***** CAPITAL CASE *****

No._____

In the Supreme Court of the United States

FLOYD DANIEL SMITH,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the killing of a white teenager by a black defendant. The case was so racially charged that the defense attorneys – who were also black – were granted funding by the trial court for private security after being victimized by vandalism and racially motivated death threats. Twice, over the course of two consecutive trials, the prosecutor struck each black juror seated. The defense repeatedly objected under *Batson v. Kentucky*, 476 U.S. 79 (1986) (*Batson*). Each time, the objections were denied.

In justifying his strikes of the black jurors, the prosecutor repeatedly cited their responses to the question: "Were you upset with the criminal jury's verdict in the O.J. Simpson case?" The stricken jurors – and all black potential jurors in the entire venire – uniformly answered this question by checking "no."

1. Should this court resolve the conflict in the lower courts concerning whether striking black jurors by using racially charged characteristics unrelated to the case is permissibly race-neutral?

2. If a reviewing court finds many of the prosecution's justifications for its strikes flawed, and also finds that numerous justifications apply equally to seated jurors, may that court bolster the prosecutor's showing by relying on differences between stricken and seated jurors that were cited neither by the prosecutor nor by the state's attorneys on appeal?

3. Should this Court hold this case in abeyance pending its resolution of *Flowers v. Mississippi,* ___ S.Ct. ___ (2018) (No. 17-9572)?

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Petitioner, Floyd Daniel Smith, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of California affirming his conviction and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Floyd Daniel Smith, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on May 21, 2018, reported as *People v. Smith*, 4 Cal. 5th 1134 (2018). A copy of that opinion is attached. Appendix A. Petitioner filed for rehearing on June 7, 2018. On July 18, 2018, the California Supreme Court denied rehearing. Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on May 21, 2018 and rehearing was denied on July 18, 2018. On October 11, 2018, Chief Justice Roberts granted petitioner's application for extension of time within which to file a petition for certiorari in this case to December 15, 2018. A copy of the letter from the Clerk of the Court notifying petitioner of the extension is attached as Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. AN INTERRACIAL KILLING AND A RACIALLY CHARGED TRIAL

In 1997, petitioner Floyd Smith, a young black man, was tried for murdering a white teenager, Joshua Rexford. The prosecution theory was that Smith sought to avenge the recent killing of a friend by ambushing Rexford (whose brother was believed to be responsible for the prior killing) in a friend's apartment. *See People v. Smith*, 4 Cal. 5th 1134, 1142-43 (2018) (*Smith*) (summarizing prosecution case). Smith was convicted of murder and sentenced to death. *Id.* at 1141.

Smith lived and was arrested in Fontana, a town "once known for cross burnings and segregated neighborhoods" and which was, at the time of trial, widely recognized as a regional headquarters for the Ku Klux Klan. Josh Dulaney, *Honoring King in Former KKK Hotbed*, THE PRESS-ENTERPRISE, Jan. 11, 2012; David Olson, *Blacks Reflect on Legacy of Fontana*, SAN BERNARDINO COUNTY SUN, Feb. 15, 2010; Juan De Lara, INLAND SHIFT: RACE, SPACE, AND CAPITAL IN SOUTHERN CALIFORNIA 123-124 (2018) (San Bernardino County area had "one of the highest concentrations of hate groups in the country" and references to Fontana as "Klan territory" were pervasive in late-1990s).

The trial itself was charged with race issues and racial violence. Both of petitioner's attorneys were black, and one of them (Edi Faal) had represented a defendant in the infamous Reginald Denny beating trial which occurred four

years prior in Los Angeles.[1] Jurors in San Bernardino County still remembered. Mr. Faal's participation in the Denny case was discussed in negative terms by jurors, *see*, *e.g.*, 19SCT:5431 ("I do not have a very high opinion of Mr. Faal"); 2RT:577-578; 4RT:984-988, and caused the trial court to voice concern that ill will from the controversial Denny trial would spread among jurors, several of whom knew of Mr. Faal. 4RT:993-94. Mr. Faal was himself a victim of racial threats and violence. During the trial, Mr. Faal's tires were slashed outside the courthouse, and he received anonymous, racially-motivated death threats. 13RT:3980, 16RT:5184. As a result of its concerns over racial violence, the trial court granted petitioner's counsel funding for a private security detail during trial. 13RT:3980; 16RT:5185.

