No. 25-5665

In the Supreme Court of the United States

ALI AWAD MAHMOUD IRSAN,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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(CAPITAL CASE)

QUESTIONS PRESENTED

The Petitioner has presented the following questions to this Court:

1. Does the knowing judicial enforcement of defense counsel's explicitly race-based agreement to exclude a Black woman from the venire violate the Equal Protection Clause?

2. Does a prosecutor's knowing acquiescence in defense counsel's racially motivated efforts to exclude Black women from jury service violate the Equal Protection Clause?

3. Do the Equal Protection rights of prospective jurors and the integrity of the courts require a remedy when the "officials responsible for the selection of [a jury] panel" fail in their "constitutional duty to follow a procedure . . . which would not 'operate to discriminate in the selection of jurors on racial grounds'"?

The Respondent offers the following threshold questions:

1. Was the Texas Court of Criminal Appeals required to review a purported violation of the Equal Protection Clause when that claim was raised for the first time on appeal?

2. Because of the absence of any objection at trial, has the record been sufficiently developed to address the purported violation of the Equal Protection Clause?

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondent, the State of Texas, hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Excusal of Numerous Prospective Jurors

In death penalty cases, Texas uses a procedure during jury selection in which prospective jurors are provided with written questionnaires, and based upon the prospective jurors' answers in those questionnaires, the parties make determinations regarding whether the prospective jurors should be individually questioned regarding their ability to follow the law and any bias against the law or the parties that they might have. The procedure for jury selection in death penalty cases in Texas is for the trial judge to first explain the law to a group of prospective jurors and then for the parties to individually question the prospective jurors:

> In a capital felony case in which the State seeks the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court.

TEX. CODE CRIM. PROC. art. 35.17(2).

However, prior to that general explanation of the law by the trial judge, and prior to individual questioning by the parties, both parties may consent to the excusal of a prospective juror without the need for any questioning. *See* TEX. CODE CRIM. PROC. art. 35.05 ("One summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled."). As it was in this case, this summary excusal is usually based upon the prospective jurors' answers to the questionnaires.

In this case, as in most death penalty cases in Harris County, a huge number of prospective jurors were excused by agreement, and the vast majority of them were excused without discussion or any questioning:

May 4, 2018	77 prospective jurors	(R.R. 14-80, 90, 103-07, 119, 129, 196-202, 204-05, 208).
May 18, 2018	20 prospective jurors	(R.R. 15-4).
May 21, 2018	3 prospective jurors	(R.R. 16-39, 43, 78).
May 22, 2018	42 prospective jurors	(R.R. 17-14, 21, 23, 40-43, 57, 110, 133).
May 23, 2018	20 prospective jurors	(R.R. 18-175, 235, 281).
May 24, 2018	2 prospective jurors	(R.R. 19-5, 154).
May 29, 2018	89 prospective jurors	(R.R. 21-19, 39-44, 89-90).
May 30, 2018	54 prospective jurors	(R.R. 22-3-4, 34, 39, 43-47, 52, 62).
May 31, 2018	66 prospective jurors	(R.R. 23-3, 36, 38, 40, 43-45, 153, 192, 194, 196).

June 1, 2018	13 prospective jurors	(R.R. 24-3, 109).
June 4, 2018	66 prospective jurors	(R.R. 25-15, 17, 28, 30, 64, 97, 99-104, 107-08, 123, 173, 263).
June 5, 2018	47 prospective jurors	(R.R. 26-180, 200-06, 209-10, 212-14).
June 6, 2018	114 prospective jurors	(R.R. 27-13, 15, 18, 22-23, 36-38, 49, 77, 79, 81-82, 84-85, 87-88, 118, 120, 123-25, 127, 143-44, 151).
June 7, 2018	13 prospective jurors	(R.R. 28-3, 21, 24, 34, 71, 80, 82, 198).
June 11, 2018	57 prospective jurors	(R.R. 30-61, 69, 73, 83-85, 96, 101, 308).
June 12, 2018	3 prospective jurors	(R.R. 31-5, 123, 214).
June 19, 2018	2 prospective jurors	(R.R. 32-16).
May 4, 2018 to June 19, 2018	**688 prospective jurors**	**(R.R. 14 to 32).**[1]

