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IN THE SUPREME COURT OF THE UNITED STATES

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JAY SHAWN JOHNSON, :

Petitioner :

v. : No. 03-6539

CALIFORNIA. :

- - - - -X

Washington, D.C.

Tuesday, March 30, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:08 a.m.

APPEARANCES:

STEPHEN B. BEDRICK, ESQ., Oakland, California; on behalf
of the Petitioner.

SETH K. SCHALIT, ESQ., Supervising Deputy Attorney
General; San Francisco, California; on behalf of the
Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 03-6539, 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.

First, the correct prima facie standard under
Batson is whether there is sufficient evidence to permit a
reasonable judge to infer discrimination. The California
threshold is too high and incorrectly conflates step one
and step three of Batson analysis.

QUESTION: Well now, Mr. Bedrick, are -- are you
talking about enough evidence, say, to -- for a trial
judge to let a case go to a jury or enough evidence to
persuade a trial judge who's sitting as the finder of
fact? I think those are two different things.

MR. BEDRICK: I would say the former rather than
the latter, Your Honor. I'm suggesting sufficient
evidence to permit a reasonable trial judge to infer that
there was racial discrimination in jury selection.

QUESTION: So it -- it doesn't have to be proven

1 by a preponderance of the evidence.

2 MR. BEDRICK: Absolutely not. California uses a
3 standard of preponderance of the evidence and we believe
4 that is substantially higher than that which the -- the
5 standard which this Court suggested in Batson and in
6 Purkett v. Elem and in Hernandez v. New York. This
7 standard is substantially higher than used by anywhere
8 else in the country.

9 QUESTION: What's the best analog that you have?
10 Probable cause doesn't seem to fit. Reasonable suspicion,
11 reasonable grounds for belief. Are -- are there cases
12 which tell us what little semantic formulation you want to
13 use?

14 MR. BEDRICK: That's a good question. In
15 discussion with associates, we thrashed that around.
16 Probable cause is much too high. Reasonable suspicion,
17 which is lower than probable cause, starts to get near it,
18 but I know the Court had a reasonable suspicion case last
19 week and I don't know all the intricacies of it. My sense
20 is somewhat --

21 QUESTION: Well, that's -- that's not the
22 standard for letting a case go to the jury, though. It
23 seems to me that if that's what you're appealing to, what
24 the test ought to be is not whether the judge thinks it's
25 more likely than not, but whether a reasonable jury could

1 think that it's more likely than not. Surely that's the
2 standard for letting a case go to the jury, not a
3 suspicion. You know, if the judge thinks --

4 MR. BEDRICK: No.

5 QUESTION: -- he has to say a reasonable juror
6 could find that it is more likely than not that the
7 plaintiff's case is -- is sustainable. Isn't that the
8 test for going to the jury?

9 MR. BEDRICK: When the test goes to the jury,
10 the plaintiff has the burden of proving his case by a
11 preponderance of the evidence.

12 QUESTION: The jury has to find it by a
13 preponderance.

14 MR. BEDRICK: Yes.

15 QUESTION: But in order to let it go to the
16 jury, I had always thought that the criterion was not
17 whether the judge thought it was more likely than not but
18 whether in his view a reasonable jury could think it more
19 likely than not.

20 MR. BEDRICK: I think that is close to the test
21 that I'm asking for, Your Honor.

22 QUESTION: Okay.

23 QUESTION: You had a model --

24 QUESTION: Of course, that standard applies
25 after the -- after the case has been -- has been tried and

1 -- and both sides have had an opportunity be heard. All
2 -- all you're asking for is the opportunity to make
3 inquiry.

4 MR. BEDRICK: Absolutely, Your Honor. All we're
5 asking is that prosecutor be -- or the -- or the
6 challenger, whoever that may be, be asked the reason. So
7 what we are ask -- our standard is somewhat closer to a
8 discovery standard.

9 QUESTION: You're asking more than that. You're
10 asking under our law that if the -- if the prosecutor
11 doesn't come back with a reason, you win.

12 MR. BEDRICK: Absolutely not, Your Honor.

13 QUESTION: You're not?

14 MR. BEDRICK: I respectfully disagree. The
15 series --

16 QUESTION: The -- the prosecutor can stand
17 silent and -- and -- and the -- the judge can still find
18 against you.

19 MR. BEDRICK: Very much so because the -- the
20 series of cases from this Court, the Batson-Hernandez-
21 Elem trilogy, and -- and also the -- some of the Title VII
22 cases provide that even though the burden of producing
23 evidence shifts, the burden of persuasion never shifts.
24 So --

25 QUESTION: But the persuasion burden would be

1 for the jury if you submit enough to make out a prima
2 facie case. The Title VII cases deal with a situation
3 where you've made the prima facie showing. You don't
4 necessarily win if the defendant comes up with a
5 nondiscriminatory reason. But if the defendant just
6 stands silent -- you've made your prima facie case.
7 Defendant says nothing. Don't you win at that point?

8 MR. BEDRICK: No, Your Honor, I do not win
9 either under Batson or under Title VII. This Court
10 decided a couple of cases, including Reeves and St. Mary's
11 Honor Center in which the finding was a prima facie case
12 was made, the employer gave a reason, the trial judge said
13 I disbelieve that reason --

14 QUESTION: Yes, of course, but suppose the
15 employer gives no reason.

16 MR. BEDRICK: I don't --

17 QUESTION: Suppose that the prosecutor stands
18 silent. Those are all cases where the prosecutor does
19 what you would expect. The defendant does what you
20 expect: come up with a reason. But if no reason is
21 given --

22 MR. BEDRICK: In the Batson context, Your Honor,
23 we have never come across a case -- there may be one. We
24 have never come across one where the prosecutor stood
25 silent. The prosecutor always has a reason.

1 QUESTION: Well, you -- you were asked to
2 consider what -- what does it mean, this prima facie case,
3 if the defendant does stand silent. It may be implausible
4 that the prosecutor would or a defendant would in Title
5 VII.

6 MR. BEDRICK: Yes, but even so, even -- even in
7 this theoretical and I think inconceivable hypothetical
8 situation, if the challenger stood silent, the trial judge
9 still has to determine whether or not the objector has
10 proven discrimination at that point, at stage three, by a
11 preponderance of the evidence.

12 QUESTION: I -- I suggest that the reason you've
13 never come across a case in which the prosecutor stands
14 silent is because the prosecutors know that if they stand
15 silent, they lose.

16 MR. BEDRICK: No. The prosecutor --

17 QUESTION: It's not at all inconceivable. I
18 mean, that -- that's why they always come up with a reason
19 because, as I understand the way we formulated our -- our
20 Title VII test, you -- you have to come up with an excuse,
21 and if you don't have an excuse, the plaintiff wins. I'm
22 -- I'm not sure I agree with that, but that's what our law
23 is.

24 MR. BEDRICK: The prosecutor knows that he will
25 look bad if he does not come up with a reason. A

1 prosecutor knows that the trial judge could infer that
2 something is up or something has been done wrong if he
3 doesn't come up with a reason. But our prosecutors are
4 bright and energetic and talkative and garrulous people.
5 They always have a reason for everything.