Racial issues also directly impacted voir dire: the trial court believed that the race of the defendant and his counsel would create "special difficulties" in dealing with the problem of "racial issues" among the San Bernardino County jury pool. As a result, the trial court ordered special individual and sequestered voir dire. 4RT:787-788; *cf*. Cal. Code Civ. Proc. § 223(d) (disfavoring this practice). Although the prosecutor objected repeatedly to individual voir dire on

[1] Reginald Denny was a white truck driver who was viciously assaulted during the race riots which ensued following the acquittal of several white police officers accused of assaulting Rodney King. *See* Edward Boyer and John Mitchell, *Acquittal, Deadlock in Riot Case: Denny Beating Trial Ends with Mistrial Declared on Final Assault Charge*, L.A. TIMES, Oct. 21, 1993 (describing Denny trial verdict as the "climax to one of the most racially charged chapters in Los Angeles history").

the issue of racial prejudice, 2RT:777, it proved fruitful. *See, e.g.,* 3RT:772 (prospective juror believed that African-Americans are "more likely than not to commit crimes" and were "very prejudiced towards others"); 4RT:878-79 ("in the past" prospective juror "didn't really like [African-Americans] too much" and his attitude toward them "wasn't very nice"); 14SCT:3976 ("I used to hate them all").

II. THE PROSECUTOR TWICE STRIKES ALL BLACK PROSPECTIVE JURORS, REPEATEDLY INVOKING BLACK JURORS' ATTITUDES TOWARDS THE O.J. SIMPSON TRIAL

Because Mr. Smith's first trial ended in a mistrial, resulting in a second trial, two consecutive juries were selected. Jury selection for the first trial began in February 1997, approximately 17 months after the verdict in the O.J. Simpson murder trial. The second trial occurred in the same year.

Beyond the fact that both cases involved interracial killings, Mr. Smith's case had no relationship or similarity to the Simpson case. Nonetheless, two questions concerning the Simpson case were included in the juror questionnaire for both trials. Question 41 was a general one, asking whether prospective jurors followed various crime stories in the news – concluding with the Simpson case – then asking "[w]hat did you learn about these cases?" 10:7thSCT:2769-2700. The second question, Question 49 (hereinafter "O.J. Simpson Question"), focused exclusively on the Simpson case. It asked "[w]ere you upset with the criminal jury's verdict in the O. J. Simpson case? Yes___ No ___ Whether you answered yes or no, please explain your answer[.]" *Id.* at 2772.

A. The *Batson* Hearing at the First Trial

In his first three strikes in the first trial, the prosecutor eliminated the only two black prospective jurors who made it into the box, resulting in an all-white jury.[2] 4RT:1039. After removing all black jurors with his initial three strikes, the prosecutor exercised no more peremptory challenges. He subsequently accepted the panel six times. 4RT:978, 982, 998, 1003, 1012, 1019. When the prosecutor later eliminated a black prospective alternate juror, Mr. Smith himself raised a *Batson* objection. *See* 4RT:1039-1047. The trial court invited the prosecutor to provide justifications, which included a reference to a black juror's alleged "support[]" for O.J. Simpson based on her response to the O.J. Simpson Question. 4RT:1043. The motion was ultimately denied without respect to that justification, on the basis that there had been an insufficient prima facie showing. 4RT:1045.

During the hearing, the prosecutor revealed that he had recently attended a prosecutorial conference on *Batson* issues, which provided guidance on how to respond to *Batson* motions. 4RT:1039. One thing he had learned was to place on the record, as a justification for his strikes, the fact that his jury selection focused on picking a "cohesive group." 4RT:1045. Neither "cohesive group" selected by the prosecutor in either of the two trials included black seated jurors. And this justification figured heavily during the second trial's *Batson* hearing; it

[2] 4RT:964 (strike of Effie Murray); 4RT:970 (strike of Claudia Wilson).

was applied to every black juror stricken, regardless of whether their shortcoming in "cohesiveness" was that they would be too much of a "leader" or would simply be a "follower," *compare* 8RT:2602 *with* 9RT:2697, whether they were highly educated or had "limited" education, *compare* 8RT:2602 *with* 9RT 2704, or whether they possessed or lacked "involvement in the community." 8RT:2616, 2620; *see also Smith*, 4 Cal. 5th at 1156 ("community involvement" justification "rings false").

B. The *Batson* Hearings at the Second Trial

In the second trial, as in the first, the prosecutor struck all black prospective jurors who made it into the box. 9RT:2707; s*ee Smith*, 4 Cal. 5th at 1146. In his first five strikes, the prosecutor quickly struck the first three black jurors (Ms. Davis, Ms. Sam, and Mr. Dredd). 8RT:2555, 2578, 2590. This lead to an initial *Batson* motion, which was denied after a hearing. 8RT:2590-620. The prosecutor later stated an intention to strike the fourth black juror (Ms. Kimbrough), resulting in another *Batson* hearing. 9RT:2696-2720. Although the prosecutor did not strike Ms. Kimbrough until his eleventh peremptory – after he had (temporarily) accepted the panel, 9RT:2696, 2720 – he later confessed that he intentionally delayed striking her due to the "chilling effect" of the prior *Batson* motion. 9RT:2698. As in the first trial, after cleansing the jury of blacks, the prosecutor exercised no more peremptories. 9RT:2733.

