10-797 DEC 2- 2010

No. _____

In the Supreme Court of the United States

T. FELKNER, *Petitioner,*

v.

STEVEN FRANK JACKSON, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-2394
Fax: (916) 324-2960
Tami.Krenzin@doj.ca.gov
Counsel for Petitioner

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QUESTION PRESENTED

In this case, the state prosecutor peremptorily excused two of three African-American jurors on the venire. The defense objected that the prosecutor had discriminated based on race. The judge overruled the objection, crediting the prosecutor's assertion of race-neutral reasons for the strikes as genuine. On direct review, the state appellate court upheld the ruling after undertaking a "comparative analysis" of the struck jurors with non-minority-member jurors whom the prosecutor had declined to challenge. In later federal habeas corpus proceedings, the district judge upheld the state court's decision as reasonable under 28 U.S.C. § 2254(d). But the Ninth Circuit reversed, explaining only that:

> The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors.

The Question Presented is: Did the Ninth Circuit's ruling satisfy the restrictions on habeas corpus relief imposed by Congress in § 2254?

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STATEMENT OF JURISDICTION

The Ninth Circuit rendered its decision on July 23, 2010, and denied a timely petition for rehearing and rehearing en banc on September 3, 2010. (App. 57-58.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Equal Protection Clause provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

2. Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. Respondent Jackson was charged in state court with burglary, robbery, sexual battery, forcible oral copulation, and rape against a 72-year-old woman.

2. During jury selection at the trial, potential juror Mr. S, an African-American man, asked to be questioned outside the presence of the other jurors. In the sequestered voir dire, Mr. S said that his niece and nephew had both been molested by their father (his brother-in-law), that his friend had been charged and convicted of rape in a high profile case in Sacramento, and that his father once had been robbed. The prosecutor asked Mr. S about why he apparently had hesitated and bit his lip when defense counsel asked him if he could be fair and impartial. Mr. S replied that he had hesitated because he "[had] a lot of baggage about his niece and nephew." He then spoke about his experiences with people who had been victims and perpetrators of sexual abuse, but claimed that he was "comfortable" sitting as a juror in respondent's case. App. 45;

Reporter's Augmented Transcript (RAT) 22, 33-38, 59.

Later in the voir dire, when asked about possible bad encounters with law enforcement, Mr. S said that, between the time he was sixteen and thirty years old, he was stopped numerous times on account of his race and age, mostly by white police officers, while walking in Fresno and Sacramento. When the prosecutor asked if he reported any of these incidents, Mr. S responded that it "[s]eemed like it would be a waste of time because I would be complaining to the people that I felt I was being harassed by." Still, Mr. S claimed that his negative encounters with law enforcement would not affect his ability to be fair as a juror. The prosecutor, nonetheless, exercised a peremptory challenge, his fifth one, to excuse Mr. S. App. 45-46; RAT 57-58, 98-99, 103.

Still later, the prosecutor exercised his twelfth peremptory challenge to remove Ms. J, an African-American woman, who had stated during voir dire that she knew people who had been arrested for driving under the influence, for insurance fraud, and for mayhem, and that she had attended some of their trials. When the trial judge asked her if there was any reason she could not be fair to both sides, she said "no." Ms. J further noted that she had been to graduate school in 1992 and had completed an internship "at the branch in the psychiatric department." Apparently, Ms. J did this internship in a jail. Further, Ms. J also had reported, on her jury questionnaire, that she held a master's degree in social work. App. 46, 49; Reporter's Transcript (RT) 77-79; RAT 181-82, 188, 200.

The prosecutor challenged Ms. J, and defense counsel objected under *People* v. *Wheeler*, 22 Cal.3d

258, 280 (1978)—a California Supreme Court decision that had anticipated this Court's ruling in *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—that the prosecutor was exercising his peremptory challenges on account of race. The trial judge noted that both jurors, as well as another prospective juror still in the venire, were African-American. Then, without making any finding of a prima facie case of discrimination, the judge asked the prosecutor for his reasons.

