
No. 17-7634

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID MINOR,

Petitioner,

v.

BEVERLY HASTINGS; ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE COURT SHOULD GRANT THE WRIT.....	1
A. The Lower Courts’ Analyses Are Not Merely Wrong; They Are Also Symptomatic Of A Broader Degradation Of The Batson Framework And Its Protections.	1
1. The Court of Appeals’ Undisputed Dilution Of The Batson Standard Is Not An Isolated Occurrence.	1
2. The State’s Argument That This Was A Batson Step-One Determination Ignores The Decision Below and Demonstrates The Necessity Of Further Review.	5
B. A Remedy Must Be Provided When A Prosecutor Improperly Quantifies The State’s Burden Of Proof, Which Remedy Must Be Based Upon A Full Consideration Of The Strength Of The Evidence.....	8
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. Terhune</i> , 516 F.3d 781 (9th Cir. 2008)	3
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	<i>passim</i>
<i>Chamberlin v. Fisher</i> , ___ F.3d ___, No. 15-70012, 2018 WL 1391732, 2018 U.S. App. LEXIS 7006 (5th Cir. Mar. 20, 2018).....	3, 4
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	9, 10, 11
<i>Dolphy v. Mantello</i> , 552 F.3d 236 (2d Cir. 2009).....	4, 7
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1973)	10
<i>Foster v. Chatman</i> , 578 U.S., 136 S. Ct. 1737 (2016)	1
<i>J. E. B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994)	5
<i>Johnson v. California</i> , 545 U.S. 162 (2005)	1, 7
<i>Johnson v. Finn</i> , 665 F.3d 1063 (9th Cir. 2011)	6
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	3
<i>Miller-El v. Dretke</i> , 545 U.S. 231 (2005)	3, 5
<i>Moore v. Morton</i> , 255 F.3d 95 (3d Cir. 2001).....	10

<i>Pena-Rodriguez v. Colorado</i> , 137 S. Ct. 855 (2017)	5
<i>Reed v. United States</i> , 133 F. App'x 204 (6th Cir. 2005)	11
<i>Roosevelt v. Griffin</i> , No. 6:15-CV-06738-MAT, 2018 WL 1509356, 2018 U.S. Dist. Lexis 51583 (W.D.N.Y. Mar. 27, 2018)	4
<i>Sanchez v. Roden</i> , 753 F.3d 279 (1st Cir. 2014)	4
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	8
<i>Trillo v. Biter</i> , 769 F.3d 995 (9th Cir. 2014)	11
<i>United States v. Potenciano</i> , No. 16-50430, 2018 WL 1406658 (9th Cir. Mar. 21, 2018)	4
<i>In re Winship</i> , 397 U.S. 358 (1970)	8
Other Authorities	
<i>Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge</i> , 49 Conn. L. Rev. 1137 (2017)	3
Jeffrey Bellin & Junichi P. Semitsu, <i>Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney</i> , 96 Cornell L. Rev. 1075, 1092-93, 1113-16 (2011)	3
Rules	
Rule 10	9

THE COURT SHOULD GRANT THE WRIT

This is not a case about correcting ordinary state trial court errors for one individual. David Minor's case demonstrates that the hard-won protections embodied in *Batson*¹ and its progeny are being misunderstood and eroded and that the pendulum of what constitutes a fundamentally unfair trial, turning as it does on the definition of the State's obligation to prove guilt beyond a reasonable doubt, has swung too far in the direction of prosecutors. This case presents an opportunity for the Court to resolve any uncertainties in the law even as it sets a clearer path towards a more just judicial system. The Court should grant the writ of certiorari.

A. The Lower Courts' Analyses Are Not Merely Wrong; They Are Also Symptomatic Of A Broader Degradation Of The *Batson* Framework And Its Protections.

Three decades ago, this Court recognized the violence that the discriminatory exercise of peremptory challenges does to our system of justice. *Batson*, 476 U.S. 89. It thus developed a framework with three distinct steps to safeguard a defendant's right to equal protection. *Id.* at 93-94; *see also Foster v. Chatman*, 578 U.S. at ___, 136 S. Ct. 1737, 1747 (2016); *Johnson v. California*, 545 U.S. 162, 168 (2005). Yet, even after fifteen years of litigation, petitioner Minor is not able to avail himself of the protections afforded by that framework; his plight, however, is far too common.