6 So in this case -- and even there are many
7 cases. In the many cases where the question of prima
8 facie case is being discussed and it looks like it's a
9 close case, in many of those, a careful prosecutor will
10 say, Your Honor, let's not hang this case up at the prima
11 facie level. I would -- let's -- let me not leave a
12 record that is not clear. I would like to tell you what
13 my reason is and here --

14 QUESTION: May I ask you a hypothetical
15 question? I hate to push you to the wall on it, but
16 supposing you had a prosecutor who conducted the voir dire
17 for the first day and then was hit by a truck and died and
18 wasn't able to continue the trial. And he had made one
19 challenge of one African American juror, but he had let
20 six others on the jury. What -- what would you do with
21 that case? Would that be a prima facie case or not?

22 MR. BEDRICK: With one juror challenged, six
23 remain, from the defense perspective, I would say I have a
24 very lousy -- lousy chance of making a prima facie case,
25 and I would not make that argument.

1 QUESTION: What if there were one and otherwise
2 it was an all-white jury?

3 MR. BEDRICK: Then I guess we would hope to find
4 some evidence of the prosecutor's reason. Perhaps he
5 had --

6 QUESTION: I'm -- I'm positing a case in which
7 for reasons beyond the control of the prosecutor, they
8 can't tell what the real reason was of the man who
9 conducted the voir dire.

10 MR. BEDRICK: At that point I would suggest that
11 the wise trial judge would find a prima facie case, avoid
12 any possible RICKS discrimination and ask jury selection
13 to begin anew. At that point, the cost to the system is 1
14 day of poor jurors parading through. That's a much lower
15 cost than the risk of this case going to the jury and
16 being tried by a jury that has been chosen with racial
17 discrimination.

18 QUESTION: What if it comes up -- comes up on
19 appeal? I mean, it's happened. In the case -- because
20 the trial judge lets the case go forward.

21 MR. BEDRICK: I -- I need some more facts.

22 QUESTION: No. The appellate court has to
23 decide whether -- whether the conviction has to be thrown
24 out --

25 MR. BEDRICK: Yes. The --

1 QUESTION: -- on the basis of a -- a strike that
2 the appellate court has no way of finding out the reason
3 for.

4 MR. BEDRICK: If --

5 QUESTION: The only prospective black juror was
6 struck.

7 MR. BEDRICK: That is why we are arguing here
8 for this -- for the threshold that we are arguing for,
9 which is a relatively -- relatively low threshold at which
10 the trial judge examines all the circumstances and, when
11 in doubt, rules that there should be a prima facie case,
12 and then we get an answer, and then the trial judge makes
13 a decision based on an answer, and then we get a record.

14 QUESTION: Why do you say when in doubt? I
15 mean, isn't it enough to say the trial judge has to -- can
16 find that there's a prima facie case of discrimination,
17 but why slant it one way or the other?

18 MR. BEDRICK: Because in response to the last
19 question, I was trying to show that one of the things that
20 are missing when a -- when the questions are not asked of
21 the challenger is a record. We do not know what the
22 answer would be, and that puts the appellate court in a
23 much more difficult situation. So that is what I was
24 saying. When we're -- when in doubt, one of the benefits
25 that we obtain from an answer is a record so that it can

1 be reviewed.

2 Furthermore, my guess is most of the
3 prosecutor's answers will, in fact, show race-neutral
4 reasons. Then we have no problem. Everyone knows what
5 the situation is. The answer has been revealed. It does
6 not become an appellate issue and everyone then has
7 confidence that the jury has been fairly chosen.

8 QUESTION: Tell me how it works. You have some
9 suspicion, because of the issues in the case and so forth
10 after the first minority juror is excused, and say oh-oh,
11 there may be something going on here. At -- at what point
12 under California procedure do you think you should make
13 the objection? At the earliest possible opportunity when
14 they've excused the first minority juror or you wait until
15 the whole jury is empaneled and ready to be sworn? How
16 does that work?

17 MR. BEDRICK: I would say it depends on the
18 discretion of the objecting party. If there was only one
19 minority juror and defense counsel thought that that was a
20 good juror and therefore smelled possible discrimination,
21 then defense counsel might make the challenge at the time
22 of the first juror. If --

23 QUESTION: What happened here? Was it after the
24 second juror or after the first?

25 MR. BEDRICK: The first motion here was made

1 after the second African American juror and the second --

2 QUESTION: And then renewed on the third.

3 MR. BEDRICK: -- and the second motion was made
4 after the third African American juror. So defense
5 counsel did not -- did not make his motion at the earliest
6 possible opportunity. He may have been giving his
7 opponent the benefit of the doubt. But after the opponent
8 challenged two out of two, he no longer thought there
9 should be a benefit of the doubt.

10 QUESTION: And under your procedure, how long
11 would this take? You say, Your Honor, I want an inquiry
12 into why this juror was excused and the -- I guess the
13 judge excuses the -- the panel, or the prospective panel,
14 and then says, Mr. Prosecutor, can you tell me why you
15 excused the jury. Is that the way it works?

16 MR. BEDRICK: Yes. In -- in this --

17 QUESTION: Don't -- don't they just go up to the
18 bench? Do they have to excuse the whole jury panel?

19 MR. BEDRICK: I've seen it done all different
20 ways. I've seen it done out in the back hall. I've seen
21 it done at the bench. I've seen it done with the room
22 cleared, and I've seen it done in front of the whole jury.
23 They do it all different ways.

24 QUESTION: What happened here?

25 MR. BEDRICK: Here both motions were discussed

1 outside of the presence of the jury, and that was, of
2 course --

3 QUESTION: And the trial judge did what? He
4 decided on his own that there were good reasons?

5 MR. BEDRICK: The trial judge in this case on
6 the first motion, decided that there was no prima facie
7 case because the trial judge speculated as to possible
8 reasons on the record that might theoretically and
9 arguably have provided a race-neutral reason.

10 QUESTION: And was the judge asked if the
11 prosecutor could be asked to explain?

12 MR. BEDRICK: The trial judge asked the
13 prosecutor, Mr. Prosecutor, I'm about to -- I'm in the --
14 I'm about to rule that there's no prima facie case. Do
15 you have anything you want to add? Do you have any
16 reasons you want to state? And the prosecutor said, no,
17 Your Honor, I don't want to --

18 QUESTION: Well, why should he --

19 QUESTION: Why should he?

20 QUESTION: -- if he's already been told?

21 (Laughter.)

22 MR. BEDRICK: That was clearly too late in the
23 process, but there are many other cases I mentioned
24 earlier where when a prima facie case seems relatively
25 close, the intelligent prosecutor will give a reason and

1 make his record and protect his record.

2 QUESTION: Counsel --

3 QUESTION: -- in the law --

4 QUESTION: -- before you exhaust your time here,
5 on appeal did you challenge also an evidentiary point, a
6 Brady claim?

7 MR. BEDRICK: There are other issues --

8 QUESTION: There are other issues in the case.

9 MR. BEDRICK: Yes.

10 QUESTION: The Brady claim, some evidentiary --
11 and -- and a new trial was granted on some of those
12 issues?

13 MR. BEDRICK: No. This -- this case has been
14 tried three times. In the -- the first case got three-
15 quarters of the way through. There was a Brady problem.
16 A mistrial was granted. There was a second trial. There
17 was a conviction after the second trial. In that second
18 trial, there were instructional errors regarding
19 concurrent causes. There was a reversal on that. This
20 now is the appeal from the third trial.

