NO. 04-6964

IN THE SUPREME COURT OF THE UNITED STATES

JAY SHAWN JOHNSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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OPINIONS BELOW

The first opinion of the California Court of Appeal, J.A. 59-113, is unofficially reported at 105 Cal. Rptr. 2d 727. The opinion of the California Supreme Court, J.A. 114-72, is reported at 30 Cal. 4th 1302, 71 P.3d 270, 1 Cal. Rptr. 3d 1. The order of this Court granting certiorari, J.A. 173, is reported at 540 U.S. 1045, and the Court's opinion dismissing the case, J.A. 174-78, is reported at 541 U.S. 428. The second opinion of the court of appeal, J.A. 179-214, is not reported. The order of the California Supreme Court denying review, J.A. 215, is not reported.

JURISDICTION

The order of the California Supreme Court denying discretionary review was entered October 20, 2004. The petition for a writ of certiorari was filed October 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT

1. Petitioner, an African-American, murdered the Caucasian 19-month-old child of his girlfriend. J.A. 116, 148.

2. During jury selection, the prosecutor exercised twelve peremptory challenges, three of which were used to challenge all of the African-American prospective jurors, C.T., S.E., and R.L.[1/] J.A. 116. Citing *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), which held "'that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates' the California Constitution," J.A. 119, petitioner objected after the challenge to S.E. and after the challenge to R.L, J.A. 116-17. Applying *Wheeler*'s requirement that the objector establish a prima facie case by showing a "strong likelihood" of group bias, the trial court denied the motions. J.A. 117-18.

3. A divided court of appeal reversed. J.A. 97. Following *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), the court held the "strong likelihood" standard enunciated in *Wheeler*

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1. To suggest discriminatory intent, petitioner notes the prosecutor "challenged [S.E.] immediately after the trial court voir dired her" and challenged R.L. "immediately after her voir dire concluded." PBOM 3. As the California Supreme Court observed, "[T]his trial occurred in 1998, at a time the trial court had primary responsibility for conducting voir dire. The district attorney asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged. Thus, asking no questions was of little or no significance here." J.A. 151-52 (citation omitted). Finally, the prosecutor's lack of response to petitioner's objection was appropriate. No response is required until the court finds a prima facie case. *J.E.B. v. Alabama*, 511 U.S. 127, 144-45 (1994).

violated *Batson v. Kentucky*, 476 U.S. 79, 94 (1986), which requires the objector to raise "an inference of discriminatory purpose." J.A. 65-72, 118. "Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that 'a prima facie case of group bias was established and that the judgment must therefore be reversed.'" J.A. 118-19.

4. The California Supreme Court reversed, "conclud[ing] that *Wheeler*'s terms, a 'strong likelihood' and a 'reasonable inference,' refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." J.A. 116. The court "also conclude[d] that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal." *Id.* The court upheld "the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly." *Id.*[2/]

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2. The trial court observed in connection with R.L. that it "had had 'concerns with regard to her qualifications in this matter based upon her answers on the questionnaire. . . . [S]he had a sister who had had drug charges'" and had "'difficulty understanding some of the issues.'" J.A. 117. The trial court had also been concerned about S.E., who in response to follow-up questions in court, but not on her questionnaire, disclosed a parent had been arrested for robbery thirty years ago, "expressed on the record that she didn't know if she could be fair," and had given an answer concerning her emotional response that "'may have caused concern for either side. Even though the answers tend to lean in favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence.'" J.A. 118. The supreme court saw "no basis on which to overturn the trial court's determinations." J.A. 148. As to C.T., about whom the trial court did not comment, likely because petitioner "did not argue that no reason existed to challenge" her, *id.*, the supreme court observed, "'(1) [S]he was childless (this case involved the death and alleged abuse of a minor), (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of

Two justices dissented based on a belief that *Wheeler*'s "strong likelihood" standard conflicts with *Batson* and that the correct standard is a "substantial danger" that challenges were discriminatory. J.A. 152-72.

5. This Court granted certiorari, J.A. 173, but concluded the judgment was not final and dismissed, J.A. 174-78.

6. The court of appeal resolved petitioner's remaining claims adversely to him and affirmed the judgment. J.A. 179-214. The supreme court denied review. J.A. 215.

SUMMARY OF ARGUMENT

The California Supreme Court held that to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objecting party must show that it is more likely than not that the other party's challenges, if unexplained, were based on impermissible group bias. That standard is correct for two reasons. First, the standard is inherent in a prima facie case that shifts the burden of production. Second, *Batson* did not constitutionally compel a lower standard. Petitioner asserts that the proper standard requires that the objector show a logical inference of discrimination. Although petitioner advances a variety of explanations in support of that standard and challenges the supreme court's reasoning, his arguments are not persuasive.

Batson requires that the objector demonstrate a prima facie case in order to shift the burden of production to the striking

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prosecuting and defending attorneys.'" *Id*. Petitioner is disturbed by the trial court's recitation of possible explanations for challenges to R.L. and S.E. and by the presentation and adoption on review of possible reasons for all the challenges. PBOM 4-6; *see* J.A. 117-18, 148. Trial courts cannot be faulted for not being persuaded by a showing offset by other information. And neither appellate counsel nor appellate courts can be faulted for relying on information in the record that supports a presumptively valid judgment. *People v. Wiley*, 9 Cal. 4th 580, 592 n.7, 889 P.2d 541, 548 n.7, 38 Cal. Rptr. 2d 347, 354 n.7 (1995).

party. It incorporated that requirement from the Court's Title VII cases. As a general principle of the law of evidence, a prima facie case that shifts the burden of production is one that entitles the moving party to relief unless the opposing party meets the shifted burden of production. The Court's Title VII cases reflect this understanding. The Court has stated that once a Title VII plaintiff has made a prima facie case and the burden of production has shifted, the factfinder must find for the plaintiff unless the defendant meets its burden of production. Similarly, as shown by the Court's disposition order in *Batson*, which remanded for the trial court to determine whether a prima facie case existed and to reverse if the prosecutor did not state race-neutral reasons, a party objecting to the use of peremptory challenges is entitled to relief if the striking party fails to meet its burden of production. For a moving party to be entitled to relief in the face of his opponent's silence, the moving party must have met its burden of persuasion, which typically is done by proving the ultimate facts by a preponderance of the evidence. The Title VII cases confirm the applicability of that burden to the requirement for a prima facie case with a shifting burden of production. When a Title VII plaintiff establishes a prima facie case, a presumption of discrimination arises. The presumption is appropriate because the Court has concluded that when the acts constituting a prima facie case have occurred and are unexplained, it is more likely than not that the acts were based on discriminatory intent. Thus, a Title VII plaintiff who presents a prima facie case that is unrebutted is entitled to relief. The plaintiff has shown that it is more likely than not that there was discrimination. Therefore, in order to prove a prima facie case of discrimination in a *Batson* hearing (thereby shifting the burden of production and entitling the objector to relief if the striking party is silent), the objecting party must show that it is more likely than not that the other party's challenges, if unexplained, were based on impermissible group bias.

The "more likely than not" standard is constitutional. Under state law, peremptory challenges are challenges for which no

reason need be given. When, under *Batson*, a court requires a striking party to state reasons for his peremptory challenges, the court trumps state law by finding it unconstitutional as applied. The effect is necessarily one of constitutional dimension because this Court lacks authority to create non-constitutional rules governing the state courts. As a foundational matter, a party seeking relief has the burden of proving the facts entitling the party to relief, which usually is accomplished by proving the facts by a preponderance of the evidence. A party who challenges a statute as being unconstitutional as applied usually would prove by preponderant evidence the facts demonstrating the asserted constitutional impairment. Thus, as the party claiming that the peremptory challenge statute is unconstitutional as applied, the party objecting under *Batson* has the burden of proving the fact of discrimination by a preponderance of the evidence in California.

Moreover, in setting standards for when trial courts must grant a request for voir dire on racial prejudice, the Court has rejected on constitutional grounds a standard akin to that advanced by petitioner. In an exercise of supervisory authority over federal criminal trials, the Court requires trial judges to grant a party's request for voir dire on racial prejudice when there is a reasonable possibility of prejudice. That standard, which is similar to the inference standard advocated by petitioner, does not apply to the States. The Constitution mandates inquiry only when there is a constitutionally significant likelihood of prejudice. The Court should not use a standard it already rejected on constitutional grounds for purposes of deciding when to question jurors about bias to determine when to question parties about bias.

California does not insist in this case that its "more likely than not" standard is constitutionally compelled. Petitioner can prevail only if its standard is prohibited. Consistent with principles of federalism, the Court largely left particularized standards implementing *Batson* to the States. Under California law, the default burden of persuasion is a preponderance of the evidence.

