No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO SANCHEZ,

Petitioner,

v.

CRAIG KOENIG, Warden

Respondent.

EDGAR RADILLO,

Petitioner,

v.

ROSEMARY NDOH, Warden

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In a case where the prosecutor has exercised peremptory challenges against minority panelists citing traits shared by non-minority panelists who were allowed to serve on the jury, does a reviewing court properly consider offsetting "pro-prosecution" traits of those non-minority jurors that were never cited by the prosecutor as a basis for the challenged strikes at the third step of review under *Batson v. Kentucky*, 476 U.S. 79 (1986) (*Batson*)?

LIST OF PARTIES

Petitioner, Alberto Sanchez, is represented by Erin J. Radekin, Esq., of Sacramento, California.

Petitioner, Edgar Radillo, is represented by Mark D. Eibert, Esq., of Half Moon Bay, California.

Respondent, Craig Koenig, Warden of Correctional Training Facility - Soledad, is represented by Deputy Attorney General Galen N. Farris, of Sacramento, California.

Respondent, Rosemary Ndoh, Warden of Avenal State Prison, is represented by Deputy Attorney General Galen N. Farris, of Sacramento, California.

JOINT PETITION FOR A WRIT OF CERTIORARI

Alberto Sanchez and Edgar Radillo petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished memorandum decision of the court of appeals is reported at *Radillo v. Long*, 708 Fed. Appx. 918, 2018 U.S. App. LEXIS 1041, 2018 WL 416255 (9th Cir. 2018). Mr. Sanchez and Mr. Radillo filed a joint petition for rehearing *en banc*, which was denied by the court of appeals on March 28, 2018. App. 107.

The memorandum of findings and recommendations prepared by the magistrate judge in *Sanchez v. Paramo,* App. 4, which was adopted in full by the district court, App. 103, is reported at *Sanchez v. Paramo*, 2015 U.S. Dist. LEXIS 67301 (E.D. Cal., May 21, 2015). The memorandum of findings and recommendations prepared by the magistrate judge in *Radillo v. Long,* App. 65, which was adopted in full by the district court, App. 106, is reported at *Radillo v. Long*, 2015 U.S. Dist. LEXIS 67300 (E.D. Cal., May 21, 2015).

JURISDICTION

The memorandum decision of the court of appeals was filed on January 16, 2018. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

As noted, this case presents the question of whether a reviewing court, upon performing a comparative juror analysis at *Batson*'s third step, properly finds a

prosecutor's stated ground for striking a minority panelist that also applies to a non-minority panelist who is allowed to serve to be non-pretextual so long as the court can point to "pro-prosecution" characteristics of the seated non-minority panelist *even though the prosecutor never referred to such characteristics to explain the facial inconsistency in striking the minority panelist, while leaving the non-minority panelist on the jury.*

The effect of such fishing expedition, designed to reel in never-before offered prosecutorial justifications for inconsistency in the treatment of minority panelists and non-minority panelists, is to eviscerate the very purpose of the *Batson* holding itself. Indeed, with only the slightest dab of creativity, *any* reviewing court can find a basis for differentiating the minority panelist from the non-minority panelist to justify a finding of no pretext. The problem arises from this straightforward analytical problem: the reviewing court is not looking to what the prosecutor stated is the reason for his or her action, but is looking for what *might have been the prosecutor's justification*. In California, this untethered analytical approach is expressly authorized by the highest court; worse, the Ninth Circuit has explicitly endorsed this mode of analysis in this case.

Review is thus warranted under this Court's Rule 10 because this is an important issue of nationwide significance and because the Ninth Circuit's

decision conflicts with this Court's *Batson* precedent, the Ninth Circuit's own decisions on this issue in other cases, and decisions of other United States Courts of Appeals on this issue.

