

No.

IN THE
SUPREME COURT OF THE UNITED STATES

CHAE CHANG,

Petitioner,

vs.

SCOTT FRAUENHEIM, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hernandez v. New York*, 500 U.S. 352, 359 (1991), this Court held that when the trial court has ruled on a prosecutor's reasons for exercising peremptory challenges, the issue of whether a prima facie case has been made as to purposeful discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986) is moot. This Court has repeatedly held that the standard for granting a certificate of appealability is a liberal one. The question presented is this:

Should a certificate of appealability be granted where both the California Court of Appeal and the federal district court have misinterpreted *Hernandez v. New York*?

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SCOTT FRAUENHEIM, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS

Petitioner, CHAE CHANG, respectfully asks that a writ of certiorari issue to review the order denying a certificate of appealability (“COA”) by the Ninth Circuit Court of Appeals on October 4, 2017.

OPINION BELOW

The order of the Ninth Circuit denying a COA is unreported and is reproduced as Appendix A to this petition.

JURISDICTION

The two judge panel denied the request for a COA on October 4, 2017. (Appendix A.) The petition for writ of certiorari is due for filing on January 2, 2018.

Supreme Court Rules 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998) (“this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability”).

STATUTES AND RULES

28 U.S.C. § 2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rule 22(b), Federal Rules of Appellate Procedure

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment (pertinent part)

No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Trial counsel made a *Wheeler/Batson* motion

Petitioner is Asian, of Korean and Chinese descent.

During jury selection in his state trial for sexual assault and domestic violence charges, defense counsel made a *Wheeler/Batson*¹ motion after the prosecutor dismissed juror no. 16.

Defense counsel: Your Honor, I challenge this on a Wheeler. I think she's Asian. She may or may not identify with this family. I think there's been nothing she has said at all –

¹ Although a prosecutor ordinarily is entitled to exercise peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried," the Equal Protection Clause forbids prosecutors to strike jurors on account of race or gender in the belief that those jurors will be unable to consider the state's case impartially. *Batson v Kentucky*, 476 U.S. 79, 89 (1986). "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S.472, 477 (2008). Accord *People v. Wheeler*, 22 Cal.3d 258, 276-277 (1978).

The court: Okay – It’s the only Asian that the prosecutor has made a motion to exercise a peremptory challenge towards. ¶ The cases are pretty clear that one juror is insufficient to bring a Wheeler/Batson motion. Her other motion – her other challenges were against an African-American and, I believe – my notes are out there.

Defense counsel: Hispanic.

The Court: A Hispanic person. ¶ So I don’t think one person does a Wheeler motion make. However, for the purposes of the record, I will have Ms. Creighton state, for the record, her reason for dismissing juror number 16.

The prosecutor: I thought she was somewhat of a blank slate. She wasn’t very, you know, active in the participation of the questioning; the fact that she’s you know, single, no kids. I wanted someone on a case like this with more experience. (3 RT 358-359, emphasis added.)

The court: “Okay. I consider that to be a race-neutral reason, so your motion to reseal a new panel is denied.” (3 RT 358-359.)

Subsequently, defense counsel said she would like to “make a record” about her *Wheeler/Batson* motion and Juror no. 16. She noted that a court can find purposeful discrimination, even where only one member of a cognizable group is challenged under *Derrick v. Lewis* (9th Cir. 2003) 321 F.3d 824, 827. (3 RT 395.)

The court responded that “notwithstanding the holding of that case, based upon her pattern of dismissing only three jurors from three different ethnic backgrounds, I did not

find a prima facie case.” (3 RT 395.)² The other Asians on the panel seem to have been dismissed for cause. There were no Asians on twelve seated now. (3 RT 395.)

The next day the court explained its decision:

While we’re waiting for the jurors to arrive, I just wanted to make a couple of things clear, some comments, after the court ruled on the Wheeler motion that you made during jury selection, as to what the court felt is the proper standard.

The proper standard and the one the court was attempting to follow, is that the defendant has the initial burden of making out a prima facie case by showing that the totality of the relevant facts that give rise to an inference of a discriminatory purpose.

All Ms. Nguyen did is point out that one of the three peremptory challenges exercised by the people at that point were against a person of Asian background, when the other two were also against other minority – cognizable minority groups, for which there was no objection.

I felt that was insufficient showing. Nevertheless, at that point, I asked Ms. Creighton to tell the court why she was exercising that, for purposes of the record. She gave a rationale and, upon further reflection, considering the issues in this case, and especially after the opening statements and Ms. Knapp testifying, and considering the background as identified of Juror Number 16, I believe it was, that the prosecutor at the time – I understand completely the race-neutral rationale by Ms. Creighton in Dismissing her, from a total different life experience than, certainly, Ms. Knapp or the other women who are involved in this case, as people’s witnesses, involved in it.