Petitioner's arguments are unavailing. He treats the term "prima facie case" as if it invariably refers to any inference that could support relief. The Court has repeatedly recognized, particularly in the Title VII cases, a different meaning, that of demonstrating an entitlement to relief such that the burden of production shifts. He imports into the term "inference" a persuasiveness threshold even though the term simply refers to a deduction of fact and even though the Court has, particularly in the Title VII cases, used it as a shorthand for when a party shows it is more likely than not the inferred fact existed. Using the mere inference test is inconsistent with the Court's voir dire cases, its favorable treatment of *Wheeler* in *Batson*, *Batson*'s description of factors in a prima facie case that go beyond mere logicality, and the Court's efforts to avoid unnecessarily disrupting voir dire. Petitioner emphasizes one definition of a prima facie case that encompasses establishing an inference on which relief could be based while largely ignoring the definition that encompasses presenting sufficient evidence to shift the burden of production and to entitle the party to relief if the other party offers no rebuttal. It is the latter that *Batson* adopted. Petitioner's assertion that no response is required eliminates the distinction between the two types of prima facie case. Petitioner argues that the inference test is appropriate because a discovery standard should apply. A *Batson* objection, however, is not a discovery motion. It is a merits motion based on evidence available to the objector in court, and discovery of information that is privileged or protected by the Sixth Amendment is not available on a mere inference. Petitioner claims other courts apply the inference test when most merely recite the term "inference" without analysis. Petitioner discusses no case that analyzes the appropriate burden in light of the nature of a prima facie case with a shifting burden of production, the Title VII cases, the constitutional necessity for invalidating state peremptory challenge laws based on improbable evidence of discrimination, the effect on privilege, and this Court's rejection in a due process context of a standard similar to the inference standard.

Using the standard advocated by petitioner potentially burdens the voir dire process as even improbable inferences of discrimination would require statements of reasons. Peremptory challenges would cease being peremptory, a result *Batson* rejected. The standard used in California guards against these abuses yet has been an historic bulwark against discrimination that has, time and again, led to inquiry into claimed violations.

ARGUMENT

I.

TO ESTABLISH A PRIMA FACIE CASE UNDER *BATSON* THE OBJECTOR MUST SHOW THAT IT IS MORE LIKELY THAN NOT THAT THE OTHER PARTY'S PEREMPTORY CHALLENGES, IF UNEXPLAINED, WERE BASED ON IMPERMISSIBLE GROUP BIAS

The United States and California Constitutions prohibit the use of race- or gender-based peremptory challenges during jury selection. Establishing the mechanism for evaluating claims that challenges were discriminatory was evolutionary, which led to different phrasings by this Court and the California Supreme Court of the test to determine the existence of a prima facie case of bias. The California Supreme Court referred to the obligation to show a "strong likelihood" of discrimination. *People v. Wheeler*, 22 Cal. 3d 258, 280, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905 (1978). This Court spoke of the obligation to "raise an inference" of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Petitioner asserts that California's articulation of the test is stricter than *Batson*'s. His argument fails, however, as he misapprehends the role "raising an inference" plays in establishing a prima facie case. Petitioner confuses the *method* of proving a prima facie case by way of inference and the *burden of proof* on the objector to demonstrate a prima facie case.

The issue is not what *facts* can lead to a deduction that there may have been discrimination but rather how *persuasive* the deduction must be before the trial court requires a statement of reasons. The supreme court below engaged in a thorough analysis, concluded the different phrases did not establish different burdens, and correctly identified the burden as being to show that it is more likely than not that the challenges, if unexplained, were based on impermissible group bias.

California strongly disputes at the outset the implication of petitioner that the California standard makes it easier for a party to discriminate than the standard he proposes. It was California's landmark *Wheeler* decision that rejected the "virtually impossible" showing required by this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), and permitted—for the first time anywhere—a party to show discrimination in jury selection on a case-by-case basis. *Batson* did not reject *Wheeler*; it embraced it. Petitioner, and the Ninth Circuit, misread *Batson* as endorsing a "reasonable inference" test. This is no test at all. Or, more precisely, it is a test with such a low threshold as to disrupt voir dire, infringe on the State's interest in its peremptory challenge scheme, and interfere with the striking party's significant (sometimes constitutional) interest in preserving work-product and attorney-client privileges even where it is more probable than not that the striking party was not engaging in discriminatory jury selection. *Batson* does not sanction such a test, which can lead to abusive motions and delays in jury selection. The California Supreme Court's historic *Wheeler* standard has served litigants well in rooting out discrimination and avoiding those adverse consequences. And it has not precluded trial courts from recognizing prima facie cases, as even a limited review of California Supreme Court cases demonstrates.[3/] Petitioner presents no

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3. *See, e.g.*, *People v. Reynoso*, 31 Cal. 4th 903, 910-11, 74 P.3d 852, 856, 3 Cal. Rptr. 3d 769, 775 (2003); *People v. Catlin*, 26 Cal. 4th 81, 116, 26 P.3d 357, 378, 109 Cal. Rptr. 2d 31, 56 (2001); *People v. Silva*, 25 Cal. 4th 345, 384, 21 P.3d 769, 795, 106 Cal. Rptr. 2d 93, 124 (2001); *People v.*

persuasive reason to reject *Wheeler* and certainly fails to show that its standard violates the Constitution.

A. Evolution Of The Prima Facie Case Requirement

1. In *Swain*, 380 U.S. 202, this Court concluded

> that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations . . . . But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.

Id. at 223-24.

2. In *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890, the California Supreme Court rejected *Swain*. Concluding that "[i]t demeans the Constitution to declare a fundamental

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Ervin, 22 Cal. 4th 48, 75, 990 P.2d 506, 519, 91 Cal. Rptr. 2d 623, 638 (2000); *People v. Williams*, 16 Cal. 4th 153, 187, 940 P.2d 710, 734, 66 Cal. Rptr. 2d 123, 147 (1997); *People v. Williams*, 16 Cal. 4th 635, 662, 941 P.2d 752, 768, 66 Cal. Rptr. 2d 573, 589 (1997); *People v. Jones*, 15 Cal. 4th 119, 159, 931 P.2d 960, 984-85, 61 Cal. Rptr. 2d 386, 411 (1997), *overruled on other grounds by People v. Hill*, 17 Cal. 4th 800, 823, n.1, 952 P.2d 673, 684 n.1, 72 Cal. Rptr. 2d 656, 667 n.1 (1998); *People v. Alvarez*, 14 Cal. 4th 155, 194, 926 P.2d 365, 388, 58 Cal. Rptr. 2d 385, 408 (1996); *People v. Jackson*, 13 Cal. 4th 1164, 1196, 920 P.2d 1254, 1269, 56 Cal. Rptr. 2d 49, 64 (1996); *People v. Sims*, 5 Cal. 4th 405, 428-29, 853 P.2d 992, 1004, 20 Cal. Rptr. 2d 537, 549 (1993); *People v. Pride*, 3 Cal. 4th 195, 230 & n.10, 833 P.2d 643, 662 & n.10, 10 Cal. Rptr. 2d 636, 655 & n.10 (1992).

personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right," the court held that *Swain* "is not to be followed in our courts." *Id*. at 287, 583 P.2d at 768, 148 Cal. Rptr. at 909-10. Instead, "all claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed" by the state constitution's representative-cross-section requirement and a new evidentiary procedure. *Id*., 583 P.2d at 768, 148 Cal. Rptr. at 910.

In establishing that procedure, the California Supreme Court sought to "define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." *Id*. at 278, 583 P.2d at 763, 148 Cal. Rptr. at 904. The court held that "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." *Id*. at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. To do that "he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." *Id.* If there is "a reasonable inference . . . that peremptory challenges are being used on the ground of group bias alone," that is, if "a prima case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone." *Id*. at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

3. In *Batson*, 476 U.S. 79, after the Kentucky Supreme Court declined to follow *Wheeler*, *id*. at 84, this Court recognized that *Swain* had imposed a "crippling burden of proof" and "reject[ed] [its] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause," *id*. at 92-93. Instead, "a defendant may establish a prima face case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of

peremptory challenges at the defendant's trial." *Id*. at 96.

The defendant must show that the facts and circumstances of the challenges "raise an inference that the prosecutor used [peremptory challenges] to exclude veniremen from the petit jury on account of their race." *Id.* "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id*. at 97. "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id*. at 98. *Batson* looked to the Court's Title VII cases, which "explained the operation of prima facie burden of proof rules." *Id*. at 94 n.18

4. Fourteen years later, the Ninth Circuit Court of Appeals concluded that *Wheeler* was incompatible with *Batson*. *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000). The court of appeals reasoned that "unlike the *Batson* Court, which required only that the defendant 'raise an inference' of discrimination, the *Wheeler* Court demanded that the defendant 'show a strong likelihood' that the prosecutor had excluded venire members from the petit jury on account of their race." *Id*. at 1195-96. "The California Supreme Court now routinely insists, despite *Batson*, that a defendant must show a 'strong likelihood' of racial bias." *Id*. at 1197. "[T]he *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test" and "therefore . . . California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*." *Id*. Based on its belief that California courts apply the wrong standard, *Wade* held that it "need not—indeed, should not—give deference [under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d),] to their determination that a defendant has failed to establish a *prima facie* case of bias." *Id*.

5. In this case, the California Supreme Court rejected *Wade*. After considering *Batson*, the nature of the requirement for a prima facie case that shifts the burden of production, and this

Court's Title VII cases, the court held that under *Batson* and *Wheeler* "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." J.A. 135.

