

07-1780-pr
Brown v. Alexander

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: April 16, 2008 Decided: September 22, 2008
5 Errata Filed: October 10, 2008)
6 Docket No. 07-1780-pr

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8 TARKISHA BROWN,

9 Petitioner-Appellant,

10 - v -

11 GEORGE B. ALEXANDER, Chairman, New York State Division of Parole,
12 ANDREW CUOMO, Attorney General of the State of New York,

13 Respondents-Appellees.*

14 -----
15 Before: WINTER and SACK, Circuit Judges, and MURTHA, District
16 Judge.**

17 Appeal from a judgment of the United States District
18 Court for the Southern District of New York (Jed S. Rakoff,
19 Judge) denying Tarkisha Brown's petition for a writ of habeas
20 corpus pursuant to 28 U.S.C. § 2254. The petitioner asserts that
21 the New York state courts unreasonably applied Batson v.
22 Kentucky, 476 U.S. 79 (1986), in concluding that she had not

* Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Chairman George B. Alexander and Attorney General Andrew Cuomo are automatically substituted for former Chairman Brion D. Travis and former Attorney General Eliot Spitzer, respectively, as respondents in this case.

** The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

1 presented a prima facie case of race discrimination with respect
2 to jury selection at her criminal trial in state court.

3 Affirmed.

4 JEFFREY J. RESETARITS, Shearman &
5 Sterling LLP (Seth M. Kean, of counsel),
6 New York, NY, for Petitioner-Appellant.

7 RAFAEL A. CURBELO, Assistant District
8 Attorney (Robert T. Johnson, Bronx
9 County District Attorney, Joseph N.
10 Ferdenzi, Nancy D. Killian, Assistant
11 District Attorneys, of counsel), Bronx,
12 NY, for Respondents-Appellees.

13 SACK, Circuit Judge:

14 Petitioner-Appellant Tarkisha Brown appeals from a
15 judgment entered on March 30, 2007, in the United States District
16 Court for the Southern District of New York (Jed S. Rakoff,
17 Judge) denying her petition for a writ of habeas corpus pursuant
18 to 28 U.S.C. § 2254. She asserts that the state trial court
19 unreasonably applied Batson v. Kentucky, 476 U.S. 79 (1986), when
20 it ruled that she had not made out a prima facie case of race
21 discrimination in jury selection during her state criminal-trial,
22 and that the Appellate Division, First Department, People v.
23 Brown, 276 A.D.2d 429, 715 N.Y.S.2d 18 (1st Dep't 2000), and the
24 New York Court of Appeals, People v. Brown, 97 N.Y.2d 500, 507,
25 769 N.E.2d 1266, 1271, 743 N.Y.S.2d 374, 379 (2002), unreasonably
26 applied Batson when they affirmed the trial court's decision. We
27 conclude that because the New York courts reasonably determined
28 that Brown had not made out a prima facie case, her
29 post-conviction detention was not unlawful.

1 **BACKGROUND**

2 In November 1997, a grand jury in Bronx County, New
3 York, returned a three-count indictment against the petitioner.
4 It included one count of criminal sale of a controlled substance
5 in or near school grounds in violation of N.Y. Penal Law
6 § 220.44(2). Voir dire of the jury took place in Supreme Court,
7 Bronx County, before Justice Robert H. Straus, on January 6 and
8 7, 1999.

9 Jury selection was conducted using the "jury box
10 system" provided by N.Y. C.P.L.R. § 270.15. Under the version
11 that Justice Straus employed, a group of sixteen prospective
12 jurors is randomly selected from the venire and interviewed.
13 After the court has struck jurors for cause, the parties are
14 permitted to examine the first twelve prospective jurors (i.e., a
15 sufficient number to complete the jury). The State, and then the
16 defendant, are allowed to exercise challenges for cause.
17 Following the court's ruling on those challenges, the parties are
18 afforded the opportunity to exercise one or more of the
19 peremptory challenges allotted to them.¹ The remaining jurors
20 from the original group of twelve are seated. The parties are
21 then permitted to consider as many remaining jurors from the
22 group of sixteen as would be necessary to fill the jury (e.g., if
23 ten jurors are seated after consideration of the first twelve

¹ Each party was permitted fifteen peremptory challenges, based on the charges brought against Brown. N.Y. C.P.L.R. § 270.25(2)(b).