A. Basis for Jurisdiction in the Lower Courts

In the court of appeals, Mr. Sanchez and Mr. Radillo, state prisoners, sought review of the denial of their petitions for writ of habeas corpus under 28 U.S.C. § 2254 by the district court in the Eastern District of California, Sacramento. App. 4, 65. The district court had jurisdiction pursuant to 28 U.S.C. § 2254(a). The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § § 1291 and 2253.

B. Facts Material to the Question

Mr. Sanchez, who was 19-years-old at the time of the crimes, and Mr. Radillo, who was 18, were tried by the same jury on charges of kidnapping, forcible false imprisonment, forcible rape, rape in concert, and assault by means of force likely to cause great bodily injury. App. 5. At trial both defendants, who are Hispanic, moved for mistrial under *Batson* after the prosecutor exercised her fifth peremptory challenge in a row, removing five out of seven, or 71.4%, of the eligible Hispanic panelists from the pool of prospective jurors. App. 12-13. And see 5 ER 54 (Juror 7 identified as Hispanic); 8 ER 147 (Juror 8 identified as

Hispanic).[1]

Without making a finding as to whether a *prima facie* case had been established under *Batson*, the trial court asked the prosecutor for comment. App. 23. The prosecutor provided reasons for the strikes which, on their face, appear to be race neutral. These reasons fell into five categories: (1) a personal, friend or family member's negative experience with law enforcement (Sarah H., Carlos H., Danielle A. and Monica V.), App. 14, 16, 20; (2) requiring additional evidence to corroborate the testimony of a witness (Carlos. H.), App. 16; (3) being young, with no children (Monica V.), App. 20; (4) having a belief that someone who accepts a ride from a stranger is responsible for what happens to them (Monica V.), App. 20; and (5) having a problem with the principles of aiding and abetting (Maria C.), App. 18.

Every reason cited by the prosecutor as her bases for the strikes applied equally to non-Hispanic panelists the prosecutor did not choose to strike. At the time the prosecutor first passed and accepted the jury, the following non-Hispanic jurors remained and possessed the same "disqualifying" characteristics cited by the

[1] "ER" refers to the excerpts of record submitted by Mr. Sanchez and Mr. Radillo with their briefing in the Ninth Circuit. Volumes 5, 6, and 8, which contained juror questionnaires, were ordered sealed by the Ninth Circuit.

prosecutor as her reasons for the challenged strikes: Jurors 1, 8, 11, and Alternate Juror 3 reported that they or a relative had a negative experience with law enforcement, FER 91[2], 6 ER 10, 8 ER 173, 8 ER 97; Jurors 1, 2, 8 and 11, and Alternative Jurors 1, 2 and 4 said they needed additional evidence to corroborate the testimony of a witness, FER 87, 8 ER 219, 6 ER 13, 8 ER 177, 8 ER 135, 5 ER 19, 8 ER 114; Juror 8 and Alternate Juror 2 were 30 years old or younger and had no children, 6 ER 7, 5 ER 12-13; Jurors 4 and 11, and Alternate Jurors 1 and 2 expressed beliefs that a person who accepts a ride from a stranger is "foolish" or bears some responsibility for what happens to him or her, 8 ER 243, 8 ER 180, 8 ER 138, 5 ER 22; and Juror 4 and Alternate Juror 2 provided responses to the question on aiding and abetting in the juror questionnaire suggesting they did not understand the concept or opposed finding guilt for an aider and abettor, 8 ER 240, 5 ER 19. 3 ER 217.[3]

The trial court accepted the prosecutor's reasons without comment, summarily denying the defendants' *Batson* motion. App. 13.