In justifying his first three strikes, the prosecutor adopted what the California Supreme Court described as a "'laundry list' approach," *Smith*, 4 Cal. 5th at 1157, articulating approximately ten justifications per juror. *See* 8RT:2590-620. In explaining why he eliminated the final black juror, the prosecutor was especially detailed: citing roughly 20 questionnaire responses (many with multiple subparts) to justify his strike. 9RT:2696-2720; *Smith*, 4 Cal. 5th at 1159 (prosecutor gave "lengthy" explanation for challenge to Ms. Kimbrough "occupying fully 10 pages of transcript").[3]

The one justification upon which the prosecutor most consistently relied was jurors' responses to questions about O.J. Simpson. Of the six jurors struck from the box during the two trials, the prosecutor premised his strikes on black jurors' responses to questions relating to O.J. Simpson five out of six times. 4RT:1043; 8RT:2594, 2599, 2603; 9RT:2700. All four strikes at issue in the second trial were justified by, *inter alia*, references to O.J. Simpson.

The prosecutor stated that his "main concern" with Ms. Davis was that she was purportedly "sympathetic" to O.J. Simpson. 8RT:2594. However, Ms. Davis said nothing indicating sympathy to O.J. Simpson; she merely checked the

[3] Although there were an exceedingly large number of justifications, there were also an extraordinary number of flaws in these justifications, a fact acknowledged by the California Supreme Court itself. *See*, *e.g.*, *Smith*, 4 Cal. 5th at 1153 (several reasons for excusing Ms. Sam "either lack record support or do not withstand comparison to the prosecutor's treatment of other jurors"); *id.* at 1154 (justifications for striking Mr. Dredd "raise much the same difficulty: While some of the reasons were supported in the record, others were not"); *id.* at 1161 (numerous responses cited by the prosecution for eliminating Ms. Kimbrough were "innocuous from a prosecution perspective").

box indicating she was "not upset" with the verdict, explaining "I really don't know if he did it. I feel he know [sic] who did it, but I really don't know." 15:7thSCT:4321. Despite being his "main concern," the prosecutor posed no questions to Ms. Davis on this topic.

The prosecutor similarly relied on Mr. Dredd's views on the Simpson case, which he alleged were "extremely negative" and "pro OJ and anti[-]prosecution." 8RT:2599. In fact, Mr. Dredd wrote only that coverage of the case taught him what he "already knew" – that there are "many sides to a story" and that he was not upset with the verdict because "I felt that their [sic] was doubt." 10:7thSCT:2770, 2772 (Q.41(b) & Q.49.) Again, the prosecutor asked no questions of Mr. Dredd on this topic.

The prosecutor also relied on Ms. Sam's statements on the Simpson case: that she was not upset because "if they didn't prove he killed Nicole then the verdict was fair, we should keep race out of it." 8RT:2603; 17:7thSCT:4966. Again, the prosecutor asked Ms. Sam no questions on this topic.

The prosecutor did ask Ms. Kimbrough questions regarding O.J. Simpson. 8RT:2585-86. After posing the questions in an uneventful exchange, the prosecutor baselessly accused Kimbrough of lying in her responses, indicating that she may have been "disingenuous" when she openly stated – as had several

other jurors – that she did not follow the case. 9RT:2700; see also, e.g., 4RT:956, 1032; 8RT:2560.[4]

Although the prosecutor repeatedly voiced concern about *black* jurors' purported sympathies for Mr. Simpson, he accepted no less than five non-black jurors who also stated that they were "not upset" by the Simpson verdict. 22SCT:6554 (Juror 86); 22SCT:6597 (Juror 87); 23SCT:6682 (Juror 119); 24SCT:7026 (Juror 370); 24SCT:7156 (Juror 392). Of these, two (as well as one alternate), indicated that they were not upset by the Simpson verdict because of the lack of sufficient proof.[5]

Black jurors were thus not alone in failing to be upset by the Simpson verdict. However, it was clear from the questionnaires that the O.J. Simpson Question was extremely racially divisive. Not a single one of the eight African-American prospective jurors in the venire stated that he or she was upset with the Simpson verdict.[6] In contrast, almost half of the non-black seated jurors

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[4] Although Ms. Kimbrough had a tangential connection to O.J. Simpson (her husband had played football for one season with Mr. Simpson during the 1970s but had no further contact) 8RT:2586, the prosecutor claimed that he "simply c[ouldn]'t" accept that she did not follow the domestic violence aspect of the coverage because she served on a board of an organization helping women surviving domestic violence. 9RT:2700. Aside from baldly accusing Ms. Kimbrough of dishonesty, the prosecutor provided no explanation for why an individual's volunteer efforts for an organization which helped victims of violent crime would not be favorable to the prosecution.