B. By Implementing A Prima Facie Case Requirement With A Shifting Burden Of Production As In Title VII Cases, *Batson* Incorporated The "More Likely Than Not" Standard

The "more likely than not" standard necessarily follows from *Batson*'s adoption of an evidentiary mechanism involving a prima facie case with a shifting burden of production and a nonmoving burden of persuasion. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (describing the three-step *Batson* process as involving a shifting burden of production and nonmoving burden of persuasion). That evidentiary mechanism in general and as construed in this Court's Title VII cases in particular (on which *Batson* relied) requires not simply that the party making a prima facie case present evidence allowing an inference but rather that the moving party present evidence such that "if she stops *and her adversary does nothing*, her victory (so far as it depends on having the inference she desires drawn) is at once proclaimed." 2 J. Strong, *McCormick on Evidence* § 338 at 421 (5th ed. 1999) (emphasis added); *accord*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-10 (1993). A showing sufficient to shift the burden of production, i.e., to warrant relief absent rebuttal, requires that the ultimate facts be proved by a preponderance.

1. "What is *prima facie* evidence of a fact?" *Kelly v. Jackson*, 31 U.S. (6 Pet.) 622, 632 (1832). Justice Story answered that question in 1832:

> It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to con-

> sider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without rebutting evidence, they disregarded it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject.

Id.

That explanation retains its vitality 173 years later. "[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 280 (1994).

Wigmore explained that the term "'prima facie case' is used in two senses." 9 J. Wigmore, *Evidence in Trials at Common Law* § 2494 at 378 (J. Chadbourn rev. ed., 1981). Although one meaning of "prima facie case" applies "where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case," 9 *id*. at 379, there is another meaning:

> [T]he term is . . . applied to the stage of the case . . . where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or *by a general mass of*

> *strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence*.

Id. (emphasis added).

Thus, in order for the burden of production to shift, the party having the original burden of production and the burden of persuasion must make a prima facie showing entitling that party to relief absent introduction of rebutting evidence.

2. Two facets of *Batson* demonstrate that it implemented this generally understood evidentiary process and incorporated the requirement for a prima facie case that shifts the burden of production after a showing of entitlement to relief.

First, *Batson* held that if the striking party fails to shoulder the shifted burden of production, the objecting party should prevail. *Batson*, 476 U.S. at 100 ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Hernandez v. New York*, 500 U.S. 352, 375-76 (1991) (Stevens, J., dissenting) ("By definition . . . a prima facie case is one that is established by the requisite proof of invidious intent. Unless the prosecutor comes forward with an explanation for his peremptories . . . to rebut that prima facie case, no additional evidence of racial animus is required to establish an equal protection violation."). The disposition in *Batson* is thus predicated on a prima facie case entitling the objecting party to relief.

Second, the Court modeled the *Batson* requirement for a prima facie case with a shifting burden of production on its Title VII cases. *Batson* observed, "Our decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules." *Batson*, 476 U.S. at 94 n.18 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *Pur-*

kett, 514 U.S. at 768-69; *Hernandez*, 500 U.S. at 359, 364-65 (plurality opinion). Those cases demonstrate that a prima facie case is one that is so persuasive it entitles the party with the burden of persuasion to relief if the opposing party does not meet the shifted burden of production.

McDonnell Douglas, 411 U.S. 792, explained, "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."[4/] *Id*. at 802. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id*. The complaining party is then "afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext," *id*. at 804, "a coverup for a racially discriminatory decision," *id*. at 805. If the defendant in a Title VII case does not meet the shifted burden of production, the plaintiff is entitled to relief.

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254; *see also St. Mary's Honor Center*, 509 U.S. at 509-10 & n.3 (concluding that if the factfinder in a Title VII case finds a prima facie case and the defendant has not met its burden, the factfinder "*must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff").

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4. This is typically done "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id*. at 802.

3. Because a prima facie case shifts the burden of production and entitles the plaintiff to a finding in its favor if its evidence is not rebutted, that party must prove its prima facie case by a preponderance of the evidence. As explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978),

> *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that *it is more likely than not* that such actions were "based on a discriminatory criterion illegal under the Act."

Id. at 576 (emphasis added). "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors." *Id*. at 577 (emphasis added). Thus, the prima facie showing "is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation *it is more likely than not* that those actions were bottomed on impermissible considerations." *Id*. at 579-80 (emphasis added). As *Burdine* recognized, the "burden of establishing a prima facie case of disparate treatment is not onerous," but "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." 450 U.S. at 252-53. *See also* 1 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 301.02[3][a] (2d ed. 1997) ("[T]he presumed facts in most civil cases must be proved by a preponderance of the evidence.").

After making a prima facie case, the Title VII plaintiff and the *Batson* objector are in the same position and are entitled to victory, absent rebuttal, based on the same evidentiary mechanism—a prima facie case with a shifted and unmet burden of production. Their initial burden is therefore the same.[5/]

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5. Although the prima facie case burden and effect are the same under

Batson necessarily incorporated the "more likely than not" standard when it established an evidentiary mechanism that (1) was based on the Title VII cases, (2) mandates a prima facie case before the burden of production shifts, and (3) entitles the objector to prevail if no rebutting evidence is presented. The state supreme court, therefore, properly identified the prima facie case burden as requiring the objecting party to show that it is more likely than not that the challenges, if explained, were made for discriminatory reasons.

C. *Batson* Did Not Declare A Constitutional Requirement For A Prima Facie Burden Lower Than "More Likely Than Not"

1. Requiring a statement of reasons from the striking party invalidates as applied the peremptory challenge statute, which in California provides that "no reason needs to be given for a

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Batson and Title VII, the parties' awareness that the burden has been satisfied is different. In a Title VII case,

> the *effect* of failing to produce evidence to rebut the [*McDonald Douglas*] presumption is not felt until the prima facie case has been *established*, either as a matter of law (because the plaintiff's facts are uncontested) or by the factfinder's determination that the plaintiff's facts are supported by a preponderance of the evidence. . . . As a practical matter . . . and in the real-life sequence of a trial, the defendant *feels* the "burden" not when the plaintiff's prima facie case is *proved*, but as soon as evidence of it is *introduced*. The defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it *unless* the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder.

St. Mary's Honor Center, 509 U.S. at 510 n.3. Under *Batson*, however, reasons need not be stated until the trial judge as factfinder determines that a prima facie case has been made. *J.E.B.*, 511 U.S. at 144-45. This difference is appropriate. In the latter context, requiring the trial judge sitting as a factfinder to make a finding on the prima facie case before the striking party must give reasons preserves the peremptory challenge statute and protects against meritless motions.

peremptory challenge." Cal. Civ. Proc. Code § 226(b) (West 1982 & Supp. 2005). *See Wheeler*, 22 Cal. 3d at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28 (statute "must give way to the constitutional imperative: the statute is not invalid on its face, but in these limited circumstance it would be invalid as applied if it were to insulate from inquiry a presumptive denial of the right to an impartial jury"). The effect of a prima facie showing cannot be other than as-applied constitutional invalidity of the State's law. Federal courts lack authority to adopt nonconstitutional rules for the States. *Dickerson v. United States*, 530 U.S. 428, 438-39 (2000).

It is the "general rule that one seeking relief bears the burden of demonstrating that he is entitled to it." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Moreover, "[i]t is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest and if it rests upon disputed questions of fact, the invalidating facts must be proved." *Minnesota Rate Cases*, 230 U.S. 352, 452-53 (1913).

In *Batson*, the "invalidating fact[]" of discriminatory intent is that the challenges were exercised "on account of [the juror's] race." 476 U.S. at 89. If, after the objecting party's showing, more than likely the peremptory challenge did *not* violate the Constitution, the objector fails to meet his burden of demonstrating entitlement to relief were the challenge unexplained and certainly has not "proved" such "invalidating facts" as would show "manifest" "constitutional invaldity." *Minnesota Rate Cases*, 230 U.S. at 452-53.

2. The nonconstitutionally compelled nature of the inference standard advocated by petitioner and the propriety of California's "more likely than not standard" are demonstrated by comparing those standards to the standards applied to determining when the trial court is required to conduct voir dire about racial prejudice. The mere inference standard advocated by petitioner is akin to a standard already rejected on constitutional grounds by this Court.

No per se rule requires a trial judge to inquire about a prospective juror's racial prejudice whenever such questioning is sought. *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976). Rather, on request, a state judge must inquire about racial prejudice when there is "a *constitutionally significant likelihood* that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne.'" *Id*. at 596 (emphasis added). Thus, in *Ham v. South Carolina*, 409 U.S. 524 (1973), "circumstances . . . *strongly suggested* the need for *voir dire* to include specific questioning about racial prejudice." *Ristaino*, 424 U.S. at 596 (emphasis added).

> Ham's defense was that he had been framed because of his civil rights activities. . . . Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor. In such circumstance we deemed a *voir dire* that included questioning specifically directed to racial prejudice, when sought by Ham, necessary to meet the constitutional requirement that an impartial jury be impaneled.

Id. at 596-97.

In *Ristaino*, an African-American "convicted in a state court of violent crimes against a white security guard," *id*. at 589, had requested that the trial court conduct voir dire on racial prejudice, *id*. at 590. The Court did not agree

> that the need to question veniremen specifically about racial prejudice also rose to constitutional dimensions in this case. The mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*. . . . The circumstances thus did not suggest a *significant likelihood* that racial prejudice might infect Ross' trial.