21 QUESTION: On the third trial, were there other
22 issues?

23 MR. BEDRICK: There are other issues that the
24 court of appeal did not reach.

25 QUESTION: That were not reached.

1 MR. BEDRICK: Yes.

2 QUESTION: But do we have a jurisdictional
3 problem? Do we have a final judgment?

4 MR. BEDRICK: We certainly have a -- we
5 certainly have a final judgment from a trial which is a
6 conviction of the defendant. We have a -- we have a
7 decision from the intermediate court of appeal that says
8 reversed. We have a decision from the State supreme court
9 that says reversed again. So that we have lost our -- we
10 have lost our Batson argument.

11 QUESTION: Well, but it's sent back. Wasn't it
12 sent back to the court of appeals for further proceedings
13 in this case?

14 MR. BEDRICK: The -- yes.

15 QUESTION: Well --

16 QUESTION: And you may win on two -- on either
17 of two issues that are left in the court of appeals.

18 MR. BEDRICK: That is theoretically possible,
19 but I think --

20 QUESTION: But that's on three of those issues.
21 Isn't it the case that the intermediate appellate court
22 said there's something going for your side on those three?
23 It's kind of hinted that you have a good case on the
24 issues it didn't yet decide.

25 MR. BEDRICK: Yes, that's correct, Your Honor,

1 but I very much hope that the Court would reach the issues
2 here. We've put in a lot of time on that.

3 QUESTION: But we have a firm finality rule. So
4 how can we if the judgment that you're bringing to us is
5 non-final?

6 MR. BEDRICK: I believe that --

7 QUESTION: We've put in a lot of time on it too.

8 MR. BEDRICK: I understand.

9 (Laughter.)

10 QUESTION: I -- I --

11 MR. BEDRICK: We have a -- California has --
12 differs from every other court in the Nation on several of
13 these jury selection points. California has a standard
14 that is much higher than virtually everyone else in the
15 Nation.

16 QUESTION: We understand that it's a good case
17 to address the issue, but only if there's a final judgment
18 so that we have jurisdiction. Can you enlighten us any
19 more on that jurisdiction point?

20 MR. BEDRICK: This issue has not been raised by
21 either side in this case.

22 QUESTION: Well, it's raised now.

23 MR. BEDRICK: I understand that, Your Honor. So
24 that it is my understanding that we have a final -- we
25 have a final judgment from the trial court of convicting

1 the defendant. We have what is a final judgment from the
2 intermediate court of appeal, which was a reversal. That
3 court did not need to reach the other issues. It felt it
4 did not need to bother to reach them.

5 QUESTION: But now it does because it's been
6 reversed and there's a remand. And when it's remanded, it
7 is certainly going to take up the issues that it left
8 undecided.

9 MR. BEDRICK: If it needs to reach those, that's
10 correct, Your Honor.

11 QUESTION: Well, it's been instructed. There --
12 there are exceptions under our Cox case, and I've looked
13 at them. I don't think this comes under them. We don't
14 like to ambush you this way, but I mean, if there's a --
15 there's a real jurisdictional problem here.

16 QUESTION: Especially since we gave you the case
17 to -- to argue. You are very kindly appearing here pro
18 bono.

19 (Laughter.)

20 QUESTION: It seems like a dirty trick.

21 (Laughter.)

22 QUESTION: No. But may I ask on the finality
23 question? Is the decision of the California Supreme Court
24 final with respect to the disposition of the Batson claim?

25 MR. BEDRICK: It very much is, Your Honor.

1 QUESTION: There's nothing more to be decided
2 relevant to that issue.

3 MR. BEDRICK: Absolutely not.

4 So that what I was hoping to argue to the Court
5 was we have a very distinct and sharp conflict between the
6 State of California and the Ninth Circuit and, indeed,
7 between the State of California and the rest of the
8 country on several of these issues. What is the --

9 QUESTION: May I ask you one question that is
10 relevant to that? And that is, that California, as I
11 understand it, is taking the position each State is free
12 to implement Batson as it chooses, and California points
13 out that it has a standard that's more stringent than the
14 Federal standard on disqualifying a juror for race bias.
15 The California standard is significant likelihood that the
16 juror is biased, where the Federal standard is a
17 reasonable possibility. So California says if we can have
18 a more stringent standard on disqualifying a juror for
19 race bias, why can't we have a more stringent standard on
20 Batson.

21 MR. BEDRICK: Because California did not present
22 any federalism issues at the State supreme court nor does
23 my opponent. California said we are deciding the Federal
24 constitutional issues. We are deciding this case under
25 Batson. We believe that our standard complies with

1 Batson.

2 QUESTION: I thought part of that was that
3 Batson leaves room for the States. It doesn't require
4 every State to -- to handle Batson challenges the same
5 way. I think that is an argument that California made.

6 MR. BEDRICK: There are -- there -- there are
7 some -- I'm not sure what aspects were left to the States,
8 but California's Supreme Court did not -- the State makes
9 this argument, but the California Supreme Court did not.
10 The California Supreme Court did not say anything
11 addressing any independent State ground.

12 QUESTION: More a question for the State than
13 for you.

14 I -- I can't really think of an analog here.
15 Our search and seizure jurisprudence, our arrest
16 jurisprudence, our Miranda jurisprudence is all uniform.
17 Here, of course, State jury selection procedures vary, and
18 so there has to be some allowance for that. On the other
19 hand, I'm not sure what the State is going to tell me so
20 far as a helpful analog for having a different --
21 different rule.

22 MR. BEDRICK: The best standard we could come up
23 with, Your Honor, was something that was similar to the
24 standard on a Federal civil procedure 12(b)(6) motion. On
25 a motion to dismiss, could a reasonable trial -- could a

1 reasonable trier of fact find for the plaintiff? That was
2 -- that is the closest analog we have.

3 QUESTION: Yes, but what you're talking about is
4 a judgment at the close of the plaintiff's case, aren't
5 you? You're not talking about a motion to dismiss a
6 complaint before trial.

7 MR. BEDRICK: That -- that's what 12(b)(6) would
8 be, Your Honor. So the question is can the plaintiff get
9 out -- can the plaintiff get out of the batter's box. So
10 that that is -- that is the type of language that -- that
11 we are seeing in the Federal courts interpreting the raise
12 in inference.

13 That's also what we are -- in Title VII context
14 we're actually seeing a lower threshold. In Title VII, to
15 establish a prima facie case, the plaintiff needs to show
16 that he was part of -- of a protected group, that he was
17 qualified for a job, that he applied, that he was
18 rejected, and the employer is still looking.

19 QUESTION: But you -- you do have some
20 difference on a motion to dismiss because the rule is that
21 if any conceivable allegations could have been proved in
22 support of what the complaint says, it shouldn't be
23 dismissed. But at the close of the plaintiff's evidence,
24 I think it's a little more stringent. It's what -- what
25 does the plaintiff's evidence show, not what could it have

1 shown.

2 MR. BEDRICK: I -- I guess I'm persuaded that we
3 are somewhat higher than rule 12(b)(6). I think we're
4 also somewhat lower than reasonable suspicion. But I
5 think this standard comes up in many other kinds of
6 motions where ordinary civil procedure motions where a
7 plaintiff wants to proceed and for -- a motion for
8 challenged discovery, for example. The plaintiff wants to
9 proceed and the defendant says we don't want our witness
10 brought in here. He's an important person. He's an
11 officer of an important corporation, and the judge -- show
12 me why we should take that person's deposition. Now, you
13 don't have to prove anything beyond a preponderance. You
14 need to show some reasonable facts that can be learned
15 from that person. In this --

16 QUESTION: But the typical discovery motion
17 isn't appealable, so there isn't much writing on the
18 subject of what sort of a standard should apply in that
19 sort of discovery.