[5] 22SCT:6595, 97 (Juror 87); 24SCT:7156 (Juror 392); 23SCT:6640 (Alternate 91).

[6] Beyond the four black jurors stricken by the prosecution at the second trial, there were four additional black prospective jurors, two of whom never made it into the box and

expressed displeasure at the verdict. 22SCT:6426; 22SCT:6512; 23SCT:6940; 23SCT:6983; 22SCT:6469; *see also* 24SCT:7069 (Juror 380 checking "yes" but explaining "not really upset – just surprised on outcome"). This racial disparity mirrored results of then-widely publicized information regarding the racial divisiveness of the Simpson case among the American populace. *See*, *e.g.*, CNN-Time Magazine, *Races disagree on impact of Simpson trial* (October 6, 1995) available at https://www.cnn.com/US/OJ/daily/9510/10-06/poll_race/oj_poll_txt.html (last visited Dec. 14, 2018) (nearly 90% of African-Americans felt that the Simpson jury "did the right thing," while only 41% of white Americans held the same position).

During the *Batson* hearing, the defense specifically objected to the prosecutor's repeated use of responses to questions about O.J. Simpson, arguing that jurors' opinions about O.J. Simpson were unrelated to the case and "inappropriate" justifications for peremptories under *Batson*. 9RT:2610. The trial court ignored this contention, but ultimately denied the motion.

The trial court had no problem with the strike of Ms. Davis. 8RT:2613. The strikes of Dredd and Sam, however, posed a "much closer question." 8RT:2613; *see Smith*, 4 Cal. 5th at 1158 (justifications for these jurors were sufficiently flawed that they caused the trial court to "express[] substantial

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one of whom was disqualified due to hearing problems. 9RT:2709. None were upset by the Simpson verdict. 9:7thSCT:2600; 19:7thSCT:5654; 16:7thSCT:4579; 3:7thSCT:3:708.

concerns about the prosecutor's challenges" and voice "skepticism as to certain of the offered reasons").

Both Ms. Sam and Mr. Dredd had many characteristics which would seem to favor the prosecution, and both supported the death penalty.[7,8] For these two jurors, the trial court ultimately credited a single justification from the prosecutor's "laundry list": the jurors' statements which the prosecutor claimed

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[7] Sam stated that the death penalty was used "not enough," a pro-prosecution sentiment expressed by only two other seated jurors. 17:7thSCT:4974; see also 22SCT:6561; 24SCT:7163. She believed in "eye for an eye," even "strongly" so in some cases. 17:7thSCT:4976. She opined that the death penalty should be imposed on everyone who intentionally kills another human being and stated that she could not grant mercy in such a case. 17:7thSCT:4976-4977, 4982. Sam was not reluctant to either vote for death or face the defendant and state this verdict. 17:7thSCT:4979. She thought that the benefit of a death sentence would be that "criminals will think twice" before committing crimes. 17:7thSCT:4979. Sam also repeatedly stated that criminal laws were enforced too leniently, 17:7thSCT:4967, writing that laws should "be more strict especially for under 18 year olds" because "they're getting more dangerous than adults because they get off." 17:7thSCT:4986. Both death eligibility and aggravation introduced during the penalty phase centered on alleged incidents of violence by petitioner which occurred when he was a minor. Sam "strongly" agreed with the proposition that adult criminals "must be punished to the full extent of the law, no matter how badly they were treated as children" and stated she would not even take into consideration a criminal's childhood experience in "order to understand what may have influenced him later in life." 17:7thSCT:4975. She stated that childhood background should not be considered in deciding between a death sentence and LWOP, volunteering that this type of mitigating evidence is "used too much lately." 17:7thSCT:4976. As with many death penalty cases, childhood trauma and deprivation was the focus of penalty phase mitigation by the defense.

[8] Dredd had a close relative who worked for the Los Angeles County Sheriff. 10:7thSCT:2758. Dredd had supported the initiative to restore capital punishment in California because he believed it would "deter serious crime" and would again vote to keep the death penalty, if called to. 10:7thSCT:2779, 2782. He wrote that he would vote for death in the appropriate case, which he believed was a practical and realistic possibility. 10:7thSCT:2780-2781. The prosecutor nonetheless (inaccurately) described Dredd as "extremely weak on the death penalty." 8RT:2595.

showed a desire for "absolute" proof of guilt (hereinafter "lingering doubt justifications"). 8RT:2620-2621.