1 jurors, two more are taken under consideration). If a full jury
2 is not seated from the first group of sixteen, a new group of
3 sixteen prospective jurors is selected and the process is
4 repeated until a sufficient number of jurors and alternates is
5 seated. See generally People v. Webb, 187 Misc. 2d 451, 452-54,
6 722 N.Y.S.2d 349, 350-51 (Sup. Ct. Kings County 2001).

7 During the first round of voir dire for the
8 petitioner's trial, the court selected a group of sixteen
9 prospective jurors at random, and discharged one of them for
10 cause. The court then permitted the parties to consider the
11 first twelve of the fifteen remaining prospective jurors.
12 Neither the State nor the petitioner exercised any challenges for
13 cause. The State exercised five peremptory challenges, however,
14 four of them against prospective jurors who were black. The
15 petitioner exercised two peremptory challenges against
16 prospective jurors whose race is not identified in the record.
17 The five remaining persons were accepted to serve on the jury.

18 The court then considered the next three prospective
19 jurors. The State sought to challenge one of them for cause, but
20 after objection by the petitioner, the court denied the
21 challenge. In response, the State used a peremptory challenge to
22 strike this same prospective juror, who was black. The
23 petitioner did not exercise any peremptory or for-cause
24 challenges against the remaining two prospective jurors. They
25 were then accepted to serve.

1 A second group of sixteen prospective jurors was then
2 selected at random. After questioning, the court discharged four
3 of them for cause and selected four additional prospective jurors
4 as replacements. After questioning of the replacement jurors,
5 one was discharged by the court for cause, again leaving fifteen
6 prospective jurors in the box. The court considered the first
7 five of them. Neither the State nor the petitioner challenged
8 any of them for cause. The State exercised two peremptory
9 challenges, however, both against prospective jurors who were
10 black.

11 The petitioner then, for the first and only time,
12 asserted a Batson challenge:

13 Judge, I'm going to raise a Batson challenge
14 against the prosecutor. I mean he never even
15 asked Mr. Harley [one of the two black
16 potential jurors just challenged] a question.

17 I'm just looking here, he's exercised nine
18 challenges, eight of them have been for
19 African Americans if I'm not wrong. I might
20 be wrong but I don't think I'm wrong.^[2]

21 We had some jurors yesterday he never spoke
22 to; no jury experience, nothing against
23 police officers and they were gone too.

24 I can't help but discern a pattern here.
25 Maybe I'm wrong. I would need some further
26 information before I could be dissuaded from
27 the fact that they're being eliminated here
28 by use of peremptory challenge because of
29 their color.

² Counsel was mistaken. At the point that she raised her Batson claim, the State had exercised eight peremptory challenges, seven of them against black members of the venire.

1 Transcript of Proceedings at 252, People v. Brown, No. 6815/97
2 (Sup. Ct. Bronx County Jan. 7, 1999).

3 The court responded:

4 [B]y my figures in the first group in the
5 jury box there were nine people that appeared
6 to me to be of African American descent and
7 in this group there are six more, that's 15
8 and by my count he challenged 7 out of the
9 15. That's the count I have.

10 But beyond that the law requires for the
11 Court to consider the challenge that there
12 must be a rather specific objection with the
13 utilization of facts and other relevant
14 circumstances to create an inference of
15 exclusion of a cognizable group.

16 Certainly African Americans are a cognizable
17 group and certainly under certain
18 circumstances a percentage of strikes can
19 cause a court to find a pattern.

20 Id. at 252-53.

21 The petitioner's counsel interjected a lengthy
22 explanation as to why four of the stricken jurors could have been
23 fair. The trial court, apparently surprised, responded: "Wait
24 just a minute. In the first group you're really concerned with
25 four African American jurors peremptorily challenged[?]" Id. at
26 255. Counsel responded in the affirmative. Counsel then
27 referred to further details about the stricken jurors.