20 MR. BEDRICK: But it -- it could turn out to be
21 appealable. The chances of them showing prejudice are
22 limited, but it's the same kind of situation. The
23 plaintiff here is trying to obtain some evidence, and here
24 it's actually the crucial evidence so that in my discovery
25 analogy, it wouldn't work for -- it wouldn't work for

1 garden-variety discovery, but if we had a major witness
2 and a major point, that issue might show up as a -- as the
3 -- as the issue on which an appeal turned.

4 Here the information we're trying to find is --
5 goes to the guts of the question of racial discrimination.
6 It goes to the reason that the prosecutor -- the reason
7 for the prosecutor's challenge. The trial judge has to
8 decide whether there is a race-neutral reason and whether
9 that was in fact the prosecutor's reason and whether that
10 reason was credible. None of that can be determined
11 unless we know the prosecutor's reason.

12 QUESTION: What if -- what if the trial court at
13 the prima facie stage says it -- it seems perfectly
14 obvious to me -- and I think this is perhaps what the
15 judge here did -- that the reason the prosecutor did this
16 was thus and so. And then the -- so he doesn't call on
17 the prosecutor, but nonetheless, it's very plausible what
18 he said. Now, isn't that a form of harmless error?

19 MR. BEDRICK: I can't see anything remotely
20 obvious here, Your Honor, between the State judges and the
21 attorney -- State Attorney General's office has speculated
22 as to two reasons for challenges to Clodette Turner. They
23 speculated as to five possible reasons for the challenges
24 to Sara Edwards, and they speculated on eight possible
25 reasons for the challenges to Ruby Lanere.

1 QUESTION: Well, what -- what --

2 MR. BEDRICK: If it was so obvious, they
3 wouldn't have 15 speculations.

4 QUESTION: What if the prosecutor, after the
5 prima facie stage, says I did it for this reason? All
6 parties -- the -- the defense isn't bound by that
7 statement, is it? But I suppose the prosecutor is.

8 MR. BEDRICK: The prosecutor is, and then the
9 defense gets to argue, as one does in a Title VII case,
10 that there is something wrong with that answer which
11 therefore shows prejudice. Perhaps the prosecutor has
12 said I challenge this juror because in voir dire, the
13 juror said he was -- I believe the juror was illiterate.
14 And it turns out the question was, Mr. Juror, how do you
15 get your news? From the newspaper or television? And the
16 juror said, I get it from television. And the prosecutor
17 thought that showed illiteracy. If that's the test for
18 literacy, then two-thirds of our population is illiterate.

19 That's why we need to get the reasons. The --
20 the defense is not bound by it. The defense is entitled
21 to show that the reason may be pretextual. Sometimes it
22 will be. Sometimes it will not. But unless the -- the
23 whole guts of Title VII where the employer always gives a
24 reason is trying to show in one way or another from the
25 facts and circumstances and all the evidence that the

1 reason is pretextual. And that should apply in -- in --
2 under Batson in the same way. But one cannot evaluate
3 from either position, from the defense position or the
4 prosecution position, whether the reason is pretextual
5 unless one hears the reason.

6 And if --

7 QUESTION: I suppose -- suppose one problem that
8 is more difficult in the Batson context -- we're talking
9 about a reason that would justify a peremptory challenge,
10 not a challenge for cause. And I imagine that a good
11 judge and a good lawyer could come up with that kind of
12 reason for almost any potential juror.

13 MR. BEDRICK: We are -- most of the time the --
14 the prosecutors are going to have race-neutral reasons.
15 All -- all we're doing is asking for, to check for the
16 unusual circumstance when the reason is not race-neutral
17 or when the reason is pretextual.

18 QUESTION: I thought you didn't need a reason
19 for a peremptory challenge. I thought that's the beauty
20 of -- of a peremptory challenge.

21 MR. BEDRICK: A peremptory challenge --

22 QUESTION: I don't know. There's just something
23 about this guy. I just -- you know, my antennae tell me
24 that this person isn't going to be good for my side of the
25 case.

1 MR. BEDRICK: A peremptory --

2 QUESTION: Is -- is that enough of a reason?

3 MR. BEDRICK: A peremptory challenge is valid
4 for any reason except an unconstitutional reason.

5 QUESTION: Right.

6 MR. BEDRICK: When this Court considered Batson,
7 the argument made by the State is we have a peremptory
8 challenge statute which is very important and you
9 shouldn't just brush it aside. And this Court decided in
10 Batson, yes, peremptory challenge statutes are important,
11 but the Equal Protection Clause and the U.S. Constitution
12 are even more important, and as in the conflict between
13 those two, the Equal Protection Clause, which is
14 preventing racial discrimination, which is protecting the
15 rights of the individual jurors not to be discriminated,
16 which is protecting the right of the defendant not to be
17 tried by a jury chosen with discrimination, and which is
18 protecting the rights of the public not to have the
19 criminal system upset by discrimination, the -- this Court
20 in Batson decided that the Equal Protection Clause under
21 -- trumps the right for --

22 QUESTION: So what I said wouldn't suffice. You
23 say that wouldn't suffice as a reason.

24 MR. BEDRICK: I would say any -- I would say a
25 -- the -- I don't want to put you -- Your Honor in those

1 shoes, but a prosecutor -- we've never seen a prosecutor
2 not have a reason. So if you -- so if you were the
3 prosecutor and you said, I have a hunch, the trial judge
4 would probably ask, counsel, please I need more than a
5 hunch. Please give me the reason for your hunch. And
6 your answer is I don't like jurors who have beards, I
7 don't like jurors who have long hair, I don't like postal
8 workers, some basis for the hunch. Any prosecutor who is
9 not discriminating would have a basis for that hunch.

10 If there are no questions, I'd like to save my
11 remaining time for rebuttal.

12 QUESTION: Very well, Mr. Bedrick.

13 Mr. Schalit, we'll hear from you.

14 ORAL ARGUMENT OF SETH K. SCHALIT

15 ON BEHALF OF THE RESPONDENT

16 MR. SCHALIT: Mr. Chief Justice, and may it
17 please the Court:

18 The more likely than not standard identified by
19 the California Supreme Court gives content to the prima
20 facie case requirement and preserves the proper balance
21 between the anti-discrimination principles enshrined in
22 the Equal Protection Clause and the State's and parties'
23 interest in using peremptory challenges to select a
24 qualified and unbiased jury.

25 QUESTION: Just so we can get it behind us, do

1 you have any observation on the apparent jurisdictional
2 problem we have? Can you give us a hand?

3 MR. SCHALIT: I'll attempt to do so, Your Honor.
4 The situation I think is akin to that under which multiple
5 claims are raised and a court of appeal disposes of it
6 based on one ground and does not discuss anything else.
7 And that court is therefore -- thereafter reversed on
8 appeal. I think that is a final judgment. The -- the
9 defendant in this case has been deprived of his reversal
10 and that is what --

11 QUESTION: Even when it's been remanded, when
12 the judgment is, you know, I decided on this ground and
13 then I remand it for further proceedings in the case?