The prosecutor's characterization of the jurors' responses on this topic was subject to dispute: the trial court itself specifically stated that it "would not have shared [the prosecutor's] concern about Ms. Sam. . . . [or] Mr. Dredd." 8RT:2614. Nonetheless, it stated that "I will accept your concern" that the lingering doubt justifications "were *the factor* that had you decided [sic] to exercise a peremptory and that you were not racially motivated." 8RT:2615 (emphasis added); *see also Smith*, 4 Cal. 5th at 1152 (jurors' purported receptivity to "lingering doubt" argument was characteristic understandably "unfavorable to the prosecution").

No argument about lingering doubt was ever presented at trial, or even hinted at by the defense. Nor did anything in the facts of the case suggest that a lingering doubt argument would feature at penalty. *See Smith*, 4 Cal. 5th at 1143-44 (summarizing the defense guilt case). Throughout the proceedings, the State has characterized evidence of appellant's guilt as "overwhelming." *See Smith*, 4 Cal. 5th 1134, Respondent's Brief, at 74, 87, 96-97.

III. The California Supreme Court Affirms, Despite Recognizing Many Flaws In The Prosecutor's Justifications

On May 21, 2018, the California Supreme Court affirmed Mr. Smith's conviction and sentence in their entirety. *Smith*, 4 Cal. 5th 1134. Although rejecting the *Batson* claim, the opinion recognized that several of the prosecutor's justifications were flawed, noting repeatedly that the prosecutor's

justifications "either lack record support or do not withstand comparison to the prosecutor's treatment of other jurors." *See*, *e.g.*, *Smith*, 4 Cal. 5th at 1153 (discussing Ms. Sam); *id.* at 1154 (discussing Mr. Dredd). Other juror responses cited as justifications by the prosecutor were characterized as "innocuous from a prosecution perspective." *Id.* at 1161 (discussing Ms. Kimbrough).

The California Supreme Court nonetheless affirmed on the basis that "[s]ome" of the reasons given by the prosecutor "find support" or at least "some support" in the record. *See*, *e.g.*, *Smith*, 4 Cal. 5th at 1152–1153 (discussing Ms. Sam); *id*. at 1156 (Mr. Dredd). The O.J. Simpson-based justifications were among those that found "some support." *Id.* at 1153. Although its analysis of these justifications was relatively cursory, the California Supreme Court cited its past practice of affirming as "race-neutral" justifications focused on jurors' views of the polarizing Simpson case. *Smith*, 4 Cal. 5th at 1153.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY CONCERNING THE PROPRIETY OF PROSECUTORS USING RACIALLY CHARGED CHARACTERISTICS UNRELATED TO THE CASE TO JUSTIFY STRIKING MINORITY JURORS

While the bulk of the prosecutor's many justifications for eliminating the black jurors in this case were demonstrably pretextual, and thus inadequate to defeat the claim at *Batson*'s third step, his use of the O.J. Simpson Question betrays more fundamental issues regarding those strikes. Because the question itself was racially charged, the answers it elicited did not properly support the

showing required of the prosecutor at step two; on the contrary, the prosecutor's selective deployment of that biased question against black jurors was itself affirmative proof of the discriminatory motive that *Batson* forbids.

As this Court has made clear, the second step of the *Batson* inquiry sets a low bar: even "implausible or fantastic" justifications may suffice, so long as they are race-neutral. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). And though relevant at the third stage, the mere fact that a justification results in the "disproportionate exclusion of members of a certain race" generally does not alone suffice to state a claim of discrimination. *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (plurality opinion).

Nonetheless, occasionally prosecutors' justifications are so charged with race that their "race-neutral" reasons fail to clear even the low hurdle of *Batson*'s second step. Virtually all state courts have given short shrift to prosecutors who use strongly racially charged justifications to strike black jurors. Unfortunately, some jurisdictions (notably two of the country's largest: Texas and California) have repeatedly chosen to ignore this practice. And these courts' decision to avert their eyes from blatant proxies for race has had an obvious and avoidable effect – encouraging prosecutors to use these same justifications again and again in other cases. It is time for this Court to resolve the lopsided split of authority on this issue.

A. There Exists a Signficant Split of Authority on How to Address Justifications for Eliminating Black Jurors that Are Based on Racially Charged Characteristics

For good reason, a robust majority of lower courts have forbidden the practice of eliminating black jurors based upon racially charged characteristics unrelated to the case. For instance, the South Carolina Supreme Court found that a prosecutor's purported "uneasiness" over a black juror's dreadlocks was not a race-neutral justification. *McCrea v. Gheraibeh,* 380 S.C. 183, 187 (2008). While at least hypothetically race-neutral, the court easily recognized the undisguised discrimination: "dreadlocks retain their roots as a religious and social symbol of historically black culture" and the justification thus failed at *Batson* step two. *Id*. This same reasoning has been adopted in many states for a variety of transparent racial proxies. *See, e.g., Jessie v. State,* 659 So. 2d 167, 169 (Ala. Crim. App. 1994) (veniremember's residence in "high crime" area not a valid race-neutral reason); *Clayton v. State*, 341 Ga. App. 193, 198 (2017) (a "full mouth of gold teeth is a cultural proxy stereotypically associated with African-Americans" and thus failed at step two); *State v. Cook*, 175 Wash. App. 36, 40 (2013) (alleged defense-bias premised upon juror's use of the term "brother" to refer to African-American attorney was "associated with racial ethnicity" and thus an impermissible justification); *People v. Pierrot*, 289 A.D.2d 511, 512 (N.Y. App. Div. 2001) (alleged sympathies toward black defendant because of employment in affirmative action program failed at step two); *State v. Coleman*,

