

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAY SHAWN JOHNSON, :

4 Petitioner :

5 v. : No. 04-6964

6 CALIFORNIA. :

7 - - - - -X

8 Washington, D.C.

9 Monday, April 18, 2005

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:49 a.m.

13 APPEARANCES:

14 STEPHEN B. BEDRICK, ESQ., Oakland, California; on behalf

15 of the Petitioner.

16 SETH K. SCHALIT, ESQ., Supervising Deputy Attorney

17 General, San Francisco, California; on behalf of

18 the Respondent.

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P R O C E E D I N G S

(10:49 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 04-6964, Jay Shawn Johnson v. California.

Mr. Bedrick.

ORAL ARGUMENT OF STEPHEN B. BEDRICK
ON BEHALF OF THE PETITIONER

MR. BEDRICK: Mr. Chief Justice, and may it
please the Court:

I would like to address three points.

One, the correct prima facie standard under
Batson is whether there's sufficient evidence to permit a
judge to draw a reasonable inference of discrimination.

Two, the challenger's own reasons must be
disclosed in order for the Batson process to work and to
prevent discrimination.

Three, it is improper for a third party to
speculate at the prima facie stage as to a challenger's
possible reason because what needs to be evaluated is the
challenger's own reason and own credibility and own
demeanor, and not someone else's guess as a reason.

The correct prima facie test is a permissive
inference test where there is sufficient evidence to allow
a judge to draw a reasonable inference of discrimination.
That's equivalent to the test where a judge decides

1 whether there's sufficient evidence to pass a case to the
2 jury, although I'd like to add one small proviso to that,
3 which is in case of doubt, the benefit should go in the
4 direction of obtaining the reason because the goals of
5 Batson cannot properly be enforced unless the reason for
6 the challenge -- the challenge is stated.

7 JUSTICE SCALIA: Well, that's not very --

8 CHIEF JUSTICE REHNQUIST: That's a very low
9 standard in the first place, and why should it be watered
10 down more?

11 MR. BEDRICK: I'm -- I'm not suggesting it be
12 watered down, Your Honor. I'm just suggesting in case of
13 a tie, in case the judge finds the question is in
14 equipoise, then there should -- the benefit should go to
15 the -- obtaining the reason and therefore obtaining a -- a
16 ruling on the merits.

17 JUSTICE KENNEDY: Is the test for going to the
18 jury the same as the test for whether or not discovery can
19 proceed?

20 MR. BEDRICK: No, Your Honor. The test for
21 going to the jury is actually higher.

22 JUSTICE KENNEDY: Well, I'm -- I'm surprised you
23 set the bar that high. If we're going to --

24 MR. BEDRICK: I guess I had the benefit of the
25 argument before the Court last year and the benefit of

1 further reflection, and I think that allowing the case to
2 go to the jury is a good standard except for my proviso
3 that if it was close and the -- was in equipoise, then the
4 benefit ought to go to obtaining the reason because it is
5 a discovery-type request.

6 JUSTICE SCALIA: Well, I was just admiring your
7 -- your proposal in that at least it relied on something
8 that the lower courts are used to applying. I mean,
9 yes, is there enough to go to the jury? My goodness,
10 it's a standard test. But you've suddenly destroyed it
11 all by saying it isn't quite that because, you know, if
12 it's -- if it's really close, the tie goes to the
13 plaintiff, which is an unusual way for the tie to go. The
14 tie usually goes to the other side.

15 MR. BEDRICK: The tie goes here to -- the
16 standard would be fine with -- with or without the benefit
17 of a tie. I would be happy with the standard either way.

18 JUSTICE O'CONNOR: Well, what's the standard
19 under title VII when we talk about that, when we talk
20 about enough evidence to shift the burden of proof? Is
21 that something less?

22 MR. BEDRICK: The standard under title VII is
23 something less, Your Honor, because under title VII, under
24 McDonnell Douglas, the plaintiff has to prove four
25 factors, that the plaintiff was a member of a protected

1 group, protected minority group; that the plaintiff was
2 qualified for a job and applied; that the plaintiff was
3 rejected; and that the position stayed open. Those
4 four --

5 JUSTICE O'CONNOR: Well, in -- in Batson, I
6 guess the opinion for the Court suggested that it was
7 basing it on the title VII cases, the McDonnell Douglas
8 formula. Is that right or not? Or have we gone beyond
9 that?

10 MR. BEDRICK: It's a parallel -- it's based on
11 McDonnell Douglas in the sense that -- that there's a
12 parallel step of prima facie case, shifting the burden of
13 production. The defendant or respondent comes up with an
14 answer, and then eventually the trier of fact decides
15 whether or not the -- the plaintiff or the moving party
16 has been persuasive.

17 JUSTICE SCALIA: What -- what happens if he
18 doesn't come up with an answer in -- in this case?
19 What --

20 MR. BEDRICK: We have --

21 JUSTICE SCALIA: -- what happens if the
22 prosecutor just says, gee, I -- you know -- or the -- the
23 prosecutor has died? You know, it comes up later in -- in
24 a habeas action. The prosecutor is dead.

25 MR. BEDRICK: That's about four questions, Your

1 Honor. If I can take them one at a time.

2 JUSTICE SCALIA: No. It -- it's one hypothesis.
3 There is no answer filed by the State as to what the real
4 reason was. What happens?

5 MR. BEDRICK: The trial -- if the State refuses,
6 willfully refuses to present an answer, the trial court
7 could and most likely will, draw an inference from that
8 intentional refusal and hold that inference against the
9 State.

10 JUSTICE KENNEDY: Are you going to say that if
11 -- if there's no answer, then the challenge is presumed to
12 be correct?

13 MR. BEDRICK: No, I'm not saying that.

14 JUSTICE KENNEDY: All right. So the trial judge
15 can -- can overrule the challenge.

16 MR. BEDRICK: Yes. The -- if -- if there is
17 a --

18 JUSTICE KENNEDY: It seems to me that's quite
19 different from the standard that requires it go to the
20 jury. You send a case to a jury if there's evidence from
21 which the jury could find for the plaintiff.

22 MR. BEDRICK: Yes, Your Honor.

23 JUSTICE KENNEDY: And that's -- it -- it seems
24 to me that's a -- that's much more rigorous than the
25 standard that you've proposed in -- in your brief, and

1 that -- and that other courts use in the Batson case. The
2 Batson inquiry, as -- as I understand it, is -- is simply
3 that, an inquiry. There's a basis to ask the prosecutor
4 the reason. That's all.

5 MR. BEDRICK: Very much so, Your Honor.

6 JUSTICE KENNEDY: And -- and that's quite
7 different than sending a case to the jury.

8 MR. BEDRICK: The -- the standard for -- I
9 believe the standard we're asking -- that's -- that's why
10 I said the standard of sending the case to the jury but
11 with the benefit of a doubt going to the -- obtaining the
12 reason.

13 JUSTICE SOUTER: May I -- may I go back to your
14 answer to the -- the question whether in the absence of an
15 answer, there is a presumption of a Batson violation, and
16 you said, no, there isn't a presumption --

17 MR. BEDRICK: That is correct.

18 JUSTICE SOUTER: -- where the court has still
19 ultimately got to decide it? What sorts of things could
20 the court consider when it ultimately decides?