The prosecutor explained that he had removed Mr. S because that juror "had a history with law enforcement where for a certain point in his life he felt he was stopped for no reasons. Whether or not he still harbors any animosity is not something I wanted to roll the dice with." The prosecutor reported, further, that he had removed Ms. J because of her educational background. He explained that he did not like to keep social workers on juries, and noted that he did not have any other social workers on the panel. App. 46-47; RT 76-78.

Defense counsel did not take issue with the prosecutor's stated reason for removing Mr. S, but only with his reason for challenging Ms. J. Defense counsel said that he had "let Mr. [S] slide because [he] anticipated the response that would be made." Defense argued only that it was objectionable for the prosecutor to have removed Ms. J based on her educational level, the nature of her degree, or her occupation. App. 47; RT 80.

The trial judge denied the motion as to Ms. J. He explained, "in view of the fact [the prosecutor] has mentioned that social worker degree, which [has] absolutely nothing to do with her race, I am going to deny the *Wheeler* motion." App. 47; RT 80.

In the end, the prosecutor peremptorily excused thirteen jurors, including two of the three African-Americans on the panel. Still, the prosecutor, who never used all of his allotted peremptory challenges, accepted the jury with the third African-American juror in the box. That juror served on respondent's jury. App. 49-50; RT 77; RAT.

3. At the trial, the 72-year-old victim testified, but was unable to identify respondent as her attacker. The prosecution introduced scientific evidence that saliva collected from the victim's breast contained DNA that matched respondent's.

The jury found respondent guilty as charged, and further found that respondent has suffered prior convictions for assaults with a firearm and a deadly weapon. The judge sentenced him to state prison for a term of 310 years to life.

4. The California Court of Appeal affirmed on direct review, rejecting among other claims respondent's argument that the prosecutor had violated *Wheeler* and *Batson* by excusing Mr. S and Ms. J. After finding that the prosecutor's stated reasons for the excusals were race-neutral, and engaging in a "comparative analysis" of Mr. S and Ms. J with non-minority jurors whom the prosecutor had declined to challenge, the California Court of Appeal concluded that respondent had failed to demonstrate purposeful discrimination.

As for Mr. S, respondent sought to compare him with only one other: Juror 8, who had stated that he believed he had been stopped once by an Illinois patrolman and given an $80 ticket because of his California license plates, and who also had been the victim of a car burglary but was disappointed that law enforcement had not done a thorough investigation. The state appellate court concluded

that Juror 8's negative experience out of state and the car burglary were not comparable to Mr. S's fourteen years of perceived harassment by local law enforcement based in part on race. Also, the state court noted that the prosecutor indeed had removed Juror C, who also had a negative experience with local law enforcement but claimed he would be fair. Juror C had stated that a Roseville police officer had assaulted him, that he had filed a civil suit against the officer, and that he had three felony charges pending against him.

As for Ms. J, respondent argued on appeal that when the prosecutor was concerned with the educational or occupational backgrounds of other jurors, he asked them several questions, but not Ms. J. The state court, however, found that Ms. J's educational background in social work—a fact specifically cited by the prosecutor—was not comparable to other jurors' backgrounds in law, biochemistry, or environmental engineering. The state court also considered the fact that the respondent's actual jury indeed included an African-American.

5. Following denial of further review by the California Supreme Court, respondent filed an application for writ of habeas corpus in the federal district court. In a detailed analysis, the district court engaged in comparative analysis of the jurors and came to the same conclusions as the state court of appeal. Applying the deferential-review standard of 28 U.S.C. § 2254(d), the district court found that the state court's decision was not "contrary to" or an "unreasonable application of" clearly established federal law, and was not based on an "unreasonable determination of the facts." The district court noted that the record showed that Juror S had "a lot of baggage" with regard to the molestation of his niece

and nephew, that he had asked to discuss the issue in private, and that he had hesitated and bit his lip when asked if he could be fair and impartial. The district court also commented that, although respondent maintained that the prosecutor should have asked more questions of Ms. J, it was unclear why the prosecutor should have asked further questions when it was her social service background specifically that was unacceptable to him.

6. In an unpublished opinion, the Ninth Circuit reversed the district court's denial of habeas relief and remanded the case. The panel offered only a brief statement:

> The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors.

