IN THE SUPREME COURT OF THE UNITED STATES

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JAY SHAWN JOHNSON, :

Petitioner :

v. : No. 04-6964

CALIFORNIA. :

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Washington, D.C.

Monday, April 18, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:49 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.

C O N T E N T S

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BEDRICK: We have --

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

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

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

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

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

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

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

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

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

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

MR. BEDRICK: Yes, Your Honor.

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

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

MR. BEDRICK: Very much so, Your Honor.

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

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

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

MR. BEDRICK: That is correct.

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

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

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

MR. BEDRICK: Yes.

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

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

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

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

JUSTICE SOUTER: Yes.

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

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

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

JUSTICE SOUTER: All right. Let me --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Don't remember.

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

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

MR. BEDRICK: Yes.

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

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

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

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

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

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

JUSTICE SCALIA: Well, that's because --

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

JUSTICE SCALIA: Wow.

MR. BEDRICK: -- slightly --

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

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

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

MR. BEDRICK: Yes.

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

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

JUSTICE BREYER: Unusual. I --

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

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

MR. BEDRICK: Yes.

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

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

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

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

JUSTICE SCALIA: What does it mean?

MR. BEDRICK: And the Batson procedure would work.

JUSTICE SCALIA: What does it mean?

MR. BEDRICK: It means when there is the purpose of --

JUSTICE SCALIA: Any suspicion whatever.

MR. BEDRICK: Pardon me, Your Honor?

JUSTICE SCALIA: Any suspicion -- he strikes one black from the jury.

MR. BEDRICK: No, not any suspicion whatsoever. It's a higher standard --

JUSTICE SCALIA: It has to be reason to inquire.

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

JUSTICE SCALIA: What's --

MR. BEDRICK: It would vary depending on the circumstances. The --

JUSTICE KENNEDY: And -- and is that like permitting discovery to go forward?

MR. BEDRICK: That's essentially what step one of Batson is --

JUSTICE KENNEDY: And -- and is that standard less than going to a jury?

MR. BEDRICK: Yes.

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

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

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

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

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

JUSTICE BREYER: That's it. Fine.

JUSTICE SOUTER: Could -- could I take that a

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

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

MR. BEDRICK: Yes.

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

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

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

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

Is that a fair statement of your position?

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

JUSTICE SOUTER: Okay.

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

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

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

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

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

open.

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

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

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

MR. BEDRICK: Yes.

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

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

MR. BEDRICK: Yes --

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

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

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

MR. BEDRICK: It is --

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

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

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

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

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

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

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

JUSTICE STEVENS: And yes, but one of the

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

MR. BEDRICK: Very much so, Your Honor.

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

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

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

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

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

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

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

MR. BEDRICK: The California --

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

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

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

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

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

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

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

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

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

MR. BEDRICK: I agree, Your Honor.

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

MR. BEDRICK: Yes.

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

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

MR. BEDRICK: Yes. Yes, Your Honor.

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

CHIEF JUSTICE REHNQUIST: Very well, Mr. Bedrick.

Mr. Schalit.

ORAL ARGUMENT OF SETH K. SCHALIT

ON BEHALF OF THE RESPONDENT

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

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

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

In title VII --

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

applied by the Federal courts and by most State courts?

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

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

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

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

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

discrimination.

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

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

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

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

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

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

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

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

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

The same is true --

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

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

JUSTICE SCALIA: Really?

MR. SCHALIT: That --

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

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

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

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

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

JUSTICE BREYER: All right.

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

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

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

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

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

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

JUSTICE BREYER: No. Assuming the four --

MR. SCHALIT: Yes.

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

MR. SCHALIT: Right.

JUSTICE BREYER: -- about that, which is what

Hicks says --

MR. SCHALIT: Yes.

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

MR. SCHALIT: Yes.

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

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

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

these --

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

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

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

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

CHIEF JUSTICE REHNQUIST: This is all step one?

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

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

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

MR. SCHALIT: Not --

JUSTICE KENNEDY: I don't understand that.

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

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

MR. SCHALIT: Yes.

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

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

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

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

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

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

JUSTICE GINSBURG: And here there was no reason given.

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

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

Worse, take a -- a discovery and one plaintiff

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

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

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

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

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

JUSTICE GINSBURG: This is not -- not issue

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

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

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

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

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

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

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

MR. SCHALIT: Yes, Your Honor.

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

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

JUSTICE STEVENS: In an ordinary tort case --

MR. SCHALIT: No.

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

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

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

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

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

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

MR. SCHALIT: Yes. That is my understanding.

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

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

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

MR. SCHALIT: Yes, Your Honor.

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

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

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

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

JUSTICE O'CONNOR: Is it because the judge could

imagine reasons that the prosecutor might have had?

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

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

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

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

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

And Justice Stevens's observation about the

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

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

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

possibility.

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

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

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

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

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

understanding of the operation of the proof rules.

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

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

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

(Laughter.)

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

(Laughter.)

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

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

Is that correct?

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

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

MR. SCHALIT: Yes, Your Honor.

JUSTICE KENNEDY: been exhausted.

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

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

JUSTICE GINSBURG: May -- may I just --

MR. SCHALIT: Oh, please.

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

misunderstand you?

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

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

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

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

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

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

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

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

JUSTICE SCALIA: What?

MR. SCHALIT: It intrudes on --

JUSTICE SCALIA: Like -- like what?

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

require divulgence of those types of confidences.

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

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

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

MR. SCHALIT: Because --

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

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

JUSTICE GINSBURG: But it still could be -- I

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

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

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

(Laughter.)

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

MR. SCHALIT: Absolutely not.

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

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

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

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

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

JUSTICE SOUTER: The dog is entitled to one bite.

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

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

MR. SCHALIT: Oh.

(Laughter.)

MR. SCHALIT: Hopefully not --

JUSTICE SCALIA: It's a New Hampshire rule.

(Laughter.)

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schalit.

Mr. Bedrick, you have 4 minutes left.

REBUTTAL ARGUMENT OF STEPHEN B. BEDRICK

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schalit.

The case is submitted.

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

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