21 MR. BEDRICK: At step one, whether or not
22 there's a --

23 JUSTICE SOUTER: At step three. We've -- we've
24 gotten to step three.

25 MR. BEDRICK: Yes.

1 JUSTICE SOUTER: Step one, whatever the standard
2 is, it has been met. Step two, silence. We get to step
3 three. What does the court consider at step three?

4 MR. BEDRICK: The court considers the
5 plaintiff's showing of a prima -- the -- the objector's
6 showing a prima facie case. The court considers the
7 answer given by the challenger.

8 JUSTICE SOUTER: Which is zero. Which is
9 silence. There is no answer.

10 MR. BEDRICK: If -- if -- I'm sorry, Your Honor.
11 I misunderstood. I didn't realize it was a silence issue.

12 JUSTICE SOUTER: Yes.

13 MR. BEDRICK: If there's a prima facie case and
14 if the prosecutor or the challenger willfully refuses to
15 answer, the trial judge is entitled to draw an inference
16 from that refusal to answer and I believe most likely
17 would draw the inference that there's something wrong here
18 and therefore would find a prima facie case.

19 JUSTICE SOUTER: All right. But what I'm
20 getting at is let's assume he doesn't draw that inference.
21 Ultimately at step three, he says, no. I am going to
22 reject the challenge. I do not think that the burden of
23 persuasion has been met. What -- what considerations
24 might lead him to do that, assuming that step one has been
25 satisfied?

1 MR. BEDRICK: I do not know, Your Honor, because
2 we have never seen a situation in which a --

3 JUSTICE SOUTER: All right. Let me --

4 MR. BEDRICK: -- prosecutor has refused to
5 answer.

6 JUSTICE SOUTER: Let me suggest this. Wouldn't
7 -- wouldn't he almost necessarily have to consider at step
8 three those reasons that the prosecutor has not given, but
9 which he thinks might be good reasons for the challenge
10 which do not raise Batson discrimination?

11 MR. BEDRICK: We have argued in our brief that
12 it's not correct for the trial judge to speculate as to
13 the prosecutor's possible reasons.

14 JUSTICE SOUTER: Right. That's what I'm --
15 that's what I'm getting at. And -- and what I'm troubled
16 by is I -- I take your -- I understand your point, that
17 it's not appropriate for him to speculate and supply an
18 answer at stage two. But if stage one -- at stage one,
19 the objector has satisfied the test and at stage three,
20 the -- the court may, nonetheless, reject the challenge, I
21 don't know what he would be rejecting the challenge for
22 unless it is on the basis of this kind of, as you put it,
23 speculation about what the reasons might be. So help me
24 out there.

25 MR. BEDRICK: I -- I agree, Your Honor. I don't

1 know what the basis would be either if a prima facie
2 case --

3 JUSTICE SOUTER: Then why don't you have to say
4 at that stage, if there is silence on the part of the
5 government, he's got to find the violation?

6 MR. BEDRICK: I -- I -- the only words that
7 would differ would be got to. I would say he'd be most
8 likely to if there --

9 JUSTICE SOUTER: But if he doesn't have to, he's
10 got to have some reason for doing it. This is not a
11 matter of whim. And if he's got to have a reason and his
12 reasons may not legitimately be those speculations on what
13 might be a legitimate basis for the challenge, but which
14 were never raised by the State, and you can't think of any
15 other reasons -- and I admit I can't right now -- then it
16 seems to me that he would pretty -- it would -- it would
17 follow that -- that he would be required to -- to uphold
18 the challenge.

19 MR. BEDRICK: I believe that it -- it would
20 require -- that he would ultimately uphold the challenge
21 but on the basis of drawing an inference from the refusal
22 to answer, and those two -- adding two and two together,
23 adding the --

24 JUSTICE SCALIA: No, but -- but the refusal to
25 answer -- I just -- you know, it happened so long ago,

1 Your Honor. I had a lot of other -- I -- you know. But
2 it comes up later, and he says I just don't remember why I
3 challenged this --

4 MR. BEDRICK: In the case of don't remember,
5 Your Honor --

6 JUSTICE SCALIA: Don't remember.

7 MR. BEDRICK: -- Batson has been the law for 18
8 or 19 years. In California, we've had Wheeler for 25
9 years. Any competent prosecutor who was challenging
10 minority jurors and was faced with a Batson motion would
11 make notes of some kind and keep a record of some kind.
12 If he did not do that, he would not be acting competently
13 and the trial court would be entitled to draw an inference
14 from that claim, refusing to remember.

15 JUSTICE GINSBURG: Mr. Bedrick, in your brief
16 you were very, it seemed, uncomfortable about addressing
17 this question. You said it's just like you go through the
18 same litany as title VII, that is, the plaintiff meets a
19 burden which is in title VII very easy to meet --

20 MR. BEDRICK: Yes.

21 JUSTICE GINSBURG: -- stage one. Then the
22 defendant has to come up with a nondiscriminatory reason,
23 and then you find out if that was pretext.

24 You kept saying in your brief what you said a
25 moment ago that you have never seen a case. You said it

1 never happens. It never happens that the prosecutor
2 stands silent. So this is a hypothetical, academic
3 question. But I think you're being pressed to say, well,
4 suppose it does happen, and I take it that your answer is
5 in that case the person who's raising the Batson challenge
6 wins. But you're -- you're not willing to say certainly.
7 I mean, you seem to say -- well, why are you uncertain?

8 MR. BEDRICK: The -- the title VII test and the
9 Batson test are parallel, but not identical. And in
10 the --

11 JUSTICE GINSBURG: But suppose you had in a
12 title VII case the employer says, I'm not going to give
13 you a nondiscriminatory reason. You -- you've gone
14 through the McDonnell Douglas. The plaintiff has shown
15 those four things. The employer says, I'm not going to
16 give you any reason. Then what happens?

17 MR. BEDRICK: The trial -- the trial court would
18 find for the plaintiff because under the title VII
19 formula, which this Court has established in the McDonnell
20 Douglas/Furnco line of cases, the finding of a prima facie
21 case entitles the plaintiff to a presumption.

22 JUSTICE SCALIA: Well, that's because --

23 MR. BEDRICK: And it's bursting the bubble --

24 JUSTICE SCALIA: Wow.

25 MR. BEDRICK: -- slightly --

1 JUSTICE SCALIA: I -- I don't think we've ever
2 said that. I thought we've -- we've said to the contrary,
3 that the ultimate question is always, did the plaintiff
4 show by a preponderance that -- that the reason was
5 discrimination. That's what I thought our -- our cases
6 say, not -- not automatically to punish the employer for
7 not giving a reason, he loses, which is what you want to
8 do here.

9 MR. BEDRICK: The employer will always give a
10 reason and the challenger will always give a reason
11 because --

12 JUSTICE BREYER: What happens in a title VII
13 case if, in fact, we meet just what Justice Ginsburg said?
14 Can you have a jury trial? Imagine a situation, jury.
15 Okay?

16 MR. BEDRICK: Yes.

17 JUSTICE BREYER: The plaintiff gets up and
18 establishes the four points. Defense. The defense rests.
19 Now, does the judge send it to the jury, or does the judge
20 direct a verdict for the plaintiff?