The California Court of Appeal conducted a third-step review under *Batson*

[2] "FER" refers to Further Excerpts of Record submitted by Mr. Sanchez and Mr. Radillo in the Ninth Circuit. These were sealed.
[3] Volume 3 of the excerpts of record was not sealed.

for the first time. App. 14-21. With regard to four of the five challenged Hispanic panelists—Danielle A., Carlos H., Sarah H., and Monica V.—the court found that the fact that there were seated non-Hispanic jurors with the same characteristics as those cited by the prosecutor as her grounds for the strikes was not probative of a racial intent because the seated panelists had other traits that made them desirable jurors from the prosecutor's point of view—traits never mentioned by the prosecutor—or they were not similarly situated to the challenged panelists in all respects. App. 15-16, 17, 20. As to the fifth challenged Hispanic panelist, Maria C., the prosecutor cited only one reason for the strike—her response to the question in the juror questionnaire on aiding and abetting. App. 18. Although the court of appeal acknowledged the question was badly worded, the court found the prosecutor was not concerned with whether Maria C. would follow the instruction on aiding and abetting, but with her response to the question "that one defendant may point the finger at another to get the other in trouble without any basis in fact."[4] App. 19. The state court of appeal thus affirmed the denial of the *Batson* motion. App. 21.

[4] The record belies the court's finding that the prosecutor was concerned about this statement, as the prosecutor did not ask Maria C. anything about it, but did ask her whether she would follow the instruction on aiding and abetting and could hold an aider and abettor liable. Maria C. confirmed that she could. App. 18.

After their petitions for review to the California Supreme Court were summarily denied, Mr. Sanchez and Mr. Radillo filed petitions for writ of habeas corpus in the United States District Court, Eastern District of California, raising their *Batson* issue. App. 4, 8, 65, 69. The district court held the state appellate court's decision was not contrary to, or an unreasonable application, of *Batson* and its progeny. App. 25, 86.

The Ninth Circuit held the California Court of Appeal did not misapply *Batson* by supplying race-neutral reasons that were not given by the prosecutor as her reasons for excusing the Hispanic panelists to find the prosecutor's strikes were not motivated by race, but was merely engaging in comparative juror analysis—that is, observing the non-Hispanic panelists allowed to serve were not similarly situated to the stricken panelists in all respects because the former had "pro-prosecution" sentiments.[5] App. 2-3. According to the Ninth Circuit panel in this case, in comparing non-Hispanic panelists who the prosecutor did not strike with the stricken Hispanic panelists, one must consider the "'totality of the relevant facts' to decide 'whether counsel's race-neutral explanation for a peremptory

[5] The state court of appeal made no attempt to consider whether the stricken Hispanic panelists, like the non-Hispanic panelists who were not stricken, had other "pro-prosecution" traits. App. 14-21.

challenge should be believed,'" citing *Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009), including traits of the seated non-Hispanic panelists never mentioned by the prosecutor as a basis for differentiating the minority panelists from the others. App. 3. This is not improper speculation, the panel found, but proper comparative juror analysis. *Id*. The Ninth Circuit thus upheld the district court's denial of habeas relief based on petitioners' *Batson* motion. *Id*.

As noted, the Ninth Circuit also denied petitioners' petition for rehearing *en banc*. App. 107.

REASONS FOR GRANTING THE PETITION

This case presents an important question of nationwide significance concerning whether a reviewing court properly considers reasons never cited by the prosecutor as a basis for exercising peremptory strikes against minority panelists at the third step of review under *Batson*. As detailed below, this question is a matter of nationwide significance because California courts and United States Courts of Appeal are issuing decisions that run counter to this Court's repeated admonition that a reviewing court must not speculate as to the prosecutor's reasons for a challenged strike in assessing a *Batson* motion. In justifying the prosecutor's systematic removal of Hispanic panel members by reliance on reasons that were not provided by the prosecutor for the strikes, the state court of appeal in this case

engaged in prosecution-oriented speculation, contrary to this Court's clear *Batson* precedent. The Ninth Circuit's memorandum decision also conflicts with this Court's *Batson* precedent, as well as its own decisions on this issue in other cases and the decisions of other United States courts of appeal on this issue. There is a lack of uniformity among the courts of appeal on this issue.

For these reasons, review on certiorari is warranted under this Court's Rule 10.

