
In the Supreme Court of the United States

THOMAS BATTLE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the California Supreme Court properly concluded that petitioner failed to establish a prima facie case of race discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986).

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Battle, No. S119296, judgment entered July 1, 2021 (this case below);

In re Battle, No. S269259, petition for writ of habeas corpus filed June 10, 2021.

California Superior Court, San Bernardino County:

People v. Battle, No. FVI012605, judgment entered August 3, 2007 (this case below).

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STATEMENT

1. On November 18, 2000, a hunter found Andrew Demko's dead body in the San Bernardino desert. Pet. App. A 3. Police were called to the scene and discovered Shirley Demko's dead body nearby. *Id.* Mr. Demko had been beaten, strangled, and stabbed to death. *Id.* Because animals had eaten much of Mrs. Demko's body, her cause of death could not be determined beyond "homicidal violence of undetermined etiology." *Id.* at 4. But her body also showed signs that she was beaten and restrained. *Id.* at 4.

The police went to the Demkos' house, where they discovered that the Demkos' car and items from inside the home were missing. Pet. App. A 4. A week later, police pulled over a woman driving the Demkos' car. *Id.* at 5. The woman said she borrowed the car from petitioner Thomas Lee Battle. *Id.* Petitioner was then arrested. *Id.*

Petitioner had four recorded interviews with the police. Pet. App. A 5. His story evolved throughout. *Id.* at 5-13. Ultimately, petitioner admitted that he robbed and stabbed the Demkos, but he claimed he did it together with (and under duress from) a man named Perry Washington. *Id.* at 12-13.

Petitioner's description of certain details surrounding the Demkos' deaths was corroborated by other evidence. Pet. App. A 13-14. And there was additional circumstantial evidence—including incriminating statements from petitioner, petitioner's possession of the loot from the Demkos' house, and

Washington's alibi—indicating that petitioner planned to, and did, rob and kill the Demkos on his own. *Id.* at 14-16.

2. a. Petitioner was charged with special-circumstance murder and other crimes related to the Demkos' deaths. Pet. App. A 1-2. During the guilt-phase trial, defense counsel contested petitioner's involvement in the murders, arguing that petitioner's admissions to the police were lies meant to protect the real killer, Washington, of whom petitioner was afraid. *Id.* at 16. The jury convicted petitioner of all counts and found true all special-circumstance allegations. *Id.* at 1-2.

In the penalty phase, the prosecution presented evidence of petitioner's prior offenses, as well as victim-impact testimony. Pet. App. A 19-20. Petitioner's evidence consisted of testimony from family members about his background, testimony from a psychologist, and expert testimony regarding prison conditions. *Id.* at 20-22. The jury reached a verdict of death, which the trial court imposed. *Id.* at 2.

b. Because petitioner's sole claim in this Court is under *Batson v. Kentucky*, 476 U.S. 79 (1986), the pretrial voir dire proceedings are of particular relevance here. Petitioner is Black and the Demkos were White. Pet. App. A 23, 30. When voir dire began, there were eight Black prospective jurors, seven of whom did not have a hardship. *Id.* at 23-24. Of those seven prospective jurors, the court removed three for cause (prospective jurors M.N., A.H, and B.A.), the prosecutor struck two (prospective jurors S.W. and J.B.),

the defense struck one (prospective juror E.F.), and one served as an alternate juror (Juror No. 360). *Id.* at 23-27.

Specifically, two Black prospective jurors, S.W. and E.F., were among the first twelve jurors seated in the jury box. Pet. App. A 24. After unsuccessfully challenging S.W. for cause, the prosecutor used his fifth peremptory challenge on her. *Id.* Prospective juror J.B., also a Black woman, was subsequently called into the box. *Id.* The prosecutor questioned J.B. about her death penalty views before deciding not to challenge her for cause. *Id.* The court excused two other Black prospective jurors—J.K. and M.N.—for hardship and cause, respectively. *Id.*

The prosecutor then used his ninth peremptory challenge on J.B. Pet. App. A 24. Following the prosecutor's exercise of two more peremptory challenges, both of which removed non-Black prospective jurors, defense counsel made a *Batson* motion regarding the removal of J.B. *Id.* at 24-25. Defense counsel did not object to the earlier removal of S.W. *Id.* at 24 n.5, 25, 29, 37 n.10. But defense counsel did point to the removal of both S.W. and J.B. in arguing that there was a prima facie case of racial discrimination because the prosecutor had used a disproportionate number of peremptory challenges against Black prospective jurors (18 percent of challenges compared to 8.13 percent of prospective jurors by defense counsel's calculation). *Id.* Defense counsel also suggested that the prosecutor had made specious requests for

counsel to stipulate to the removal of Black prospective jurors for cause. *Id.* at 25-26.

