme Court looked at all the relevant circumstances and evidence presented, and correctly found that there was no purposeful discrimination in Hemphill's use of peremptory strikes for Jurors 7 and 13.

As discussed *supra*, despite still having peremptory strikes remaining after striking Juror 7, Hemphill did not use any strikes on the next two jurors tendered to it, both of whom were African American but younger than Juror 7. The trial court found that there was

no evidence that Hemphill used this strike for the purpose of race.

Likewise, there is no evidence in the record that Hemphill struck Juror 13 on the basis of race. Hemphill's stated reason was Juror 13's employment, since as noted by the Mississippi Supreme Court, this was a contractor/subcontractor dispute, in which part-time labor forces were an issue. H.A.S. offered no response other than to state that Juror 13 was black.

Looking at the totality of the circumstances, the trial court's factual findings should be left undisturbed and H.A.S.'s Petition should be denied.

CONCLUSION

The Circuit Court of Rankin County, Mississippi, and the Supreme Court of Mississippi correctly applied federal law concerning *Batson* challenges. Further, the trial court's factual finding that Hemphill's use of peremptory strikes were not racially motivated was not clearly erroneous. As such, H.A.S.'s Petition should be denied.

Respectfully submitted,

DAVID W. MOCKBEE

DAVID B. ELLIS

Counsel of Record

MOCKBEE HALL & DRAKE, P.A.

125 S. Congress St., Ste. 1820

Jackson, MS 39201

(601) 353-0035

dmockbee@mhdllaw.com

dellis@mhdllaw.com

Counsel for Respondent

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