Id. at 597 (footnote omitted) (emphasis added). Thus,

> [o]nly when there are more *substantial indications of the likelihood* of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion. [¶] Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions.

Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (plurality opinion) (emphasis added); *see also id*. at 194-95 (Rehnquist, J., concurring in the result) (agreeing with most of plurality's reasoning). In rejecting the notion of inquiry in every case, *Ristaino* observed, "In our heterogeneous society policy as well as constitutional considerations militate again the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." 424 U.S. at 596 n.8.

This "constitutionally significant likelihood" test is more stringent than the test adopted under this Court's supervisory authority. In federal criminal trials, inquiry is required when "the total circumstances suggest a *reasonable possibility* that racial or ethnic prejudice will affect the jury." *Rosales-Lopez*, 451 U.S. at 192 (plurality opinion) (emphasis added). That test would, for example, have required inquiry in *Ristaino* had that case been tried in federal court. 424 U.S. at 597 n.9.

The inference test advocated by petitioner is equivalent to the "reasonable possibility" test applicable to federal criminal trials but constitutionally inapplicable to state criminal trials. It would be anomalous to conclude that a test that does not apply to state courts deciding whether to conduct voir dire of prospective jurors (who *are* the focus of the proceedings) must apply to state courts deciding whether to question parties exercising peremptory challenges (who most certainly are *not* the focus of the proceedings and who have a statutory right not to disclose the reasons for their challenges).

Nor should the divisive assumption *Ristaino* sought to avoid be fostered by adopting a test it rejected and creating the impression that officers of the court are discriminating when the objector's evidence of discrimination does not preponderate.

3. Petitioner can prevail only if California's standard is constitutionally *prohibited*. *Smith v. Robbins*, 528 U.S. 259, 284 (2000) ("'We address not what is prudent or appropriate, but only what is constitutionally compelled.'"). It is not. *Batson* made "no attempt to instruct [trial courts] how best to implement" its holding. 476 U.S. at 99 n.24. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979); *see also Robbins*, 528 U.S. at 272 (noting "established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy"). Moreover, "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion . . . .'" *Patterson v. New York*, 432 U.S. 197, 201 (1977).

As explained by the California Supreme Court below, "'Except as otherwise provided by law,' the default burden of proof in California is 'proof by a preponderance of the evidence.' Here, no other law has provided for a different standard." J.A. 133-34 (citations omitted).

Requiring preponderant evidence to establish a prima facie case is compatible with the Equal Protection Clause. That Clause is not violated by different definitions of the prima facie case burden but in the *exclusion* of a juror for discriminatory reasons. *See, e.g.*, *Hernandez*, 500 U.S. at 359 (plurality opinion) ("departure from the normal course of proceeding" arising from prosecutor's stating reasons before trial court ruled on prima facie case "need not concern us"). "[T]he ultimate question [is] discrimination *vel non*." *Aikens*, 460 U.S. at 714. "*Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." *Hernandez*, 500 U.S.

at 375 (O'Connor, J., concurring). Under *Batson*, California is not precluded from requiring the objector at the prima facie case stage to show more likely than not that the peremptory challenges were made for discriminatory reasons.

D. Petitioner's Arguments Are Unavailing

Petitioner presents a variety of arguments against the standard articulated below, none of which is persuasive. An overarching theme is that because the issue involves racial discrimination and the Equal Protection Clause, a lower standard is appropriate. "'[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination . . . reflect an important national policy. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.'" *St. Mary's Honor Center*, 509 U.S. at 524. The *Batson* procedure is simply a method of determining "a pure issue of fact." *Hernandez*, 500 U.S. at 364; *see also id*. at 372 (O'Connor, J., concurring).

1. a. Petitioner contends using a "more likely than not" prima facie case standard "undermines the whole meaning of *prima facie* case, which is to make a preliminary showing." PBOM 15. The assertion is circular and presupposes a barely logical inference regardless of its persuasive force satisfies the *Batson* prima facie case requirement. As shown above, a barely logical inference does not satisfy any prima facie case requirement that, like *Batson*'s, involves a shifting burden of production.

Nor does the preponderance standard "undermine[] the whole meaning of *prima facie* case." Since Justice Story's time, the term has been employed to mean a showing sufficiently persuasive that it entitles the party to victory absent rebuttal. *Kelly*, 31 U.S. (6 Pet.) at 632.

What would distort "the whole meaning of *prima facie* case" is eliding the clear difference between a prima facie case

without a shifting burden of production and a prima facie case *with* a shifting burden of production. That, essentially, is petitioner's approach under which a prima facie case sufficient to shift the burden of production arises when the party "adduce[s] evidence sufficient to permit an inference of discrimination." PBOM 21. But that is precisely what is required by a prima facie case requirement without a shifting burden of production. That version of a prima facie case arises when the party "having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty." 9 Wigmore, *supra*, § 2494 at 379. Such a showing would avoid nonsuit or similar intervention preventing the case from going to the fact-finder. But it would not obligate the opposing party to produce evidence, i.e. it would not shift the burden of production. That occurs only when the first party "has *not only* removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but *has gone further*" and shown entitlement to relief. *Id*. (emphasis added).

Petitioner's argument thus collapses the two forms of a prima facie case into one. The practical effect of that analytic compression became apparent at oral argument last Term when petitioner asserted that the party to whom the burden of production shifted could remain silent but not necessarily suffer an adverse finding. Tr. (03-6539) 7. If that were so, no burden would have shifted to the second party.

Under petitioner's analysis, then, there is but one definition of a prima facie case—creating an inference sufficient to avoid an adverse ruling as a matter of law but not requiring any response from the opponent. Such a nonburden would require much rewriting of the law as it is well understood that "the penalty for not producing evidence when obliged to do so is nonsuit, dismissal, or adverse finding or when trial is by jury, directed verdict or adverse instruction to the jury." D. Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 Va. L. Rev. 281, 286 (1977). Obligation cannot so easily be transformed into option. *Cf. United States v. Citizens & S. Nat'l Bank*, 422

U.S. 86, 120 (1975) (after prima facie case of Clayton Act § 7 violation, it is "*incumbent* upon [defendant] to" rebut) (emphasis added); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (affidavits in support of application to reopen deportation "made out a 'prima facie' case" where the "facts . . . if true, would show, *more probably than not*, that petitioner[]" was a refugee) (emphasis added); *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 581 (9th Cir. 1982) ("[A] prima facie case . . . had been established, i.e., . . . the General Counsel *had shown* the union activities were 'a motivating factor' in their discharge. The Company then bore the burden of proving that the discharges would have been made in the absence of the employees' participation in any protected activity") (emphasis added); *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 68-69 (1st Cir. 1981) (after prima facie case of antiunion motive, burden of production shifted to "come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a *preponderance of the evidence* establishing a violation") (emphasis added).[6/]

One case that would need to be reconsidered is *Purkett*. According to petitioner, if reasons *are not* given, "the trial judge still has to determine whether or not the objector has proven discrimination at that point, at stage three, by a preponderance of the evidence." Tr. (03-6539) 8. Yet according to *Purkett*, that duty arises when reasons *are* given. 514 U.S. at 767 ("*If* a race-neutral explanation is tendered, the trial court must *then* decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (Emphasis added).)

b. Petitioner attempts to bolster his circular argument by

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6. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983), disagreed with the First Circuit's approach, holding that because the employer presents an affirmative defense the burden of persuasion, not simply production, shifts. That case was later rejected to the extent it held under the Administrative Procedure Act the burden of persuasion shifts. *Greenwich Colliers*, 512 U.S. at 276-78.

contending the state supreme court "conflates steps one and three" of *Purkett* (establishing a prima facie case and meeting the ultimate burden of persuasion). PBOM 16. That is no more true here than it is in a Title VII case. That the court must determine whether there is discrimination at step three does not mean that the court does not determine whether the objector has shown discrimination at step one. Indeed, neither *Purkett* nor *Batson* states that persuasiveness is irrelevant at stage one. To the contrary, *Purkett* says that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." 514 U.S. at 768. If the burden rests with the objector, that suggests the burden is present at stage one as much as at stage three. Indeed, only when there is preponderant evidence of discrimination at stage one does the court invalidate the peremptory challenge statute as applied such that the objector is entitled to prevail in the face of silence by the striking party at step two.

Petitioner's insistence that the first stage is not a merits stage is incorrect. It is necessarily a merits stage as only a merits finding entitles the objector to prevail in the face of the striking party's silence, as *Batson* compels. 476 U.S. at 100 (requiring reversal if the prosecutor "does not come forward with a neutral explanation for his action"); *Hernandez*, 500 U.S. at 375-76 (Stevens, J, dissenting.). Thus, although the burden of persuasion on the objector is the same at steps one and three, the steps nevertheless remain distinct because meeting the burden at step one simply shifts the burden of production. *After* neutral reasons for the challenges have been given by the striking party, the objector must overcome the reasons to *meet* his ultimate burden of persuasion. But if such reasons are not given, the objector is entitled to prevail because like the Title VII plaintiff, he already *has met* his burden of showing likely discrimination.

c. Petitioner also asserts the "more likely than not" standard improperly requires proof of discrimination "without allowing the objector to have access to the most important piece of information, which the objector would ordinarily use at step

three, namely, the prosecutor's purported reason." PBOM 16. Petitioner proceeds from a flawed and unstated premise—that the *type* of evidence available to the objector determines how *persuasive* the evidence must be. It does not. The burden of persuasion was set by the adoption of a prima facie case requirement that invalidates application of peremptory challenge statutes and shifts the burden of production to the striking party who will suffer an adverse ruling if that shifted burden is not met.

