No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

WARREN JUSTIN HARDY, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

ON A PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

(CAPITAL CASE - NO EXECUTION DATE SET)

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(CAPITAL CASE - NO EXECUTION DATE SET)

QUESTION PRESENTED

Whether, in a case with racial overtones, the California Supreme Court's refusal to conduct a meaningful comparative analysis, or infer a likelihood of discriminatory purpose from the prosecutor's removal of the only African-American prospective juror, violates this Court's jurisprudence, the Fourteenth Amendment right to equal protection, and the Sixth Amendment right to a fair trial by an impartial jury.

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Petitioner Warren Justin Hardy respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of the State of California on May 31, 2018, affirming his conviction and sentence of death. Petitioner's timely petition for rehearing was denied on July 18, 2018.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the Defendant and Petitioner Warren Justin Hardy and Respondent the People of the State of California.

OPINION BELOW

The opinion of the California Supreme Court issued on May 31, 2018. The opinion is reported at *People v. Hardy*, 5 Cal.5th 56 (2018). A copy is

attached as Appendix A. On July 18, 2018, the California Supreme Court issued an order denying rehearing. The order is attached as Appendix B.

JURISDICTION

The California Supreme Court entered judgment on May 31, 2018, and denied rehearing on July 18, 2018. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Federal Constitutional Provisions

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

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 defense

Amendment XIV

Section 1. 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.

2. State Statutory Provisions

California Code of Civil Procedure Section 231.5

A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.

California Government Code Section 11135, Subdivisions (a) and (d).

(a) No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

(d) The protected bases used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

STATEMENT OF THE CASE

Petitioner, an African-American man, was convicted of the first degree murder of a white woman with special circumstances that the murder was committed during the commission of robbery, kidnapping for rape, rape, sexual penetration by a foreign object, and the infliction of torture. App. A at 1-63. Petitioner and two companions were walking late at night when "they noticed the [deceased] across the street, [and] heard her yell at them "'Fuck

you, niggers.'" App. A at 4. The crimes followed. The jury returned a verdict of death. App. A. at 2.

At trial, petitioner asserted the prosecution committed error under *Batson v. Kentucky*, 476 U.S. 79 (1986), by using peremptory strikes to remove the only African-American prospective juror from the main panel, and the first two African-American prospective jurors from the alternate panel. App. A. at 17-18. The prosecutor provided reasons for her challenges before the trial court ruled whether a prima facie case was established. App. A at 18. The trial court then denied petitioner's motion objecting to the prosecutor's exercise of peremptory challenges against African-Americans. App. A at 18.

On direct review, the California Supreme Court found the prosecutor "excused every African-American prospective juror she could have excused - one while selecting the main panel and two while selecting an alternate" and that the "case had definite racial overtones." App. A at 22. The California Supreme Court independently reviewed the record and the prosecutor's six stated reasons for striking the only African-American prospective juror to the main panel. The Court concluded three reasons were "weak" or "not . . . very convincing," while three others were "especially strong." App. A at 28-29. The Court found the record did not support an inference of discriminatory intent by the prosecutor. App. A. at 28-29. One justice dissented based on all the

relevant circumstances, including the answers from stricken prospective and other jurors, the prosecutor's "apparent lack of concern about nonblack jurors with similar traits," and because the trial court's ruling lacked "any reasoned evaluation of the prosecutor's reasons." App. A. (Liu J. dissenting opinion) at 1-2. The dissent did not find any of the prosecutor's stated reasons "especially strong at all", concluded "[e]ach one of the stated reasons is problematic and raises doubts about the neutrality of the strike," and the three acknowledged weak reasons were "significant evidence of pretext." App. A. (Liu J. dissenting opinion) at 5, 18.