28 After counsel had finished, the trial court responded,

29 Well, based on what you've said up to this
30 point and what you have pointed out up to
31 this point I'm not going to require the
32 People to offer an explanation for their
33 peremptory challenges. You can renew the
34 application later [and] we'll see where the
35 challenges go from this point on

1 Id. at 256-57. Counsel for the petitioner again stated that the
2 "jury selection [wa]s not fair." Id. at 257. The judge
3 responded, "I understand that, but based on right up to this
4 point I do not find a pattern of purposeful exclusion that's
5 sufficient to raise an inference of discrimination based on the
6 numbers." Id.

7 The State then sought to make clear on the record that
8 of the seven jurors chosen, three were black women. The court
9 acknowledged the statistic, but said, "It doesn't matter how many
10 sworn jurors [there are.] [I]t's not determinative[.] [I]t's
11 not dispositive. . . . [A] Batson challenge can be made even as
12 to one juror but I don't find the pattern." Id. at 258.

13 The remainder of voir dire moved along briskly. The
14 State exercised one additional peremptory challenge, that to an
15 alternate juror; the petitioner exercised four. Neither party
16 challenged any jurors for cause. The final five members of the
17 jury were selected, as were three alternates. The race, color,
18 or ethnicity of these jurors is not reflected in the record.

19 The petitioner never renewed her Batson challenge.

20 The jury ultimately found the petitioner guilty of
21 criminal sale of a controlled substance in or near school grounds
22 under N.Y. Penal Law § 220.44(2). Based on that verdict, the
23 trial court rendered judgment on February 4, 1999, and sentenced
24 the petitioner to an indeterminate prison term of two to six
25 years. The petitioner appealed her conviction on evidentiary

1 grounds,³ and also challenged the trial court's denial of her
2 Batson claim.

3 On October 26, 2000, the Appellate Division, First
4 Department, unanimously affirmed the petitioner's judgment of
5 conviction. People v. Brown, 276 A.D.2d 429, 715 N.Y.S.2d 18
6 (1st Dep't 2000). The defendant -- the petitioner here -- moved
7 for leave to appeal the Appellate Division's decision to the New
8 York Court of Appeals. The motion was granted. People v. Brown,
9 96 N.Y.2d 826, 754 N.E.2d 206, 729 N.Y.S.2d 446 (2001) (Kaye,
10 C.J.).

11 On March 19, 2002, the New York Court of Appeals
12 affirmed the order of the Appellate Division. People v. Brown,
13 97 N.Y.2d 500, 507, 769 N.E.2d 1266, 1271, 743 N.Y.S.2d 374, 379
14 (2002). As to the Batson issue, the Court of Appeals concluded,
15 "[D]efendant's reliance on the People's removal of seven
16 African-Americans through the exercise of eight peremptory
17 challenges was inadequate, without more, to require the trial
18 court to find a prima facie showing of discrimination." Id. at
19 508, 769 N.E.2d at 1271, 743 N.Y.S.2d at 379.

20 The petitioner then applied for a writ of habeas corpus
21 pursuant to 28 U.S.C. § 2254 in the United States District Court
22 for the Southern District of New York. She claimed that the
23 state trial court had unreasonably applied Batson when it ruled

³ The evidentiary question, which was considered by the Appellate Division, and later the Court of Appeals, is not before us.

1 that she had not made out a prima facie case, and that the
2 Appellate Division and Court of Appeals unreasonably applied
3 Batson in affirming the trial court's decision.

4 In a report and recommendation dated January 12, 2007,
5 United States Magistrate Judge Michael H. Dolinger concluded that
6 the state courts had not unreasonably applied Batson in finding
7 that the petitioner had failed to make out a prima facie case.
8 Judge Dolinger therefore recommended that Brown's petition for a
9 writ of habeas corpus be denied. In an Order dated March 28,
10 2007, the district court (Jed S. Rakoff, Judge) adopted the
11 recommendation to dismiss the petition but grant a certificate of
12 appealability under 28 U.S.C. § 2253(c)(1).