A. Review Is Warranted Because the Ninth Circuit's Decision in this Case Conflicts with this Court's Repeated Admonition that a Reviewing Court Does Not Properly Speculate Regarding a Prosecutor's Motivation for a Peremptory Strike In Assessing a *Batson* Motion.

The issue at the third step of *Batson* review is whether the prosecutor's strike was, in fact, motivated by race. *Green v. LaMarque*, 532 F.3d 1028, 1030 (9th Cir. 2008) ("When conducting the analysis at the third step, the trial court must decide not only whether the reasons stated are race-neutral, but whether they are relevant to the case, and whether those stated reasons were the prosecutor's genuine reasons for exercising a peremptory strike, rather than pre-texts invented to hide purposeful discrimination." (citing *Batson*, 476 U.S. at p. 95)). It is clearly established law under the precedent of this Court that a *Batson* violation may be shown by disparate treatment of minority and non-minority jurors—that is, if a side-by-side

comparison of stricken minority panelists and non-minority panelists shows that the only relevant distinction between the removed panelists and the non-minority panelists is their race. *Miller El v. Dretke*, 545 U.S. 231, 241 (2005) (*Miller-El*). The Ninth Circuit has held the third step properly includes a comparative analysis of the jurors who were stricken and the jurors who were allowed to remain. *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006) ("We believe . . . that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a *prima facie* case").

This Court has specifically admonished against engaging "in needless and imperfect speculation [about the prosecutor's reasons for excluding a juror] when a direct answer can be obtained by asking a simple question." *Johnson v. California*, 545 U.S. 162, 172 (2005) (*Johnson*). That principle "was clearly established" for AEDPA purposes in 2005—well before petitioners' trial—by this Court's decision in *Johnson*. The *Johnson* Court noted that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," 545 U.S. at p. 172 (emphasis added), and quoted with approval the Ninth Circuit's statement in *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) that "[i]t does not matter that the prosecutor might have had good reasons . . . [;][w]hat matters is the real reason they were stricken."

Johnson, 545 U.S. at p. 172 (emphasis added).

Again, in 2005, in *Miller-El*, this Court stated, "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." 545 U.S. at pp. 251-252. The Court explained, "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." 545 U.S. at p. 252. Importantly, *Miller-El* was a federal habeas case in which the prosecutor provided reasons for the challenged strikes and the trial judge denied the motion at step three of the *Batson* analysis. 545 U.S. at p. 236. It is therefore clearly established Supreme Court law that it is improper to speculate as to the reasons for the prosecutor's strike at step three of *Batson* review.

In this case the Ninth Circuit cited *Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009) (*Ali*) and *Kesser v. Cambra*, 465 F.3d 351, 359 (2006) (*Kesser*) for the proposition that a court conducting *Batson* review appropriately considers "the totality of relevant facts" in engaging in a comparative juror analysis, including the fact that a seated non-minority panelist has a characteristic that was never cited by the prosecutor as a basis for a challenged strike. App. 2-3. Neither United States

Supreme Court *Batson* precedent nor the cases cited by the Ninth Circuit support the proposition that it is appropriate to consider race-neutral traits of a seated non-minority panelist that were never cited by the prosecutor as a basis for a challenged strike in comparative juror analysis. Indeed, this Court has held that, in performing such analysis, the fact that a stricken minority panelist and a seated non-minority panelist are not similarly situated in all respects does not make the comparison not probative of whether the strike was motivated by race. *Id*. at p. 247 n. 6 ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.") As the Court noted in *Miller-El*, "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id*.

Moreover, neither *Ali* nor *Kesser* hold that, in engaging in comparative juror analysis pursuant to a *Batson* review, a court appropriately considers facts never cited by the prosecutor as a reason for a strike. In both cases the courts engaged in a straightforward comparative juror analysis—these courts compared the challenged minority panelists to seated panelists and found the fact that seated panelists possessed the same characteristics cited by the prosecutor as reasons for

the challenged strikes was evidence the strikes were motivated by race. See *Ali*, *supra*, 584 F.3d at pp. 1187, 1189, 1190; *Kesser*, *supra*, 465 F.3d at pp. 362, 364, 366, 367.