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER, IN A CASE WITH RACIAL OVERTONES, THE CALIFORNIA SUPREME COURT'S REFUSAL TO CONDUCT A MEANINGFUL COMPARATIVE ANALYSIS, OR INFER A LIKELIHOOD OF DISCRIMINATORY PURPOSE FROM THE PROSECUTOR'S PEREMPTORY STRIKE AGAINST THE ONLY AFRICAN-AMERICAN PROSPECTIVE JUROR BASED ON THREE "WEAK" AND THREE "STRONG" REASONS, VIOLATES THIS COURT'S JURISPRUDENCE, THE FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION, AND THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

A. Introduction.

The jury sitting in judgment of petitioner, who is African-American, in a case with "definite racial overtones, App. A at 2, had no African-American

juror on the main panel. The alternate panel had a single African-American in the fourth and final position, the least likely alternate who could be called to serve as a juror. App. A at 18, 21. Certiorari is needed so this Court can define more precisely, and in keeping with *Batson* precedent, the degree of similarity between challenged jurors and seated jurors that triggers the requirement of a side-by-side comparison.

The California Supreme Court did not conduct the meaningful comparative analysis between stricken and "similarly situated" seated jurors required by *Miller-El v. Dretke,* 545 U.S. 231, 247-252 (2005) and *Snyder v. Louisiana*, 552 U.S. 472, 483-484 (2008). The dissent noted the "opinion does not contain any analysis of a specific comparator juror - not a single one." App. A. (Liu J. Dissenting opinion) at 18. Indeed, the degree of similarity among jurors required by the California Supreme Court to conduct a meaningful comparative analysis places an insurmountable hurdle to any party raising a *Batson* challenge. See e.g., App. A at 29, 31 [citing minor dissimilarities among jurors to conclude comparative analysis does not support inference of bias]. The California Supreme Court thereby "unduly minimizes probative evidence bearing on the prosecutor's motivation and cannot be squared" with this Court's precedent. App. A. (Liu J. dissenting opinion) at 18.

The California Supreme Court relied, in part, on defense counsel's silence after the prosecutor provided reasons for her strike, "thus offering nothing to challenge the credibility of the prosecutor's reasons." App. A at 23. The Court applied *People v. Jones*, 51 Cal.4th 346, 361 (2011) to find the prosecutor's reasons credible based on defense counsel's silence after the court invited defense counsel to comment. App. A. at 23. California's approach is inconsistent with this Court's precedent and an unwarranted extension and misreading of *Uttecht v. Brown*, 551 U.S. 1, 18 (2007), which held defense counsel's failure to raise a *Batson* claim was a factor.

The California Supreme Court's misapplied this Court's precedent in a way that violated petitioner's Fourteenth Amendment right to equal protection and Sixth Amendment right to a fair trial by an impartial jury.[1] Here, "there is reason to believe Frank G. 'should have been an ideal juror in the eyes of a prosecutor seeking a death sentence.'" App. A. (Liu J. dissenting opinion) at 2, quoting *Miller-El v. Dretke*, 545 U.S. 231, 247 (2005). In *Miller-El*, this Court made clear that "similarly situated" does *not* mean identical. "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an

[1] As the dissent notes, from 1993 to 2013, the California Supreme Court "rejected *Batson* claims in 101 out of 102 cases." App. A (Liu J. dissenting opinion) at 24; see also *People v. Gutierrez*, 2 Cal. 5th 1150 1175 (2017) (Liu J. concurring opinion) [the "decision is the first time in 16 years, and the second time in over 25 years, that this court has found a *Batson*/*Wheeler* violation."].

exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El, supra,* 545 U.S. at 247, fn. 6. The California Supreme Court failed to follow this Court's precedent on the degree of similarity required for comparative analysis, in part, because this Court has offered little guidance on how to assess similarities that are relevant to the analysis.

B. Factual Background.

1. African-American, Prospective Main Panel Juror Frank G., Excused by the Prosecutor.

"Frank G. was a 68-year-old married homeowner in South Central Los Angeles with five grown children and four grandchildren. He previously served 10 years in Air Force intelligence, achieving the rank of staff sergeant. He held a supervisory position at the Hertz car rental company, evaluating liability claims and assisting in civil litigation. On his juror questionnaire, he wrote that he 'enjoy[s] his present position and take[s] pleasure in resolving difficult cases.'" App. A (Liu J., dissenting opinion) at 2-3.