14 MR. SCHALIT: I think so, Your Honor, in that
15 the -- the legal issue is -- is still present as to the --

16 QUESTION: That's not the test. The test is
17 whether the case is final.

18 MR. SCHALIT: Regrettably, Your Honor,
19 unfortunately I haven't had time --

20 QUESTION: Yes, we sort of sprung it on you.

21 MR. SCHALIT: Yes.

22 QUESTION: Okay. I just thought you might have
23 an answer.

24 MR. SCHALIT: That's as best as I can do. My
25 apologies.

1 QUESTION: You have an issue that's finally
2 decided in this case.

3 MR. SCHALIT: Correct, Your Honor.

4 QUESTION: And that will be law on the case.
5 But you don't have a judgment, a final judgment in the
6 case because now there are all those issues that the
7 intermediate appellate court said it left open. It gave
8 some hints about what validity it thought they had, but --
9 but there is -- there are a number of issues that are
10 still to be opened. So the judgment isn't final. Only
11 one issue in the case is.

12 MR. SCHALIT: My apologies, Your Honor. Beyond
13 what I've already articulated in terms of that --
14 deprivation of that reversal based on that issue is the
15 extent of my knowledge, this issue not having been
16 briefed.

17 QUESTION: May I ask you this question about the
18 California standard? Is it -- did you just say the
19 standard is the judge must decide that it's more likely
20 than not that there was discrimination? Or -- and I think
21 it would be quite different to say -- the judge must
22 decide that a reasonable juror could conclude that it's
23 more likely than not that there was a -- discrimination.

24 MR. SCHALIT: No, Your Honor. It is not the
25 latter test.

1 QUESTION: It's not the latter.

2 MR. SCHALIT: No.

3 QUESTION: And why shouldn't it be the latter?

4 MR. SCHALIT: Because the judge is operating as
5 the fact finder in this setting, and given the nature of
6 the prima facie case requirement, which is one that when
7 the prima facie case is met, entitles the objecting party
8 to prevail --

9 QUESTION: In your -- in your ordinary civil
10 trials, which view does the -- is -- what is the rule in
11 California? Would -- would it be the one I stated or the
12 one you stated?

13 MR. SCHALIT: That depends on the function of
14 the prima facie case in term -- in -- in the context in
15 which it's being used. There are two terms --

16 QUESTION: Say it's a tort case where he sued
17 for, you know, negligence in driving a car. Which --
18 which would be the correct statement under California law?

19 MR. SCHALIT: Well, if it is a question of has
20 the --

21 QUESTION: Do I let the case go to the jury?
22 That's what's before him.

23 MR. SCHALIT: If that's the question, then it is
24 an inference --

25 QUESTION: It's whether a reasonable jury could

1 find that there was --

2 MR. SCHALIT: Correct, Your Honor.

3 QUESTION: And why do you say there's a
4 distinction here? I -- I understood you to -- to say that
5 the -- the distinction rests on the fact that the -- at
6 the -- at the close of -- of whatever argument or point
7 the -- the defense counsel makes, that he's entitled, in
8 effect, to -- to win the point. But that's not so.

9 MR. SCHALIT: In the face of his opponent's
10 silence, Your Honor --

11 QUESTION: In the face of silence.

12 MR. SCHALIT: Correct, Your Honor.

13 QUESTION: That's a further -- I mean, a further
14 fact in evidence. I mean, if -- if somebody puts in a --
15 a permissive case in a -- in a civil action and the
16 defense puts in nothing, the -- the jury may or may not
17 ultimately award for the -- for the plaintiff. They may
18 -- but in -- in this case, I take it the way it works,
19 there is a -- a presumption that aids the objecting party
20 and therefore the objecting party wins. Is -- is that
21 your understanding?

22 MR. SCHALIT: Essentially, Your Honor.

23 QUESTION: Yes.

24 MR. SCHALIT: In the -- in the Batson context.
25 It is not a presumption in the McDonnell sense of having

1 proved certain predicate elements.

2 QUESTION: Okay. But if the -- if, on the other
3 hand, the prosecutor does make a response, then there's no
4 presumption. Then the -- the judge simply has to make a
5 determination.

6 MR. SCHALIT: Correct, Your Honor. The judge
7 must evaluate the response and the -- and the rest of the
8 evidence in determining whether the objector has met his
9 ultimate burden of persuasion.

10 QUESTION: And -- and when he does that, he may
11 very well, in effect, say, yes, there's evidence here from
12 which I could infer discriminatory intent, but I don't
13 infer it. I am not wholly convinced by it for whatever
14 reason. And that's -- that's a possible resolution by the
15 court, isn't it?

16 MR. SCHALIT: In a stage three, Your Honor, of a
17 Batson proceeding?

18 QUESTION: Yes.

19 MR. SCHALIT: Yes.

20 QUESTION: So at -- at the last stage, the trial
21 judge is acting as if he were -- it were a bench trial,
22 and it's up to him to decide whether there was or was not
23 a discriminatory purpose.

24 MR. SCHALIT: Correct, Your Honor. Having now
25 heard the reasons, the trial court will evaluate the

1 credibility of the prosecutor. As the plurality
2 recognized in Hernandez, frequently the credibility of the
3 striking party will be dispositive.

4 QUESTION: But -- but if no reasons are given,
5 it's your position that automatically it's determined that
6 there's a constitutional violation.

7 MR. SCHALIT: Correct, Your Honor. That is --

8 QUESTION: The other side says no.

9 MR. SCHALIT: Well, that ignores the disposition
10 in Batson itself in which the Court explained that on
11 remand it was up to the trial court to determine whether
12 there was a prima facie case, and if the prosecutor did
13 not come forward with his race-neutral reasons, the
14 judgment had to be reversed. It is that --

15 QUESTION: But isn't the -- the position that --
16 that you are advocating, if I understand it correctly, is
17 that the court saves the prosecutor that burden by the
18 court, before turning to the prosecutor, to say what's
19 your nondiscriminatory reason. The court itself first
20 thinks of can the court think of a good reason, and if the
21 court thinks of a good reason, it never asks the
22 prosecutor. That's the -- that's -- as I understand your
23 case, you say that's how it works.

24 MR. SCHALIT: Not entirely, Your Honor, in that
25 it is not the court's obligation nor do California courts

1 seek out to save the striking party. What they do do is
2 attempt to determine whether the objecting party has met
3 its burden of persuasion at that first step, and in
4 considering everything before it, it will make that
5 determination. Now, there may be --

6 QUESTION: Well, do you think -- suppose there
7 were 12 peremptory challenges and there were 12 African
8 American prospective jurors there and all of them were
9 stricken. Is there enough case made if there's an
10 objection by the defense counsel?

11 MR. SCHALIT: Well, Justice O'Connor, certainly
12 numerosity is an important point or an important
13 consideration.

14 QUESTION: -- in my example.

15 MR. SCHALIT: Your -- Your Honor, your example
16 actually needs additional facts. If, for example, one of
17 those African American prospective jurors said, I hate
18 cops and the second was wearing, you know, Crypts colors
19 in a case involving the Bloods, and the third was half
20 asleep and the fourth had some other obvious explanation,
21 then no.

22 QUESTION: Well, so, the trial judge can look
23 into that as a part of the prima facie case. He can look
24 into what the jurors responded?

25 MR. SCHALIT: Yes, Your Honor, because of the --

1 it is the trial judge's obligation under Batson to
2 evaluate all the facts and circumstances. Batson itself
3 recognized that the prosecutor's questioning during voir
4 dire may support or refute --

5 QUESTION: Suppose I'm the trial judge and I
6 consider, you know, there are reasons why the prosecutor
7 -- legitimate reasons why the prosecutor might have
8 exercised this challenge. Do I go further?