1. The Court of Appeals' Undisputed Dilution Of The *Batson* Standard Is Not An Isolated Occurrence.

In his Petition, Minor detailed how each court that has touched his case has

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

applied an inappropriately high burden at *Batson* step one.² Recognizing this error, but inexplicably adverse to granting relief, a panel of the Court of Appeals determined to treat the trial court's *Batson* step-one finding – that Minor had not made out a *prima facie* case of discrimination – as a *Batson* step-three credibility determination that the prosecution lacked discriminatory intent; compounding this error, the Court of Appeals stated that the trial court's step-three determination was supported by the record, even though (i) the trial court expressly stated that it was making a *Batson* step-one ruling that Minor had not made out a *prima facie* case of discrimination; (ii) the prosecutor in fact gave no race-neutral reasons to comport with *Batson* step two; (iii) for at least one juror, no race-neutral reason can possibly be conjured up from the record; and (iv) Minor had no opportunity to rebut any supposed reasons as pretextual under *Batson* step three. Pet. at 12-23; Pet. App. 9a-10a.

There can be no question: the Court of Appeals collapsed the *Batson* framework. Indeed, the State does not even try to dispute this fact. Opp. at 18-22 (arguing only that Minor did not make out a *prima facie* case at *Batson* step one).³

² The trial court elevated Minor's burden by requiring a "substantial likelihood" of race-based motivation, rather than the inference of discrimination that the law requires, Pet. App. 55a. As well, the State appellate court improperly looked to the ultimate composition of the jury in reviewing *Batson* step one, which creates an insurmountable hurdle to relief since the defense can never know, at the time of a challenge, what that composition will be, Pet. App. 10a; this was, an error that was repeated by the district court below, Pet. App. 33a.

³ Contrary to the State's contention, disregarding the Court of Appeals decision and viewing the trial court as having only reached *Batson* step one does not resolve this issue. See *infra* Part I.B.

Nor does the State address the nonsensical predicament in which this modified *Batson* framework places a defendant: in order to bear his burden of ultimately showing that the strikes were racially motivated, a defendant must anticipate what race-neutral reasons a prosecutor might articulate, and then rebut them before they are articulated. *Id.*

The decision of the Court of Appeals is troubling beyond its departure from the three-step *Batson* framework. Even under the Antiterrorism and Effective Death Penalty Act (AEDPA), the task of a reviewing court is not merely an exercise in rubber stamping the findings of prior courts. *Miller-El v. Dretke*, 545 U.S. 231, 240, 265 (2005) (“The standard is demanding but not insatiable . . . ‘[d]eference does not by definition preclude relief.’”) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 350 (2003)); *Anderson v. Terhune*, 516 F.3d 781, 786 (9th Cir. 2008) (“AEDPA deference is not a rubber stamp”). By accepting lower courts’ errors and even crafting legal reasoning around them, all by way of upholding convictions, lower federal courts steadily chip away at the protections that *Batson* engenders.⁴ And “[w]ith a

⁴ Dissenting from a recent decision of the Court of Appeals for the Fifth Circuit sitting *en banc*, five judges noted that “you can count on one hand the number of cases from this court finding the discriminatory use of a preemptory strike. It appears that only two of the hundreds of *Batson* decisions in our circuit have ever found that a strike was discriminatory.” *Chamberlin v. Fisher*, __ F.3d __, No. 15-70012, 2018 WL 1391732, at *9-10, 2018 U.S. App. LEXIS 7006, at *28-32 (5th Cir. Mar. 20, 2018) (*en banc*) (Costa, J., dissenting) (noting that the majority avoids identical comparison of jurors by differentiating jurors “based on reasons not cited during the *Batson* inquiry at trial”) ; *see also* Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge*, 49 Conn. L. Rev. 1137, 1140 (2017) (arguing that *Batson* is so ineffectual that the only solution is to abandon peremptory challenges altogether); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or*

precarious framework like *Batson*, any loosening of the reins can result in an empty harness.” *Chamberlin*, __ F.3d at __, 2018 WL 1391732, at *22, 2018 U.S. App. LEXIS 7006, at *70 (Costa, J. dissenting)