"Frank G. indicated on the questionnaire that he 'favor[ed]' the death penalty—a view that he said had not changed over time—and he felt it was used 'too seldom.' He believed California should have the death penalty

because 'certain crimes deserve' such punishment. He did not report any 'social, philosophical, or religious convictions' that would prevent him from voting to impose the death penalty, and he was not a member of any organization that opposed capital punishment. He wrote that he could see himself personally voting for death for 'heinous crimes' and that he was 'not likely' to take a defendant's background or childhood experiences into consideration when doing so. When defense counsel asked Frank G. to expand on this answer, he said it would be 'difficult' for him to consider defendant's background because 'everybody has their own choices in life,' but he ultimately said he could consider such evidence." App. A (Liu J., dissenting opinion) at 2-3.

"The year before . . . trial, Frank G. had been the victim of a home burglary. Although the person responsible was never identified or arrested, he said he was 'satisfied' with the police's conduct in that case. Ten years before . . . trial, he had been falsely arrested for car theft due to a 'computer error by [the] rental agency.' The case was dismissed, and he wrote on the questionnaire that he had been 'treated fairly by police' and that 'justice [was] served.' Asked his views on what should be done about crime, Frank G. wrote, 'Hire more law enforcement' and 'Enforce, strongly, current laws.' In his view, the major crime problem in Los Angeles was 'gang activity' that led

to 'too many innocent persons [being] harmed.' When asked for his 'thoughts about how childhood experiences affect a person's development in relationship to committing criminal acts,' he wrote, 'I don't believe in too many mitigating factors. People have choices.' He checked 'no' when asked whether he believed 'a person's upbringing may relieve that individual from responsibility for committing violent or criminal acts.' Overall, he thought the criminal justice system was 'slow but in most cases fair.' He also wrote, 'I sincerely respect judges.'" App. A (Liu J., dissenting opinion) at 3-4.

"When asked about prejudice and biases, Frank G. wrote, 'I experienced racial prejudice while in the Air Force stationed in San Antonio, Texas in 1952,' and 'I am biased against drug & alcohol abusers and gang activity.' He checked 'yes' when asked if he 'believe[d] that a white/caucasian person can be the victim of a hate crime.' When asked if there were 'any reasons [he] might be biased or prejudiced either for, or against, Black Americans,' he wrote, 'No.'" App. A (Liu J., dissenting opinion) at 4.

"Frank G. had never served on a jury before. He wrote that '[i]f selected, [he] will serve,' that '[i]t is my duty as [a] citizen to serve,' and that he expected to be 'fair, impartial & listen to evidence' as a juror. When asked '[w]hat is it about yourself that makes you feel you can be an impartial juror,' he wrote, 'I am a good listener and observer.' When asked 'whether your

attitudes on our criminal justice system are such that you would be leaning towards the prosecution or the defense stance before hearing both sides,' he wrote, 'I would not lean one way or the other until all evidence is heard.'" App. A (Liu J., dissenting opinion) at 4.

"The prosecutor asked very few questions of Frank G. during voir dire." App. A (Liu J., dissenting opinion) at 4; 7RT 1294-97. "The prosecutor stated six reasons for excusing Frank G.: (1) 'He indicated on question no. 42, "'Police are not always truthful and tend to exaggerate"'; (2) 'He speaks to attorneys daily, and knows 50 to 60 civil or criminal lawyers'; (3) 'He did not want to sit on this case'; (4) 'He was arrested in 1992 by the Los Angeles Sheriff's Department'; (5) During questioning, 'he refused to smile at me, although he smiled for the defense'; and (6) 'He also indicated that LWOP [life without the possibility of parole] was worse for a defendant.'" App. A at 23-24.

2. African-American, Prospective Alternate Juror Marion H., Excused by the Prosecutor, and African-American Alternate Juror S-6169, Accepted by the Prosecutor.

After the main panel was selected, the prosecutor exercised two of her four peremptory challenges to excuse African-American prospective alternate jurors Marion H. and Darin B. App. A at 17-18. "One black juror, Juror No. S-6169, was . . . seated as the fourth and final alternate after both parties

had exhausted their peremptory strikes." App. A (Liu J. dissenting opinion) at 1. Petitioner focuses on the clearly manipulative timing of the prosecutor's strike of Marion H.