Moreover, it is counterintuitive to argue it is harder for the objector to show discrimination was more likely than not when the objector does not have the striker's reasons. Typically, reasons will undercut the objector's case. Not having to contend with unfavorable information does not work to the objector's disadvantage. Once reasons are given, the objector has the additional burden of showing they are false, by, for example, providing comparative analysis of the challenged and unchallenged jurors. *See* J.A. 136, 140-42, 146 (noting availability of comparative analysis by objector in trial court).

In any event, having and disproving the striking party's reasons for the challenges is not a necessary part of a prima facie case. The objector has a wealth of information at his disposal to demonstrate a prima facie case. "During jury selection, the entire *res gestae* take place in front of" the parties. *United States v. Armstrong*, 517 U.S. 456, 467 (1996). The objector can rely on factors such as the race or gender of the parties and key witnesses, the number of challenges exercised, the composition of the jury, the composition of the venire, the questions and answers during voir dire, and the demeanor of the venirepersons. The objector does not have the striking party's explanation for the challenges for the simple reason that he is not entitled to them. The challenges *are* peremptory, and the peremptory challenge statute is valid as applied until the objecting party establishes discrimination by preponderant evidence. At that point, the striking party is entitled to the reasons and can, at stage three, attempt to show they are false. Thus, it is petitioner who conflates steps one and three. Show-

ing reasons are pretextual is not part of the prima facie case; rather, such a showing is a way the objecting party meets his burden of persuasion at step three.

d. Petitioner asserts that his survey of 84 cases with a finding of discrimination shows that "[i]n the vast majority of these cases, that finding . . . turned on analysis of the challenger's stated reasons," PBOM 18, and "that the real purpose of a *prima facie Batson* finding is to allow the objector to obtain, and the trial court to hear, the challenger's reason," akin to a discovery motion, PBOM 19.

If that were the real purpose, then the preponderance test is more likely to accomplish the goal. Petitioner's position is internally inconsistent as it purports to ensure reasons will be given but rests on the premise that a striking party will not necessarily suffer an adverse finding if reasons are not provided. Given improbable evidence of discrimination, the striking party could safely conclude it would be better to remain silent and preserve trial strategy.

If the cases explained the "real purpose" of the test, presumably petitioner would have included the reasoning of the cases, not their result. But he discusses no case that adopts the permissive inference test after evaluating the nature of a prima facie case with a shifting burden of production and the invalidation of a state statute on improbable evidence.

But, that is not the "real purpose" of a prima facie case. Certainly, once reasons are given, they are important because typically "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365 (plurality opinion). But that does not suggest that the prima facie case burden is set at the level of bare logicality. It suggests the opposite—that race-neutral reasons are important because the objecting party has "gone further" and shown entitlement to relief by a preponderance. *See Hernandez*, 500 U.S. at 375 (Stevens, J.) ("By definition . . . a prima facie case is one that is established by the requisite proof of invidious intent.").

If reasons must be given, petitioner's standard undermines

the rule that the burden of persuasion never shifts from the objector. Given the importance of reasons, if improbable evidence were a prima facie case, the "distinction between [the burden of production] and the ultimate burden of persuasion—always an elusive distinction in practice—disintegrates completely." *United States v. Baker Hughes Inc*., 908 F.2d 981, 991 (D.C. Cir. 1990).

Fundamentally, a *Batson* motion is not "akin to a discovery motion." PBOM 19. It is a *merits* motion. A *Batson* objector does not seek discovery to use in a later motion claiming the jury selection process violated equal protection. Instead, the objector directly claims an equal protection violation. His motion is not for discovery but to quash the venire or obtain other relief. *Batson*, 476 U.S. at 99-100 n.24; *People v. Willis*, 27 Cal. 4th 811, 43 P.3d 130, 118 Cal. Rptr. 2d 301 (2002).

As Justice Marshall, joined by Justice Brennan, observed, a party

> need not have made out a full prima facie case in order to be entitled to discovery. A prima facie case, of course, is one that if unrebutted will lead to a finding of selective prosecution. It shifts to the Government the burden of rebutting the presumption of unconstitutional action. But a defendant need not meet this high burden just to get discovery; the standard for discovery is merely nonfrivolousness.

Wayte v. United States, 470 U.S. 598, 625 (1985) (Marshall, J., dissenting) (citations omitted).

A showing of nonfrivolousness, i.e., the showing made by raising a barely logical inference, is insufficient to establish "a full prima facie case" that shifts the burden of production in a hearing on the merits of an equal protection claim. Rather, to create a prima facie case, shift the burden of production, and compel a response on pain of an adverse finding, the party seeking to establish a violation of the Equal Protection Clause most go beyond mere logicality and demonstrate entitlement to relief. When the striking party is required to respond, he does so not because the objecting party has propounded an interrog-

atory or request for admission but because the court has, by finding a prima facie case, informed the striking party that the burden of production in an evidentiary proceeding has shifted to him and that the court will enter an adverse finding on the merits of the motion unless he responds.

If *Batson* were a discovery device, petitioner's standard would still be inappropriate. Step two requires disclosure of opinion work product (if not communications protected by privilege and the Sixth Amendment). Unlike other work product, *opinion* work product "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). A "far stronger showing . . . would be necessary." *Id.* at 402. A barely logical inference is not "a showing of extraordinary circumstances" warranting discovery of opinion work product. 6 J. Moore, *Moore's Federal Practice* § 26.70[5][e] at 26-224 (3d ed. 2004).[7/]

The "real purpose" of the prima facie case requirement, then, is not to provide discovery to the objecting party but to protect the peremptory challenge statute and privileged information until the probability of discrimination has been demonstrated so that the benefit of inquiry outweighs its cost.

e. Petitioner's table comparing the number of disputed challenges and the number of cases in which a prima facie case has been found, PBOM 20, is telling, but not for the reason he asserts. He claims that "the vast majority would not have met

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7. Although he claims that requiring him to prove his case without such "discovery" would violate due process, petitioner's cited case, *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), does not support him. It held that a Title VII complaint need not plead *McDonnell Douglas* facts and "instead must contain only a 'a short and plain statement of the claim showing that the pleader is entitled to relief'" to avoid dismissal. *Id.* at 508. It says nothing about due process requiring discovery. It certainly does not hold that a state privilege to withhold information can be overcome on due process grounds in a Title VII case. *Cf. Davis v. Alaska*, 415 U.S. 308, 319 (1974) (in *criminal* case, right to confrontation was "paramount to the State's policy of protecting a juvenile offender").

the California *prima facie* case standard as applied here, namely that no *prima facie* case was established, even though the prosecutor challenged all three black jurors." PBOM 20. Yet that assumes a certain number of challenges must constitute a prima facie case. In *Batson*, however, at the trial of a black defendant the prosecutor struck "all four black persons on the venire, and a jury composed only of white persons was selected." 476 U.S. at 83. If that were a prima facie case as a matter of law, the Court would presumably have so held rather than remanding to determine whether "the facts establish, prima facie, purposeful discrimination." *Id*. at 100.

Moreover, petitioner silently suggests California has a rule that challenging three minority jurors is never a prima facie case. Certainly the supreme court did not so hold here. What it did conclude was that viewing the circumstances of the case "in isolation, it certainly looks suspicious that all three African-American prospective jurors were removed from the jury. But viewing a case like this in isolation is all a reviewing court *can* do." J.A. 149; *see also People v. Childress*, 81 N.Y.2d 263, 267, 614 N.E.2d 709, 711, 598 N.Y.S.2d 146, 148 (1993) (disproportionate number of strikes rarely dispositive although "it may be indicative of an impermissible discriminatory motive"; striking two of three "not sufficient, on this record"). But that is not all an objector can do. He can marshal the evidence to show discrimination. J.A. 142; *Childress*, 81 N.Y.2d at 268, 614 N.E.2d at 712, 598 N.Y.S.2d at 149 (objector "should articulate and develop all of the [factual and legal] grounds").

The greater significance of the table is that 26 of the 81 cases, or nearly 33 percent, involved a challenge to a single juror. PBOM 20. If challenging one juror is enough to establish a prima facie case (and under petitioner's permissive inference test it is difficult to see why it would not suffice), then the prima facie case requirement serves no function. Each challenge creates a prima facie case and reasons must always be given. That result, however, effectively abolishes peremptory challenges, a step *Batson* refused to take. *Cf*. *Batson*, 476

U.S. at 107 (Marshall, J., concurring) (urging "eliminating peremptory challenges entirely in criminal cases").