13 The petitioner, now on parole, appeals.

14 **DISCUSSION**

15 I. Standard of Review

16 "We review a district court's ruling on a petition for
17 a writ of habeas corpus de novo." Overton v. Newton, 295 F.3d
18 270, 275 (2d Cir. 2002).

19 Pursuant to 28 U.S.C. § 2254(d), as amended by the
20 Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L.
21 No. 104-132, § 104, 110 Stat. 1214, 1219 (1996), a writ of habeas
22 corpus may not issue for any claim adjudicated on the merits by a
23 state court unless the state-court decision was "contrary to, or
24 involved an unreasonable application of, clearly established
25 Federal law, as determined by the Supreme Court of the United
26 States," id. § 2254(d)(1), or was "based on an unreasonable

1 determination of the facts in light of the evidence presented" in
2 state court, id. § 2254(d) (2).

3 Under section 2254(d) (1), the statutory phrase "clearly
4 established Federal law, as determined by the Supreme Court of
5 the United States," 28 U.S.C. § 2254(d) (1), refers to "the
6 holdings, as opposed to the dicta, of [the Supreme] Court's
7 decisions as of the time of the relevant state-court decision."
8 Williams v. Taylor, 529 U.S. 362, 412 (2000); Overton, 295 F.3d
9 at 275-76 (quoting Williams). A state-court decision is
10 "contrary to" clearly established federal law as determined by
11 the Supreme Court if the state court's conclusion on a question
12 of law is "opposite" to that of the Supreme Court or if the state
13 court decides a case differently than the Supreme Court's
14 decision "on a set of materially indistinguishable facts."
15 Williams, 529 U.S. at 413 (2000); Overton, 295 F.3d at 275
16 (quoting Williams). A state-court decision "involves an
17 unreasonable application of" clearly established federal law as
18 determined by the Supreme Court if it "identifies the correct
19 governing legal principle from [the Supreme Court's] decisions
20 but unreasonably applies that principle to the particular facts
21 of [a] prisoner's case." Williams, 529 U.S. at 413; Overton, 295
22 F.3d at 275 (quoting Williams). "An unreasonable application of
23 federal law is different from an incorrect or erroneous
24 application of federal law." Williams, 529 U.S. at 412; Overton,
25 295 F.3d at 277 (quoting Williams). Interpreting Williams, and
26 by extension section 2254(d) (1), we have observed that the

1 "unreasonable application" standard "falls somewhere between
2 merely erroneous and unreasonable to all reasonable jurists."
3 Id. at 277 (internal quotation marks and citation omitted).
4 Although "[s]ome increment of incorrectness beyond error is
5 required, . . . the increment need not be great; otherwise habeas
6 relief would be limited to state court decisions so far off the
7 mark as to suggest judicial incompetence." Id. (internal
8 quotation marks and citation omitted).

9 Finally, under section 2254(d)(2), a state court's
10 findings of fact are "presumed to be correct." The habeas
11 petitioner bears the burden of "rebutting the presumption of
12 correctness by clear and convincing evidence." 28 U.S.C.
13 § 2254(e); see Overton, 295 F.3d at 275 (quoting section
14 2254(e)).

15 II. Clearly Established Federal Law:
16 Batson and Its Progeny

17 Batson v. Kentucky, 476 U.S. 79 (1986), established a
18 three-step burden-shifting mechanism for evaluating allegations
19 of race discrimination during jury selection at a criminal trial.
20 At the first stage of the inquiry, the defendant must establish a
21 "prima facie" case "by showing that the totality of the relevant
22 facts gives rise to an inference of discriminatory purpose." Id.
23 at 93-94. Once the defendant has made out such a prima facie
24 case, the burden shifts to the State to provide a race-neutral
25 explanation for its peremptory strikes. Id. at 97. Finally, the
26 trial court must determine whether the defendant has established

1 purposeful discrimination, id., in which case the selection
2 process was a violation of the Equal Protection Clause of the
3 Fourteenth Amendment.