21 MR. BEDRICK: I believe in the title VII context
22 the judge would direct the verdict for the plaintiff.

23 JUSTICE BREYER: Unusual. I --

24 JUSTICE KENNEDY: And -- and it seems to me the
25 -- your -- there's some difficulty in -- in trying to

1 equate Batson challenges and -- and title VII, and that's
2 because your beginning point is that you base -- you --
3 you require too much of the prima facie case. It -- it
4 seems to me all that's required under Batson is reason to
5 inquire.

6 MR. BEDRICK: Yes.

7 JUSTICE KENNEDY: And that's -- that's a special
8 use of the term prima facie.

9 Now, if -- if we want to be consistent with the
10 use of the word -- of the term, prima facie, from Batson
11 to title VII, then it seems to me this inquiry is
12 necessary. But -- and you're the one that puts it in
13 motion by setting this rather high threshold that is the
14 same as to go to a jury. I disagree with that.

15 JUSTICE SCALIA: May I suggest you might have
16 put the high threshold because it's a threshold that
17 judges are familiar with and can use, whereas reason to
18 inquire would be a fine test for when a judge is permitted
19 to demand a response but it cannot possibly be a test for
20 when a judge is required to demand a -- what does -- what
21 does reason to inquire mean? Is that a -- is that a
22 standard that -- that can be applied in law?

23 MR. BEDRICK: I accept the suggestion from the
24 Court that the standard could also be reason to inquire.
25 We would be -- we would be happy with that standard.

1 JUSTICE SCALIA: What does it mean?

2 MR. BEDRICK: And the Batson procedure would

3 work.

4 JUSTICE SCALIA: What does it mean?

5 MR. BEDRICK: It means when there is the purpose

6 of --

7 JUSTICE SCALIA: Any suspicion whatever.

8 MR. BEDRICK: Pardon me, Your Honor?

9 JUSTICE SCALIA: Any suspicion -- he strikes one

10 black from the jury.

11 MR. BEDRICK: No, not any suspicion whatsoever.

12 It's a higher standard --

13 JUSTICE SCALIA: It has to be reason to inquire.

14 MR. BEDRICK: It has to be reason to inquire.

15 JUSTICE SCALIA: What's --

16 MR. BEDRICK: It would vary depending on the

17 circumstances. The --

18 JUSTICE KENNEDY: And -- and is that like

19 permitting discovery to go forward?

20 MR. BEDRICK: That's essentially what step one

21 of Batson is --

22 JUSTICE KENNEDY: And -- and is that standard

23 less than going to a jury?

24 MR. BEDRICK: Yes.

25 JUSTICE KENNEDY: All right. So that -- that's

1 -- I recognize that it's been difficult for us to find an
2 analog. It may be that Batson is sui generis. It may not
3 be. If we're going to talk about what judges are familiar
4 with, then it's prima facie case and it's title VII.

5 MR. BEDRICK: But title VII doesn't quite work
6 because the -- the prima -- the definition for prima facie
7 case in title VII is different, and it's easier. If we
8 were to put in the -- they're -- they're parallel tests.
9 They're not identical. If we were to import the title VII
10 prima facie case in a Batson, it will be satisfied every
11 time there was a challenge to a minority juror because
12 under any -- every such situation, there would be a
13 minority juror who was qualified because he passed for
14 cause who was rejected and the seat would be open. That
15 would be -- that's a -- that's even a lower standard than
16 we are --

17 JUSTICE BREYER: Then are you saying, look,
18 judge -- imagine you had a jury on this question. If the
19 defendant has made out enough of a case that you would
20 send it to the jury, then go to step two and ask the
21 questions as to why.

22 MR. BEDRICK: Yes, Your Honor, that's my
23 position.

24 JUSTICE BREYER: That's it. Fine.

25 JUSTICE SOUTER: Could -- could I take that a

1 step further? Would this -- would this be a -- a fair
2 summary of -- of your position on all the steps?

3 Step one, there must be enough that would
4 justify sending the question to the jury if it were a jury
5 question.

6 MR. BEDRICK: Yes.

7 JUSTICE SOUTER: Number two, if there is silence
8 at stage two or in Justice Scalia's example, the
9 prosecutor just can't remember, and we then go to stage
10 three, your position is as follows.

11 At stage three, number one, there is enough --
12 there is enough evidence on the record from which the
13 judge can find a Batson violation.

14 Number two, there is a state of the evidence
15 from which he is not required to find a Batson violation.
16 Sometimes, maybe most times, the prosecutor's silence will
17 be a reason to find a Batson violation, in addition to
18 those that were stated at stage one.

19 And finally, theoretically -- theoretically even
20 with the prosecutor's silence, the evidence at stage one,
21 sufficient as it might be to get to the jury, will not be
22 persuasive. And there may be outlying cases in which,
23 even with prosecutorial silence, the court will say I
24 don't see the Batson violation shown here.

25 Is that a fair statement of your position?

1 MR. BEDRICK: Yes, Your Honor, it is.

2 JUSTICE SOUTER: Okay.

3 MR. BEDRICK: An example -- the only example
4 that I can think -- the only practical example that I can
5 think of, however, where a trial court is likely not to
6 draw a strong negative inference from the prosecutor's
7 failure to answer is in the situation suggested where it
8 reviews it -- reviewed it on appeal and the prosecutor
9 died. Under those circumstances, the -- maybe there --
10 there may be notes in the file, but if there aren't notes
11 in the file, the prosecutor's failure to answer is beyond
12 his control.

13 JUSTICE KENNEDY: I -- I take it in your view
14 the California standard is more strict than the title VII
15 standard for prima facie case.

16 MR. BEDRICK: Yes, Your Honor, in my view it is.

17 JUSTICE O'CONNOR: Well, the California court at
18 least appears to say it's the same.

19 MR. BEDRICK: The -- I believe the California
20 court has misread title VII practice in several ways. I
21 believe it has -- it misread what is produced at the -- it
22 has misread what the plaintiff's burden is to produce a
23 prima facie case. And under title VII, the plaintiff's
24 burden is merely, as I stated, to show that a member of a
25 protected group qualified, applied, rejected, position

1 open.

2 JUSTICE KENNEDY: And do we say that that
3 equates to a standard of more likely than not or do we not
4 say that?

5 MR. BEDRICK: The -- those facts under title VII
6 must be proved more likely than not. And from that, under
7 the title VII McDonnell Douglas formula --

8 JUSTICE KENNEDY: Is -- is step one of title VII
9 more likely than not?

10 MR. BEDRICK: Yes.

11 JUSTICE KENNEDY: Well, I don't see how that's
12 much different from what California is doing.

13 JUSTICE SOUTER: I thought step one was evidence
14 from which it could be found more likely than not.

15 MR. BEDRICK: Yes --

16 JUSTICE SOUTER: He doesn't have to prove more
17 likely than not at stage one, as I understand your
18 position. He has to put in enough evidence from which a
19 fact finder could find more likely than not if he accepts
20 all the evidence as true and so on.

21 MR. BEDRICK: That's correct, Your Honor, under
22 -- under Batson. The tests are not identical. Here --
23 I'm sort of stumbling over my tongue a bit in trying to
24 point out that the tests are parallel but they are not
25 identical.

1 JUSTICE SCALIA: Can I ask you a question about
2 the other part of your case, which is that the judge
3 cannot consider in -- in step one anything except the --
4 except the -- the racial strikes and -- and nothing else
5 and cannot even speculate as to what causes might have
6 produced the strikes? That seems to me rather extreme.