970 So. 2d 511, 514-17 (La. 2007) (citation to black juror's involvement in discrimination suit coupled with reference to defendant's race and defense counsel's voir dire on race was not race-neutral). Such justifications are not simply inadequate, they affirmatively betray evidence of racial bias.

One particularly pernicious and recurring variation of this issue is the use of justifications based on questions which gratuitously interject racial themes, which are then used by prosecutors as a basis for peremptory challenges. Courts in Florida and New York have directly rejected the use of racially divisive questioning as a basis for strikes. Their reasoning is that allowing such a practice threatens to eviscerate *Batson*'s protections entirely.

Turnbull v. State, 959 So. 2d 275 (Fla. Dist. Ct. App. 2006) rejected the use of unnecessarily racially charged questioning as a basis for strikes. In *Turnbull*, a questionnaire asked jurors repeatedly about the existence of "racial profiling," and responses were then used by the prosecution to justify the exclusion of four African-American jurors. *Id.* at 276. The court accepted that a "racial profiling inquiry may be relevant in voir dire, such as when a juror brings up the subject of racial profiling, or when racial profiling is related to the defense at trial." *Id.* at 277. However, noting that the phrase "racial profiling" itself "can be a term that engenders a visceral response," and specifically because "racial profiling did not bear any relevance to the case," the court held that using such questions to justify striking African-American jurors was not race-neutral.

Id. at 277-278. The Florida court adopted a rule forbidding racially charged questions to justify exclusion because the "logical extrapolation of allowing this initial line of questioning is that attorneys will use irrelevant inflammatory questions to incite jurors to respond" in a manner that justifies exclusion. *Id.* at 278; *see also Clark v. State*, 601 So. 2d 284, 286 (Fla. Dist. Ct. App. 1992) (juror's predictable response to "provocative[]" questioning about police credibility insufficient at step two: "counsel-instigated antagonism with a prospective juror" will "not suffice as a race-neutral basis"); *Brown v. State*, 733 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 1999) (because of "widely held perception" among African-Americans concerning the existence of racial profiling, inquiries concerning this topic risk "singling the juror out for special questioning designed to evoke a certain response").

New York courts have followed the same rule. Thus, where the prosecutor excluded two black prospective jurors "solely based upon their answers to a race-based question, i.e., whether they believed that police officers 'unfairly target members of the minority community,'" the court held that the prosecutor had failed to provide a race-neutral justification. *People v. Mallory*, 121 A.D.3d 1566, 1567 (N.Y. App. Div. 2014). The court found the question racially biased because it "was unrelated to the facts of this case, which does not involve any allegation of racial profiling" and the prosecutor and court were still able to ask "numerous

race-neutral questions intended to ensure that the prospective jurors would fairly assess the testimony of police witnesses." *Id.* at 1567–68.

Other courts have adopted similar reasoning. *See State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992) (supposed hostility to the criminal justice system not race-neutral where juror stated system was "generally fair" but later expressed that there were "flaws" after "repeated invitations from the prosecutor to find some fault with 'the system.'"); *see also Coleman*, 970 So. 2d at 515 (prosecutor violated *Batson* at step two where he "interjected the issue of race").

In direct conflict with the above decisions, our nation's two most populous states, Texas and California, refuse to look beyond the surface of racially charged justifications at *Batson* step two. Texas courts have endorsed the practice – also sanctioned by the California Supreme Court in appellant's case and other cases – of using questions about the racially divisive Simpson trial as the basis for striking all blacks from the jury. *Shelling v. State*, 52 S.W.3d 213. 219-221 (Tex. App. 2001) (en banc). In *Shelling*, the prosecutor justified his total exclusion of black jurors in part on several jurors' alleged agreement with the O.J. Simpson verdict. Over a sharp dissent, the court held that the justifications were race-neutral, despite the "common knowledge that the Simpson trial had a polarizing effect on the American public." *Shelling v. State*, 52 S.W.3d 213, 220 (Tex. App. 2001); *cf. id.* at p. 225 (Mirabal, J., dissenting) ("We should not sanction skirting around *Batson* by condoning the peremptory strike of a

member of a particular minority based solely on one answer to one question about which a vast majority of that minority have been demonstrated to agree"); *see also id.* at 227 (Price, J., dissenting) (the Simpson "question and answer was the easiest and most consistent method for the prosecutor accomplishing his desired result" of excluding blacks from the jury).