So that was the rationale for the court’s decision. (4 RT 602.)

² *Batson* set down a three part test for determining whether the prosecutor has engaged in purposeful discrimination. Step one is prima facie case. 476 U.S. at 93-94. Step two is race neutral explanation. Step three is purposeful discrimination. At step three, which the trial court must always reach, is where it is to be determined whether the prosecutor’s reasons at step two were pretextual. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

B. The prosecutor did not exercise peremptory challenges against other jurors who were young and single with no children

After the court and parties questioned the jurors, Juror Nos. 6, 9, and 28, were excused for cause. (2 RT 91.) Juror Nos. 13, 15, and 20, were dismissed for lack of English skills. (2 RT 92, 3 RT 312-314.) Juror No. 3 was dismissed because she failed to appear. (3 RT 313.)

The prosecutor exercised her first peremptory against Juror No. 17 and the defense attorney exercised her first peremptory against Juror No. 19. (3 RT 315.)

Juror Nos. 44, 49, and 35 were dismissed for cause. (3 RT 340, 355.)

The prosecutor exercised her second peremptory against Juror No. 34 and the defense exercised her second peremptory against Juror No. 36. (3 RT 356.)

The prosecutor exercised her third peremptory against Juror No. 10 and the defense exercised her third peremptory against Juror No. 29. (3 RT 357.)

The prosecutor exercised her fourth peremptory against Juror No. 16. (3 RT 357.) It was at that point that defense counsel made the *Wheeler/Batson* motion. As noted above, the prosecutor said she dismissed Juror No. 16 for being young and single with no children, and without experience. (3 RT 357.) Juror No. 16 was a chemist for a pharmaceutical company. She was unmarried, had no children, lived in Reseda, and had no prior juror experience. (2 RT 55.)

Notably, the prosecutor did not exercise any peremptories or move to excuse for cause the following jurors who were also young and single, with no children and who had no experience:

Juror No. 18 was a senior financial analyst who was also single, lived with a roommate and was serving on a jury for the first time. (2 RT 55.)

Juror No. 27 was dog groomer and a pre-nursing student who lived with his/her parents and had no prior jury experience. (2 RT 58.)

Juror No. 47 worked at Macy's, was single, had no children, and had never served on a jury. (3 RT 319.)

C. The California Court of Appeal held there was no prima facie case

Petitioner argued on direct appeal that the trial court's finding there was no prima facie case contradicted clearly established United States Supreme Court authority, namely, *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes **moot**.

Hernandez v. New York, 500 U.S.352, 359 (emphasis added).

The California Court of Appeal, however, did not even acknowledge *Hernandez* and held that Petitioner did not make out a prima facie case.

Appellant argues that the trial court in fact ruled on the issue of intentional discrimination, but did so without an analysis under *Batson's* step three, that

is, without an evaluation of the genuineness of the prosecutor's explanation. Thus, appellant contends, the court erred.

We see the record differently. The court based its denial of appellant's motion on its finding that appellant did not make a prima facie case of discrimination. The fact that the court asked the prosecutor for an explanation does not change that. Our Supreme Court has suggested that "Though not strictly required, it is the better practice for the trial court to have the prosecution put on the record its race neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out." (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.)

(Appendix C at 30-31.)³

The Court of Appeal went on to find that Petitioner had not made a prima facie case and in any event, the prosecutor did not engage in purposeful discrimination. (Appendix C at 7.)

Moreover, as respondent argues, there is ample evidence to support the finding that appellant did not make a prima facie case. All appellant did was establish the challenged juror was a member of a cognizable group. That is simply not enough. (*People v. Bell* (2007) 40 Cal.4th 582, 598.)

Nor are we persuaded by appellant's contention that the prosecutor's acts with regard to other jurors establishes that her challenge to Juror 16 was based on race. Appellant argues that Jurors 18, 27, 28, and 47 were similarly young, single, and inexperienced, and were not challenged by the prosecutor.

We do not so read the record. Juror 28 was challenged for cause, after telling the court that she had twice been the victim of sexual assault as a teenager, and did not think that she could be unbiased. There is no evidence that the other jurors were comparable in age to Juror 16, only that all the jurors were single, that one (Juror 18) lived with a roommate, and one (Juror 27) lived with is/her parents.

³ The opinion of the California Court of Appeal is reproduced as Appendix C. The judgment, order adopting the report, and report and recommendation of United States Magistrate Judge is attached is Appendix B.

At any rate, Juror 16 was not excused based solely on age, but on her demeanor, a legitimate ground for excusal. (*People v. Lenix, supra*, 44 Cal.4th at p. 613 [prospective juror may be excused based on facial expressions, gestures, hunches].)

(Appendix C at 31.)