7 MR. BEDRICK: It is --

8 JUSTICE SCALIA: How can you possibly decide
9 whether it -- a reasonable juror could find this? Let's
10 assume that all three of the -- of the minority, three
11 blacks are stricken by the prosecution. The judge, the
12 district judge, knows that everyone of them is -- is a --
13 a defendant's lawyer, every single one. He has to blot
14 that out of his mind?

15 MR. BEDRICK: Your Honor, that's a -- in that
16 example, which I respectfully submit would be rather
17 extreme and unusual, the trial judge should still not
18 speculate.

19 The reason why the trial judge should not
20 speculate is shown by the facts of this case. With regard
21 to juror Sara Edwards, the trial judge speculated on two
22 possibly reasons. One possibly reason was that she had a
23 relative who had been arrested for a serious crime 35
24 years ago, and the second reason that he speculated was
25 that she had -- was -- did not know whether she could be

1 fair in the case of a death of a child. As to the second
2 reason, that would show -- if any bias, that would show
3 pro-prosecution bias.

4 JUSTICE SCALIA: But once -- once you have the
5 lenient test that you've established, why isn't it enough
6 to say even with that -- even with that speculation, a
7 reasonable juror could find? Once you have that lenient
8 test, I don't know why you have to exclude the
9 speculation.

10 I mean, there -- what if all three of the blacks
11 -- it's a case in which the -- the visual evidence is
12 significant and all three of the blacks are blind and --
13 and you tell me the judge has to say, oh, no, it -- it
14 can't be that -- that reason that they were stricken.
15 That doesn't make any sense.

16 MR. BEDRICK: In presenting a test -- in
17 presenting a test or significant formula, every once in a
18 while there will be a case where this test is slightly
19 over-inclusive. And Your Honor has given an example of
20 that. But if that's the case, the trial judge will say,
21 you know, I bet I know what the answer is. Mr.
22 Prosecutor, what's the answer? The prosecutor gives the
23 answer. The trial judge says, yes, I find that credible.
24 Motion denied.

25 JUSTICE STEVENS: And yes, but one of the

1 things, it seems to me, you're all overlooking is that if
2 it's as obvious as they're all blind, those would be
3 challenges for cause.

4 MR. BEDRICK: Very much so, Your Honor.

5 JUSTICE STEVENS: We're talking about challenges
6 where there are no -- no obvious basis for it.

7 CHIEF JUSTICE REHNQUIST: Well, in practice, Mr.
8 Bedrick, is it always worked out like this kind of a
9 minuet? First we have step one and step two. Isn't a lot
10 of it just at a bench conference?

11 MR. BEDRICK: Yes. The minuet may -- may --
12 will be most likely at a bench conference. In this case
13 the two motions were discussed. One was discussed during
14 a jury recess. The other was discussed the next morning
15 before the jury was assembled. So it may be a minuet, but
16 it's a -- I'm not sure who the -- there's a 1-minute
17 waltz. So it is more like a 1-minute waltz than a full
18 minuet.

19 JUSTICE SCALIA: Why do we need the same -- the
20 same rules for State and Federal courts? You have here
21 the California Supreme Court. Why do they have to use the
22 same -- the same minuet that the Federal courts do?

23 MR. BEDRICK: Because under Batson and then
24 under Purkett v. Elem and under Hernandez v. New York,
25 this Court has declared that Batson is a rule of Federal

1 constitutional law, that the purpose of Batson is to
2 protect the Sixth and Fourteenth Amendment rights of the
3 jurors to equal protection and not being "perempted" for
4 racial reasons. In --

5 JUSTICE SCALIA: Yes, but -- but State courts
6 have different rules of evidence. They have different
7 rules of procedure, and we allow Federal cases to be
8 determined under those State rules of evidence and State
9 rules of procedure so long as they provide due process.

10 MR. BEDRICK: The California --

11 JUSTICE SCALIA: Why can't -- why can't the
12 Batson question similarly be decided but decided under
13 State rules of procedure?

14 MR. BEDRICK: The California Supreme Court made
15 no claim to be deciding this case under State rules of
16 procedure. It asserted repeatedly that in this case that
17 it was deciding this question under its understanding of
18 Federal law, under its understanding of the Batson line of
19 cases, and that it was interpreting Federal law and
20 nothing more.

21 My opponent argues that there should be a State
22 law question, but that's a different position than taken
23 by the State supreme court.

24 JUSTICE SCALIA: So you would have no objection
25 to our limiting our opinion, saying, you know, reversing

1 and remanding and saying this is not Federal law. It's
2 not what we would do in Federal court. Of course, the
3 California Supreme Court is free to have some different
4 system.

5 MR. BEDRICK: I would respectfully disagree,
6 Your Honor.

7 JUSTICE SCALIA: No, you don't want us to do
8 that, do you?

9 MR. BEDRICK: No, Your Honor. I respectfully
10 disagree. This is -- I believe this is a question of
11 Federal constitutional law that needs to be applied
12 everywhere. This is a rule followed in 12 -- all 12
13 Federal district -- circuits and in 48 of the 50 States.

14 JUSTICE GINSBURG: Isn't it sometimes even when
15 you're not involved with a constitutional question, if you
16 have a Federal claim in a State court -- Byrd against Blue
17 Ridge is one example -- the Federal procedure -- that the
18 State procedure needs to be modified so it's in sync with
19 the Federal?

20 MR. BEDRICK: I agree, Your Honor.

21 JUSTICE GINSBURG: That was a question of what
22 kind of questions go to juries.

23 MR. BEDRICK: Yes.

24 JUSTICE GINSBURG: The State said ordinarily we
25 don't give this kind of question to the jury, but we're

1 dealing with a Federal claim, and the Federal procedure
2 trumps.

3 MR. BEDRICK: Yes. Yes, Your Honor.

4 If the Court has no more questions, may I
5 reserve the rest of my time for rebuttal?

6 CHIEF JUSTICE REHNQUIST: Very well, Mr.
7 Bedrick.

8 Mr. Schalit.

9 ORAL ARGUMENT OF SETH K. SCHALIT

10 ON BEHALF OF THE RESPONDENT

11 MR. SCHALIT: Mr. Chief Justice, and may it
12 please the Court:

13 Petitioner's position would require this Court
14 to abandon Batson's requirement for a shifting burden of
15 production or to announce a new rule of constitutional
16 evidence that burdens of production shift based on
17 improbable inferences.

18 The standard recognized by the State is
19 consistent with Batson. Batson provided for a shifting
20 burden of production and it directed the courts to look to
21 this Court's title VII cases to see how that process
22 operates.

23 In title VII --

24 JUSTICE KENNEDY: Well, do -- do you agree that
25 the California standard is more rigorous than the standard

1 applied by the Federal courts and by most State courts?

2 MR. SCHALIT: No, Your Honor. California's
3 standard is consistent with Batson. Now, there are very,
4 very few courts that have actually considered the precise
5 question presented here. California does not stand alone
6 in its analysis of this --

7 JUSTICE KENNEDY: Do you think the California
8 rule is the same as the Federal rule?

9 MR. SCHALIT: I think the Federal rule has been
10 stated in many different ways. The Federal rule has been
11 stated by lower courts in many different ways. It is
12 certainly the same as or consistent with the Federal rule
13 as announced by Batson, which is the only question that
14 matters because in Batson --

15 JUSTICE KENNEDY: Well, what about Hanson, and
16 is it Purkett v. Elem?

17 MR. SCHALIT: Yes, Your Honor. In -- in Purkett
18 and in -- I don't know whether it was Hernandez -- I may
19 have misheard you -- the Court reiterated the three-step
20 process. All of those cases, however, rely on the
21 existence of a step one with a shifting burden of
22 production before reasons must be given and they must be
23 given when step one is met. The objecting party must make
24 a prima facie case. That does not happen until he has
25 shown that it is more likely than not that there is

1 discrimination.