The trial court denied the *Batson* motion, concluding that petitioner failed to establish a prima facie case of racial discrimination. Pet. App. A 26. Consequently, the prosecutor was not required to explain the challenged conduct at step two of the three-step *Batson* framework. See *id.* The prosecutor did, however, note that the trial court's removal of M.N. for cause based on her expressed views regarding capital punishment had vindicated his prior attempt to remove her by stipulation. *Id.* at 26. The court added that M.N.'s son had been murdered, and the court had been surprised by the lack of a stipulation from the parties to dismiss her. *Id.* at 26-27.

Voir dire continued, and the prosecutor exercised eight more peremptory challenges, none against Black prospective jurors. Pet. App. A 27. The prosecutor twice accepted panels with E.F., the Black prospective juror who had been in the jury box the entire time, before defense counsel ultimately struck him. *Id.* During the selection of alternate jurors, the parties stipulated to the dismissal of Black prospective jurors A.H. and B.A for cause. *Id.* There was one Black juror among the four alternates who were ultimately chosen, but that juror did not end up participating in either phase of the trial. *Id.* Ultimately, the jury at both the guilt and penalty phases did not include any Black jurors. *Id.*

3. a. The California Supreme Court affirmed in an opinion authored by Justice Cuéllar. Pet. App. A 23-48. Reviewing the matter de novo, the court concluded that the record did not give rise to an inference of discriminatory intent. *Id.* at 28, 32.

The court rejected petitioner's contention "that the prosecutor's disproportionate strike rate against Black prospective jurors supports a prima facie case." Pet. App. A 32. The court observed that Black prospective jurors without hardships comprised 8 percent of the prospective juror pool (7 out of 88). *Id.* When the *Batson* motion was made, the prosecutor had used 18 percent of his peremptory challenges (2 out of 11) on Black prospective jurors. *Id.* By the close of voir dire, the prosecutor had used 10 percent of his peremptory challenges (2 out of 19) on Black prospective jurors. *Id.* Although these percentages exceeded the percentage of Black prospective jurors in the prospective juror pool, "[t]he small sample size introduces uncertainty into the analysis and severely limits the value of the data." *Id.* Furthermore, had the prosecutor succeeded in removing S.W. for cause, the "disparities become negligible." *Id.*; see also *id* at 33 n.8¹ The court was unpersuaded by petitioner's arguments that, despite the small sample size, it should still draw

¹ The California Supreme Court observed that, given S.W.'s views on the death penalty, the trial court would have been justified in excusing her for cause. Pet. App. A 37 n.10.

an inference of discrimination from the prosecutor's exercise of peremptory challenges. *Id.* at 33-35.

The court also noted other facts militating against an inference of discriminatory purpose. Pet. App. A 35-37. For instance, the prosecutor did not strike J.B. right away, instead passing on her for several rounds until he used his ninth challenge to excuse her. *Id.* at 35. In addition, the prosecutor repeatedly passed on E.F.—who was in the jury box from the start—and twice accepted a jury panel with E.F. as a member before defense counsel ultimately struck him. *Id.* Similarly, the prosecutor accepted the final panel, which included a Black alternate juror. *Id.* at 36.

As for J.B., the court acknowledged that she had attributes that might have made her an attractive juror for the prosecution. Pet. App. A 37-39. But J.B.'s written questionnaire and voir dire responses contained statements that raised significant concerns about her willingness to impose the death penalty, such that any reasonable prosecutor would logically wish to avoid her serving on the jury. *Id.* at 40-42. Specifically, she indicated that death by lethal injection or the gas chamber was, in her view, cruel and inhumane. *Id.* at 40. She was also worried about sitting in a capital trial involving an innocent defendant. *Id.* at 40-41. And she said it was “unfortunate” that she had to go along with the law if petitioner were proven guilty. *Id.* at 41. While J.B. made other statements that arguably suggested her willingness to impose the death

penalty, when taken in context, those statements did not necessarily ameliorate her express misgivings about the death penalty. *Id.* at 42-43.

The court also addressed the suggestion that the prosecutor sought pre-voir-dire stipulations to dismiss Black prospective jurors for cause at a disproportionate rate. Pet. App. A 44-45. The court reasoned that this was not indicative of racial animus, given that defense counsel agreed to the for-cause dismissals. *Id.* at 44-45. Likewise, defense counsel agreed to additional stipulated dismissals of Black prospective jurors during voir dire—one of which defense counsel proposed. *Id.* at 45.