Marion H. was a 40-year old black female who was raised in Long Beach. She worked as an audit clerk for Ralphs Grocery Company, and had served for three years as an enlisted soldier in the Army in the early 1980's. 8CT 2098, 2100-2102. Marion H. was a high school graduate who also had attended military training. 8CT 2104. Her friend worked as a jailer. 8CT 2104. Marion H. found it difficult to judge another's guilt or innocence. She explained, "given all the facts I will do my best as a jurist." 8CT 2106. She had served twice before as a juror in two criminal cases that went to the jury. Verdicts were reached by both juries. 8CT 2106. As a juror, Marion H. said she expected to hear all the evidence and determine guilt. 8CT 2107. Because of her past jury service, she felt the courts and criminal justice system did a "good job." 8CT 2107. She held no generalized opinions about either prosecutors or defense attorneys. 8CT 2107.

During voir dire, the prosecutor asked about Marion H.'s answer that she had "no opinion" about whether California should have the death penalty. 11CT 2139. Marion H. explained, "Depending on the crime, then, yes, you should. If it's a sufficient enough crime for it, yes." 7RT 1219. The

prosecutor explained California had the death penalty only for murder cases. Marion H. said that did not affect her opinion. 7RT 1219. She did not believe there were other types of crimes for which the death penalty should be imposed. 7RT 1219. Marion H. agreed the death penalty should be imposed only for murder. 7RT 1220.

The prosecutor also asked Marion H. about her response where she stated she would prefer not to be a juror in the case. 7RT 1220. Marion H. wrote, "It's a sad case. I [sic] will be really hard to sentence someone to death." 11CT 2146. The prosecutor asked Marion H. if she could "vote to impose death?" 7RT 1220. Marion H. said, "If there was enough evidence towards it, yes, I could." 7RT 1220.

The prosecutor asked Marion H. about her difficulty in judging another person. Marion H. stated this was "based on religious or philosophical or moral reasons." 7RT 1220. Nevertheless, Marion H. believed she was able to make the decision on guilt or innocence, and on the death penalty. 7RT 1221.

"Marion H. and Juror S-6169 were the only jurors the prosecutor questioned in depth during the entire jury selection process." App. A (Liu J. dissenting opinion) at 21. The prosecutor twice passed and accepted Marion

H., "then challenged her after the defense exercised two additional challenges." App. A at 18.

C. The California Supreme Court Failed to Conduct a Meaningful Comparative Analysis Because the Court Set an Artificially High Requirement of "Similarity" Between Challenged and Seated Jurors.

Without adequate consideration of the responses of similarly-situated jurors, the California Supreme Court focused on each challenged prospective juror's answers and the prosecutor's stated reasons for the challenges. It failed to engage in a meaningful comparative analysis by purporting to do so "without any analysis to a specific comparator juror." See Appendix A (Liu J. dissenting opinion) at 18. If the California Supreme Court had engaged in a meaningful comparative analysis, it would have concluded, as did the dissent, that each one of the six "stated reasons [for challenging Frank G.] is problematic and raises doubts about the neutrality of the strike." App. A (Liu J., dissenting opinion) at 6.

The prosecutor challenged Frank G., the only African-American available to sit on the main panel. App. A at 17-18. However, the "side-by-side comparisons . . . of black venire panelists who were struck and white panelists [who were] allowed to serve" are "more powerful" than the bare statistics. *Miller-El v. Dretke, supra,* 545 U.S. at 342. Such a side-by-side

comparison reveals the discriminatory intent of the prosecutor's peremptory challenges.

The prosecutor's first stated reason for challenging Frank G. was wrong. App. A at 24 [terming error a "discrepancy"]. Frank G. did *not* state the police were not always truthful. *Ibid.* Rather, he stated that both "prosecutors" and "criminal defense attorneys" "are not always truthful and tend to exaggerate." 11CT 2906; App. A 24, 26. Even had the prosecutor's claim been accurate, comparative analysis reveals the prosecutor's lack of concern over a similar assertion by Juror No. C-1938 (a white male), who wrote, "police have been known to embellish or withhold facts, plant evidence and perjure themselves." 3CT 708, 725; App. A (Liu J., dissenting opinion) at 7.