D. The district court disagreed with Petitioner’s interpretation of *Hernandez*

Petitioner argued in his 2254 petition that because the state court’s decision was contrary to *Hernandez v. New York* (see Memorandum ISO Petition at 18-19), it applied a legal standard that contradicted clearly established federal law. This afforded “de novo review of the applicant’s claims, applying the correct legal standard to determine whether the applicant is entitled to relief.” *Castellanos v. Small*, 766 F.3d 1137, 1146 (9th Cir. 2014).

In its answer to the petition, Respondent agreed that *Hernandez* was controlling:

To the extent that the preliminary issue of whether Petitioner had made a prima facie case was mooted by the trial court’s request for the prosecutor to state her race-neutral explanations and the court’s ruling on the ultimate question of intentional discrimination (*see Hernandez v. New York*, the California Court of Appeal’s decision was not based on an unreasonable determination of the facts in light of the evidence presented.

(Answer at 16.)

Nevertheless, the Report disagreed with Petitioner’s interpretation of *Hernandez v. New York*. The Report asserted that in *Hernandez*, the prosecutor did not wait for a ruling on whether a prima facie case had been established but instead “volunteered his

reasons” without any “prompting” from the court. The court did not rule whether a prima facie case had been established. (Appendix B, Report at 9-10, citing *Hernandez*, 500 U.S. at 359.) By contrast in Petitioner’s case, the trial court did rule there was no prima facie case and also asked the prosecutor to state her reasons “for the record.” (Report at 10.) The Report found that *Hernandez* did not consider such a situation. (*Id.*)

The Supreme Court certainly did not hold that when a court asks the prosecutor to state the reason for the challenge and finds that reason to be race neutral, the court moots a step one finding it actually made. Indeed, as was noted in another case before this court, ‘many courts have held that the *prima facie* issue is *not* moot under these circumstances.’ *Hernandez v. Long*, 2013 WL 6595560 at *5 (C.D. Dec. 16, 2013) [2013 U.S. Dist. LEXIS 176357] (collecting cases); *see also Sorto v. Herbert*, 497 F.3d 163, 175 n.9 (2d Cir. 2007) (stating despite the approach taken in *Hernandez v. New York*, “a habeas court remains free to affirm based on the prima facie rulings”).

(Appendix B at 18; Report at 10.)

E. The objections to the Report pointed out that its interpretation of *Hernandez v. New York* was wrong

The Report, however, inaccurately characterized the holdings of the cases it relied on. First, as to *Hernandez v. New York*, the issue of mootness did not turn on whether it was the trial court that asked the prosecutor to state reasons for the record, or whether the prosecutor volunteered her reasons and/or the court failed to rule on whether there was a prima facie case. To clarify, the issue before the Supreme Court was whether the prosecutor had offered a race neutral reason for challenging potential Latino jurors. *Hernandez*, 500 U.S. at 355. The high court noted that the failure to determine whether a prima facie case

had been made at step one “need not concern us.” *Id.* at 359. This was because the trial court had ruled on the merits. *Id.*

By way of analogy, the Court cited an employment discrimination case. “[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, *whether the plaintiff really did so is no longer relevant.*” *Hernandez v. New York*, 500 U.S. at 359 citing *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (emphasis added). The Supreme Court in that case held that because the issue of employment discrimination had been tried “on the merits” it was “surprising” that the Court of Appeals was “still addressing” whether the plaintiff had made out a prima facie case. 460 U.S. at 714-715.

The same principle applies in *Batson*. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes **moot**.

Hernandez v. New York, 500 U.S. at 359 (emphasis added).

Thus, the critical issue in *Hernandez v. New York* is whether the trial court ruled on the merits of the prosecutor’s reasons for exercising the peremptory challenge. It is irrelevant whether the court asked the prosecutor to state her reasons for the record or whether the prosecutor volunteered those reasons. It is also irrelevant whether the trial court made a dual finding that there was no prima facie case and that the prosecutor’s reasons were race neutral. The Report’s characterization of what *Hernandez v. New York* held is simply wrong.

In Petitioner's case, the prosecutor stated her reasons on the record and the court gave a ruling on the merits. (3 RT 358-359.) Thus, the issue of whether Petitioner really made a prima facie case is moot. *Hernandez v. New York*, 500 U.S. at 359.

Second, as to *Hernandez v. Long*, the Report inaccurately states what that case held. The district court found that *Hernandez v. New York* did not apply because "Petitioner's trial court never 'ruled on the ultimate question of intentional discrimination.'" 2013 U.S. Dist. LEXIS 176357 at **12-14. Here again, because the trial court in Petitioner's case "evaluated" the prosecutor's "reasons" the issue of whether there was a prima facie case is indeed moot. *Id.*

Third, as to *Sorto v. Herbert*, 497 F.3d at 175 n.9, the Second Circuit's footnote is clearly wrong.⁴ The footnote acknowledges that *Hernandez v. New York* holds that if the court addresses the credibility of the prosecutor's reasons, the issue of whether there was a prima facie case is moot. After acknowledging the supreme court authority, the footnote then cites *United States v. Diaz*, 176 F.3d 52, 77-78 (2d Cir. 1999) as allowing a habeas court to affirm based on prima facie rulings. However, in *Diaz*, the case of *Hernandez v. New York* is not cited even once.