2 JUSTICE GINSBURG: But that's in -- in the title
3 VII context, certainly you don't have to show more likely
4 than not to get past the initial threshold. All you have
5 to do is to make four showings that -- that Federal courts
6 have recognized are rather easily made. So the real show
7 doesn't come until the pretext stage. But it's not that
8 you have to show anything by a preponderance of the
9 evidence, that -- you don't have to show discrimination by
10 a preponderance of the evidence under title VII. You just
11 have to show four things from which someone may but not
12 must infer discrimination.

13 MR. SCHALIT: Your Honor, in the title VII
14 circumstance, you are correct. The ultimate, ultimate
15 finding is, of course, made after the employer responds if
16 the employer chooses to respond in light of all of the
17 evidence. The employer may not respond, for example, if
18 the employer does not believe those four elements have
19 been established or the jury would find them to be
20 established.

21 However, if those four elements are established
22 in the minds of the jury by a preponderance of the
23 evidence, according to this Court in St. Mary's Honor
24 Center and in -- in Burdine or Burdine, the obligation is
25 on the fact finder at that point to find for the employee

1 if there's no response at step two because a presumption
2 is established.

3 And Furnco expressly states that there is a
4 presumption because the prima facie case if established
5 makes it more likely than not that there was
6 discrimination. The prima facie case in the run of the --
7 run of the cases we know the reason that those four facts
8 are true is that there was discrimination in the face of
9 silence.

10 JUSTICE GINSBURG: I thought all it did was
11 shift the burden of production to the defendant. It
12 doesn't -- the showing at stage one doesn't involve the
13 burden of persuasion.

14 MR. SCHALIT: Yes, Your Honor. It -- it shifts
15 the burden of production, but the reason it does so is
16 that, in the language of Wigmore, the employee, or in a
17 title VII case, the objecting party, has gone further.
18 The -- that party has not simply removed the obligation to
19 present evidence from which one can infer a fact. But he
20 has gone further and presented sufficient evidence to
21 entitle that party to prevail in the face of his
22 opponent's silence.

23 And Justice Powell, writing the opinion in
24 Batson, clearly referred to the Court's title VII cases,
25 including the opinion that he wrote for the Court in

1 Burdine, which in the footnote expressly stated that the
2 McDonnell Douglas presumption does not adopt the prima
3 facie case in the sense of merely allowing the jury to
4 make a finding. It stated that -- adopted the prima facie
5 case with a shifting burden of production, and that is one
6 with a presumption that entitles the party to prevail.

7 The same is true --

8 JUSTICE SCALIA: I mean, you -- you can say that
9 its words say that, but what it does doesn't say that. I
10 mean, to establish a prima facie case, all you have to
11 show is that -- that you were qualified for the job,
12 you're a member of a minority, and you weren't hired, and
13 somebody who's not a member of a minority was hired. Do
14 you think that's enough to show that it's more likely than
15 not that race was the basis and that's -- you know, that's
16 how those cases pan out? That's enough for a prima facie
17 case. Is that enough to say it's more likely than not
18 that race was the reason?

19 MR. SCHALIT: It is enough to say that when
20 unexplained, when there's no response from the employer,
21 yes. The jury is instructed that --

22 JUSTICE SCALIA: Really?

23 MR. SCHALIT: That --

24 JUSTICE SCALIA: Do you really believe that? I
25 mean, in -- in a large -- you know, large -- large

1 operation, you -- you're a minority. You apply for a job.
2 You're qualified for it. You aren't hired, but somebody
3 who's not a minority is hired. That alone, without any
4 other information, is enough to enable somebody to find
5 that it is more likely than not that -- that race was the
6 reason? My goodness. I -- I don't think that's an
7 accurate description.

8 MR. SCHALIT: Well, that is -- Your Honor,
9 sorry. That was my reading of -- of St. Mary's when --
10 and Burdine when a --

11 JUSTICE BREYER: Hicks does say that. I think
12 you're right.

13 JUSTICE SCALIA: It does say it. I'm just
14 saying --

15 JUSTICE BREYER: All right.

16 But suppose that -- but Wigmore says that the
17 words, prima facie case, can be used either to describe
18 the Hicks situation, which is the plaintiff produces the
19 four elements. The defendant sits silent, and the judge
20 says, directed verdict for plaintiff. That's what Hicks
21 seems to say. And Wigmore says the words, prima facie
22 case, can mean that. But then he says the words, prima
23 facie case, can also mean a different thing, and the
24 different thing is what the judge says then is, jury, you
25 may find for the plaintiff, not you have to. And so I

1 guess our question is which of the two meanings shall we
2 take here.

3 And my question to be -- to you is, why not the
4 second? After all, the whole point of Batson is in
5 suspicious circumstances to explore matters further, and
6 once you get to the point where you're willing to tell a
7 jury, jury, you may, you have suspicious circumstances.

8 MR. SCHALIT: Well, Your Honor, in the title VII
9 case, I believe that what happens is that the case does go
10 to the jury. It is not a directed verdict. It is --

11 JUSTICE BREYER: Well, if it's not a directed
12 verdict, then a fortiori, then every analogy works against
13 you.

14 MR. SCHALIT: No, Your Honor. To be -- let me
15 -- let me be perhaps slightly more precise. It is not a
16 directed verdict. It is a requirement for the court to
17 instruct the jury to make a finding if -- if in fact it
18 finds all the four elements to be true. That is still a
19 jury question.

20 JUSTICE BREYER: No. Assuming the four --

21 MR. SCHALIT: Yes.

22 JUSTICE BREYER: -- elements, directed verdict.
23 If you're right --

24 MR. SCHALIT: Right.

25 JUSTICE BREYER: -- about that, which is what

1 Hicks says --

2 MR. SCHALIT: Yes.

3 JUSTICE BREYER: -- we have a choice, a fork in
4 the road. Take it. All right.

5 MR. SCHALIT: Yes.

6 JUSTICE BREYER: Which fork? And I put the
7 reason why. Your opponents will argue, it seems
8 plausibly, take the second fork because we have the
9 suspicious circumstance.

10 MR. SCHALIT: Because that would upset the
11 balance that -- that Batson has drawn. Suspicious
12 circumstance was the same type of problem confronted in
13 Rosales-Lopez and Ristaino. The Court adopted a
14 possibility of a racial bias test for the purpose of
15 inquiring of jurors on voir dire as to whether there's
16 discrimination for use in a Federal system as a rule of
17 criminal process and supervision over the Federal courts.
18 It refused to apply that test, which is akin to the test
19 adopted by the Ninth Circuit and advocated by petitioner,
20 in Ristaino because it recognized that we should not adopt
21 a divisive assumption that everything turns on race.