Moreover, the court observed that the record did not show that the prosecutor questioned Black prospective jurors in a meaningfully different way from other jurors. Pet. App. A 46. Nor did the prosecutor show selective solicitude for J.K.'s hardship dismissal; the record demonstrated that the prosecutor simply agreed with the trial court's assessment that J.K. faced great financial hardship if she were to serve. *Id.* at 46-47.

Finally, the court noted that none of the statements the prosecutor made regarding his peremptory challenges supported an inference of discrimination. Pet. App. A. 47. Because the trial court determined that no prima facie case had been made, the prosecutor was not required to state his reasons for challenging J.B., and he declined to do so. *Id.* at 26, 47. The California Supreme Court noted that the prosecutor did explain that he sought a stipulation to dismiss another prospective juror (M.N.) for cause based on her

death penalty reservations, which elicited the trial court's observation that M.N.'s son had been murdered. *Id.* at 26, 47. The prosecutor responded, "[T]hat's one of the people I proposed to stipulate to. And that goes far beyond racial reasons." *Id.* at 27. The California Supreme Court acknowledged that, to the extent the pronoun "that" in the quoted remarks referred to the murder of M.N.'s son rather than to her views regarding capital punishment, the prosecutor did not know about the murder when he proposed the stipulation. *Id.* at 47. But, to the extent the prosecutor misspoke about the reason for the proposed stipulation, there was no indication the misstatement was intentional, and the statement did not give rise to any inference of discrimination—particularly given the prosecutor's accurate statement that M.N. had clearly expressed bias against the death penalty. *Id.* at 48.

b. Justice Liu dissented. Pet. App. A Dissent 1-9.² He concluded that the "totality of the relevant facts surrounding J.B.'s excusal gives rise to an inference of discrimination." *Id.* at 6. In his view, the majority inappropriately relied on judicial speculation to dismiss a plausible claim of discrimination. *Id.* at 1, 7.

² Appendix A to the petition retains the same numbering convention as the slip opinion, so the dissenting opinion starts over at page 1 following page 81 of the majority opinion.

ARGUMENT

Petitioner claims that the California Supreme Court erred when it concluded that he had not made a prima facie showing of racial discrimination at step one of the *Batson* framework. That claim does not warrant review by this Court. The state court reasonably applied settled law to the record in this case and correctly held that petitioner failed to make a prima facie case of discrimination. Moreover, the principal legal argument petitioner seeks to raise here finds no persuasive support in lower-court cases addressing step one of the *Batson* framework.

1. The decision below does not contravene this Court's precedents involving racial discrimination in jury selection. The Equal Protection Clause forbids a prosecutor from using a peremptory challenge to remove a potential juror solely on the basis of race. See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). A defense objection to the prosecutor's use of a peremptory challenge is subject to a three-step analysis. *Id.* at 96-98; see *Johnson v. California*, 545 U.S. 162, 168 (2005). "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson*, 545 U.S. at 168. Second, if a defendant has made such a showing, the burden shifts to the prosecutor to explain the peremptory challenge. *Id.* Third, if the explanation is race-neutral, the court must decide whether the defendant "has proved purposeful racial discrimination." *Id.*

Beyond those basic rules, *Batson* “decline[d] . . . to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Batson*, 476 U.S. at 99. Instead, it remains for the lower courts “to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.” *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

The California Supreme Court faithfully applied this Court’s precedents. In its de novo analysis of petitioner’s *Batson* claim regarding the peremptory challenge with respect to J.B, the court carefully reviewed: the prosecutor’s questioning of J.B. during voir dire, which focused on J.B.’s death penalty views; J.B.’s written questionnaire responses regarding the death penalty; and the proportion of peremptory challenges the prosecutor used on Black prospective jurors versus the proportion of Black prospective jurors overall. Pet. App. A 27-48; see *Batson*, 476 U.S. at 96-97. Having considered that information through the prism of this Court’s holding in *Johnson*, the court determined that the totality of relevant facts “fails to establish a basis for inferring that the prosecution may have struck a particular Black juror because of her race.” Pet. App. A 48.

The court explained that “the record reveal[ed] . . . assertions by J.B. that, considered together and in context, justifiably would have raised significant concerns about her *willingness* to impose the death penalty.” Pet. App. A 40

(emphasis in original); see also *id.* at 43 (“[T]aken together and considered in context, the combination of J.B.’s responses revealed significant reservations about the death penalty.”). As the court observed, “[a]ny reasonable prosecutor would logically wish to avoid a juror who, over the course of multiple responses, expressed such hesitation to impose the death penalty.” *Id.* at 42. Accordingly, J.B.’s “death penalty misgivings, under the circumstances, necessarily dispel any inference that discrimination motivated her excusal.” *Id.* at 44. That analysis was correct and consistent with this Court’s precedents.