This is readily apparent in Minor’s case, in which court after court – state and federal – has eschewed the proper application of the *Batson* framework, going so far (as the Court of Appeals did) as to manufacture race-neutral reasons for the prosecutor’s strikes where none can be found in her statements or in juror responses to the voir dire questionnaire. Pet. App. 74a-76a, 103a, 120a. More profoundly, however, what occurred here represents an all-too-common phenomenon, in which courts modify the *Batson* framework. See, e.g., *Sanchez v. Roden*, 753 F.3d 279, 285-89, 308 (1st Cir. 2014) (reversing denial of habeas petition where trial court conflated *Batson* steps one and three, and remanding for the court to reconstruct steps two and three); *Dolphy v. Mantello*, 552 F.3d 236, 239-40 (2d Cir. 2009) (reversing where state appellate court and federal district court collapsed latter two *Batson* steps); but see, e.g., *United States v. Potenciano*, No. 16-50430, 2018 WL 1406658, *2 (9th Cir. Mar. 21, 2018) (recognizing district court error for failure to evaluate *Batson* step three, but concluding that defendant had nevertheless failed to carry her burden to show purposeful race discrimination); *Roosevelt v. Griffin*, No. 6:15-CV-06738-MAT, 2018 WL 1509356, at *6, 2018 U.S. Dist. Lexis 51583,

Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075, 1092-93, 1113-16 (2011) (compiling federal cases reviewing race-based *Batson* challenges from 2000 to 2009, and arguing that the *Batson* framework is ineffectual without a rigorous third step, particularly in light of unconscious biases, and should in fact be modified to facilitate recognition of more *Batson* violations).

*18-23 (W.D.N.Y. Mar. 27, 2018) (affirming denial of habeas petition without examining whether the trial court had made a step-one determination or permitted petitioner the opportunity to rebut prosecutor’s race-neutral justifications).

Eliminating discrimination from jury selection is more than a laudable goal; it is a constitutional requirement, and one that is necessary if society is to have confidence in the criminal justice system, *Miller-El v. Dretke*, 545 U.S. at 237 (“When the government’s choice of jurors is tainted with racial bias . . . the very integrity of the courts is jeopardized . . .”); *J. E. B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) (“potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice”), and to make real this Court’s proclamation that “blatant racial prejudice is antithetical to the functioning of the jury system,” *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017). Minor’s case presents an opportunity to restore meaning to and reinforce the structure of the *Batson* framework to ensure that racial discrimination does not pervade our system of criminal justice from the very outset of a trial.

2. The State’s Argument That This Was A *Batson* Step-One Determination Ignores The Decision Below and Demonstrates The Necessity Of Further Review.

The State urges that no *Batson* error occurred because Minor did not meet his burden at *Batson* step one. Opp. at 21-22. But this is both incorrect and misses the point. First, as every court has recognized, both the trial and the State appellate courts imposed too high a burden, the trial court by requiring that Minor

show a “substantial likelihood” of race-based discrimination and the appellate court by considering the ultimate composition of the jury. Pet. at 12, 14-19; Pet. App. 10a, 55a, 118-19a.

The State’s characterizes the following portion of the appellate court decision as “dicta”:

There was no proof by the defense of an unfair or unreasonable under-representation of African-Americans or women. Indeed, the record discloses that the majority of jurors who heard the case were African-Americans. We have stated that the ultimate composition of the jury [] is relevant to the determination of whether the prosecutor’s intent was discriminatory. As we recently noted in *Osario*, the presence on the jury of a substantial number of the group alleged to have been discriminatorily excluded may support a finding that a questionable proffered reason for challenging a member of that group was not reflective of a discriminatory intent. In this instance, the defense did not make a *prima facie* showing that the jury was not drawn from a representative cross-section of the community. Accordingly, we reject defendant’s argument.