22 It would be a very simple matter to inquire of
23 jurors on voir dire about their racial biases on a mere
24 possibility. The same argument about let us simply
25 inquire and find out could be applied. After all,

1 these --

2 CHIEF JUSTICE REHNQUIST: On step one, I take it
3 it's not enough to simply say, look, the person challenged
4 is a member of a minority group. What more must be shown?

5 MR. SCHALIT: No, Your Honor. I would agree
6 that that is simply not enough. And Batson demonstrates
7 that that is not enough because in Batson there were four
8 blacks challenged, all four blacks in a case involving a
9 black defendant. You must show under the totality of the
10 circumstances at Batson -- as Batson says, that there's
11 discrimination, and that includes circumstances that may
12 refute the case because, as Batson says, the statements of
13 the prosecutor and questions --

14 CHIEF JUSTICE REHNQUIST: But I'm talking about
15 step one.

16 MR. SCHALIT: Yes, and this is step one, Your
17 Honor.

18 CHIEF JUSTICE REHNQUIST: This is all step one?

19 MR. SCHALIT: This is all step one. Batson, at
20 page 97, states that a prosecutor's questions and
21 statements on voir dire in exercising the challenges may
22 support or refute an -- an inference of discrimination.
23 The party who is making the claim is in the best position,
24 any party who wants to be in, in terms of making a claim
25 to a fact finder. He has the fact finder before him.

1 That fact finder has witnessed the same thing as the
2 party. They are all professionals and skilled in this
3 area. And if that single juror was struck because of
4 race, the party can say that it was the same race as the
5 defendant if that may be a fact. It may be that that --
6 there's no apparent explanation because, let's say, it was
7 a -- another prosecutor who has struck --

8 JUSTICE KENNEDY: Why -- why is the defense
9 attorney in a better position to explain the -- the
10 motives of the prosecutor than the prosecutor?

11 MR. SCHALIT: Not --

12 JUSTICE KENNEDY: I don't understand that.

13 MR. SCHALIT: Not to explain the motives, Your
14 Honor, but to confront the totality of the circumstances
15 that are present in that courtroom that Batson requires
16 that party to confront.

17 JUSTICE KENNEDY: The question is what motivated
18 the prosecutor. Correct?

19 MR. SCHALIT: Yes.

20 JUSTICE KENNEDY: It's hard for me to see how
21 the -- the defense counsel is in a better position than
22 the prosecutor to show that.

23 MR. SCHALIT: He's in a better -- he is in the
24 position to meet his obligation under Batson to explain
25 why, given --

1 JUSTICE SCALIA: The question is not what
2 motivated the prosecutor unless and until the step one
3 showing can be made.

4 MR. SCHALIT: Yes, Your Honor, and thank you.
5 That is a more precise response.

6 JUSTICE KENNEDY: But, of course, you can afford
7 to be very rigorous at step two because your threshold at
8 step one is high. The threshold is -- if the threshold at
9 step one is -- is easier to cross, then we could be more
10 rigorous at -- at step two.

11 MR. SCHALIT: Step two does not have any
12 persuasiveness component to it. There is no rigorousness
13 to it in my mind. It is merely a statement of a race-
14 neutral reason or reasons. It is not the time to
15 persuade, and we know that from Purkett.

16 JUSTICE GINSBURG: And here there was no reason
17 given.

18 MR. SCHALIT: Here, because there was no prima
19 facie case, Your Honor, yes, there was no reason given.

20 JUSTICE GINSBURG: So why shouldn't this operate
21 as so many things do in -- in an unfolding proceeding? If
22 someone stands silent -- and we're not involved with a
23 Fifth Amendment privilege -- there's an inference -- an
24 adverse inference.

25 Worse, take a -- a discovery and one plaintiff

1 asks for discovery from -- from the -- the defendant, and
2 the defendant says, sorry, I'm not going to give you what
3 you want. What is the consequence of that if the
4 defendant, being presented with a opportunity or a
5 requirement to give a reason or to produce something,
6 says, I won't?

7 MR. SCHALIT: There may be an adverse inference
8 that would be drawn from that. There might be issue
9 preclusion. There might be a termination sanction.
10 There's a range, as I understand civil procedure, of -- of
11 options that are available.

12 In this context, of course, petitioner asserts
13 that there could be an adverse inference drawn from
14 silence. However, if the standard is, as he proposes,
15 that there is simply a mere inference from which
16 discrimination can be detected, the silence of the
17 striking party may have no informative content.

18 JUSTICE GINSBURG: But one of the -- if we're
19 going to continue with that analogy to someone who says I
20 won't make discovery, is not just an inference but that
21 you take what the opposing party says to be true on that
22 issue.

23 MR. SCHALIT: Yes, Your Honor. There -- there
24 could be issue preclusion. I assume that's --

25 JUSTICE GINSBURG: This is not -- not issue

1 preclusion. I mean, this is -- that is -- the defendant
2 who stands silent is going to lose.

3 MR. SCHALIT: Yes, but in -- in this
4 circumstance, the -- the striking party's silence is one
5 -- when the test is set at the inference level not at the
6 more likely than not level, the -- the test is one -- I'm
7 sorry -- not the test, but the -- the silence is one of
8 strategic judgment. Let me balance the risk of having the
9 adverse inference drawn against me against the risk of
10 disclosing my trial strategy or my voir dire strategy.

11 JUSTICE STEVENS: I must confess I'm a little
12 puzzled about the discussion of the trial strategy because
13 is it not correct that whenever the judge thinks step one
14 has been met, the prosecutor always answers the question?

15 MR. SCHALIT: Does always answer the
16 question because it is understood that, having shown at
17 step one it is more likely than not that there's
18 discrimination, silence at step two will result in an
19 adverse finding. And --

20 JUSTICE STEVENS: Well -- well, whatever it is,
21 he -- generally they are not silent when the judge says I
22 think step one has been met.

23 I want to be sure understand California's
24 position on one point. Is it your view in -- in
25 California that the judge must decide himself that it is

1 more likely than not that -- that discrimination is
2 present before you proceed to step two?

3 MR. SCHALIT: Yes, Your Honor.

4 JUSTICE STEVENS: Now, that is not the test in
5 an ordinary tort case in California, is it?

6 MR. SCHALIT: In a case of -- of --

7 JUSTICE STEVENS: In an ordinary tort case --

8 MR. SCHALIT: No.

9 JUSTICE STEVENS: -- if the judge, at the end of
10 the plaintiff's case, says I'm not sure what the answer
11 is, but there is enough evidence here to submit to the
12 jury, so I'm going to overrule the motion for judgment --
13 judgment at the end of the case. Now, that's a different
14 test than you say is appropriate under Batson, is it not?

15 MR. SCHALIT: Yes, Your Honor, because in that
16 circumstance in deciding --

17 JUSTICE STEVENS: So you -- so you have two --
18 in California you have two definitions of a prima facie
19 case, one for Batson and one for all normal tort
20 litigation.

21 MR. SCHALIT: In California, we like every other
22 jurisdiction, as far as I know, probably has two
23 definitions, just as this Court does.

24 JUSTICE STEVENS: And is it not true that the
25 definition that your opponent asks for is the same

1 definition that would apply in tort litigation in
2 California and in most States of the country?