2. Petitioner's principal contention, PBOM 21-28, echoes the Ninth Circuit's conclusion in *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000): *Batson* "required only that the defendant 'raise an inference' of discrimination," *id*. at 1195, and California's "strong likelihood" test "is impermissibly stringent in comparison to the more generous *Batson* 'inference' test," *id*. at 1197. The implicit premise in that argument—that the word "inference" set a burden of persuasion—is incorrect.[8/]

a. That *Batson* spoke of the need to raise an inference is unsurprising. An inference "is '[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.'" *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814 (1990) (Scalia, J., dissenting) (quoting Black's Law Dictionary 700 (5th ed. 1979)). Only by making inferences can the trial court determine whether the striking party in fact acted based on group bias. The Court's

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8. Petitioner's assertion that "*Batson* cannot possibly mean that in order to *permit* an inference of discrimination, an objector must adduce evidence that *compels* a finding of discrimination," PBOM 23, assumes what he has not proved, that *Batson* requires only a permissive inference, and overstates the burden on the objector. His later references to the state supreme court's requiring a "'dispositive' inference of discrimination" or "a 'conclusive' inference," PBOM 29, rely on word transposition to inflate the burden recognized by that court. The court did not say that an objector must show a "dispositive inference" or a "conclusive inference." Rather, in a particular *appeal*, the court concluded that a certain factor (removal of all members of a group) "may have given rise to an inference" but may not have been "dispositive on this record," *People v. Sanders*, 51 Cal. 3d 471, 500, 797 P.2d 561, 576, 273 Cal. Rptr. 537, 552 (1990), and was "not conclusive," "[c]onsidering all the relevant circumstances," *People v. Howard*, 1 Cal. 4th 1132, 1156, 824 P.2d 1315, 1326, 5 Cal. Rptr. 2d 268, 279 (1992). It is not error for an appellate court to recognize that it is for the factfinder to choose among the available inferences. *Hernandez*, 500 U.S. at 369 (plurality opinion) ("'[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'").

comments in *Oregon v. Kennedy*, 456 U.S. 667 (1982), concerning the process of determining whether a prosecutor intended to provoke a mistrial, apply:

> [A] standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id. at 675.

An inference by itself may be extremely probative, *see, e.g.*, *Barnes v. United States*, 412 U.S. 837, 845-46 (1973) (unexplained possession of recently stolen checks payable to persons unknown to defendant "permitted *the inference of guilt*" and "was clearly sufficient to enable the jury to find *beyond a reasonable doubt* that petitioner knew the checks were stolen") (emphasis added), or only minimally appealing, *see Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (in ADEA case under Title VII model, even if defendant gives false explanation to conceal something other than discrimination, prima facie case of the plaintiff and the falsity of the employer's justification will not always be sufficient to sustain a jury's finding of liability for plaintiff because the "'inference of discrimination will be weak or nonexistent'"). It may be so strong as to establish guilt, *see American Tobacco Co. v. United States*, 328 U.S. 781, 787 n.4 (1946) (noting need in criminal case for "'evidence from which the jury could properly find or *infer, beyond a reasonable doubt*,' that the accused is guilty") (emphasis added), or so weak that it merely permits the proponent to avoid a nonsuit.

To require an inference of discriminatory purpose is to require a method of producing evidence about the state of mind of a party. That evidence is available only by inference, i.e., the process of logical deduction, because no party exercising a challenge that is by definition peremptory would state a discriminatory purpose. The inference must still satisfy a persua-

siveness threshold. As the state supreme court observed, the definition of an inference "does not address . . . how strong the inference must be." J.A. 133 n.4.

b. The Court's use of the term "inference" in other contexts shows that *Batson*'s use of the term was not intended to set the prima facie case burden at the level of mere logicality regardless of the improbability of the inference. At a general level, the Court has recognized that "[a] common definition of 'finding of fact' is, for example, '[a] conclusion by way of reasonable inference from the evidence.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988). Thus, the use of the term "inference" in *Batson* accords with the requirement that sufficient evidence be presented to support a factual finding of discrimination such that the peremptory challenge statute may be found invalid as applied and the burden of production shifted onto the striking party.

More particularly, the Title VII cases demonstrate that the term "inference" in that context does not mean mere logicality without regard to persuasiveness but instead refers to a "more likely than not" showing. The Court has stated that Title VII requires a plaintiff to show an inference of illegal conduct:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate *to create an inference* that an employment decision was based on a discriminatory criterion illegal under the Act.

Teamsters v. United States, 431 U.S. 324, 358 (1977) (emphasis added). In raising the necessary "inference" to make a prima facie case, the plaintiff shows that the employment decision was more likely than not taken for discriminatory reasons. The plaintiff is therefore entitled to relief unless the defendant rebuts the prima facie case.

Thus, in *Furnco Construction Corp.*, 438 U.S. 567, the Court stated,

> *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer *from which one can infer*, if such actions remain unexplained, that *it is more likely than not* that such actions were "based on a discriminatory criterion illegal under the Act."

Id. at 576 (emphasis added). "A prima facie case under *McDonnell Douglas raises an inference* of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors." *Id*. at 577 (emphasis added); *see also id*. at 579-80 (stating that the prima facie showing "is simply proof of actions taken by the employer *from which we infer* discriminatory animus because experience has proved that in the absence of any other explanation *it is more likely than not* that those actions were bottomed on impermissible considerations") (emphasis added).

In *Burdine*, 450 U.S. 248, the Court expressly rejected the notion that a prima facie case turns on a mere logical inference. The Court explained, "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id*. at 254. Moreover, the Court (citing the same section of Wigmore as discussed above, although from an earlier edition) concluded,

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Id. at 254 n.7.

Petitioner's reading the word "inference" as meaning mere logicality reduces the prima facie case requirement to "producing enough evidence to permit the trier of fact to infer the fact at issue." *Id*. *Burdine* specifically rejected that definition. *Batson* relied on the Title VII cases, including *Burdine*, in establishing the prima facie case requirement with its obligation to raise an inference of discrimination that shifts the burden of production. Furthermore, the disposition in *Batson* (remanding with directions to reverse if the prosecutor "does not come forward with a neutral explanation for his action," 476 U.S. at 100) necessarily precluded application of the mere inference standard advanced by petitioner. Under that standard, the Kentucky court on remand would have been free to find a prima facie case yet affirm the conviction even in face of prosecutorial silence. The Court does not adopt procedures that conflict with its remand orders. *Cf. Mickens v. Taylor*, 535 U.S. 162, 170-72, nn.3-4 (2002) (treating as dictum portion of opinion "inconsistent with the disposition" and that "simply contradicts the remand order"). *Batson*, therefore, did not adopt the very standard rejected in *Burdine*.

c. The inference standard advocated by petitioner is also inconsistent with the Court's treatment of the *Wheeler* standard, the factual showing necessary under *Batson*, and the Court's understanding of the role of voir dire.

Batson itself acknowledged the compatibility of *Wheeler*'s "strong likelihood" standard with the Court's holding. Citing *People v. Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) as an example, *Batson* noted, "In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived." 476 U.S. at 99 & n.23 (footnote omitted). In his concurrence, Justice Marshall observed, "Evidentiary analysis similar to that set out by the Court . . . has been adopted as a matter of state law in States including Massachusetts and California." *Id*. at 105 (Marshall, J., concurring).

Batson describes a prima facie case based on more than mere logicality or production of some evidence. *Batson* identified three components of a prima facie case: (A) "[T]he defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96 (citation omitted). (B) "[T]he defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id*. (C) "Finally, the defendant must show that these facts *and any other relevant circumstances* raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id*. (emphasis added). If mere logicality were sufficient, *Batson* would have stated that factors (A) and (B) establish a prima facie case. A peremptory challenge that removes a member of the defendant's cognizable racial group through a practice that permits those who wish to discriminate to do so creates a logical inference of discriminatory intent. But *Batson* said "[t]his combination of factors . . . raises the necessary inference," *id*., referring to all three. Factor (C) requires evidence that makes the inference not just logical but sufficiently persuasive as to shift the burden of production and compel a response and to warrant a finding adverse to the striking party if that party fails to meet the shifted burden of production.

The Court avoided a variety of problems in *Batson* by adopting the prima facie case requirement with a burden-shifting mechanism, which inherently involves establishing that a challenge was more likely than not for discriminatory reasons.

The "significant intrusion into the jury selection process" required by *Batson*, *see J.E.B.*, 511 U.S. at 147 (O'Connor, J, concurring), is fully justified when evidence of discrimination preponderates given the pernicious effect of discrimination on the justice system, *Johnson v. California*, 543 U.S. ___, ___ (2005) (slip op. 10). Requiring reasons in the face of improbable evidence of discrimination is not. Doing so will "increase

the possibility that biased jurors will be allowed on the jury" given that "the lawyer will often be unable to explain the intuition" about "which jurors are likely to be the least sympathetic." *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring). Peremptory challenges would lose much of their peremptory nature if the evidentiary bar were set at the level of a logical inference. *Batson* obviously rejected Justice Marshall's position that peremptory challenges should be banned, a position based in part on his concern that a prima facie case requires a persuasive showing. *Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case"). The prima facie case requirement serves an important function under *Batson*, namely, to discourage meritless motions and to terminate *Batson* claims at the prima facie case stage (thereby preserving state law, the peremptory nature of the challenges, and trial strategy) when the objector has not made a persuasive showing that the striking party was acting unconstitutionally.[9/]

Using logicality as the operative test could consume scarce judicial resources, probing the state of mind of the striking party rather than answering the legal and factual questions to be decided at trial. The purpose of voir dire is "to identify