The Ninth Circuit's view in this case—that it is appropriate to consider traits never mentioned by the prosecutor as a basis for a challenged strike in performing comparative juror analysis at the third step of *Batson* review—is not supported by United States Supreme Court *Batson* authority or the cases cited by the Ninth Circuit in this case. Further, as detailed below, there are decisions of the Ninth Circuit and sister circuits that hold that such speculation is *not* permitted in comparative juror analysis at the third step of *Batson* review.

B. Review Is Warranted to Secure Uniformity of Decision Among the United States Courts of Appeal on this Important Issue.

As noted, the Ninth Circuit held in this case that, in engaging in third-step comparative juror analysis, it is appropriate to consider traits not cited by the prosecutor in assessing whether the fact there are seated non-minority panelists who possess the same traits cited by the prosecutor as his or her bases for excusing minority panelists is probative of a racial motive. Such traits, according to the Ninth Circuit's view, merely indicate the seated non-minority panelists are not otherwise similarly situated to the stricken panelists. This view conflicts with that

expressed by sister circuits and other decisions of the Ninth Circuit.

In *Chamberlin v. Fisher*, 855 F.3d 657 (5th Cir. 2017) (*Chamberin I*) (reversed after rehearing *en banc* by *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) (*Chamberin II*)), the Fifth Circuit specifically considered the view advocated by the Ninth Circuit in this case and rejected it as contrary to clearly established United States Supreme Court precedent:

> The State does not contest the obvious—that on the questions the prosecutor cited during jury selection as his reasons for excluding [two black panelists], [a seated white panelist] gave the same responses. Instead, it argues that it should now be able to identify differences among those prospective jurors on their responses to other questions. . . . The problem is that *Miller-El*[]rejected prosecutors' ability to justify their strikes based on reasons not offered during jury selection and appellate courts' ability to come up with new rationales on prosecutors' behalf[.]
> . . .
> [¶] Despite this unequivocal command, the dissent argues we can nonetheless consider the jurors' views on questions not cited by the prosecutor after he was asked to justify the strikes. It first says we should do so because *Miller-El*[] instructed courts to evaluate whether a prosecutors' stated reason is plausible "in light of all evidence with a bearing on it." 545 U.S. at [pp.] 251-52. But that should not be read to provide an end run around the prohibition on considering new reasons set forth in the same opinion. *Miller-El*[] shows the difference between evidence bearing on plausibility, which reviewing courts should consider, and new reasons, which they may not. In evaluating whether proffered reasons were plausible, *Miller-El*[] looked to evidence of the prosecutor's veracity: did he rely on misrepresentations about stricken jurors' answers, accept jurors with similar answers to stricken jurors, or give inconsistent explanations for strikes? *Id*. at [pp.] 244-51.

> In contrast, *Miller-El*[] would not consider a new reason this court identified on appeal. *Id*. at [p.] 252. . . . *Miller-El*[] rejected this approach, similar to that of the dissent, because the "Court of Appeals's . . . substitution of a reason . . . does nothing to satisfy the prosecutor's burden." *Id*. at [pp.] 252.
> . . .
> [¶] The dissent thinks this prohibition on post-trial justifications can be overcome by repackaging the argument made by the State . . . . What the State candidly recognized is a new reason for striking the black jurors is now a new reason for keeping the white juror. . . . As the "comparative juror analysis" name indicates, the inquiry is a comparative one that requires differentiating the answers of struck and accepted jurors. That means citing different answers to the same question as a reason for keeping one juror is the same as saying the difference was a reason for striking the other juror. . . . .
>
> The dissent's position that courts may credit new reasons jurors were kept despite sharing the trait the prosecution claimed justified striking black jurors—a position for which it cites no authority—would make *Miller-El*[]'s bar on considering new reasons for strikes meaningless.