3 MR. SCHALIT: Yes. That is my understanding.

4 JUSTICE STEVENS: So you're asking for a special
5 rule for California's application of Batson.

6 MR. SCHALIT: No, Your Honor, because in that
7 circumstance --

8 JUSTICE O'CONNOR: It sounds like you are in
9 that it's a tougher standard than normal. Here you had a
10 situation, did you not, where there were three black
11 prospective jurors and the prosecutor struck all three?

12 MR. SCHALIT: Yes, Your Honor.

13 JUSTICE O'CONNOR: And could that present enough
14 evidence that the fact finder, if it were referred to the
15 fact finder, could find a Batson violation?

16 MR. SCHALIT: Yes, Your Honor. A fact finder
17 could make a -- a conclusion from that, but the --

18 JUSTICE O'CONNOR: So why is that not enough to
19 satisfy the standard to require the prosecutor to give an
20 answer?

21 MR. SCHALIT: Because, for example, the
22 appellate perspective as to whether a fact finder could
23 make that conclusion, could any rational finder of facts
24 draw that conclusion.

25 JUSTICE O'CONNOR: Is it because the judge could

1 imagine reasons that the prosecutor might have had?

2 MR. SCHALIT: It is not a question of -- of
3 imagining reasons, Your Honor. It is a question of the
4 judge bringing his or her observation to what has occurred
5 in the courtroom, and to return to the example --

6 JUSTICE O'CONNOR: Would your answer here be
7 exactly the same if there had been 12 African American
8 prospective jurors and all 12 were struck? Does that make
9 a difference?

10 MR. SCHALIT: Yes, it might in that the -- the
11 inference would be probably -- it would be much stronger
12 the greater number you have. But, for example, those 12
13 could theoretically all still be defense attorneys.

14 JUSTICE KENNEDY: But -- but your test is -- is
15 that the judge under California law is required to find
16 that there's a strong likelihood or a reasonable
17 likelihood, but he must do that without hearing the
18 prosecutor's reasons. That's your position. Right?

19 MR. SCHALIT: Yes, Your Honor. Step one,
20 because you do not hear reasons until, under JEB, you've
21 gone past step one and get the reasons at step two. Under
22 Batson, you do, however, consider information that may
23 refute the inference. Batson tells the judge to do that
24 and to consider the totality of the circumstance.

25 And Justice Stevens's observation about the

1 difference between the two tests is true, but in the -- in
2 the circumstance in which the question is whether it goes
3 to the jury to avoid, for example, non-suit, that is
4 because there is a fact finder for the case to go to
5 separate from the judge, and that fact finder does not
6 have to make an intermediate determination. Here the
7 court has --

8 JUSTICE STEVENS: Yes, but it would be the same
9 rule if it was a bench trial. The judge could say to him
10 -- say, I think you may have enough but I'm not 100
11 percent sure yet. I'd like to hear the defense -- hear
12 the rest of the case. He doesn't -- it does not really --
13 the -- the definition of a prima facie case does not
14 depend on whether it's a jury trial or a bench trial.

15 MR. SCHALIT: But it does also turn, Your Honor,
16 in part on the nature of the interest at issue, and the
17 particular process that the Court set up in Batson to
18 create an order -- order -- system of proof and to allow
19 the proper balance to be struck between the importance of
20 peremptory challenges and their use in selecting a fair
21 and unbiased jury and the interest in assuring that there
22 has not been a constitutional violation, much for the same
23 reason that in Ristaino we do not inquire on mere
24 possibility. There are countervailing interests. In
25 Ristaino there has to be much more than a mere

1 possibility.

2 In Batson, the Court sought to move away from
3 the difficult-to-establish standard of Swain to something
4 that would be more flexible yet still maintain the State's
5 interest in having a peremptory challenge system.

6 Your Honors, California does not stand alone in
7 its interpretation of this test. As I mentioned earlier,
8 there are very few States that have considered this issue.
9 Connecticut, Maryland have done what this Court said it --
10 they should do, what all courts should do and look at the
11 title VII cases. California has done that.

12 It has not announced a standard that is
13 inconsistent with Batson. It has announced a standard
14 that follows from this Court's direction in Batson. It
15 has required a shifting burden of production which does
16 not occur until there has been either a presumption or a
17 strong mass of evidence, to use Wigmore's term.

18 JUSTICE SCALIA: Do you think that the -- the
19 steps in this case have to be determined by what we do in
20 title VII, that whatever we do here should be -- should
21 be, must be the same as what we do in title VII?

22 MR. SCHALIT: I think it provides a close
23 analogy. It is not -- it is not a perfect fit, no, Your
24 Honor. But it does -- but the Court very carefully
25 directed parties and courts to look to title VII for

1 understanding of the operation of the proof rules.

2 JUSTICE SCALIA: Well, but perhaps only for --
3 for the operation of, you know, what the various steps
4 are. You have to go step one first, step two next, and so
5 forth.

6 MR. SCHALIT: Well, Your Honor, I believe the
7 phrasing was that it's explained the operation of prima
8 facie burden of proof rules, and that's the footnote on
9 page 94, sort of the operation of the burden of proof
10 rules that is at issue here. And the burden of proof and
11 burden of production rules --

12 JUSTICE SCALIA: A lot of people don't read
13 footnotes.

14 (Laughter.)

15 MR. SCHALIT: Well, Your Honor, California's
16 Supreme Court did. Connecticut did.

17 (Laughter.)

18 MR. SCHALIT: And given the -- given the -- an
19 occasion to do so, I think that's the appropriate path to
20 take.

21 JUSTICE KENNEDY: Could I -- I just confirm my
22 understanding of how the jury selection process in
23 California works? All the for-cause challenges are -- are
24 made and ruled upon. Then there are 12 jurors in the box,
25 and then you make the peremptory challenge juror by juror.

1 Is that correct?

2 MR. SCHALIT: Yes, Your Honor. There may be
3 more jurors that have been subject to voir dire if a six
4 pack is used, but challenges are only made to those in the
5 box when the box is full, there's a full complement of jurors.

6 JUSTICE KENNEDY: After the for-cause challenges
7 have been --

8 MR. SCHALIT: Yes, Your Honor.

9 JUSTICE KENNEDY: been exhausted.

10 MR. SCHALIT: Yes, Your Honor. And, of course,
11 in California like elsewhere, peremptories are used
12 sometimes to remedy a failure to properly grant a
13 challenge for cause.

14 Your Honors, California's system maintains a
15 proper balance between protection interests and the
16 State's and parties' interests in using a venerable tool
17 for selecting a fair and unbiased juror.

18 JUSTICE GINSBURG: May -- may I just --

19 MR. SCHALIT: Oh, please.

20 JUSTICE GINSBURG: -- ask you to clarify one
21 thing? I -- I take it from what you've said, although I
22 didn't understand it from your brief, that California
23 doesn't have any different standard, that they are
24 following the same standard that would be applicable in
25 Federal court on a Batson challenge. Or did I

1 misunderstand you?

2 MR. SCHALIT: California is following the
3 standard that we believe Batson has identified. Now,
4 there are certainly Federal courts, such as the Ninth
5 Circuit, that disagree with that. And so all Federal
6 courts do not do what California believes Batson allows to
7 be done. The Ninth Circuit has concluded that
8 California's standard is contrary to and an unreasonable
9 application of Batson. That's *Wade v. Terhune*, 202 F.3rd.

10 JUSTICE GINSBURG: So you're not arguing that
11 States have flexibility to apply Batson according to
12 different procedural rules. You're arguing that the Ninth
13 Circuit is wrong about what the Federal standard is.