2. Petitioner argues that review is warranted because the California Supreme Court supposedly contradicted other lower-court decisions when it considered “hypothetical” justifications for the prosecutor’s conduct. Pet. 15-19. In support of that argument, however, petitioner relies primarily on authorities involving the second or third step of the *Batson* framework—rather than the first step, which is at issue here.

a. As noted above, if a court determines that a defendant has made out a *prima facie* case of discrimination at step one, then the prosecutor must explain the peremptory challenge (step two). *Johnson*, 545 U.S. at 168. If that explanation is race-neutral, then the court must determine (at step three) whether the defendant “has proved purposeful racial discrimination.” *Id.*

In cases that progress beyond step one, lower courts have noted that “*Batson* means what it says: the court must ask the prosecutor to provide reasons, rather than merely speculating about what such reasons might be.”

Johnson v. Martin, 3 F.4th 1210, 1224 (10th Cir. 2021); see Pet. 15.³ As another decision invoked by petitioner (at 16) put it, “if the objecting party establishes a prima facie case”—thereby triggering the second step of the *Batson* inquiry—then it would be error to reject the claim “on the ground that the record suggested legitimate reasons that *could* have motivated the prosecutor to exercise the contested peremptory challenge.” *Bronshtein v. Horn*, 404 F.3d 700, 723 (3d Cir. 2005); see also *id.* at 275 (holding that “Bronshtein failed to make out a prima facie case” because, among other things, “the prosecutor’s questions and statements during voir dire did not suggest that Ms. Eidelson was peremptorily challenged because of her religion or ethnicity”).

This case, of course, did not progress to the second step of the *Batson* inquiry. See *supra* p. 4. Instead, “[t]he trial court found that Battle failed to establish a prima facie case” at step one. Pet. App. A 26. Consequently, the prosecutor was under no obligations to explain his reasons for striking J.B., and did not do so. See *id.*

³ The quoted statement from the Tenth Circuit’s opinion in *Johnson* was plainly made in reference to what “[t]he second step of *Batson* specifically requires,” *Johnson*, 3 F.4th at 1224—it was not a statement of the “law governing the prima facie case,” Pet. 15. Later on in the opinion, when the Tenth Circuit “review[ed] Johnson’s *Batson* claim de novo,” the court assumed without deciding that it could “consider . . . allegedly obvious reasons” for the peremptory challenge “in assessing Johnson’s prima facie case,” but held that the reasons proffered by the State did “not significantly undermine Johnson’s prima facie case[.]” *Johnson*, 3 F.4th at 1226.

b. In reviewing the trial court's determination that petitioner failed to establish a *prima facie* case, the California Supreme Court relied on precedent holding that, at step one of the *Batson* framework, it must "examine the entire record before the trial court," Pet. App. A 29 (citing *People v. Reed*, 4 Cal. 5th 989, 999 (2018)), and may consider (among other things) "nondiscriminatory reasons for the challenged strikes that are 'apparent from and 'clearly established' in the record,'" *id.* at 30 (quoting *People v. Scott*, 61 Cal.4th 363, 384 (2015)); see also *id.* ("Yet we may do so only when these reasons 'necessarily dispel any inference of bias,' such that "'there is no longer any suspicion . . . of discrimination in those strikes.'"). The court articulated the same standard in several earlier cases involving *Batson* challenges where this Court denied certiorari. See *Rhoades v. California*, No. 19-8332, *cert. denied*, 141 S. Ct. 659 (2020); *Reed v. California*, No. 18-6411, *cert. denied*, 139 S. Ct. 1260 (2019); *Parker v. California*, No. 17-6923, *cert. denied*, 138 S. Ct. 988 (2018).

That approach is consistent with this Court's *Batson* precedent. *Supra* p. 9. It also tracks the approach followed by many other lower courts. For example, in *United States v. Stephens*, 421 F.3d 503 (7th Cir. 2005), the Seventh Circuit reiterated "that courts considering *Batson* claims at the *prima facie* stage may consider apparent [non-discriminatory] reasons for the challenges discernible on the record." *Id.* at 515. It explained that "[t]his consideration of 'apparent reasons' is in fact nothing more than a consideration of 'all relevant circumstances' when determining whether an inference of

discrimination is established.” *Id.* at 516; see also, e.g., *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir. 2014) (giving weight to whether there are “‘apparent non-discriminatory reasons’” for the challenged conduct); *Brown v. Jones*, 978 F.3d 1029, 1035 (7th Cir. 2020) (“Courts considering *Batson* claims at the prima facie stage may consider ‘apparent’ reasons for a strike.”); *Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000) (considering “plausible” reasons); cf. *Capers v. Singletary*, 989 F.2d 442, 446-447 (11th Cir. 1993) (considering “probable” reasons at prima facie stage under *Swain v. Alabama*, 380 U.S. 202 (1965)).