4 The Supreme Court did not establish a bright-line rule
5 for determining what constitutes such a prima facie case.
6 Instead, the Court instructed trial judges to consider whether
7 "all relevant circumstances" and facts before them give rise to
8 an inference of discrimination. Id. at 96-97. Batson did
9 indicate that a pattern of strikes against African-American
10 jurors may give rise to such an inference, and that the
11 prosecutor's questions and statements might also support or
12 refute such an inference. Id. at 97. Ultimately, though, Batson
13 left substantial discretion in the hands of the trial court,
14 expressing "confidence that trial judges, experienced in
15 supervising voir dire, w[ould] be able to decide if the
16 circumstances concerning the prosecutor's use of peremptory
17 challenges create[d] a prima facie case of discrimination against
18 black jurors." Id.

19 The Supreme Court recently reiterated that it "did not
20 intend the first step [in the Batson inquiry] to be . . .
21 onerous." Johnson v. California, 545 U.S. 162, 170 (2005). "[A]
22 prima facie case of discrimination can be made out by offering a
23 wide variety of evidence, so long as the sum of the proffered
24 facts gives 'rise to an inference of discriminatory purpose.'" Id.
25 Id. at 169 (quoting Batson, 476 U.S. at 94) (footnote omitted).
26 The Court also restated the principle that a defendant is not

1 "require[d]" to "prove[] discrimination" at the prima facie
2 stage. Id. at 169-70.

3 This court has put a further gloss on what constitutes
4 a prima facie case under Batson, and what constitutes an
5 unreasonable application of Batson and its progeny. We have
6 noted that "under Batson and its progeny, striking even a single
7 juror for a discriminatory purpose is unconstitutional." Walker
8 v. Girdich, 410 F.3d 120, 123 (2d Cir. 2005). And we have said
9 that we have "no doubt that statistics, alone and without more,
10 can, in appropriate circumstances, be sufficient to establish the
11 requisite prima facie showing." Overton, 295 F.3d at 278-79 (2d
12 Cir. 2002); see also Tankleff v. Senkowski, 135 F.3d 235, 249 (2d
13 Cir. 1998) ("[T]he fact that the government tried to strike the
14 only three blacks who were on the panel constitutes a
15 sufficiently dramatic pattern of actions to make out a prima
16 facie case."). We have made clear, however, that "[o]nly a rate
17 of minority challenges significantly higher than the minority
18 percentage of the venire would support a statistical inference of
19 discrimination." United States v. Alvarado, 923 F.2d 253, 255-56
20 (2d Cir. 1991) (finding that "a challenge rate nearly twice the
21 likely minority percentage of the venire strongly supports a
22 prima facie case under Batson"). We have also required that
23 statistical arguments be based on a well-developed factual
24 record. Such a record

25 would likely include evidence such as the
26 composition of the venire, the adversary's
27 use of peremptory challenges, the race of the

1 potential jurors stricken, and a clear
2 indication as to which strikes were
3 challenged when and on what ground, and which
4 strikes were cited to the trial court as
5 evidence of a discriminatory intent.

6 Sorto v. Herbert, 497 F.3d 163, 171-72 (2d Cir. 2007).

7 Although we have embraced the use of statistics, we
8 have also indicated that, in every case, "an assessment of the
9 sufficiency of a prima facie showing in the Batson analysis
10 should take into consideration 'all relevant circumstances'
11 including, but not restricted to, the 'pattern' of strikes."
12 Harris v. Kuhlmann, 346 F.3d 330, 345 (2d Cir. 2003). This
13 comports with our understanding that "Batson must be read as not
14 only prohibiting certain specific actions, but also as creating a
15 broad standard or principle that the courts must, in reason,
16 follow." Overton, 295 F.3d at 278.