14 MR. SCHALIT: We're arguing, first, the Ninth
15 Circuit is wrong and that California's rule is consistent
16 with Batson.

17 Now, as to whether other rules may apply, Batson
18 has a footnote stating that it was not going to attempt to
19 instruct courts on how to apply its process. That might
20 leave room for other States to come up with alternate
21 systems of proof.

22 What is important here is that California's
23 system is consistent, and as respondent, we are not
24 seeking to require all States to do something. Rather, as
25 the respondent, it is sufficient that California's process

1 is acceptable just as California's process was acceptable
2 in Smith v. Robbins for handling cases in which there are
3 no nonfrivolous appeals on issues. A variety of standards
4 perhaps could be tolerated.

5 JUSTICE SCALIA: Mr. Schalit, can you give me
6 some reason why I should care a whole lot about this?
7 What's the big deal? I mean, so what if we adopt a very
8 minimal standard. So what. It just means you have a
9 bench conference and the -- and the judge asks, you know
10 -- you know, you struck three -- three blacks. It, you
11 know, looks suspicious to me. I'm not sure it's more
12 likely than not. I'm not sure it's even enough to go to a
13 jury, but it looks suspicious to me. Why just -- how come
14 you -- you struck all three blacks that were in the
15 venire? What is such a big deal about adopting a very --
16 a very low standard?

17 MR. SCHALIT: Because it intrudes on other
18 interests that our State --

19 JUSTICE SCALIA: What?

20 MR. SCHALIT: It intrudes on --

21 JUSTICE SCALIA: Like -- like what?

22 MR. SCHALIT: I believe it intrudes on the
23 parties' interest and work product and opinion work
24 product and attorney-client privilege and perhaps even the
25 defendant's Sixth -- Sixth Amendment right because it may

1 require divulgence of those types of confidences.

2 CHIEF JUSTICE REHNQUIST: So the State has an
3 interest in exercising peremptories.

4 MR. SCHALIT: Absolutely, Your Honor, yes.
5 Using peremptory challenges to select a fair and unbiased
6 jury is very important to the State. Having confidence
7 that the juries are fair and unbiased is important because
8 it allows parties to accept the results of verdicts as
9 being a product of a fair and just system.

10 JUSTICE SCALIA: Well, I agree. Of course, the
11 State has a -- has an interest in -- in exercising
12 peremptories. But -- but why is it important that whether
13 the State is doing it in a biased fashion be decided up
14 front at step one instead of having the parties come to
15 the judge and say, you know, why did you do it?

16 MR. SCHALIT: Because --

17 JUSTICE SCALIA: That's what I can't understand,
18 why that is so important to the State.

19 MR. SCHALIT: Because the -- the challenges
20 essentially cease being peremptory and become quasi-
21 challenges for cause. The State has an interest in
22 maintaining the system as a peremptory challenge system
23 and in maintaining Sixth Amendment privileges and work
24 product. And it has --

25 JUSTICE GINSBURG: But it still could be -- I

1 mean, you're not taking away the peremptory. You're
2 saying the -- the prosecutor can give a reason and the
3 judge says, okay, that passes. It wouldn't pass for a
4 challenge for cause, but as a peremptory, it's okay.

5 MR. SCHALIT: Well, the challenge does cease
6 being peremptory because the Equal Protection Clause has
7 overturned the State statute that provides that challenges
8 -- peremptory challenges are challenges for which no
9 reason need be given.

10 JUSTICE SCALIA: But Batson overruled that. I
11 mean, those days are gone. Tell California to stop
12 worrying about that.

13 (Laughter.)

14 JUSTICE SCALIA: You cannot make peremptory
15 challenges for any reason anymore. You can't do it for
16 any reason.

17 MR. SCHALIT: Absolutely not.

18 JUSTICE SCALIA: So they're gone. Now, once you
19 acknowledge they're gone, what's the big deal about --
20 about having the parties come up to the judge and just
21 explain to the judge, we didn't do it for a racial reason?

22 MR. SCHALIT: Because Batson could have chosen
23 to adopt a Connecticut-style strict objection system. It
24 did not do that. The Court has made a judgment about the
25 nature of peremptories as peremptories as still being

1 important. Preserving that interest in using those and
2 not disclosing trial strategy is important. Having --
3 avoiding the risk that a party may respond with
4 unarticulable reasons that erroneously won't be believed
5 is important. We do not want to chill the exercise of
6 challenges for those reasons that are not based on
7 discriminatory reasons but are unarticulable.

8 JUSTICE STEVENS: Of course, in avoiding that
9 chill, you're in effect saying the prosecutor is entitled
10 to one or two free discriminatory challenges.

11 MR. SCHALIT: Well, certainly there -- there is
12 a somewhat different consequence in -- in the standard as
13 articulated by petitioner in that the striking party does
14 get perhaps a freebie. And California doesn't accept
15 that. We've recognized that in State supreme court cases
16 there are no substantial free challenges.

17 JUSTICE SOUTER: The dog is entitled to one
18 bite.

19 MR. SCHALIT: I'm sorry, Your Honor?

20 JUSTICE SOUTER: I say, the dog is entitled to
21 one bite.

22 MR. SCHALIT: Oh.

23 (Laughter.)

24 MR. SCHALIT: Hopefully not --

25 JUSTICE SCALIA: It's a New Hampshire rule.

1 (Laughter.)

2 MR. SCHALIT: Thank you, Your Honors. Unless
3 there are any further questions.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Schalit.

6 Mr. Bedrick, you have 4 minutes left.

7 REBUTTAL ARGUMENT OF STEPHEN B. BEDRICK

8 ON BEHALF OF THE PETITIONER

9 MR. BEDRICK: Here the prosecutor perempted all
10 three black jurors and left a black defendant to be tried
11 by an all-white jury in a racially tinged case. These
12 facts indisputably present an inference of discrimination.

13 The -- my opponent suggests that silence may be
14 a strategic decision. But we have yet to locate any --
15 any case where any prosecutor anywhere in a situation
16 remotely like this has chosen silence as the proper
17 strategy. The purpose of Batson is -- is to elicit
18 reasons from the prosecutor and then for the trial court
19 to evaluate those reasons and determine whether or not,
20 looking at the -- all the circumstances and the
21 prosecutor's credibility and the type of case, whether or
22 not their challenge is race-based. Reasons are crucial.

23 In the appendix to our opening brief, we
24 examined 84 cases in the last couple years where
25 discrimination was found in violation of Batson. In

1 virtually all of these cases, the decision turned on the
2 evaluation of the articulated reason. In some of those,
3 the articulated reason was unsupported by the record.
4 From that, there was an inference and a finding of
5 discrimination. In others of those, the articulated
6 reason applied to many white jurors who were not
7 challenged. All those facts existed here.

8 The goals of Batson, which are admirable and
9 important, which should apply in all 50 States, not just
10 in 48, require -- need the reasons to be elicited because
11 Batson won't work unless reasons are known and examined
12 and ruled on on the merits and a record is made.

13 We'd ask this Court to bring California into the
14 mainstream and ask that reasons be called for in
15 California under the same standard that they're called for
16 everywhere else.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Schalit.

19 The case is submitted.

20 (Whereupon, at 11:46 a.m., the case in the
21 above-entitled matter was submitted.)
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25