The Excusal of the Particular Prospective Juror

The issue presented in this Petition for a Writ of Certiorari deals with one of the hundreds of prospective jurors who were excused by agreement, and she was ultimately excused by agreement on June 6, 2018 (R.R. 27-142-43). On June 4, 2018, two days before this prospective juror had originally been scheduled for individual questioning, (R.R. 25-66-68), the prospective juror informed the trial court that her employer would pay her for being away from work for two weeks, but

[1] The number of those excused by agreement was much higher than that implied in the Petition for a Writ of Certiorari (petition at 18).

apparently nothing beyond that (R.R. 25-105). She stated that she would have to "run some numbers" in order to see whether being away from work for several weeks would be a financial hardship for her (R.R. 25-105). On that particular day, the trial judge informed the prospective jurors that the trial would last at least five to six weeks (R.R. 25-68, 106-07).[2]

On the day that the prospective juror was originally scheduled to be individually questioned, she apparently did not show up and was not answering her telephone (R.R. 27-140). The trial judge eventually was able to reach the prospective juror on the telephone near the end of the day, and the trial judge had a conversation with the prospective juror off the record (R.R. 27-142). After that off-the-record conversation, the trial judge went back on the record and announced that both sides had agreed to excuse the prospective juror (R.R. 27-142-43).

The trial judge did not end her telephone conversation with the prospective juror, and the prospective juror expressed interest in being on the jury, while at the same time acknowledging the real uncertainty as to whether she could actually serve on a death penalty jury for several weeks:

> THE COURT: Okay. Thank you for being willing to come downtown. You don't have to come.
>
> VENIREPERSON: Okay.
>
> THE COURT: We don't want to put you through a financial burden. But thank you for being willing to serve. It means a lot to us.
>
> VENIREPERSON: Okay. I mean, actually, I was really interested in doing it.

[2] The trial actually lasted longer than that, lasting over seven weeks, going from June 25, 2018 (R.R. 1-59) to August 14, 2018 (R.R. 1-76).

THE COURT: That's what I thought. But I can't quite get a straight answer out of you if it's going to be a financial hardship or not. It's time we have an answer.

VENIREPERSON: Well, I mean, I just wanted – the agency said they would contact me back and let me know if they could put me on for weekends. If I wasn't needed on the weekend –

THE COURT: Are y'all hearing that?

VENIREPERSON: – I need income coming in.

THE COURT: Excuse me. Ma'am, just a moment. Did y'all hear that? She really wants to be on the jury, she's trying to get temporary work on the weekends so that she can serve. Are y'all still okay with excusing her?

MS. PRIMM [prosecutor]: Yes, ma'am.

MR. TANNER [defense counsel]: And I am – after reviewing her questionnaire again, we'll agree if the State wants to agree.

MS. PRIMM: Yes, we want to agree.

THE COURT: Everyone agrees. I think after looking at your questionnaire, they think you probably won't be on the jury anyway. So that way, it will save you a trip down here.

VENIREPERSON: Okay. Well, thank you.

(R.R. 27-143-44). After both parties continued to agree to excuse the prospective juror without any further questioning, the trial judge ended the telephone conversation with the prospective juror (R.R. 27-144-45).

The petitioner's trial attorney then stated the following:

MR. TANNER: Also for the record, Judge, she is a black female.

THE COURT: I don't think so. Was she?

> MR. TANNER: She's a black female. And knowing what the evidence could – could come out in evidence is a possible – is a reason – another reason I take into consideration in our decision to agree to her.
>
> THE COURT: Are some of the victims black females?
>
> MR. TANNER: No, ma'am. There are other issues.
>
> THE COURT: Other issues? Okay. Well, I don't know what those are, but if it's important to you, I imagine there's a good reason.

(R.R. 27-145). The matter was not brought up again. The matter was not raised in the petitioner's motion for new trial (C.R. 11-3127).

The record does not reflect the prior reason or reasons that the parties had for initially excusing the prospective juror without individual questioning, although it was certainly based upon her answers to her questionnaire. Before any of the above-quoted discussions occurred, the parties had already agreed to excuse the prospective juror without any questioning. Based upon this record, it is also possible that the excusal of the prospective juror without questioning was also based upon the difficulty that the prospective juror had in committing to being available for a death penalty case that was going to last several weeks. As the prospective juror did not show up for individual questioning on the particular day that her individual questioning was scheduled, the record does not reflect whether the prospective juror would have been available for individual questioning or would have been able to serve if the parties were forced to accept her as a juror. She had articulated a financial hardship, and was only available for questioning by telephone near the end of the day (R.R. 27-140).