17 "The discrimination condemned by Batson need not be as
18 extensive as numerically possible." Alvarado, 923 F.2d at 256.
19 "A prosecutor may not avoid the Batson obligation to provide
20 race-neutral explanations for what appears to be a statistically
21 significant pattern of racial peremptory challenges simply by
22 forgoing the opportunity to use all of his challenges against
23 minorities." Id. Thus, while the presence of one or more black
24 jurors "might tend to rebut an inference [drawn by the trial
25 court in connection with the defendant's attempt to establish a
26 prima facie case] that the prosecutor used his peremptory strikes
27 in a discriminatory manner, . . . this fact alone [i]s [not]

1 sufficient to refute an otherwise-appropriate inference [of
2 discrimination]." Harris, 346 F.3d at 346.

3 III. The New York State Court Decisions.

4 Based on principles established by Batson and its
5 progeny, and by AEDPA and the case law interpreting it, we agree
6 with the conclusion of the district court that a writ of habeas
7 corpus was not warranted here. The state-court decisions were
8 not "contrary to, [and did not] involve[] an unreasonable
9 application of[] clearly established Federal law, as determined
10 by the Supreme Court of the United States," id. § 2254(d)(1), nor
11 were they "based on an unreasonable determination of the facts in
12 light of the evidence presented" in the trial court, id.
13 § 2254(d)(2).

14 According to the trial court, at the time the
15 petitioner raised her Batson claim, the totality of the relevant
16 facts did not give rise to an inference of discrimination. The
17 court "d[id] not [at that time] find a pattern of purposeful
18 exclusion . . . sufficient to raise an inference of
19 discrimination based on the numbers." Transcript of Proceedings
20 at 257, People v. Brown, No. 6815/97 (Sup. Ct. Bronx County Jan.
21 7, 1999). The trial court's conclusion in this regard hinged
22 primarily on the fact that the Batson challenge was lodged
23 relatively early in the jury selection process. The court
24 stated:

25 [B]ased on what [the defendant] said up to
26 this point and what you have pointed out up
27 to this point I'm not going to require the

1 People to offer an explanation for their
2 peremptory challenges. You can renew the
3 application later [and] we'll see where the
4 challenges go from this point on.

5 Id. We have "held, on habeas review, that a state court does not
6 act unreasonably where it denies a Batson challenge early in the
7 jury selection process." Sorto, 497 F.3d at 170. It is not
8 ordinarily unreasonable for a state court to conclude that a
9 petitioner has not made out a prima facie case when she raises a
10 Batson challenge "before jury selection [i]s completed and before
11 the . . . facts [a]re even fully established on the record."
12 Overton, 295 F.3d at 279. "The need to examine statistical
13 disparities may commend a wait-and-see approach," Sorto, 497 F.3d
14 at 170, and the trial court's "wait-and-see approach" here was
15 not unreasonable.

16 The Appellate Division affirmed the trial court's
17 Batson ruling principally on the grounds that the "[d]efendant's
18 statistical claim regarding the prosecutor's allegedly
19 disproportionate use of peremptory strikes was insufficient to
20 support a prima facie showing of purposeful discrimination,
21 particularly in light of the racial makeup of the panel of
22 prospective jurors." People v. Brown, 276 A.D.2d 429, 429-30,
23 715 N.Y.S.2d 18, 19 (1st Dep't 2000). It was not unreasonable
24 for the Appellate Division to conclude that at the time
25 petitioner moved under Batson for the State to articulate a race-
26 neutral explanation for its peremptory challenges, the "rate of
27 minority challenges [was not] significantly higher than the

1 minority percentage of the venire [thereby] support[ing] a
2 statistical inference of discrimination." Alvarado, 923 F.2d at
3 255-56. And it was not unreasonable for the Appellate Division
4 to conclude that the record before the trial court at the time of
5 the challenge did not contain sufficient "evidence of a
6 discriminatory intent" to justify the burden-shifting
7 contemplated by Batson. Sorto, 497 F.3d at 171-72.