Lower court decisions condoning the use of racially charged questioning have had significant and predictable consequences. Soon after the *Shelling* decision, a training manual was disseminated to Texas prosecutors specifically listing "Agreed with O.J. Simpson verdict" as a permissible race-neutral justification. Gilad Edelman, *Why Is It So Easy For Prosecutors To Strike Black Jurors?*, THE NEW YORKER (June 5, 2015). And numerous Texas cases have since featured O.J. Simpson as the purportedly "race-neutral" justification for excluding black jurors. *Herbert v. State*, No. 10-11-00290-CR, 2012 WL 1366576, at *2 (Tex. App. Apr. 18, 2012) (unpublished) (black juror's statement in relation to the Simpson case that "it's guilty until you're proven innocent" served as "race-neutral" justification); *Craig v. State*, No. 06-07-00038-CR, 2008 WL 89751, at *3 (Tex. App. Jan. 10, 2008) (unpublished) (juror's purportedly angry eye contact when prosecutor asked panel whether "anyone thought O.J. was innocent" was race-neutral); *see also Manning v. Epps*, 695 F.Supp.2d 323, 350-352 (N.D. Miss. 2009) (finding race-neutral Mississippi prosecutor's justifications

that several black jurors read "Ebony" and "Jet" magazines, magazines the prosecutor dubiously claimed "championed O.J. Simpson's innocence").

Like Texas, California has not only accepted the practice of strikes based on racially charged questioning about the Simpson case, but has done so repeatedly. This may explain why the California court didn't even acknowledge the racially fraught nature of the O.J. Simpson justifications in Mr. Smith's case. *See Smith*, 4 Cal. 5th at 1153 (finding the justification found "some support" in the record because "[w]e have previously upheld challenges based on similar reasons"). In fact, currently pending before the California Supreme Court is yet *another* capital case from the same county as appellant's – but tried in 2000 – in which all black jurors were stricken, and in which the prosecutor again relied on answers to *identical* questions about the Simpson trial. Bob Egelko and Megan Cassidy, *'O.J. Strategy': Lawyers Say Prosecutors Ask about Guilt to Cull Black Jurors*, SAN FRANCSCO CHRONICLE, November 4, 2018.

The practice of using answers concerning racially divisive topics to exclude black jurors is by no means limited to questions concerning the O.J. Simpson case. Every era in American history has had racially polarizing moments. And whether these events garner national – or merely local – attention, prosecutors have used them as a basis to justify excluding racial minorities. *See*, *e.g.*, *Congdon v. State*, 262 Ga. 683, 684 (1993) (justification that prospective juror was resident of Ringgold and "black residents of Ringgold had

harshly criticized the sheriff for his handling of another case" was not race-neutral); *cf. State v. Self*, No. E201402466CCAR3CD, 2016 WL 4542412, at *36 (Tenn. Crim. App. Aug. 29, 2016) (unpublished) (although "the Trayvon Martin case involved race-related issues" the prospective juror's purported dissatisfaction with the verdict in that case was a race-neutral justification);[9] *People v. Silas*, No. A150512 (Cal. Ct. App. filed Feb. 9, 2017) (black juror stricken based on support for Black Lives Matter movement).

The American jury acts "as a vital check against the wrongful exercise of power by the State and its prosecutors" and the "intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). If the promise of *Batson* is to have any force, this Court should grant review and remind lower courts that questioning on racially polarizing topics unrelated to the case is not a valid basis for peremptory challenges.

[9] A black Florida teenager, Trayvon Martin, was killed by a white resident, George Zimmerman, and the subsequent trial was widely publicized and highly controversial. Jeffrey Billman, *Yes, race did play a role in the Trayvon Martin case*, ORLANDO WEEKLY, July 16, 2013 ("Not since O.J. Simpson has a murder case so polarized America.")

B. This Case Presents a Ready Vehicle to Address the Split of Authority on the Propriety of Using Racially Charged Justifications Unrelated to the Case

This is precisely the type of case in which appropriately identifying the O.J. Simpson justifications as racially biased would have the strong potential to change the outcome.