The Direct Appeal

In his direct appeal before the Texas Court of Criminal Appeals, the petitioner raised two claims relevant to this Petition for a Writ of Certiorari:

- "The trial court's acquiescence in defense counsel's race-based exclusion of prospective juror [# 467] violated the Equal Protection Clause."
- "The prosecution team's acquiescence in defense counsel's race-based exclusion of prospective juror [# 467] violated the Equal Protection Clause."

The petitioner pointedly did not raise a claim of ineffective assistance of counsel.[3]

In addressing the two issues raised by the defense, the Texas Court of Criminal Appeals stated that it was not clear that *Batson v. Kentucky* and *Georgia v. McCollum*—upon which the petitioner had relied—applied to this fact situation. *Irsan v. State,* 708 S.W.3d 584, 600 (Tex. Crim. App. 2025) (citing *Batson v. Kentucky,* 476 U.S. 79, 89 (1986); *Georgia v. McCollum,* 505 U.S. 42, 59 (1992)). The Court of Criminal Appeals held that the petitioner's claims were procedurally defaulted because no objection had been raised at trial. *Irsan,* 708 S.W.3d at 600. The Court drew an analogy to the review of a *Batson* objection to the exercise of peremptory challenges:

> "*Batson* error," we have said, "is subject to principles of ordinary procedural default." *Batiste v. State,* 888 S.W.2d 9, 17 n.5 (Tex. Crim. App. 1994). If a defendant does not object to what he believes to be race-based peremptory strikes, he forfeits his opportunity for a hearing in which the State can offer race-neutral explanations to any prima facie case of purposeful discrimination. *See id.* It follows that a trial court has no *sua sponte* duty to initiate the *Batson* protocol by

[3] Throughout every stage of these proceedings—including before this Court—the petitioner has not directly challenged the actions of his trial attorney, but has instead challenged the inaction of the trial judge and the trial prosecutor.

> demanding race-neutral explanations for the State's peremptory strikes.

Irsan, 708 S.W.3d at 600.

The Court of Criminal Appeals held that the petitioner had not

> satisfactorily explained why, even though a trial court has no *sua sponte* duty to demand race-neutral explanations from the State, it nevertheless has (or should have) a *sua sponte* duty to demand race-neutral explanations from the defense. He suggests that such a duty might arise when it becomes "apparent" that the defense is engaging in racial discrimination. But under ordinary rules of procedural default, the egregiousness of an alleged error does not transform a forfeitable claim into one that is immune from procedural default. *See Proenza v. State,* 541 S.W.3d 786, 796 (Tex. Crim. App. 2017) ("[A] proper determination of a claim's availability on appeal should not involve peering behind the procedural-default curtain to look at the particular circumstances of the claim within the case at hand.") (internal quotation marks omitted). Neither we nor the Supreme Court have ever held that some *Batson* or *McCollum* violations are so egregious (or "apparent") that the trial court must, on its own initiative, intervene. *See McCollum,* 505 U.S. at 59 ("*if the State demonstrates a prima facie case of racial discrimination* by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges.") (emphasis added).

Irsan, 708 S.W.3d at 600-01.

Argument

The Texas Court of Criminal Appeals correctly held that the petitioner procedurally defaulted his Equal Protection claim.

This Court has consistently held that a state may impose a requirement that a claim regarding a purported Equal Protection violation first be raised at trial. *See Ford v. Georgia,* 498 U.S. 411, 422 (1991) ("The requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors

and the administration of their oaths, is a sensible rule."). In *Batson* itself, this Court "recognized that local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases, and [this Court] left it to the trial courts, with their wide 'variety of jury selection practices,' to implement *Batson* in the first instance." *Ford,* 498 U.S. at 423. (citing *Batson,* 476 U.S. at 99 n.24). Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected. *Ford,* 498 U.S. at 423.[4]

This Court has consistently held that, even regarding constitutional error, an objection should be raised at trial regarding that claimed error, and such claims should not be raised for the first time on appeal. *Wainwright v. Sykes,* 433 U.S. 72, 86 (1977) (with regard to a claim that a defendant's confession was involuntary under the United States Constitution, this Court "reaffirmed the view that the Constitution does not require a voluntariness hearing absent some contemporaneous challenge to the use of the confession.").