7. On September 3, 2010, the Ninth Circuit denied panel rehearing and rehearing en banc and on September 29, 2010, stayed its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

Despite the strong protection AEDPA accords to state court fact-finding, the Ninth Circuit for the scantest of cited reasons, and with no explanation of how the state court's findings could be deemed "unreasonable," overturned the credibility call of the state trial judge even after it had been affirmed by both the state court of appeal and the federal district court. In doing so, the Ninth Circuit nullified a rape

conviction, and in effect has forced a now 80-year-old rape victim to retrial. In addition, the Ninth Circuit's ruling unfairly impugns the prosecutor's motives as racial in nature—despite the obvious support in the record for the prosecutor's race-neutral explanations that were credited as genuine by the trial judge who observed the witness himself.

In doing all this without the requisite compelling reason—and virtually without any explanation at all—the Ninth Circuit failed to carry out its obligation under 28 U.S.C. § 2254 to presume the state court's fact-finding to be correct and to review it merely for objective reasonableness. Indeed, the Ninth Circuit's opinion reflects the opposite of AEDPA deference, which requires the federal habeas court to *accept* the state court's finding of fact if rationally supported in the state-court evidentiary record. Instead, the Ninth Circuit's minimal explanation is indistinguishable from a mode of improper de novo review that would perversely *reject* a state court's finding of fact if there is any basis for the federal court to merely disagree with it.

This Court should grant plenary review, and would be justified in summarily reversing, because the Ninth Circuit's decision conflicts with this Court's precedent governing the deference afforded to state courts under both *Batson* and AEDPA.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DEFERENTIAL STANDARDS OF REVIEW THIS COURT AND CONGRESS HAVE ESTABLISHED FOR CLAIMS UNDER *BATSON* AND AEDPA

The ultimate question under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), is essentially a

credibility determination of whether the party's peremptory challenge was exercised on the basis of the impermissible criterion of race. And this Court has clearly established that reviewing courts are to afford great deference to the trial court's factual findings regarding this crucial question of motive. *Batson*, 476 U.S. at 98 n.21; *Hernandez* v. *New York*, 500 U.S. 352, 364-65 (1991); *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003). Most recently, in *Snyder* v. *Louisiana*, 552 U.S. 472, 477 (2008), this Court again reaffirmed that the trial judge, who observes the witness, plays the pivotal role in the *Batson* inquiry. Determinations of credibility and demeanor "lie particularly within the trial judge's province." *Id.* In the absence of exceptional circumstances, deference is given to the trial court. *Id.*

Given the deference that is already afforded to a trial court's ruling, the relief that is available for a *Batson* claim is even more limited under AEDPA's deferential standard of review. See *Knowles* v. *Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411, 1420 (2009) (AEDPA requires doubled deference where original claim itself requires deference). A federal habeas court is limited under 28 U.S.C. § 2254(d)(2), as enacted by AEDPA, to determine whether the state court's crucial finding about purposeful discrimination was "objectively unreasonable" in light of the evidentiary record. See *Rice* v. *Collins*, 546 U.S. 333 (2006). Under § 2254(d)(2), a federal court must be careful not to "improperly substitute[] its evaluation of the record for that of the state trial court." *Rice*, 546 U.S. at 337-38. To find an unreasonable determination of the facts under § 2254(d)(2), the facts must "compel the conclusion that the [state court fact-finder] had no permissible alternative but to" reach a different determination.

Id. at 341. "State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.* at 338-39; § 2254(e)(1).

The record in this case, however, presented no exceptional circumstances that warranted the Ninth Circuit's departure from the deference owed under *Batson* and *Hernandez* to the trial court. Certainly, the Ninth Circuit claimed none.

