
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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

Despite the tight limit on federal habeas relief imposed by the deferential-review rule of 28 U.S.C. § 2254(d), the Ninth Circuit, without explaining why it believed its decision comported with that rule, overturned the state trial judge's credibility determination under *Batson v. Kentucky*, 476 U.S. 79 (1986). It did this even after the state judge's determination had been affirmed by both the state court of appeal and the federal district court, and despite the fact that the race-neutral justifications offered by the prosecutor were directly supported by the record.

Instead, the Ninth Circuit concluded that purposeful discrimination existed simply because the prosecutor had challenged two of three prospective African-American jurors and because the record reflected different treatment of what it dubiously deemed to be "comparably situated jurors." The Ninth Circuit's ruling failed to address the state court's factual findings and failed to provide any basis for concluding that the state court had unreasonably determined them. Thus, the Ninth Circuit engaged again in "judicial disregard" of its obligation under § 2254 to presume the state court's fact-finding to be correct and to review it merely for objective reasonableness. This Court should grant certiorari, and certainly would be justified in summarily reversing, because the Ninth Circuit's decision conflicts with this Court's precedents prescribing deference to state courts under *Batson* and because it conflicts with § 2254(d)'s restrictions on federal courts as this Court again made clear just days ago in *Harrington v. Richter*, 562 U.S. ___ (2011).

1. The conclusory nature of the Ninth Circuit's opinion betrays its "judicial disregard" of § 2254(d). As this Court recently explained, § 2254(d) requires the federal habeas court to consider the arguments or theories that supported or *could have supported* the state court's decision. *Harrington v. Richter*, 562 U.S., at ___ (slip op., at 12, 14) (emphasis added). Here, the state and federal jurists who previously considered respondent's claim, one in essence determined on a credibility call by the trial judge, all rejected it. The Ninth Circuit's sudden and cryptic reversal, in the face of repeated decisions rejecting respondent's claim, provides little basis for confidence that it adhered to the limits on its powers as set out in § 2254(d) and explained in *Richter*. As in *Richter*, there is no good reason to think that the Ninth Circuit's analysis would have been any different *without* § 2254(d).

2. Respondent takes issue with the State's reliance on the state court's finding that the prosecutor had allowed a third African-American to serve on the jury. But respondent has not shown that this factual finding by the state court was unreasonable under § 2254(d)(2). Nor has he presented clear and convincing evidence to rebut the presumption of correctness afforded the state court's factual finding under § 2254(e)(1). The State's reliance on this factual finding is therefore proper.

3. Respondent also argues that—even though the state court cited the underlying facts—the prosecutor did not expressly justify his challenge of Juror S on grounds that the juror had "a lot of baggage" with regard to the molestation of his niece and nephew and that the juror had hesitated and bit his lip when asked if he could be fair and impartial. But this Court has never "clearly established" that

such obvious reasons are out of bounds in the judge's assessment of whether a *Batson* "prima facie" case of racial discrimination has been shown. Instead, this Court in *Batson* explained that, "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." 476 U.S. at 96-97.

In any event, the district court certainly was entitled to consider such apparent facts in determining the "only question that matters" here: whether the state court reasonably determined that respondent had failed to meet his ultimate burden of proving racial discrimination under the totality of the circumstances. See *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (a prosecutor's motive can be inferred from the totality of the circumstances); see also *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). The record supported the state court's finding that the reasons the prosecutor specifically gave for excusing Mr. S were race-neutral, and the district court correctly found the state court's determination reasonable.

4. Respondent's arguments mistakenly proceed from a "de novo" rather than deferential consideration of his *Batson* claim. Under § 2254(d), however, the issue is not whether respondent or the Ninth Circuit believes that the state court correctly decided the *Batson* claim, but only whether the state court's findings were objectively unreasonable—meaning that no reasonable jurist could make the same factual determinations as the state court did and ultimately decide that no *Batson* violation occurred. See *Harrington v. Richter*, 562 U.S., at ___ (slip op., at 11-13) (under § 2254(d), federal habeas relief is precluded unless there is no possibility that "fairminded jurists could disagree" on the correctness

of the state court's decision or that the state court's decision conflicts with this Court's precedent).

It is futile to say that all reasonable jurists would have to conclude that other jurors, unchallenged by the prosecutor, were "similarly situated" with the two African-American jurors excluded from the panel. And, of course, the Ninth Circuit opinion contains no such assertion. A reasonable jurist easily could conclude that no other juror was similarly situated with Ms. J, who had a distinctive background in social work that was anathema to the prosecutor. And a reasonable jurist easily could conclude that no other juror was like Mr. S, who had reported experiencing years of repeated harassment by local law enforcement because of his race and age. This conclusion is supported by the record and is evidenced in the findings of both the state and federal courts—both of which fully engaged in "comparative juror analysis" and upheld the state judge's ruling in light of it.

5. Respondent's argument, that the Ninth Circuit's decision is unpublished and fact-specific, ignores the important and the recurring nature of the problem of misapplication of § 2254(d). This Court's many grants of certiorari in the past few Terms, and reversals of grants of relief under § 2254(d), attest to the importance of the issue.

Further, unwarranted grants of relief under *Batson* entail their own significant consequences. Even though § 2254(d) all but imposes a complete bar on federal relitigation of claims decided in state court, the Ninth Circuit recently has granted relief under *Batson* in this case and in two other cases based on its own comparison of jurors from a cold record. See *Ali v. Hickman*, 584 F.3d 1174 (9th Cir. 2009); *Reynoso v. Hall*, No. 08-15800, 2010 WL

3516410 (9th Cir. Sept. 7, 2010) (Callahan, J., dissenting). Indeed, the Ninth Circuit also granted relief on similar erroneous grounds and was reversed by this Court in *Rice v. Collins*, 546 U.S. 333 (2006).

These reversals require retrials for crimes that occurred years before, forcing victims and their families to relive their past experiences and forcing prosecutors to obtain evidence that may not have been preserved. Here, a now 80-year-old rape victim will have to endure the retrial of a brutal rape. Such an intrusion into the state's criminal justice system is warranted only in extreme circumstances. See *Harrington v. Richter*, 562 U.S., at ___ (slip op., at 13) ("Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal.") (internal citation omitted). A grant of such an extraordinary remedy, after all of the judges considering the claim earlier had rejected respondent's claim, certainly warrants an explanation responsive to § 2254(d). The decision in this case, employing an unarticulated comparative juror analysis to trump the state court's credibility findings, threatens, if not invites, the kind of "judicial disregard" of § 2254(d) that this Court condemned in *Richter*.

For these reasons, and those set out in the
Petition, this Court should grant a writ of certiorari.

Respectfully submitted

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