"With very rare exceptions," this Court "will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *Campbell v. Louisiana,* 523 U.S. 392, 403 (1998) (citing *Adams v. Robinson,* 520 U.S. 83, 86 (1997)). The failure to timely object amounts to an independent and adequate state

[4] In *Ford,* this Court ultimately rejected the retroactive application of a procedural default rule because an objection had in fact been made at that defendant's trial. In this case, no objection was made at any time at trial.

procedural ground that would prevent direct review by this Court. *Wainwright,* 433 U.S. at 86-87 (citing *Henry v. Mississippi,* 379 U.S. 43 (1965)).

As is the case throughout the United States, Texas imposes a requirement upon its litigants that issues first be raised at trial before they can be addressed on appeal. As a prerequisite to presenting a complaint for appellate review, the record must show that:

> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
> >
> > (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> > (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> >
> > (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a). The responsibility of asserting forfeitable rights belongs to the litigants, and not the trial judge. This is why such rights will be unavailable on appeal if not urged at trial. An appellate court should not find error in a trial judge's inaction when contemporaneous action is neither requested nor independently required of her. *Proenza v. State,* 541 S.W.3d 786, 797 (Tex. Crim. App. 2017).

The Texas Court of Criminal Appeals has identified certain rights that can be raised for the first time on appeal, noting that there are three categories of rights, the first two of which can be raised for the first time on appeal:

1. Rights that are widely considered so fundamental to the proper functioning of our adjudicatory process that they cannot be forfeited by inaction alone. These are considered absolute or systemic rights.
2. Rights that are not forfeitable—they cannot be surrendered by mere inaction, but are waivable if the waiver is affirmatively, plainly, freely, and intelligently made. The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver.
3. Rights are forfeitable and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction.

Grado v. State, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). *See Marin v. State,* 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993).

In this case, the petitioner has drawn an analogy to *Batson* jurisprudence, but—consistent with the holding reached in this case—the Texas Court of Criminal Appeals has uniformly held that a *Batson* claim is not excepted from the general rules of procedural default. *See Williams v. State,* 301 S.W.3d 675, 688 (Tex. Crim. App. 2009), *cert. denied,* 560 U.S. 966 (2010) (error not preserved on *Batson* issue when defense counsel did not secure an express or implied ruling on his *Batson* challenge regarding particular prospective juror). *See also Batiste v. State,* 888

S.W.2d 9, 17 n.5 (Tex. Crim. App. 1994); *Rosales v. State,* 841 S.W.2d 368, 379-80 (Tex. Crim. App. 1992), *cert. denied,* 510 U.S. 949 (1993); *Williams v. State,* 773 S.W.2d 525, 529-30 (Tex. Crim. App. 1989) (citing *Modden v. State,* 721 S.W.2d 859, 862 (Tex. Crim. App. 1986); *Hawkins v. State,* 660 S.W.2d 65 (Tex. Crim. App. 1983); *Burks v. State,* 583 S.W.2d 389 (Tex. Crim. App. 1989)).[5]

This Court's Equal Protection jurisprudence clearly places on a party the burden to make a *prima facie* case of purposeful racial discrimination, and then the state would have the burden to explain the purported racial discrimination. With any Equal Protection claim, the burden rests on the defendant or the party who alleges purposeful discrimination. *Batson,* 476 U.S. at 93 (citing *Whitus v. Georgia,* 385 U.S. 545, 550 (1967); *Terrance v. Florida,* 188 U.S. 519 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson,* 476 U.S. at 93 (citing *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977)). Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial or discriminatory exclusion. *Batson,* 476 U.S. at 94 (citing *Alexander v. Louisiana,* 405 U.S. 625, 632 (1972)).

None of that development of the record will occur if the Equal Protection claim is raised for the first time on appeal. Thus, in *Snyder v. Louisiana,* this Court

[5] The jury-selection process is still an adversarial one and the case law, including *Batson* and the cases that followed it, make it clear that *Batson* issues must be raised. *Batson* is not self-executing. Trial courts should take great care before raising a *Batson* challenge *sua sponte*. A court

> recognize[d] that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.

Snyder v. Louisiana, 552 U.S. 472, 483 (2008).