9 MR. SCHALIT: I think it's up to the trial --
10 trial judge to determine whether the objector has met his
11 burden of persuasion as more likely than not. If I can
12 see a legitimate reason --

13 QUESTION: Well, I -- the -- the case is the one
14 I -- I gave you. There's an objection. And I say, you
15 know, there are reasons why this prosecutor might have
16 done this. Do I quit at that point and say, well, you
17 haven't made out your case? That's the way I understand
18 the California rule, incidentally. If there -- if there
19 are reasons that might have allowed the prosecutor to give
20 the peremptory challenge, the prima facie case may not
21 have been made out.

22 MR. SCHALIT: And I think it's important, Your
23 Honor, to distinguish the rule as understood on appeal in
24 California from the rule in application in the trial
25 courts. It is not can we hypothesize a potential reason

1 in -- from the trial judge's perspective that there's a
2 challenge here. It is up to the trial judge to determine
3 from all of the evidence whether it is more likely than
4 not. And maybe I have a reason but --

5 QUESTION: But it's very odd that he would do
6 that without even asking the prosecutor to comment.

7 MR. SCHALIT: Not -- not particularly, Your
8 Honor. If the prosecutor has --

9 QUESTION: I mean, it's odd in the sense that
10 California is one of the only States that does it.

11 MR. SCHALIT: Well, Your Honor, if the
12 prosecutor three African American prospective jurors, all
13 of whom are defense attorneys and they're struck by the
14 prosecutor, there's nothing odd about not asking about
15 that. They're all defense attorneys.

16 If, however, maybe, you know, there was a little
17 something that one of the jurors did and I can sort of see
18 the reason for that, but they struck 12 of them and I sort
19 of see a reason, that's not enough most likely in the more
20 likely than not context. And the prosecutor will be
21 required to state reasons.

22 Now, that is different than on appeal where, of
23 course, the judgment of the trial court is presumed
24 correct and the trial court is the entity that has seen
25 everything. And if on the face of the record, there's

1 something that appears to be the reason, well, then that
2 must be used on appeal, just as in the other appeal to
3 support the judgment below. But it is the trial court's
4 obligation to evaluate everything before it, and to
5 determine --

6 QUESTION: Well -- no, I didn't mean to --
7 complete your -- the -- the problem I have with -- with, I
8 guess, that argument and -- and with the California
9 position is this. I assume that under Batson when and if
10 the time comes for the prosecutor to make a response, we
11 want a -- a context in -- in which the prosecutor at least
12 has got a fair shake to -- to persuade the court. And on
13 the California system, which you're defending, the judge
14 does not, in effect, ask the prosecutor for a response
15 until the judge, in effect, has already found against him
16 on the merits because on your view, the prosecutor has
17 said implicitly, by a preponderance of the evidence, they
18 have proven discrimination. Anything you'd like to say
19 about that? That's a very different thing from saying,
20 this side's case is in and I might find for them, but I --
21 I haven't yet. What do you have to say? It -- it in
22 effect on -- on the California scheme forces the -- the
23 court to say I've already ruled against you based on the
24 merits unless you say something.

25 MR. SCHALIT: Yes, Your Honor, and that is the

1 purpose of the -- of the prima facie case requirement. It
2 is to allocate the introduction of the burden of proof and
3 it is to protect the constitutionality of the State
4 statute and the nature of the challenges as being
5 peremptory.

6 QUESTION: But it puts the prosecutor in a -- in
7 rather a difficult spot if -- if you get to that point.

8 MR. SCHALIT: Yes, and that --

9 QUESTION: Because the prosecutor has already
10 been told you lose unless you've got a darned good reason.

11 MR. SCHALIT: Just as the employer is told that
12 essentially in a Title VII case when the evidence is
13 introduced on those four McDonnell Douglas factors and the
14 evidence is persuasive.

15 QUESTION: But -- but it seems to me --

16 QUESTION: No.

17 QUESTION: -- the opposite is also true for what
18 Justice Souter is saying. The -- the judge says, you're
19 going to win unless you say something.

20 MR. SCHALIT: Well, then there's --

21 QUESTION: No.

22 QUESTION: So I -- I -- in that instance, he
23 obviously says nothing.

24 MR. SCHALIT: Correct, Your Honor.

25 QUESTION: He doesn't say you're going to win.

1 He's going to say there is enough to require you to
2 respond. Whether -- whether you win or lose is up to me
3 after the response.

4 MR. SCHALIT: In the -- in the Batson setting,
5 in the Title VII cases, in any case in which there is a
6 prima facie case found, going back to Kelly v. Peters with
7 Justice Story, there is such evidence that unless
8 rebutted, the party with the burden of persuasion will
9 prevail.

10 QUESTION: That is true if you've got a
11 presumption working. It is not true if you simply have a
12 -- a standard that -- that allows for the permissive
13 inference. If -- if nothing more than a permissive
14 inference is involved and the case -- and the defense puts
15 in no case, the plaintiff may or may not win. The only
16 thing that makes the difference is -- is whether a
17 presumption operates to convert the permissive case into a
18 victory, and whether the presumption is going to operate
19 or not is a question of -- of policy. It's not a question
20 of logical relationships.

21 MR. SCHALIT: Certainly it does operate when
22 there is a presumption established by the court, as this
23 Court did in McDonnell Douglas. It also operates when
24 there is a -- what Wigmore referred to as a strong mass of
25 evidence. That concept cannot be alighted from the

1 definition of a prima facie case in that --

2 QUESTION: May I ask you this question just to
3 be sure I -- I have your position? The other side says
4 California is the only State in the Union that follows
5 this strict a rule and the Federal courts all follow the
6 -- the other rule. Are they right on that, or do you
7 think they're -- you have company in other parts of the
8 country?

9 MR. SCHALIT: We are -- there are -- there are
10 other cases that announced the same standard. Maryland
11 announced it. Connecticut announced it. The court below
12 recognized that. There are a handful of cases on the
13 other side that recognize inference. The Ninth Circuit
14 does.

15 QUESTION: The legislature overturned it in
16 Connecticut. Isn't that so?

17 MR. SCHALIT: My belief is that actually the
18 Supreme Court of Connecticut under its supervisory
19 authority established a sort of --

20 QUESTION: Anyway, it's no -- Connecticut is not
21 out of line anymore.

22 MR. SCHALIT: Not -- yes. They don't apply it,
23 but they don't apply it based on their supervisory
24 authority. As an understanding of the meaning of Batson,
25 it's still valid. And because it's actually California,

1 Maryland, and Connecticut that have considered the meaning
2 of Batson and the Title VII cases. The other cases -- the
3 Ninth Circuit just looked at the word and said inference.
4 They isolated that word from the rest of the Batson
5 opinion. That's not the appropriate way to read an
6 opinion. It must be considered in context. Batson
7 expressly told the courts to look to the Title VII cases
8 for an explanation of the operation of the prima facie
9 case rules.

10 QUESTION: But in Title VII there would be a
11 presumption if the employer said nothing. If the -- if
12 the plaintiff shows the McDonnell Douglas factors and the
13 employer doesn't come up with any reason at all, I thought
14 at that point, plaintiff wins because there's a reasonable
15 inference, plus presumption. Plaintiff wins. When
16 defendant comes forward with a nondiscriminatory reason,
17 then the presumption drops out of the case. Plaintiff
18 shoulders the burden of persuasion.

19 MR. SCHALIT: Correct, Your Honor. And that is
20 one example of a prima facie case with a shifting burden
21 of production that entitles the party to prevail in the
22 face of silence.