Chamberlin I, 855 F.3d at pp. 666-668.

The *Chamberlin I* court noted that "[o]ther circuits conducting comparative jury analysis have also read *Miller-El*[] as requiring that the 'validity of a strike challenged under *Batson* must "stand or fall" on the plausibility of the explanation given for it at the time, not new post hoc justifications[,]'" citing *United States v. Taylor*, 636 F.3d 901, 905-906 (7th Cir. 2011) (where prosecutor offered only one reason for excusing a black juror—that he expressed the position he could not impose the death penalty on a non-shooter—at the original *Batson* hearing, district

court, by accepting "new, unrelated reasons extending well beyond the prosecutor's original justification" at an evidentiary hearing upon remand, engaged in clear error); *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252, 1269 (11th Cir. 2009) (faulting state appellate court for bolstering the prosecutor's reason with a new explanation when the "[s]tate never offered such a full explanation."); and *Love v. Cate*, 449 F. App'x 570, 572 (9th Cir. 2011)[6]. 855 F.3d at p. 668.

Upon rehearing *en banc*, the Fifth Circuit reversed its position, holding it is appropriate for courts reviewing *Batson* motions to consider traits of seated non-minority panelists that were never mentioned by the prosecutor as a basis for challenged strikes in the course of comparative juror analysis. Noting that the district court found the prosecutor's reasons for striking two black jurors based on their responses to three questions in the juror questionnaire was based on race because the prosecutor failed to strike a white juror who answered the three questions identically, the court stated,

> . . . [B]ut questions 30, 34, and 35 were not the only questions [the stricken black panelists and the seated white panelist] had to answer. They were rather three questions out of dozens on a pages-long jury

[6] Petitioners cite to this unpublished case pursuant to Federal Rule of Appellate Procedure 32.1(a)(1).

> questionnaire. And if [the seated white panelist] in particular gave other responses that materially differentiated him from [the stricken black panelists] and made him a more favorable juror for the prosecution, then the district court's ruling does not follow.

Chamberlin II, 855 F.3d at p. 840. The *Chamberlin II* court thus found that ". . . the district court took out of context the *Miller-El*[] admonition that 'a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.'" *Id*. at p. 841, quoting *Miller-El*[], 545 U.S. at [p.] 252. The court held that it would be unfair to the prosecutor to not consider other reasons the seated white panelist was not a good juror from the prosecutor's point of view, because the prosecutor was never asked to explain why he or she allowed the white panelist to serve while striking the black panelists.[7] *Id*. at pp.

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[7] Such view is contrary to this Court's pronouncement in *Miller-El* that, "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." 545 U.S. at pp. 251-252. Indeed, the idea that a prosecutor, with his or her education and training, and who presumably knows the purpose of a *Batson* motion, is incapable of articulating his or her actual reasons for striking a minority panelist, including all of the ways in which the minority panelist can be differentiated from the non-minority panelist who remains on the jury, is untenable. More importantly, a trial court deciding a *Batson* motion is charged with assessing the credibility of the prosecutor's stated reasons. *Batson*, 476 U.S. at p. 93 ("In deciding if the defendant has carried his or her burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). As the Ninth Circuit has noted in *Boyd*

841-842.

As the court in *Chamberlin I* noted, other courts of appeals have espoused the view that it is not appropriate to consider reasons never cited by the prosecutor as a basis for challenged strikes in the course of comparative juror analysis. In *Love v. Cate*, *supra*, 449 F. App'x at p. 572, the Ninth Circuit found the state court of appeal made an unreasonable determination of the facts under AEDPA by disregarding the fact that the prosecutor had failed to excuse non-African-American teachers and educational aides but stated his reason for excusing the challenged African-American panelist was because he thought she was a teacher. That panel of the Ninth Circuit refused to consider the state's assertion that "these jurors had non-racial characteristics that distinguished them from the black venire-member," asserting "the prosecutor never stated to the state trial court that he relied on these characteristics, even though *Batson* required him to articulate his reasons." *Id.* Further, as noted above, in *Paulino v. Castro*, *supra*, 71 F.3d at p. 1090, the Ninth Circuit stated that "[i]t does not matter that the prosecutor might