For the first time in his Petition for a Writ of Certiorari, the petitioner has complained about the exclusion without questioning of other prospective jurors (petition at 4, 20-21). This argument was not previously raised. This type of argument underscores the need for a trial objection and the corresponding record development that typically would occur. The type of claim made in this case is much more suited to a post-conviction writ of habeas corpus, in which the record can be fully developed by all parties. The Texas Court of Criminal Appeals held in this case that the petitioner's Equal Protection claim was procedurally defaulted because no objection was made at trial. That was an appropriate state procedural ground for denying the points of error raised by the petition on direct appeal. The Petition for a Writ of Certiorari can and should be denied by this Court on that basis, and on that basis alone.

The decision of the Fifth Circuit Court of Appeals in *Mata v. Johnson* does not provide a basis for requiring the Texas Court of Criminal Appeals to hold that a trial judge or a trial prosecutor must have intervened to question the isolated statement of a criminal defendant's trial attorney.

In *Mata v. Johnson*—upon which the petitioner has heavily relied, "The

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should at least wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge. *United States v. Elizondo,* 21 F.4th 453, 469 (7th Cir. 2021).

prosecution and the defense counsel explicitly agreed to exclude all eight black venire members from the jury, and the trial judge approved the agreement, at least implicitly, by permitting the parties to strike each and every black without articulating a reason or even expending any of their allotted peremptory challenges." *Mata v. Johnson,* 99 F.3d 1261, 1268 (5th Cir. 1996), *vacated on other grounds*, 105 F.3d 209 (5th Cir. 1997). The federal appellate court spoke in terms of "collusion among the prosecution, the defense, and the judge," *Mata,* 99 F.3d at 1268, and a "mutual agreement" among the parties. *Mata,* 99 F.3d at 1269.

Even in *Mata,* the federal appellate court was opposed to granting a defendant a new trial based upon the conduct of his trial attorney.

> We . . . resist the invitation to establish a per se rule that would have us throw out the verdict and try the case again whenever veniremembers have been excluded from a jury on the basis of race. Instead, any time that a defendant requests a new trial on the basis of his own constitutional violation, we shall consider the facts peculiar to that case, balance the competing harms to the system, and choose that course of action that we believe will do the least damage to the system and to the peoples' perception of it.

Mata, 99 F.3d at 1270-71. *Cf. also United States v. Ausbie,* 782 Fed. Appx. 525, 526 (9th Cir. 2019) (holding that, under the "invited error" doctrine, defendant could not raise his own attorney's purported violation of *Batson* in the exercise of peremptory challenges).

This case that confronted the Texas Court of Criminal Appeals is nothing like *Mata.* The petitioner acknowledges that "the record here does not establish the explicit agreement between prosecution and defense to remove African-American venire members present in *Mata* . . ." (petition at 13). There is no indication that

the petitioner's trial attorney was acting with purposeful discrimination in in agreeing to the hundreds of exclusions of prospective jurors without individual questioning. There was no "agreement" in this case to engage in purposeful discrimination on the part of the trial judge, the trial prosecutors, and defense counsel. There was no "collusion."

The petitioner acknowledges that that record does not reflect that the trial prosecutors were aware of defense counsel's reason for agreeing to the summary exclusion of the prospective juror from the need for individual questioning (petition at 4). In this case, the parties had already agreed to exclude the prospective juror without individual questioning based upon the answers to her jury questionnaire. She additionally presented herself as someone who was unavailable for individual questioning and probably unavailable for a death penalty case that was going to last almost two months.

There is no indication on this record that defense counsel's previous agreement to exclude the prospective juror without individual questioning was "motivated in substantial part by discriminatory intent." *See Flowers v. Mississippi,* 588 U.S. 284, 288, 303, 311, 315 (2019). *Cf. also United States v. Martinez-Salazar,* 528 U.S. 304, 314-15 (2000) (under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race); *Bush v. Vera,* 517 U.S. 952, 959 (1996) (requiring race to be the "predominant" motivating factor).

The trial judge and the trial prosecutor had no duty to *sua sponte* intervene,

force the withdrawal of the parties' agreement to have the prospective juror excused without individual questioning, and have the absent prospective juror brought into court to be individually questioned—merely because the petitioner's trial attorney stated an additional reason for excusing the prospective juror without individual questioning. Because of the lack of objection, and the corresponding lack of development of the record, this case does not present a good vehicle for this Court to address the petitioner's weighty Equal Protection claims. This Court should deny the petitioner's Petition for a Writ of Mandamus.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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