23 The other example included in that same section
24 of Wigmore is the strong mass of evidence, and he later
25 explains that those things are different in operation and

1 they differ -- but the same in effect. And the effect is
2 the same. The operation is different and the operation --

3 QUESTION: But I thought that -- that this Title
4 VII, the idea of reasonable inference plus presumption --
5 that that's supposed to be the formula for Batson as well.

6 MR. SCHALIT: Not presumption in the sense that
7 there are four elements of McDonnell Douglas that apply in
8 a Batson context. There can't be those four elements.
9 Every time there's a challenge in a Batson setting, the
10 four elements of McDonnell Douglas, for example, would
11 have been met. The juror would have been a minority
12 qualified, excused, and replaced.

13 The -- the reference in Batson to the Title VII
14 is not to a presumption, but to the operation of the prima
15 facie case rules, and the operation of those rules are
16 such that you provide sufficient evidence to entitle you
17 to prevail in the face of silence. And Wyoming ties that
18 together with being synonyms for the same mechanism. They
19 are akin to presumptions.

20 QUESTION: I thought he said that the
21 presumption operates in the run -- mine run of cases, it's
22 the presumption that the -- what you call the strong
23 evidence test -- that's Batson for special instances and
24 it isn't the dominant rule.

25 MR. SCHALIT: That -- Your Honor, Wigmore

1 recognized there are these two means in which you can
2 create the prima facie case. One is the presumption. And
3 that is helpful in a case in which there's a run of the
4 mill type facts and in the run of the cases, that fact
5 that is presumed, more likely than not, follows from the
6 predicate facts. That cannot be applied in Batson.

7 What does apply in Batson, however, is the other
8 aspect of the prima facie case mechanism recognized by
9 Wigmore which is the strong mass of evidence concept.
10 That has to be what is applied here in that the nature of
11 the jury selection --

12 QUESTION: The -- the problem with -- with this
13 is, though, is that, say, in the employment discrimination
14 case, there's been discovery. The events have happened
15 outside the hearings of the court. There has been time to
16 look at it. Here the alleged wrong is occurring right in
17 the courtroom in front of the judge. And so all they're
18 saying is that the judge should, in an appropriate case,
19 say, hey, what's going on here, Mr. Prosecutor. That's
20 all. And -- and it seems to me that's a very, very
21 minimal intrusion on -- on the trial.

22 And the -- the State of California's rule seems
23 to presume that the defense counsel, if -- if he's the one
24 objecting, has the resources of discovery and -- and the
25 opportunity to -- to reflect and -- and to find other

1 evidence. He doesn't. The jury is being selected now.

2 MR. SCHALIT: Precisely, Your Honor, and that is
3 to his advantage. As -- as U.S. v. Armstrong recognized,
4 the res gestae takes place in front of the court. It
5 takes place in front of the parties therefore. Everything
6 that that party needs is available to the party. This is
7 not Swain where the objecting party would have to engage
8 in some sort of historical discovery and analysis.
9 Everything the party needs is there, and the striking
10 party has --

11 QUESTION: Everything the party needs except the
12 state of mind of the prosecutor, and the --

13 MR. SCHALIT: Correct, Your Honor, to which he
14 is not entitled until he demonstrates entitlement to
15 relief and is able to overturn the statute and make it
16 unconstitutional as applied. This Court has already
17 rejected --

18 QUESTION: Of course, the irony of that is that
19 if -- if you had an ordinary civil lawsuit and the
20 plaintiff files a complaint on information and belief -- I
21 have good faith and belief such and such happened -- then
22 he takes a deposition and asks the defendant did it
23 happen. But here you can't do that. You got to know the
24 answer to what your information and belief is before you
25 file your complaint.

1 MR. SCHALIT: That's -- that's the nature of
2 privilege of peremptory challenges, the nature of any
3 other privilege that protects information.

4 This Court has already rejected this sort of
5 inference standard in its voir dire cases. It's -- it
6 requires that you inquire of jurors, if there's a
7 possibility of -- not if there's a possibility of
8 prejudice but if it's constitutionally significant.

9 QUESTION: Is it appropriate in a case like this
10 to weigh, on the one hand, the importance of the interests
11 that are protected by the Batson rule and, the other hand,
12 the burden on the prosecutor by having to answer the
13 question? Is that an important part of the analysis?

14 MR. SCHALIT: No, Your Honor. It's not a
15 question of the burden of the -- of the 10 seconds it
16 takes to state an answer. It is a question of the burden
17 on the peremptory challenge system and the effect on the
18 voir dire process. A low standard will create an
19 incentive to bring these motions more frequently. That
20 requires excusing the jury every time. That requires
21 taking a proceeding and getting an answer. And that may,
22 in turn, require proceedings through rebuttal. Well,
23 let's go through our dozen discharged jurors and piles of
24 questionnaires to do a determination of whether this is
25 pretext.

1 Moreover, it is the nature of the peremptory
2 challenge system that is entitled to protection. These
3 challenges are peremptory. We don't want to discourage
4 challenges based on hunches which will be discouraged
5 under a lower standard. This gives the trial courts a
6 clear guidance.

7 QUESTION: Of course, there are those -- I
8 remember Justice Marshall used to take the position that
9 it would be better for the system as a whole if we
10 entirely abandoned peremptories because you -- you're
11 better off if you always know what the reason is. At
12 least that's a permissible view.

13 MR. SCHALIT: Yes, that was his view, Your
14 Honor. And the reason he had that view was because he did
15 not like the Batson rule which required a flagrant showing
16 of discrimination in order to rise to the level of a prima
17 facie case. He understood that a prima facie case was one
18 that entitled the party to relief. That was the --

19 QUESTION: But they -- most -- most
20 jurisdictions -- most courts that considered this issue
21 have the reasonable inference and that gives rise to the
22 presumption. California is in a minority. Are you saying
23 that California is right and everyone else is wrong? Or
24 that you're both right?

25 MR. SCHALIT: Well, Your Honor, I'm not sure

1 that the numbers are that stark, given that most cases --

2 QUESTION: Whatever. There is a divergence.

3 MR. SCHALIT: There's certainly a divergence.

4 QUESTION: Now, are you saying there is only one
5 right way and that's California's, or are you saying it's
6 up to the States? They can have one rule or the other.

7 MR. SCHALIT: Your Honor, I think that certainly
8 the footnote in Batson in the final part of the discussion
9 recognizes the -- that it is left to the States to
10 determine procedures to govern Batson. Now, on the other
11 hand --

12 QUESTION: Does that mean -- procedures to
13 govern -- that one State can have reasonable inference
14 gives rise to presumption and in another, as California,
15 can have strong likelihood?

16 MR. SCHALIT: Quite possibly, Your Honor, in
17 that we believe more likely than not is -- is the result
18 from Batson given the Title VII description. On the other
19 hand, there is that -- that footnote and leaving to the
20 States.

21 And it is not unheard of, to return to Justice
22 Kennedy's earlier question, to have some variance. And I
23 think one good example of that is incompetence and Medina
24 v. California, which recognized that California could use
25 the more likely than not standard and place that burden on

1 the party claiming he was incompetent. Other States can
2 have a different burden.

3 QUESTION: Because you -- you said something
4 about one of the reasons you're resisting this is it may
5 -- it prolongs the trial and you have to clear the jury
6 and the -- in the -- the places that have reasonable
7 inference plus presumption, has there been this slowing
8 down, the clogging of the court? Has -- has what you're
9 predicting played out in reality?