Petitioner cites several Ninth Circuit cases to support his argument that, at step one of the *Batson* framework, a court may not consider “justifications, not cited by the prosecutor, that hypothetically could have supported the peremptory challenge[.]” Pet. 15; see *id.* at 16-18. But the first case, *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004), actually *confirms* that, at the prima facie stage, courts “may consider whether ‘the record contains entirely plausible reasons, independent of race, why’ a prosecutor may have exercised peremptories”—and emphasizes that, “[i]f there are such reasons in the record, . . . it’s difficult to say that defendant has raised an inference of bias.” *Id.* at 1091-1092 (quoting *Wade v. Terhune*, 202 F.3d at 1198).⁴ On the facts

⁴ The court explained that looking at record-based plausible reasons for the exercise of peremptory challenges “ha[s] usually helped persuade us that defendant made no prima facie showing where defendant challenged the

before it, which involved the prosecutor's excusal of five out of six Black prospective jurors by means of five out of six peremptory challenges, the court held that a prima facie case had been established. *Id.* at 1092. It is in *that* context—*after* a prima facie case is established—that “it does not matter that the prosecutor might have had good reasons to strike the prospective jurors” and “[w]hat matters is the *real* reason they were stricken.” *Id.* at 1090; see *also id.* at 1092 (observing that Paulino “has made a prima facie showing sufficient to require the prosecutor to explain her actual motivations for her peremptory challenges”).

Petitioner also invokes *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015). That case involved a former rule under which state appellate courts would automatically affirm the denial of a *Batson* claim at the prima facie stage so long as the record ““suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.”” *Id.* at 1101. The Ninth Circuit described the former rule as involving “speculation.” *Id.* But it did not conclude that courts are barred from considering matters that are readily apparent from the record, even if such consideration might technically qualify as being speculative. *Id.* at 1101-1103. On the contrary, the court held that the defendant had established a prima facie case in part because—unlike in

excusal of just one juror.” *Paulino*, 371 F.3d at 1092. That is precisely what occurred here. See Pet. App. A 25 (“What’s at issue here is, ultimately, the removal of *one* juror out of the prosecutor’s first 11 peremptory challenges.”).

this case—“[t]here was *no readily apparent reason* to strike” a particular Black prospective juror. *Id.* at 1102 (emphasis added).

Finally, petitioner cites *Johnson v. Finn*, 665 F.3d 1063 (9th Cir. 2011). In that case, the court stated that “the existence of [non-discriminatory] ‘grounds upon which a prosecutor could reasonably have premised a challenge,’ does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework.” *Johnson v. Finn*, 665 F.3d at 1069; see also *Currie v. McDowell*, 825 F.3d 60, 610 n.5 (9th Cir. 2016) (citing *Johnson v. Finn* for similar point). But that statement is not inconsistent with the approach followed by the California Supreme Court below: the possibility that there might conceivably be non-discriminatory grounds for a prosecutor’s peremptory challenge does not, by itself, *suffice* to defeat an inference of racial bias at the prima facie stage. Rather, the reviewing court “must carefully scrutinize . . . all other relevant circumstances.” Pet. App. A at 31-32. In any event, if petitioner were correct in reading that statement to suggest that race-neutral reasons for a peremptory challenge can never be considered at the prima facie stage—even when they are readily apparent from the voir dire questions and other information in the record—the statement would be inconsistent with other Ninth Circuit precedent. See *supra* p. 14. It would also be inconsistent with *Batson* itself, which emphasized that “the prosecutor’s questions and statements during *voir dire* examination . . . may

refute an inference of discriminatory purpose” at the prima facie stage. *Batson*, 476 U.S. at 97 (emphasis added).⁵

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 1, 2022

Respectfully submitted,

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⁵ Petitioner also contends that the California Supreme Court’s approach below conflicts with the proper approach to claims of racial discrimination in employment under Title VII of the Civil Rights Act of 1964. Pet. ii, 22-24. He did not make that argument below. In any event, he does not identify any support for the argument that the Title VII framework requires a court adjudicating a claim of discrimination in jury selection at step one of the *Batson* framework to blind itself from considering race-neutral justifications that are obvious or otherwise apparent from the record.