Pet. App. at 58-59a (internal quotation marks and citations omitted). But far from an aside or tangential comment, it is the very application of the law to Minor’s case, and shows that the State appellate court erroneously based its *Batson* step-one analysis upon whether the final jury was “drawn from a representative cross-section of the community.” *Id.* This was plainly contrary to and an unreasonable application of established law. *See Johnson v. Finn*, 665 F.3d 1063, 1068 (9th Cir. 2011) (“A state court that equates a correct standard with an incorrect standard cannot be applying the correct standard in the manner required by law.”). Indeed, had any reviewing court properly applied the *Batson* step-one standard, as set forth

in *Johnson*, 545 U.S. at 169-70, 173 (requiring only evidence sufficient to permit the trial judge to draw an “inference[] that discrimination may have occurred”), Minor would have easily satisfied this low bar. See Pet. App. 82a (four of prosecutor’s first five strikes targeted African-Americans); Pet. App. 119a (counsel argued that the State excluded 80 percent of jurors who were the same race as defendant on the assumption that individuals who share the same race would be more sympathetic to defendant); Pet. App. 250a (during argument on reverse-*Batson* challenge, prosecutor complained that “the majority of the individuals on the jury are African American” and “the State has now run out of challenges”); Pet. App. 273a (prosecutor took issue with an African-American male juror smiling at defense counsel).

But more importantly, the disconnect between the Court of Appeals decision – viewing the record as reaching *Batson* step three, Pet. App. 9a-10a – and the State’s framing of this issue – focusing on *Batson* step one exclusively, Opp. 20-22 – powerfully exemplifies the issues that flow from a collapsed *Batson* analysis. Without undertaking and reviewing the *Batson* steps individually, and with each subsequent reviewing court seeking to justify a process that was not faithful to the law, a defendant’s ability to hold the State accountable for race-based peremptory challenges evaporates. See, e.g., *Dolphy*, 552 F.3d at 239-40 (noting the challenges of appellate review resulting from trial court’s failure to conduct a distinct *Batson* step-three inquiry and reversing district court’s determination, which had collapsed latter two *Batson* steps and concluded that a credibility finding was implicit in the

trial court's step-two ruling). Minor's case presents the Court with the opportunity to avoid eviscerating *Batson* in this unfortunately common manner. The Court should grant a writ of certiorari to prevent *Batson* from fulfilling its role as the guarantor of equal protection under the law in jury selection.

B. A Remedy Must Be Provided When A Prosecutor Improperly Quantifies The State's Burden Of Proof, Which Remedy Must Be Based Upon A Full Consideration Of The Strength Of The Evidence.

The State's burden to prove the charges against a defendant beyond a reasonable doubt is one of the core tenets of our judicial system. *In re Winship*, 397 U.S. 358, 359 (1970) (proof of guilt beyond a reasonable doubt is one of "the essentials of due process and fair treatment"); *see generally Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (jury instruction giving incorrect standard for beyond a reasonable doubt constitutes structural error and does not require showing of prejudice to warrant reversal). That is because the beyond-a-reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error;" that is, our society values the "freedom of every individual [and] should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Winship*, 397 U.S. at 363-64. To that end, we allocate the risk of error to the state because a criminal defendant "has at stake an interest of transcending value – . . . his liberty." *Id.* at 364. The importance of this concept cannot be overstated: it is "indispensable to command the respect and confidence of the community in applications of the criminal law" and must "not be diluted." *Id.*

Minor's Petition showed how the beyond-a-reasonable-doubt standard is

significantly undermined when the State tells the jury that it is equivalent to whatever level of self-ascribed certainty the State's witness professes at trial. Pet. App. 23a-25a. Several Circuits have commented disapprovingly about a prosecutor's quantification of the burden of proof, but as Minor argued, none have addressed the proper remedy to be granted on this basis. Pet. at 24. In light of the fundamental role that this standard of proof plays in our system of criminal justice, how and when the quantification of this standard can be permitted and what the relief for such a violation should be all provide a compelling justification for the further review of this case. *See* Supreme Court Rule 10 ("writ of certiorari will be granted only for compelling reasons").