Further, the record provided no basis for the Ninth Circuit to conclude that the state court had unreasonably determined the facts in light of the evidence, or that "clear and convincing evidence" disproved those findings. To the contrary, the prosecutor gave race-neutral reasons (negative experience with law enforcement and occupation or educational experience) of a kind that the Ninth Circuit, as well as other circuit courts, have consistently found permissible.[1] Those reasons were

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[1] The Ninth Circuit has held that a negative experience with law enforcement is an acceptable, race-neutral explanation to strike a potential juror. *Mitleider* v. *Hall*, 391 F.3d 1039, 1048 (9th Cir. 2004); see also *United States* v. *Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (challenges based on family member's negative experiences with law enforcement have been upheld under *Batson*). Excluding jurors because of their profession is wholly within the prosecutor's prerogative. *United States* v. *Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987). It is also entirely permissible for a prosecutor to excuse a prospective juror based on her educational experience. See *United States* v. *Campbell*, 317 F.3d 597, 605-06 (6th Cir. 2003); *United States* v. *Alanis*, 265 F.3d 576, 584 (7th Cir. 2001) ("The attainment of certain educational level has been accepted by numerous circuits as a race neutral criterion for exercising a peremptory challenge under the *Batson* mandate, and, as far as we can determine, has been rejected by none."); *Batson*, 476 U.S. at 89 n.12 (lawyers wish to know as much as possible about

(continued...)

amply corroborated by the record. And the state judge, as the factfinder with the pivotal role, credited those stated reasons as the true ones.

The Ninth Circuit, however, overrode that finding with one of its own, apparently based on nothing more than an inference it chose to draw from the fact that the prosecutor had challenged two of the three prospective African-American jurors and from the panel's unexplained view that the voir dire record somehow reflected different treatment of similarly-situated jurors. Regardless of the Ninth Circuit's own view from its remote perch, however, the record clearly supports the state court's fact finding as at least reasonable.

Indeed, the trial record demonstrates that the state court was absolutely correct. That record supports the state court's factual finding that no other jurors were similarly situated to Ms. J. Both the state court of appeal and the federal district court found that no other juror had an educational background in social work—the particular kind of background the prosecutor specially disfavored. It is unexplained, and indeed inexplicable, how the Ninth Circuit could conclude other jurors were similarly situated to Ms. J.[2]

The record also supports—as reasonable and more—the state court's findings regarding Mr. S. No other juror reported experiencing years of repeated

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prospective jurors, including their age, education, employment, and economic status, so they can ensure selection of jurors who at least have an open mind about the case).

[2] At oral argument in the Ninth Circuit, Ms. J was not even a topic of discussion. See www.ca9.uscourts.gov, audio transcript for *Jackson* v. *Felkner*, case no. 09-15379.

harassment by local law enforcement because of race and age. It was more than reasonable for the state court to conclude that a juror who believed he had received an out-of-state traffic ticket because of his California license plates was not similarly situated to Mr. S. It would trivialize racial discrimination and harassment to equate the two. Further, the prosecutor's challenge of a Caucasian juror who claimed he had been assaulted by a local police officer reasonably confirmed that the prosecutor legitimately challenged jurors whose negative experience with law enforcement presented a risk of potential bias. The legitimate basis for the prosecutor's challenge of Mr. S is further evidenced by the fact that defense counsel never stated any reasons why he believed the prosecutor might have excluded Mr. S from the jury based on race. In fact, defense counsel stated that he "let Mr. [S] slide because [he] anticipated the response would be made." As the federal district court found, it appeared the trial judge and defense counsel tacitly acknowledged that there was a sufficient basis other than race for challenging Mr. S.

The Ninth Circuit cited its own precedent *Ali* v. *Hickman*, 584 F.3d 1174, 1182 (9th Cir. 2009), as "holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable." But, as the State elsewhere has explained, the Ninth Circuit was wrong in *Ali* too. See *Cate* v. *Ali*, 2010 WL 304266 (U.S.), pet. for cert. filed Jan. 21, 2010. Moreover, the Ninth Circuit in *Ali* relied on a "comparative analysis" of the jurors that the state court had declined to undertake. *Ali*, 584 F.3d at 1180-81. Here, in contrast, the state court of appeal engaged in comparative juror analysis. The Ninth Circuit never explained why the

state court's comparative juror analysis in this case did not reasonably support its ultimate finding that the prosecutor's challenges were in fact motivated by race-neutral considerations.