The prosecutor's second stated reason - - Frank G.'s frequent contact with attorneys - - also does not withstand comparative analysis with respect to other jurors. Juror M-7421 (a Japanese American female) stated she knew "too many [lawyers] to name," and "worked as a legal secretary for over 8 years." 4 CT 981, 998; App. A (Liu J., dissenting opinion) at 7. Jurors Nos. L-3164 (a white male) and S-3388 (a white male) had attorneys in the own families. 5CT 1142, 1159 [cousin],1303, 1308 [sister]. Juror No. W-6681 (a

white male) knew four attorneys he identified as acquaintances, one who was his friend for 20 years. 10 CT 2700.

The prosecutor's third stated reason, that Frank G. did not want to sit as a juror because of his concerns about the length of the trial and potential interference with his work schedule, also fails when subjected to comparative analysis. Six seated jurors and one alternate expressed similar concerns. Juror No. A-4635 (a white male) explained he did not want to be a juror because "the nature of the crime alone ma[de] [him] sick." 4CT 871, 901. Juror B-0057 (a white male) wrote he did not want to be a juror "because of the seriousness of the crime. This was a brutal murder." 5CT1250, 1280. Juror M-7421 (a Japanese American female) did not want to be a juror because of work responsibilities and because the "violent nature of this case [was] disturbing to [her.]" 4CT 981, 1011. White male Juror No. 3164 wrote, "I would not like to sit on this trial because of its potential length," and because it "would be a financial hardship." 5CT 1142, 1172-73. Juror No. 5904 (a white male) did not want to be a juror because of "time out of work." 3CT 763, 793. Juror No. S-8868 (a white female) expressed reluctance to sit because the case "sound[ed] very disturbing." 3CT 818, 848. Alternate Juror No. 9343 (a white male) did not want to be a juror because he had his job to do. 6CT 1409, 1439.

In fact, as noted by the dissent, the trial court's assurance about the length of trial and potential conflict with Frank G.'s work "seemed to satisfy the juror," completely undermining the credibility of this "reason" for the strike, App. A at 27, particularly in view of similar concerns expressed by several jurors. In *Snyder v. Louisiana*, this Court engaged in a fact-intensive analysis that exposed the prosecutor's specious claim an African-American juror was excused because of his concern the trial would interfere with his student-teaching obligation. *Snyder v. Louisiana, supra,* 552 U.S. at 479-80. This Court noted the challenged juror was one of many "who expressed concern that jury service would interfere with work, school, family, or other obligations." *Ibid.* Thus, this Court concluded the prosecution's proffered reason was not credible where the prosecutor accepted white jurors who shared similar reservations about jury service as serious, if not more serious, than the challenged African-American juror. *Id.* at 483. A comparative analysis of Frank G. compels the same conclusion.

The prosecutor's fourth stated reason, Frank G.'s 1992 arrest a decade earlier,[2] revealed no basis for a challenge. While a "negative experience with law enforcement" can be a valid reason for a peremptory challenge, App. A at

[2] Voir dire commenced on October 31, 2002; the jury impaneled on November 12, 2002. 7RT 1084; 9RT 1862-63, 1879-85.

28, Frank G.'s experience was not negative. Frank G. stated " he had been treated fairly by police and justice had been served." App. A 28.

The prosecutor's fifth stated reason, that Frank G. did not smile at her, was a demeanor-based challenge with no support in the record and no finding by the trial court. This Court has held that, when the trial judge makes no finding on the record about a challenged juror's demeanor, a reviewing court cannot presume the trial judge "credited the prosecutor's assertion" about demeanor. *Snyder v. Lousiana, supra,* 552 U.S. at 479. In the absence of a trial court finding, the California Supreme Court erroneously relied on the fact "defense counsel did not dispute this reason." App. A. at 28. Doing so conflicts with this Court's pronouncements in *Uttecht v. Brown, supra,* 551 U.S. 1.

Uttecht v. Brown considered the combination of: (1) the prosecution's reasons for a challenge, (2) defense counsel's failure to object *at all*; and (3) the trial court's excusal of the prospective juror as factors indicating "the interested parties . . . all felt that removing of Juror Z was appropriate." *Uttecht v. Brown*, *supra,* 551 U.S. at 18. Here, petitioner's counsel was *not* silent; he objected under *Batson* to the prosecutor's challenges to "all three African-Americans for reasons of group bias." App. A. At 18.