8 This is not to say that statistics alone can never
9 establish a prima facie Batson claim prior to the completion of
10 jury selection. There are likely circumstances in which the
11 numbers of minority members struck, seated, and on the venire
12 would justify Batson's burden-shifting long before the last juror
13 was seated. Nor do we mean to suggest that the petitioner here
14 could not have established a prima facie case on a complete
15 record in this case following a proper motion in the light of
16 that record. A defendant may establish a prima facie case in any
17 number of ways, the burden of establishing such a case is not
18 onerous, and Batson left the trial court with substantial
19 discretion to determine whether such a case was made. But here,
20 petitioner's Batson challenge was denied as premature, she failed
21 to renew the motion, and the status of jury selection at the time
22 of the challenge did not insure that the statistics would
23 establish a prima facie case irrespective of what happened during
24 the jury selection process thereafter.

25 For the foregoing reasons, we conclude that the
26 decision that a prima facie case had not been made out under

1 Batson at the time the Batson claim was asserted was not
2 "contrary to, [n]or [did it] involve[] an unreasonable
3 application of, clearly established Federal law, as determined by
4 the Supreme Court of the United States," 28 U.S.C. § 2254(d) (1),
5 nor was it "based on an unreasonable determination of the facts
6 in light of the evidence presented" in state court, id.
7 § 2254(d) (2).

8 The New York Court of Appeals affirmed. For the
9 foregoing reasons, under the circumstances presented, that
10 decision does not provide a basis for habeas relief in the
11 federal courts.

12 We pause to note, nonetheless, that the Court of
13 Appeals, in rejecting the petitioner's argument, commented:

14 Defendant was explicitly invited by the trial
15 court to articulate any facts and
16 circumstances that would support a prima
17 facie showing of discrimination. Instead of
18 making a record comparing Caucasians accepted
19 with similarly situated African-Americans
20 challenged, or by establishing objective
21 facts indicating that the prosecutor has
22 challenged members of a particular racial
23 group who might be expected to favor the
24 prosecution because of their backgrounds,
25 defense counsel responded that certain
26 persons excused by prosecution peremptories
27 had no prior jury service or had attended
28 college and, thus, gave no indication that
29 they could not be 'fair.' Based on the
30 numbers and arguments presented, the trial
31 court ruled that it did not find a
32 discriminatory pattern. No further Batson
33 objection was raised during the remainder of
34 voir dire proceedings. Upon this record, we
35 conclude that defendant's numerical argument
36 was unsupported by factual assertions or
37 comparisons that would serve as a basis for a

1 prima facie case of impermissible
2 discrimination.

3 Brown, 97 N.Y.2d at 508, 769 N.E.2d at 1271-72, 743 N.Y.S.2d at
4 380 (emphasis added; citations and internal quotation marks
5 omitted).

6 We find the emphasized language in the court's opinion
7 somewhat puzzling. It seems, at least at first blush, to be at
8 odds with the Supreme Court's instruction that under Batson, "a
9 prima facie case of discrimination can be made out by offering a
10 wide variety of evidence, so long as the sum of the proffered
11 facts gives rise to an inference of discriminatory purpose."
12 Johnson, 545 U.S. at 170. The Supreme Court has not, for
13 example, required that Batson challengers compare jurors struck
14 with jurors seated, nor has it required that they show that
15 jurors struck would have favored the prosecution.

16 But upon closer examination, we read the paragraph in
17 question not to impose specific requirements on persons making
18 Batson challenges. Instead, we think, it provides examples of
19 evidence that "would [have] serve[d] as a basis for a prima facie
20 case of impermissible discrimination" had it been offered.
21 Brown, 97 N.Y.2d at 508, 769 N.E.2d at 1272, 743 N.Y.S.2d at 380.
22 Thus understood, there is nothing in the statement that is
23 contrary to clearly established federal law.

24 In any event, Supreme Court, Bronx County, the
25 Appellate Division, and the Court of Appeals, all reached the
26 conclusion that the petitioner had failed to make out a prima

1 facie case of race discrimination under Batson. We agree with
2 the district court that under the principles of both Batson and
3 AEDPA, that conclusion will not support the grant of a habeas
4 corpus petition. We therefore affirm the judgment of the
5 district court denying the application for such a writ.

6 **CONCLUSION**

7 For the foregoing reasons, the judgment of the district
8 court is affirmed.