This Court, in correcting a similar error by the Ninth Circuit in *Rice* v. *Collins*, cautioned that AEDPA deference precludes the federal court from relying merely on debatable inferences from the record as a basis for rejecting state court findings of fact. 546 U.S. at 341-42. The Ninth Circuit disregarded that admonition here. Arguably, as reflected in the Ninth Circuit oral argument in this case, Mr. S's claim that he still could be fair might be cited as possibly true. See www.ca9.uscourts.gov, audio transcript for *Jackson* v. *Felkner*, case no. 09-15379. But, just as in *Rice*, it hardly compelled any conclusion under § 2254 that the prosecutor could have no legitimate basis for doubting it. Indeed, as the district court recognized, the record showed that Mr. S had hesitated and bit his lip before asserting that he could be fair and impartial. And Mr. S even acknowledged that he had hesitated because he had a "lot of baggage" about his niece and nephew.

Similarly, excluding jurors on the stated ground of negative experience with law enforcement arguably might impact African-American jurors; and some might argue that it could raise at least a debatable inference that citing such a factor might be a pretext for racial discrimination. See www.ca9.uscourts.gov, audio transcript for *Jackson* v. *Felkner*, case no. 09-15379. But no "clearly established Federal law" binding on the States and on the federal habeas court for § 2254(d) deferential-review purposes, invalidates honest reliance on such considerations in jury selection. In any event, any such concern would have been insufficient here to

establish that the state court's credibility determination in this case was unreasonable based on the record in this case.

In *Rice*, the Ninth Circuit recited the proper standard of review, but this Court determined that in fact it had merely substituted its judgment for that of the state trial court. *Rice*, 546 U.S. at 337-38. Contrary to this Court's dictate, the Ninth Circuit here improperly substituted its own judgment for that of the state court once again.

II. THE NINTH CIRCUIT'S MISAPPLICATION OF *BATSON* AND AEDPA IS AN IMPORTANT AND RECURRING ISSUE

Under the decision in this case as explained by the Ninth Circuit, a habeas court might facilely invoke comparative juror analysis as if it always trumped the state court's credibility determinations, without even explaining how such a fact-intensive inquiry led to such a result. Here, the Ninth Circuit granted the extraordinary remedy of habeas relief with no apparent basis. The Ninth Circuit's failure to even explain its remarkable result serves to highlight that its decision is indefensible under both *Batson* and AEDPA.

In a relatively short time period, the Ninth Circuit has found *Batson* error in four cases, this one and three others, based on its own comparison of jurors from a cold record despite the deferential standards of review that apply to *Batson* and AEDPA claims. See *Ali* v. *Hickman,* 584 F.3d 1174 (9th Cir. 2009) (habeas relief in first-degree murder case); *Rivera* v. *Nibco*, No. 09-15136, 2010 WL 1193319 (9th Cir. March 29, 2010) (reversed jury verdict in a 52-

day trial);[3] *Reynoso* v. *Hall*, No. 08-15800, 2010 WL 3516410 (9th Cir. Sept. 7, 2010) (habeas relief in first-degree murder case).[4]

Here, the Ninth Circuit's unexplained ruling departs from judicial norms for granting an extraordinary remedy such as habeas relief. See Sup. Ct. Rule 10(a). The unexplained ruling is particularly disturbing when multiple courts, including the federal district court, came to a contrary conclusion. If such unexplained rulings were to become the norm, the decisions will become review-proof in derogation of the deference owed to state court decisions under AEDPA.

In *Rice*, this Court granted review because the Ninth Circuit had misapplied the deferential standard of review required under AEDPA. And, indeed, it has granted certiorari and reversed many Ninth Circuit decisions in the very recent past for failure to abide by the deferential-review reform enacted by Congress in AEDPA. This Court's review is warranted again to correct the Ninth Circuit's misapplication of AEDPA and of this Court's *Batson* precedents.

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[3] A petition for writ of certiorari is pending in this Court. The petition refers to this case as an example of the Ninth Circuit's improper approach to basic principles of deference. See *Nibco* v. *Rivera*, No. 10-383, pet. for cert. filed Sept. 17, 2010, at 29.

[4] In *Reynoso*, Judge Callahan dissents, finding that the majority misapprehends both the requirements of AEDPA and controlling Supreme Court opinions.

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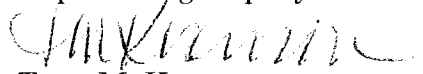
CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General



TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

December 2, 2010

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