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9. Of course, under state law, a prima facie could be established with a lesser showing. Florida abandoned the strong likelihood requirement and now requires inquiry "when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner," *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993), "eliminat[ing] the requirement that the opponent of the strike make a prima facie showing of racial discrimination," *Melbourne v. State*, 679 So. 2d 759, 764 n.5 (Fla. 1996). Connecticut also recognized that *Batson* incorporated the "more likely than not" standard, *State v. Gonzalez*, 206 Conn. 391, 395-96, 538 A.2d 210, 212-13 (1988), but, under supervisory authority, requires reasons when a "defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire," *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166, 171-72 (1989).

unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The Court has cautioned against unnecessarily shifting the focus from establishing guilt of the defendant to guilt of the striking party: "It remains for the trial courts to develop rules, *without unnecessary disruption of the jury selection process*, to permit legitimate and *well-founded* objections to the use of peremptory challenges as a mask for race prejudice." *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (emphasis added). "The analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges *without substantial disruption of the jury selection process*." *Hernandez*, 500 U.S. at 358 (plurality opinion) (emphasis added); *see also id*. at 374 (O'Connor, J., concurring) (cautioning against "unacceptable delays in the trial process" by "turning voir dire into a full-blown disparate impact trial" that "would be antithetical to the nature and purpose of the peremptory challenge"); *accord*, *Wheeler*, 22 Cal. 3d at 278, 583 P.2d at 763, 148 Cal. Rptr. at 904 (stating intent to "define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system"); *id*. at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906 (describing obligation of trial judge at prima facie stage "to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay").

Given societal understandings that race and gender matter, *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring); *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring), and given that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" *Batson*, 476 U.S. at 96, an inference (in the sense of the simple deduction of a fact from the existence of another fact) of discrimination could be hypothesized on nothing more than a black defendant challenging a white juror or a white prosecutor challenging a black juror. Race is one possible logical explanation. But the prospect that race is the reason for the challenge may be so remote that it

does not amount to a prima facie case.

Suggesting that the Federal Constitution invalidates peremptory challenge statutes nationwide on any inference of discriminatory purpose, no matter how weak, no matter how unlikely it appears to the trial judge, is to denigrate the importance of peremptory challenges to the selection of a qualified and unbiased jury, *see Batson*, 476 U.S. at 91 & n.15; *Holland v. Illinois*, 493 U.S. 474, 481-82 (1990), and the legislative choices of the several States, including California.

e. Petitioner offers a generic assertion that "inference" ordinarily refers to a permissive inference, which he distinguishes from a presumption. PBOM 23-24. Thus, he emphasizes Wigmore's description of the term "prima facie" as applying to the situation in which a party produces sufficient evidence to "'pass the judge to the jury.'" PBOM 23. Of course, the California Supreme Court recognized that sense of the term "prima facie." J.A. 130-31. It also recognized the other meaning, also identified by Wigmore, which involves a shifting burden of production. *Id*. "The difference between the two senses of the term [prima facie] is practically of the greatest consequence; for, in [one] sense, it means merely that the proponent is safe in having relieved himself of his duty of going forward, while in the [other] sense it signifies that he has further succeeded in creating it anew for his opponent." 9 Wigmore, *supra*, § 2494 at 381. It is the last described sense that *Batson*, with its shifting burden of production, necessarily adopted.

Petitioner also quotes *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979), where the Court recognized that a permissive inference "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact." (Citation omitted.) The Court thus restated the passing-to-the-jury definition of "prima facie" articulated by Wigmore. But *Batson* necessarily adopted the other definition because, unlike the prima facie case

identified in *Allen*, "which places no burden of any kind" on the other party, the *Batson* prima facie case shifts the burden of production to the striking party.

Petitioner's reliance on *Armstrong*, 517 U.S. 456, is even less appropriate. There, the Court considered the standard to be met for a defendant to obtain discovery concerning selective prosecution from the Government. The Court reiterated that under "'ordinary equal protection standards,'" a claimant "must demonstrate" discriminatory effect and intent. *Id*. at 465. "'This is a matter of proof, and *no fact should be omitted to make it out completely*, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.'" *Id*. at 466-67 (emphasis in *Armstrong*). The Court recognized "that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Id*. at 464. The "required threshold" is "a credible showing of different treatment of similarly situated persons." *Id*. at 470. Petitioner asserts, "When an objector initially makes a *Batson* motion, he similarly seeks discovery, namely, the purported reason for the peremptory challenge." PBOM 23. He reasons that if the *Armstrong* standard "is good enough" for selective prosecution discovery, it is "good enough" for *Batson* discovery. *Id*. As already explained, a *Batson* motion is not a discovery motion, it is a merits motion. The analogy to *Armstrong*, then, is not to its discussion of discovery but to its recognition that more is required for a merits showing than is required for discovery.

f. Petitioner claims the lower courts understand *Batson* as requiring merely an inference. He offers three cases that read *Batson* as rejecting strong likelihood or the preponderance standard: *Wade*, *King v. Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999), and *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). (Petitioner trumpets that the Ninth Circuit "in five opinions, decided by twelve different judges, appointed by four different presidents" concluded that California's prima facie test is unduly stringent. PBOM 24. Aside from the irrelevance of the number of judges or appointing Presidents, the

cases were decided after *Wade* by panels bound by *Wade*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (panel is bound by prior panel decision). Repeated application of (erroneous) circuit precedent is not significant.) All are conclusory; none analyzes the effect of a shifting burden of production, the Title VII cases, or the effect on the peremptory challenge statute. Petitioner's other authorities recite that an inference is required or existed without addressing the requisite persuasiveness of the inference. Repetition is no substitute for analysis.

Petitioner's assertion about regular application of the inference test, PBOM 25, is belied by the cases he cites. They articulate not one uniform "inference" test but a variety of tests. The lesson is not that the inference test is regularly applied but that the Third Circuit, Ninth Circuit, Eleventh Circuit, and California Supreme Court each have *different* tests for determining the existence of a prima facie case. Such differences are tolerated in *Batson*. *Batson*, 476 U.S. at 99 n.24.

Finally, petitioner asserts federal courts regularly find a prima facie case from two or more challenges that remove all or a majority of a "protected group." PBOM 28. Even if true, he presents no analysis from those cases about the proper burden at step one. And his "rule" perversely permits one "free" peremptory challenge notwithstanding the well-understood principle that a challenge to a single juror can violate equal protection. *See Batson*, 476 U.S. at 95. Petitioner does not articulate any logical barrier to mandating a finding whenever one minority juror is struck. Yet petitioner claims that Connecticut's standard, which requires a statement of reasons when a "defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire," *Holloway*, 209 Conn. at 646 n.4, 553 A.2d at 172 n.4, is "distinctly lower than that which Petitioner proposes." PBOM 27 n.20. That assertion is further belied by his reliance on his case survey, in which 26 of the 81 cases involved a challenge to one juror. PBOM 20.

In any event, petitioner's count-the-strikes rule is invalid given *Batson*'s remand to determine as a *factual* matter whether striking all four black venirepersons in the trial of a black man was a prima facie case. 476 U.S. at 100; *see also Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) ("Two challenges out of two venirepersons are not always enough to establish a *prima facie* case."); *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) (seven blacks in venire; four of six challenges against blacks); *United States v. Dennis*, 804 F.2d 1208, 1209 (11th Cir. 1986) (per curiam) (three of five blacks).

Petitioner's counting-the-strikes approach demeans the individuality of the jurors and the striking party, reduces the trial judge to a practitioner of sets and numbers who classifies and counts the races and the strikes, and is inconsistent with the Court's insistence that the objecting party show discrimination from the facts and circumstances of voir dire. *Batson*, 476 U.S. at 96-97. It is *fact* finding, not *pattern* finding that is required. *Moore*, 895 F.2d at 485 (stating that it is "important that the defendant come forward with *facts*, not just numbers alone"). Petitioner discusses no case that rejects the "more likely than not" standard after considering the nature of a prima facie case that shifts the burden of production, the Court's Title VII cases, and the twin constitutional anomalies of invalidating a state statute on barely logical but improbable evidence of discrimination and of rejecting for purposes of questioning jurors a standard similar to that which he advances but using that standard to question parties.

3. Petitioner attacks the California Supreme Court's reasoning by asserting that the Title VII analogy is flawed. None of his arguments is persuasive.

a. Petitioner contends, "In a Title VII case a plaintiff emphatically is not required, in order to create a *prima facie* case, to show by a preponderance of the evidence that the employer engaged in discrimination." PBOM 32. Petitioner's understanding of the requisite burden of proof has changed and is incorrect. In his Petition for Certiorari in No. 03-6539 at 14-

15, he (correctly) acknowledged that the

> the quantum of proof needed to establish a prima facie case in employment cases is a preponderance of the evidence. This is true, (a) because the quantum of proof which establishes a prima facie case under Title VII must be sufficient to allow the plaintiff to win a judgment, and (b) because winning a judgment necessarily requires proof by a preponderance of the evidence.

Petitioner now believes "the *McDonnell Douglas* and *Furnco* test requires a permissive inference but no more. Under this standard, the burden on the plaintiff is to identify evidence which allows a court to 'infer' that discrimination occurred." PBOM 33 (footnotes omitted).