10 MR. SCHALIT: Your Honor, I'm not aware of
11 anyone having conducted a time in motion study of -- of
12 voir dire in the various States to find out how they're
13 proceeding. Certainly the system does not have to
14 collapse in order to conclude that the more likely than
15 not standard, with its advantages and its compliance with
16 Title VII, with the holding in Batson, with the nature of
17 declaring the statute unconstitutional as applied, is
18 constitutionally prohibited. It is a somewhat surprising
19 notion to suggest that using the lowest of the three basic
20 burdens of persuasion is constitutionally prohibited.

21 QUESTION: I -- I did -- the question I asked
22 you was just a purely practical one. Has what you
23 predicted as the adverse consequences, if you loosen up
24 the -- what the plaintiff has to show -- what the
25 defendant has to show -- and my understanding is that --

1 that it hasn't been a big problem in the Federal courts,
2 in States.

3 MR. SCHALIT: I think it's unknowable, Your
4 Honor, that the -- the extent to which the system is
5 burdened is not something that can be readily determined.
6 You can infer that there is a burden imposed on it, one
7 that California can legitimately seek to avoid by using
8 the most common burden of persuasion.

9 QUESTION: Well, how does California handle a
10 challenge for cause? Does it clear a courtroom every time
11 someone makes a challenge to cause? Does it call counsel
12 up to the bench to give their reasons simply to the judge
13 on the record or some third way? How does -- how does it
14 handle it?

15 MR. SCHALIT: Frequently it's done at the -- at
16 the bench, Your Honor.

17 QUESTION: Well, this -- couldn't the same thing
18 be done on -- on a Batson challenge?

19 MR. SCHALIT: It's not typically done that way.
20 The -- the --

21 QUESTION: Well, why couldn't it be?

22 MR. SCHALIT: The -- the first step perhaps
23 could be, but at some point there's going to need to be
24 most likely further proceedings or to then go back and
25 determine whether those reasons are pretextual. We'll

1 have to excuse the jury to go through the questionnaires
2 and -- and do a comparison.

3 And that wouldn't happen in a -- in a challenge
4 for cause. The -- the challenge for cause is pretty much
5 over at that point because the judge knows it's just that
6 one juror and -- and can make that determination based on
7 that juror and -- and the information presented by the --
8 the challenging party. A Batson proceeding is much larger
9 than that.

10 Your Honors, the -- the more likely than not
11 standard is an appropriate standard. It is supported by
12 the effect on the statute declaring it unconstitutional as
13 applied. It avoids using an inference standard that does
14 not provide guidance to the trial courts, a standard that
15 this Court has already rejected in the voir dire context.
16 It maintains the proper balance between the anti-
17 discrimination goals of the Equal Protection Clause and
18 the peremptory challenge system what this Court -- which
19 this Court has repeatedly recognized plays an important
20 function in serving the selection of a fair and qualified
21 jury.

22 The judgment should, therefore, be affirmed.

23 Thank you.

24 QUESTION: Thank you, Mr. Bedrick -- or rather,
25 Mr. Schalit.

1 Mr. Bedrick, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF STEPHEN B. BEDRICK

3 ON BEHALF OF THE PETITIONER

4 MR. BEDRICK: Thank you, Your Honor.

5 In this case, the prosecutor preempted all three
6 African American jurors, leaving a black defendant to be
7 tried before an all-white jury in a case that had racial
8 issues. If this Court -- this is a paradigm of a prima
9 facie case. This is a much stronger prima facie case than
10 that which is required in virtually all of the Federal
11 courts.

12 If this Court does not reach this question
13 because it finds something that still is alive below, I
14 respectfully submit that this Court would be sending a
15 very poor message to the State courts and a very poor
16 message to the Federal courts, namely, that yes, it is
17 technically in error but it's not important enough for us
18 to decide. I'd respectfully ask the Court to reach this
19 issue.

20 In terms of what would happen if the States --
21 at the State court, I don't think I -- I could never get
22 back to this Court or anywhere else. Let us say I go back
23 to the State court of appeal. The State court of appeal
24 rules against me on the evidentiary issues and says,
25 counsel, on the Batson issue we'd like to rule for you but

1 the State supreme court said no, so we can't do anything.
2 Review at the State supreme court is discretionary. I
3 file a petition for review and the State supreme court
4 says we decide that -- we already decided that. We don't
5 care. Get out of here. Review dismissed.

6 I then will be trying to come to this Court,
7 having gotten no opinions from the court of appeal, having
8 gotten a postcard denial from the State supreme court and
9 I would not be able to get here. I think that will be --

10 QUESTION: Yes, you would. You'd have a --

11 QUESTION: We'll be waiting.

12 (Laughter.)

13 QUESTION: You'd have a decision from the
14 highest Court in the State that has ruled on it, and you
15 could -- you could come here. You would have then --
16 let's say you have a judgment affirming the conviction.
17 You could come here from that.

18 MR. BEDRICK: If -- if that was a guaranteed
19 invitation, Your Honor, I would accept it.

20 (Laughter.)

21 MR. BEDRICK: But odds on getting to this Court
22 aren't quite so guaranteed as --

23 QUESTION: We will -- we will already have done
24 the work. Your odds are better than most people.

25 (Laughter.)

1 QUESTION: So will you.

2 MR. BEDRICK: Yes.

3 QUESTION: Well, and importantly, we know what
4 the California Supreme Court's final word is on it
5 already.

6 MR. BEDRICK: We don't know. Every time around,
7 they make up a new definition. They had strong
8 likelihood. They had not -- they had dispositive
9 inference. They had conclusive presumption. This time we
10 -- this time they made up more likely than not. They may
11 make some other standard. We don't know what they're
12 going to do, and it's a -- it's a moving target and it is
13 -- the target is moving in the direction of denying --
14 denying consideration of these cases and the target is
15 moving in the direction of denying the opportunity to show
16 whether or not there's discrimination.

17 If the California court's standard of
18 preponderance of the evidence is allowed to apply, we
19 believe that will eviscerate Batson because that means you
20 cannot get in California what you would get -- at least
21 eviscerate Batson in California because that would mean
22 you cannot get in California what you could get anywhere
23 else in this country on these facts --

24 QUESTION: But maybe they can get it from the
25 Ninth Circuit.

1 MR. BEDRICK: That is possibly true.

2 QUESTION: It's definitely true. Hasn't the
3 Ninth Circuit disagreed with the California Supreme Court?

4 MR. BEDRICK: Yes, and we have this continuing
5 battle where counsel is required to spend and waste
6 enormous amounts of time going back and forth and back and
7 forth. I mean, I guess this case could become my career.
8 I'd sort of ask the Court --

9 (Laughter.)

10 MR. BEDRICK: -- to let me go on and -- I want
11 to represent my client, but I'd ask the Court to let me go
12 and do something else.

13 (Laughter.)

14 MR. BEDRICK: In conclusion, I would ask to
15 point out to the Court that obtaining the reason is the
16 most important thing we're asking here. It's very simple.
17 Most of the time it will solve the problem. We won't be
18 bouncing back and forth between courts.

19 Discrimination cannot be shown unless the
20 challenger's reasons are known. I would ask this Court to
21 decide this case in a way that challenger's reasons become
22 known.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Bedrick.

25 The case is submitted.

1 (Whereupon, at 11:04 a.m., the case in the
2 above-entitled matter was submitted.)
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