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v. Newland, *supra*, 467 F.3d at p. 1145, this Court has "made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims." (Citing *Miller-El*, *supra*, 545 U.S. at p. 241.) The fact that the minority panelist stricken has similar traits to the seated non-minority panelist is a matter that surely should be inquired into by the trial judge.

have had good reasons . . . [;][w]hat matters is the real reason they were stricken." *Johnson, supra,* 545 U.S. at p. 172.

Hence, the United States Courts of Appeal are clearly in disarray over this issue. Some courts of appeal, including other panels of the Ninth Circuit, have concluded that, under clearly established United States Supreme Court authority, *Batson* jurisprudence does not permit speculation as to the prosecutor's reasons for striking a minority panelist based on a particular trait while not striking a non-minority panelist with the very same trait in the course of comparative juror analysis at the third step of *Batson* review. The panel in this case, and the Fifth Circuit in *Chamberlin II*, adopted the contrary view.

Accordingly, review on certiorari is warranted under this Court's Rule 10 to settle this important issue among the United States courts of appeals.

C. Review Is Warranted to Settle this Important Issue of Nationwide Importance.

As argued above, in considering reasons not cited by the prosecutor at the third step of *Batson* review in the guise of comparative juror analysis, the Ninth Circuit and the California Court of Appeal departed from well-established *Batson* precedent. This is not an isolated case—the California courts have a history of misapplying this Court's *Batson* jurisprudence.

As Justice Liu remarked in his concurring opinion in *People v. Harris*, 57 Cal.4th 804, 864 (2013), "[the California Supreme Court's *Batson* jurisprudence . . . , including our decision in the present case, appears noticeably out of step with principles set forth by the United States Supreme Court." Justice Liu noted two respects in which that court departed from the authority of this Court:

> First, by scouring the record for nonobvious reasons that might explain the peremptory strike of a minority juror, and by relying on such reasons to negate the inference of discrimination otherwise arising from the circumstances, this court has improperly elevated the standard for establishing a *prima facie* case beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike. Second, while regularly invoking nonobvious reasons that a prosecutor might have given for striking a minority prospective juror, this court has erroneously prohibited the use of comparative juror analysis to test whether a hypothesized reason was likely the actual reason for a particular strike. . . . .
>
> [¶]
>
> Both infirmities threaten *Batson*'s vitality by improperly restricting a party's ability to probe peremptory challenges that may be unconstitutionally discriminatory.

(*Harris*, *supra*, 57 Cal.4th at p. 864.)

The California Supreme Court has expressly sanctioned the consideration of the traits of a seated non-minority panelist in the course of comparing that panelist with a stricken minority panelist that were never cited by the prosecutor as a basis

for distinguishing the two panelists. In *People v. Lenix*, 44 Cal.4th 602 (2008), upon comparing a stricken black panelist, C.A., who was the subject of the defendant's *Batson* motion, with a seated Hispanic panelist, Juror No. 482753, both of whom reported having had a negative interaction with law enforcement, the court found that because Juror No. 482753 had a trait the prosecutor likely found favorable, there was no evidence of pretext, even though the prosecutor never mentioned this trait as a basis for distinguishing the two panelists, *Lenix*, 44 Cal.4th at pp. 601-611. The court reasoned:

> . . . Juror No. 482753 stated that he was a high school acquaintance of one of the police officers identified as a potential witness in defendant's case. The juror described the officer as "a really good guy." This factor would likely have been significant in the prosecutor's decision to retain the juror and further distinguishes this juror from C.A. The prosecution's acceptance of this juror demonstrates another aspect of jury selection. While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so.

Id. at p. 631.