Petitioner relegates to a footnote discussion of the key language of *Furnco Construction Corp*.: "Under *Furnco Construction* the phrase 'more likely than not' does not describe the strength of the evidence needed to establish the plaintiff's inference. Instead, the phrase 'more likely than not' characterizes what the trier of fact may find if it accepts plaintiff's inference, namely, that discrimination was more likely than not." PBOM 33 n.26. That is contrary to the Court's precedent on the operation of presumptions in general and the *McDonnell Douglas* presumption in particular. "To establish a 'presumption' is to say that a finding of the predicate fact (here the prima facie case) produces a 'required conclusion in the absence of explanation' (here, the finding of unlawful discrimination)." *St. Mary's Honor Center*, 509 U.S. at 506. If the trier of fact in a Title VII case finds the four *McDonnell Douglas* prima facie case elements, there is a "required conclusion"—that there was discrimination. *Furnco Construction Corp.* explained that it was appropriate to require the fact-finder to conclude there was discrimination based on the *McDonnell Douglas* elements because "we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors." 438 U.S. at 577 (emphasis added).

Petitioner's efforts to explain away footnote seven of *Burdine* are no more persuasive. To reiterate, there, the Court explained,

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J.Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

450 U.S. at 254 n.7. Petitioner posits, "[T]his footnote only concerns the *consequence* of creating a Title VII *prima facie* case, not the type or quantity of evidence needed to do so." PBOM 35. The "consequence" of establishing a legally mandatory, rebuttable presumption—requiring that a fact (discrimination) be presumed given the proof of the predicate facts (the *McDonnell Douglas* prima facie case elements)—is tenable only because the existence of the prima facie elements is more likely than not the product of the presumed fact. *Furnco Constr. Corp.*, 438 U.S. at 576-80; *cf. Leary v. United States*, 395 U.S. 6, 36 (1969) (criminal statutory presumption unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend").

b. Petitioner contends the "sole purpose of that presumption is to compel the employer to articulate a reason." PBOM 36. There is no compulsion if, as petitioner asserted, the employer can remain silent and not necessarily lose. Tr. (03-6539) 7.

c. Petitioner asserts that "because a showing of 'strong evidence,' within the meaning of Wigmore §2494, is not needed to get a Title VII case to a jury, it would be nonsensical to require proof at that elevated level to establish the preliminary step of a *prima facie* case." PBOM 36. Not so. First, the role of a prima facie case in Title VII is not to determine whether sufficient evidence allows the case to go to the jury. That

question implicates the alternate sense of prima facie case described by Wigmore and expressly rejected by *Burdine*, 450 U.S. at 254 n.7.

Second, petitioner draws a false distinction between the "general mass of strong evidence," 9 Wigmore, *supra*, § 2494 at 379, and a presumption. The "general mass of strong evidence" and a presumption involve means of proof "differing widely in terms and appearance, but essentially the same in principle." 9 Wigmore, *supra*, § 2487 at 295. "In the ordinary case, this overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data, differing in every new trial and not to be tested by any set formulas." *Id*. This precisely describes a *Batson* hearing. "Another mode under which this process is carried out employs the aid of a fixed rule of law, i.e., *a presumption*, applicable to *inferences from specific evidence to specific facts forming part of the issue*, rather than to the general mass of evidence bearing on the proposition in issue." *Id*. This precisely describes the *McDonnell Douglas* inference. "The result is the same as in the preceding form of process . . . , i.e., the opponent loses as a matter of law, in default of evidence to the contrary . . . ." *Id*. Thus, "prima facie" "serves to subsume under one name the similar legal effects . . . produced by a specific presumption or by a ruling on the mass of evidence in the particular case." *Id*. § 2494 at 379.

c. Petitioner offers three reasons the *Batson* burden should be lower than the Title VII burden. First, he argues the Title VII evidence must be "strong enough to establish a presumption of discrimination, while the [*Batson* prima facie case evidence] do[es] not." PBOM 36. Aside from contradicting his assertion on the same page that "strong evidence" is not required in a Title VII case, the argument fails to appreciate that *in effect* a *Batson* prima facie case *does* create a presumption of discrimination. When "prima facie case" is "used to mean evidence so cogent as to require a particular conclusion in the absence of explanation, [it] has the probative effect of a presumption." Louisell, *supra*, at 291; *see* 9 Wigmore, *supra*, §

2494 at 379 ("the term 'prima facie' is sometimes used as *equivalent to the notion of a presumption*"). That is precisely the reason the striking party is required to give reasons. The presumption that the strikes were constitutional has been provisionally removed and the striking party will suffer an adverse finding (that he violated the Equal Protection Clause) unless he states reasons.[10/]

Petitioner's second and third reasons are the same idea under different names and merely reiterate his argument that *Batson* is a discovery mechanism. He is mistaken. *Ante* 29-30.

4. At bottom, petitioner contends that a low threshold is good policy and that the standard identified by the California Supreme Court is too onerous. According to petitioner, "The purpose of a *prima facie* case under *Batson* is to help courts and parties answer, not improperly evade, the ultimate question of discrimination," PBOM 9, and only the permissive inference test "can assure inquiry into the challenger's reasons whenever peremptory challenges may be the result of improper discrimination," PBOM 22. He believes "[t]he cost of adding a few minutes to a trial to obtain the reasons for a questioned challenge is far lower than the cost of allowing a trial to proceed which has been tainted by racial discrimination." PBOM 23.

Petitioner's view of the burdens, costs, and benefits is flaw-

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10. The effect does not arise from a true presumption, i.e., one based on proving specific antecedent facts. The four prima facie case elements of *McDonnell Douglas* could not be applied to jury selection. Doing so would render superfluous the various factors this Court has recognized as being relevant to the establishment of a prima facie case. Anytime a minority juror is peremptorily challenged, all four *McDonnell Douglas* factors are met: (1) The prospective juror was a minority; (2) the juror was qualified, no challenge for cause for want of general qualification having been successful, *see, e.g.*, Cal. Civ. Proc. Code §§ 226(c), 227(b), 228 (West 1982 & Supp. 2005); (3) despite the juror's qualification, he or she was rejected; (4) having been rejected, the juror seat necessarily remained open and other qualified jurors were considered.

ed. *Batson* itself recognized that California's standard did not cause "serious administrative burdens." 476 U.S. at 99. The burden imposed under the "more likely than not" standard is no greater than that imposed in the Title VII cases, which themselves concern discrimination.

The purpose of the prima facie case is not to answer the ultimate question of discrimination or to initiate a discovery process designed to allow the objector to develop his claim. Rather, it requires an objector to present his case. It thereby screens out meritless claims, avoiding unnecessary disclosure of trial strategies and preserving the peremptory nature of the challenges by requiring explanations only when discrimination is proven by preponderant evidence. Petitioner's minimalist standard for a prima facie case would needlessly undermine confidence in the jury system as criminal and civil venires were repeatedly excused and the courts investigated improbable, if barely logical, accusations of discrimination. *Cf. Ristaino*, 424 U.S. at 596 n.8 (rejecting *per se* rule requiring voir dire on racial bias).

The "more likely than not" standard allocates the risk of an incorrect determination of the question of discrimination to the party making the objection. That is as it should be. The objecting party properly bears the risk that his evidence might be insufficiently persuasive in light of the circumstances as a whole even though he in fact might be correct about the basis for the peremptory challenges. If, for example, a defendant were to strike several minority prospective jurors, all of whom were affiliated with law enforcement, it would be entirely reasonable to reject the prosecutor's *Batson* objection even though there would be an inference of discrimination. Of course, it could be the defendant in fact challenged the jurors because they were minorities, and in that circumstance, the unconstitutional action would go unproven. But that risk is true when *any* burden is placed on the objecting party. The risk is not only acceptable, it is necessary. Neither voir dire, the judicial system as a whole, nor federalism is well served by interrupting jury selection each time logical but improbable

evidence of discrimination is presented.[11/]

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11. Petitioner's remaining arguments are not within the question presented and will not be addressed. His second argument asserts the state supreme court erroneously allows courts and appellate prosecutors "to postulate hypothetical justifications for challenges in order to disprove a *prima facie* case." PBOM 38. The *types* of evidence courts consider in determining *Batson* motions is unrelated to the degree of *persuasiveness* of the objector's evidence, and his argument confuses an objector's failure of proof (as seen by the trial judge or as apparent on a cold record) with improper speculation. Petitioner also extensively argues the need for comparative jury analysis and the retroactivity of *Miller-El*. *See* PBOM 44 & n.32. This argument too relates to types, not persuasiveness, of evidence. The Court previously rejected petitioner's attempt to obtain review of these issues, *see* Pet. for Cert. (No. 03-6539) i (whether the "California Supreme Court violated the Constitution when it refused to apply comparative juror analysis"; and whether *Miller-El* is retroactive). Moreover, the Ninth Circuit recently agreed that comparative analysis for the first time on appeal was not compelled. *Boyd v. Newland*, 393 F.3d 1008, 1015 (9th Cir. 2004) In his third argument, petitioner asks the Court to determine whether there was a prima facie case. PBOM 47-50. This argument also seeks to answer a question on which the Court declined to grant certiorari—whether "the California Supreme Court violate[d] Batson when it held that the challenges to all three black jurors did not present even an inference of discrimination, which is necessary to establish a prima facie case." Pet. for Cert. (No. 03-6539) i.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

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Respectfully submitted,

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