The California Supreme Court misapplied *Uttecht v. Brown* to draw an improper conclusion from defense counsel's alleged silence after he had, in fact, objected under *Batson*. The California Supreme Court also improperly relied on defense counsel's failure to counter the prosecutor's speculative claim that Frank G. did not smile at her, but smiled at defense counsel, in order to uphold the prosecutor's demeanor-based challenge despite the fact the trial court made no finding about the prospective juror's alleged "demeanor" as required . App. A. 28.

Under *Miller-El v. Dretke, supra,* 545 U.S. at 251-52 and *Snyder v. Louisiana*, *supra,* 552 U.S. at 478, reviewing courts have a duty to look at all of the circumstances and are not bound by the arguments - - or lack thereof - - in the record. Here, it is the trial court's silence on the juror's alleged demeanor that is significant, not defense counsel's. *Snyder v. Louisiana*, *supra,* 552 U.S. at 479.[3]

The prosecutor's sixth and final reason for excusing Frank G. was he viewed life without the possibility of parole as a worse punishment than the

[3] The California Supreme Court's approach contrasts with the Court's acceptance of the prosecutor's silence when she failed to question Frank G. about the majority of her stated reasons stated for the challenge. The prosecutor asked no questions about Frank G.'s views about police, experience with attorneys, attitude about the nature of crimes, or his 1992 arrest App. A (Liu J. Dissenting opinion) at 7, 9, 13.

death penalty. This reason likewise fails under a meaningful comparative analysis review. Jurors were asked whether life in prison or a death sentence was worse for the defendant. On the written questionnaire, Frank G. answered life in prison was worse. 11CT 2939. During voir dire, Frank G. explained it was worse because "you think about what you did, the crime that you committed and the fact that you're going to be locked up for the rest of your life without no possibility of getting out." 7RT 1294. Other seated jurors answered similarly, ambiguously, or not at all.

Juror No. C-1938 (a white male) wrote life in prison was worse, because "the defendant will not only lose his/her freedom, but will have the time to contemplate his/her actions." 3CT 708, 750. This answer was substantively similar to Frank. G.'s answer. The prosecutor asked no questions of Juror C-1938 about his views. See App. A (Liu J. dissenting opinion) at 15. Juror No. S-8868 (a white female) also wrote "prison is worse but the tax payer should not have to support them." 3CT 818, 860. Other seated jurors either did not respond or responded ambiguously. Juror No. 3388 (a white male) answered "both are equally as bad." 5CT 1302, 1345. Juror No. 2235 (a white male) circled "death," but wrote it "depends on the beliefs of the individual as to which is actually worse." 6CT 1462, 1504. Juror

No. 9710 (an Hispanic male) declined to answer the question. 4CT 1089, 1131. Juror No. A-4635 (a white male) also declined to answer the question, writing only a question mark. 4CT 871, 913 ["?"]. Despite these close similarities, the prosecutor asked no questions of these jurors about their responses on the issue, which so concerned her with respect to Frank G.

The prosecutor posed few questions to Frank G. 7RT 1294-97. She did not ask one question about her first, second or fourth stated concerns: (1) his views of police truthfulness, (2) his daily communications with attorneys, or (3) his 1992 arrest. *Ibid.*; see also App. A (Liu J., dissenting opinion) 7, 9, 13. The prosecutor's failure to question Frank G. about these areas of claimed concern casts doubt on the legitimacy of the stated reasons. *Miller-El v. Dretke, supra,* 545 U.S. at 246.

The prosecutor's disparate treatment of African-American jurors and jurors of other races is significant and apparent from the foregoing comparative analysis, which the California Supreme Court failed to conduct. This Court requires such a comparison and recognizes disparate treatment as a factor showing discriminatory bias. *Miller-El v. Dretke, supra,* 545 U.S. at 253-63.

Rather than engage in a meaningful comparative analysis, the California Supreme Court blithely concluded seated jurors were not similar enough to Frank G. to infer discrimination. App. A at 29-30. That approach conflicts directly with this Court's precedent, which instructs that review of "all relevant circumstances" includes a side-by-side comparison of individuals with *similar* characteristics. *Miller-El v. Dretke, supra,* 545 U.S. at 240, 241-53. This Court expressly warned that "similarly situated" seated jurors does not mean seated jurors who are "identical" to challenged ones "in all respects." *Id.* at 247, fn. 6. Yet, near identical similarity is the improper hurdle the California Supreme Court required *before* it would engage in a meaningful comparative analysis.