Following *Lenix*, the California Court of Appeal in *People v. Jones*, 51 Cal.4th 346 (2011) held that a reviewing court *must* consider traits in addition to those cited by the prosecutor as his or her reasons for striking minority panelists in engaging in comparative juror analysis. The court explained:

Defendant's proffered comparative juror analysis is not very probative in this case. The prosecutor candidly stated he was concerned about all of the bus drivers, but he was not asked why he did not peremptorily challenge the others. The record strongly suggests race-neutral reasons why he chose to accept the others despite his concern that they were bus drivers. For example, the two bus drivers the prosecutor did not challenge said they were "strongly in favor" of the death penalty. G.G. rated himself as only "moderately in favor" of the death penalty. An attorney must consider many factors in deciding how to use the limited number of peremptory challenges available and often must accept jurors despite some concerns about them. A party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Lenix*, *supra*, 44 Cal.4th at p. 624.) The comparison here provides no basis to overturn the trial court's ruling.

Defendant argues that the prosecutor did not cite G.G.'s views on the death penalty as a reason for challenging him, and that we are limited to considering the reasons the prosecutor gave. We agree with defendant that in judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given. "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) But we disagree with defendant's further argument that we may not consider reasons not stated on the record for accepting other jurors. The prosecutor was not asked why he did not challenge the other bus drivers. When the trial court finds a *prima facie* case of improper use of peremptory challenges, the prosecutor must state the reasons for those challenges "and stand or fall on the plausibility of the reasons he

> gives." (*Ibid*.) But no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged. One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges. *When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors*.

(*Jones*, 51 Cal.4th at pp. 365-366 (emphasis added).) Although, in the above quote, the *Jones* court states that "in judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given," it immediately contradicted itself by then asserting, "When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors." The *Jones* court clearly endorses the view that a reviewing court properly speculates as to reasons the prosecutor might have allowed a non-minority panelist to remain on the jury who possess a trait he or she cited as objectionable in defending her strikes of minority panelists.

It is thus clear that California courts have a pattern of going beyond the prosecutor's stated reasons for challenged strikes to speculate as to other pro-

prosecution traits seated jurors have that might have constituted the prosecutor's grounds for allowing such jurors to remain while striking minority panelists on the basis of traits those seated jurors also possess.

The California Court of Appeal decision in this case suffers from the same "infirmities" noted by Justice Liu. Pursuant to the practice of the California courts, as sanctioned by the California Supreme Court, the court of appeal here "scoured" the juror questionnaires of the seated non-Hispanic panelists who possessed the same traits cited as objectionable by the prosecutor to search for offsetting "pro-prosecution" traits. App. 15-16, 17, 20. Such practice allows a reviewing court to disregard the probative value of the fact a prosecutor struck minority panelists on the basis of traits possessed equally by seated non-minority panelists. Pursuant to this Court's clear authority, such fact is evidence of pretext. *Miller-El*, *supra*, 545 U.S. at p. 248. It is obvious that scouring a seated non-minority panelist's juror questionnaire will almost always produce a pro-prosecution trait to offset the objectionable trait he or she shares with a stricken minority panelist. The same conclusion holds for the stricken panelist. In this case, the juror questionnaires were 18 pages long. Reviewing court could find pro-prosecution sentiments in the responses in a questionnaire of this length. Indeed, any court can find *something*, *somewhere* in the record to make a juror appear pro-prosecution. This extending

of juror comparison outside of its intended function, as dictated by this Court, eviscerates the value of comparative juror analysis and does nothing to discern and discourage racial bias in jury selection.

As noted above, this error in *Batson* analysis at the third step extends outside of California, as the panel of the Ninth Circuit in this case and the court in *Chamberlin II* also sanctioned the consideration of reasons never cited by the prosecutor as the basis for the strikes in the course of comparative juror analysis.

Accordingly, review is warranted under Rule 10 to settle this important issue, of nationwide significance.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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