⁴ The issue in this case was whether the record on appeal was sufficient to support the petitioner's claims ("the record is far too sketchy"). *Id.* at 173. There was a dissent in favor of the petitioner. *Id.* at 175-178.

In sum, the Report's assertion that *Hernandez v. New York* is not controlling is flat out wrong. Therefore, the Report's finding that the state court properly found Petitioner did not make out a prima facie case is irrelevant. (Appendix B at 18-22; Report at 10-14.)

F. The objections also pointed out that the Report was wrong on the facts

Respondent also agreed that the prosecutor did not strike other jurors who were single, inexperienced, and who had no children. However, Respondent characterized this as "superficial similarities." (Answer at 18.) The district court, after finding that Petitioner did not make out a prima facie case, went on to hold that the record did not support Petitioner's comparative analysis argument. The Report did not dispute that "Like Juror 16, the other jurors also appeared to be childless, and none had prior jury experiences." (Appendix B at 21; Report at 13.)

But in terms of life experience, the jurors differed. While Juror 16 was a chemist for a pharmaceutical company, Juror 18 was a senior financial analyst, Juror 27 owned two dog grooming shops in addition to being a pre-nursing student, and Juror 47 managed several departments at Macy's. The prosecutor might fairly have considered all these other prospective jurors to have had greater life experience than Juror 16 based on their work alone.

(Appendix B at 21; Report at 13.)

The Report's assertion that the owner of a dog grooming shop, an employee at Macy's, and a financial analyst have "greater life experience" than a chemist for a pharmaceutical company is nonsensical. Moreover, there is no case which permits the court

to guess what a prosecutor's true reasons were. If the prosecutor's reasons do not hold up on comparative analysis, reversal is required. *Castellanos v. Small*, 766 F.3d at 1150.

G. The Ninth Circuit summarily denied a COA

Petitioner argued that he was entitled to a COA because the district court's denial of his 2255 petition was debatable among jurists of reason. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003). The Ninth Circuit summarily denied the COA by a two judge panel. (Appendix A.)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED WHEN THE STATE COURT AND THE DISTRICT COURT ISSUE DECISIONS THAT ARE CONTRARY TO *HERNANDEZ V. NEW YORK*

“A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2).

[T]o obtain a COA under § 2253(c), a habeas petitioner must make a substantial showing of a denial of a constitutional right, a demonstration that, under *Barefoot [v. Estelle]*, 463 U.S. 880, 893 (1983), includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clarified that in order to obtain a COA the applicant does not have to show that he will win his appeal.

The threshold inquiry does not require full consideration of the factual or legal bases adduced in support of his claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El at 336-337.

[A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were

denied because the prisoner did not convince a judge, or for that matter, three judges, that he or she would prevail.

Id. at 337.

A prisoner seeking a COA must prove ‘something more than the absence of frivolity’ or the existence of ‘mere good faith’ on his or her part. We do not require the petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for writ of habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.’

Id. at 338.

The COA inquiry, we have emphasized, is not coextensive with a merits analysis We reiterate what we have said before: A ‘court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,’ and ask ‘only if the District Court’s decision was debatable.’

Buck v. Davis, ___ U.S. ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017), citing *Miller-El*, 537 U.S. at 327, 348.

This Court should grant certiorari to clarify for the lower courts – both state and federal – that *Hernandez v. New York*, 500 U.S. at 359, held that once a trial court rules on the prosecutor’s reasons for exercising peremptory challenges, the issue of whether a prima facie case has been made under *Batson* is moot. In this case, both the California courts and the federal district court misinterpreted *Hernandez v. New York*. *Hernandez v. New York* is an important decision in the *Batson* three step analysis and the lower courts continue to get it wrong.

This Court should also grant certiorari to clarify yet again that the standard for issuing a COA is a liberal one. Where it is clear that the district court has misinterpreted both the law and the facts, a COA should issue. Whether the petitioner will ultimately prevail in the appellate court is a decision to be reached only after a COA has been granted. The lower federal courts repeatedly and routinely deny COAs in summary fashion when the constitutional issues are indeed debatable among jurists of reason.

This case is the perfect vehicle for providing guidance to the lower courts on both the test for a COA and for mootness under *Hernandez v. New York*.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: December 26, 2017

Respectfully submitted,

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