Finally, the suspect timing and purposeful manipulation of the prosecutor's peremptory challenges demonstrate a discriminatory purpose on the prosecutor's use of strikes. *Miller-El v. Dretke* found significant the prosecutor's use of a a procedure to shuffle the venire panel before voir dire starts. *Miller-El v. Dretke, supra,* 545 U.S. at 253. The procedure permits a party to "rearrang[e] the order in which members of a venire panel are seated and reached for questioning." *Ibid.* The effect is that "members seated at the back . . . escape voir dire altogether, for those not questioned by the end of the week are dismissed." *Ibid.* This Court concluded the prosecution's

exercise of this "jury shuffle when a predominant number of African-Americans were seated in the front of the panel . . . raised a suspicion that the State sought to exclude African-Americans from the jury." *Id.* at 254, quoting *Miller El. V. Cockrell*, 537 U.S. 322, 246 (2003). While there was no "shuffle" procedure at play in petitioner's case, the prosecutor's manipulative challenges to African-American prospective jurors who could have sat as alternates also indicates racial bias."The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking . . . in an implausible light." *Miller-El v. Dretke, supra,* 545 U.S. at 252.

The California Supreme Court incorrectly concluded the prosecutor's passing on prospective alternate Marion H. twice "suggests that her later challenge of this juror was not based on race." App. A at 32. The record does not support this conclusion. The prosecutor's acceptance of Marion H. occurred *before* defense strikes moved Marion H. from the fourth alternate position to the third, and *before* African-American Juror No. G-2235 would be called for questioning. (App. A (Liu J. dissenting opinion) at 20. Thus, "before using her final strike against Marion H., the prosecutor asked how alternates would be called to the main panel, if needed, and the trial court said alternates would be called in the order they were seated, not at random." *Id.* at 20-21. When the prosecutor challenged Marion H., she knew

"she could not avoid having one black juror on the alternate panel, and her strike of Marion H. . . . ensured that the one black juror would be in the fourth position and thus least likely to serve." *Id.* at 20.

The California Supreme Court ignored this Court's precedent to conclude the prosecutor's process with the alternates likely was "not based on race." Yet, every strike must be considered along with every other strike. *Snyder v, Louisiana, supra,* 552 U.S. at 478. After "the prosecutor knew she could not avoid having one black juror on the alternate panel" she employed her own "mini-shuffle" by striking Marion H, and thereby "ensured that the one black juror would be in the fourth position and thus least likely to serve." App. A (Liu J. dissenting opinion) at 20.

The comparative analysis above, required by this Court's precedent, demonstrates the prosecutor's stated reasons belied her discriminatory intent. Based on the record, Frank G. "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence." *Miller-El v. Dretke, supra,* 545 U.S. at 247. He had a stable professional and family life, considered it his duty to serve a juror; favored hiring more law enforcement, the death penalty, and enforcing current criminal laws strongly; and did not believe in "too many mitigating factors" because "people have choices." 11CT 2897-

2904, 2906, 2922, 2937. Comparative analysis revealed the prosecutor's unequal treatment of African-American Frank G. compared to non-African-American seated jurors who expressed nearly identical views. The trial court erred in denying petitioner's *Batson* motion, and the California Supreme Court erroneously applied this Court's *Batson* jurisprudence to deny petitioner's claim of discriminatory purpose in striking prospective African-American jurors from the venire.

CONCLUSION

"Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 859 (2017). "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection." *Batson v. Kentucky, supra,* 476 U.S. at 86. "[D]iscrimination on the basis of race [is] 'odious in all aspects [and] especially pernicious in the administration of justice.'" *Pena-Rodriguez v. Colorado*, *supra,* 137 S.Ct. at 859, quoting *Rose v. Mitchell*, 443 U. S. 545, 555 (1979). "A constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." " *Pena-Rodriguez v. Colorado*, *supra,* 137 S.Ct at 869.

Moreover, denial of state-created rights prohibiting discrimination violates federal due process. *Hicks v. Oklahoma,* 447 U.S. 343, 345 (1980).

For the reasons set forth above, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the California Supreme Court.

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Respectfully submitted,

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