Contrary to the State's contention, Minor's case is ideal for this purpose. Indeed, the trial court, State appellate court, and Court of Appeals all disapproved of the prosecutor setting the burden of proof at 80 percent.⁵ However none took action to remedy the error, at least in part, because they did not conduct the analysis dictated by this Court to determine if such statements deprived Minor of a fair trial. *See Darden v. Wainwright*, 477 U.S. 168 (1986).

Specifically, in *Darden*, this Court required that courts consider *all* of the evidence against the defendant when evaluating whether prosecutorial misconduct during summation "so infected the trial with unfairness as to make the resulting

⁵ *See* Pet. App. 311a (trial court noting that reasonable doubt is not defined "in terms of percentages of certainty"); 60a (State appellate court agreeing that prosecutor's comments "were obviously an incorrect statement of the law"); 36a (district court recognizing State appellate court determination that prosecutor's

conviction a denial of due process.” 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1973)); *see also Moore v. Morton*, 255 F.3d 95, 110-11, 119-20 (3d Cir. 2001) (reversing the denial of habeas relief based on prosecutorial misconduct where guilt turned on uncertain identification evidence). But the courts here did not give any consideration to the strength of the State’s case when evaluating the summation misconduct.⁶ Pet. App. 59-60a. This context is particularly significant here because the case presented to the jury turned entirely upon the victim’s identification. Pet. at 27-30. As that identification became less certain, with the victim testifying that he was now only 80 percent sure that Minor was the person who had robbed him, Pet. App. 15a-16a, and that he was admittedly terrified, focused on the gun, and not thinking about looking at the perpetrator’s features during the robbery, Pet. App. 300a, so too did the likelihood of a conviction. The State’s summation was an attempt to close the gap between her case, as it was deteriorating, and her burden, by reducing that burden in a manner that is profoundly contrary to fundamental principles underlying our system of criminal justice.⁷

statements were improper); 7a (Court of Appeals stating that “prosecution’s summation was troublesome”).

⁶ In fact, the only analysis the State appellate court conducted on this issue was to state that standard jury instructions had been given. Pet. App. 60a. But as Minor explained in his Petition, these instructions did not directly address the prosecutor’s comment and were patently insufficient to overcome the damage done by the prosecutor’s improper quantification of the beyond-a-reasonable-doubt standard. Pet. at 29-30.

⁷ The State seeks to save Minor’s conviction by placing the prosecutor’s comment in the context of the rest of her summation, but nothing therein contradicts her

The constitutional requirement that the State prove guilt beyond a reasonable doubt is too important to be given such short shrift. The analysis embraced by the Court of Appeals, devoid of any consideration of the context of the case against a defendant, is in conflict with decisions of this Court and of other Circuits and deprives the defendant of the due process guaranteed by the Fourteenth Amendment. *See* Pet. at 26-27; *Darden*, 477 U.S. at 181-82; *Trillo v. Biter*, 769 F.3d 995, 1001 (9th Cir. 2014); *Reed v. United States*, 133 F. App'x 204, 210-11 (6th Cir. 2005). But particularly because guilt beyond a reasonable doubt is so fundamental to a defendant's right to due process and to our system of justice, the Court should grant the petition to provide guidance as to the appropriate remedy when a prosecutor improperly quantifies the burden of proof and to assure that any such remedy is not unmoored from the broader context of the case and especially from the strength or weakness of the State's evidence.

statement that her burden of proof was set at the witness's most equivocal estimate of his certainty as to the identification of the defendant: "80 percent is a very high percentage, ladies and gentlemen. *That's beyond a reasonable doubt.* Preponderance of [the] evidence in civil cases is a little more than 50/50. *Beyond a reasonable doubt is 80 percent, 90 percent, 100 percent. That's all we need. That's sufficient.*" Pet. App. 324-25a (emphasis added). Nor can this statement be fairly characterized as invited response to defense counsel's closing argument, in which she suggested that a low B, in the context of the weak evidence presented, would not rise to the level of beyond a reasonable doubt, Pet. App. 316-17a; Pet. at 25. Defense counsel merely commented on the weakness of the State's case; the prosecutor, on the other hand, reduced her burden, telling the jury that 80 percent certainty is sufficient for a criminal conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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