Every court to look at this case has expressed doubt at the prosecutor's "laundry list" of justifications. As the California Supreme Court conceded, the trial court itself voiced "skepticism as to certain of the offered reasons," *Smith*, 4 Cal. 5th at 1158, and this skepticism was reserved for the very jurors that the trial court felt presented "much closer question[s]." 8RT:2613 (Mr. Dredd and Ms. Sam). Yet despite "close questions" and doubts about the justifications, the trial court latched onto a single (highly questionable) reason among the prosecutor's "laundry list" as providing a race-neutral basis. 8RT:2615 (denying the *Batson* claim as to Ms. Sam and Mr. Dredd solely based on the prosecutor's lingering doubt justifications).[10]

Many additional flaws overlooked by the trial court were identified by the California Supreme Court when it examined the "laundry list." Specifically, as

[10] A more fair reading of the record was that Ms. Sam and Mr. Dredd wanted to be sure of guilt, not that they had any particular openness to a "lingering doubt" argument. *Cf. Smith*, 4 Cal. 5th at 1152. Nor is it likely that they even understood that arcane legal term. The trial court's statement that it did not "share[]" the prosecutor's "concern" for either juror confirms this reading. 8RT:2614. And there was no suggestion that lingering doubt would even appear as a defense argument. Finally, Ms. Sam and Mr. Dredd's expressed desire for certainty of guilt in a death penalty case was a characteristic shared by a non-black juror seated by the prosecution, a juror who was never even questioned on the topic. *See infra*.

to the very two jurors who presented "much closer questions" for the trial court, the California Supreme Court stated that several reasons either "lack[ed] record support or do not withstand comparison to the prosecutor's treatment of other jurors." *Smith,* 4 Cal. 5th at 1153, 1154.

Critically, if excusal based upon the racially divisive O.J. Simpson Question was *not* race-neutral, the California Supreme Court needed to resolve a second, important question which almost certainly would have altered the outcome. How should courts address cases in which race – at least in part – played a role in the prosecution's decision to strike a juror: so-called "mixed-motive" cases? *See Smith*, 4 Cal. 5th at 1162 n.7 (declining to resolve the open question of mixed-motives in *Batson* cases because it failed to discern any race-conscious justifications). The mixed-motives question has led to a tangled knot of conflicting, published opinions in both state and federal courts. *See generally*, Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 297-301 (2006) (collecting and discussing conflicting tests).

While this Court could of course resolve the lower court split on mixed-motives in Mr. Smith's case, it need not do so. For the purpose of this petition, it is enough to note that the mixed-motive question would likely be outcome determinative. Although the California Supreme Court has yet to determine which of the several available tests to apply to a case of mixed-motives in the

Batson context, *Smith*, 4 Cal. 5th at 1162 n.7, the test applied by lower California courts is *per se* reversal. *People v. Douglas*, 22 Cal. App. 5th 1162, 1172-76 (Cal. Ct. App. 2018).

And even if a less stringent test applies, a mixed-motives analysis would almost surely change the outcome. Both the trial court and reviewing court in this case expressed doubts regarding numerous justifications. Moreover, black jurors' responses to the O.J. Simpson Question was not only a ubiquitous justification, but it rose to the level of the prosecutor's "main concern" – even for the juror most plainly problematic to the prosecution. 8RT:2594. If the O.J. Simpson issue was the prosecutors "main concern" and applied to every single juror, it can hardly be characterized as an insubstantial factor in his decision-making. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (*Snyder*) (declining to resolve mixed-motives question, but assuming that peremptory strike shown to be "motivated in substantial part by discriminatory intent could not be sustained").

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE ACKNOWLEDGED SPLIT OF AUTHORITY REGARDING WHETHER A REVIEWING COURT CAN DEFEAT COMPARATIVE ANALYSIS BY MANUFACTURING REASONS NEVER ARTICULATED BY PROSECUTORS IN ORDER TO JUSTIFY WHY SIMILARLY SITUATED JURORS WERE SEATED

The instant case presents yet another important *Batson* issue that splits lower courts and is ripe for resolution by this Court: Is it appropriate for a court reviewing a *Batson* claim to bolster the prosecutor's showing by picking out

differences, not cited by the prosecutor at trial, between stricken and seated jurors – particularly when those reasons were not voiced by the State on appeal?

A. The Instant Case Exemplifies the Latest Iteration of the California Court's Evasion of this Court's *Batson* Jurisprudence

This Court has consistently recognized that a rigorous and methodical review of the entirety of the record in evaluating a prosecutor's credibility is crucial to the vitality of *Batson*. *See Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*); *Snyder*, 552 U.S. 472; *Foster v. Chatman*, 578 U.S. ___, 136 S.Ct. 1737 (2016) (*Foster*). In doing so, the Court has expressly recognized the critical importance of examining whether the prosecutor's justifications for striking minority jurors applied with equal force to other jurors who were permitted to serve. *See, e.g., Miller-El II*, 545 U.S. at 241 (describing this approach as a tool so "powerful" that it was more probative than a prosecutor's decision to strike 10 of 11 black prospective jurors). This "comparative juror analysis" is merely an expression of the core doctrine of equal protection; as Justice Kennedy observed, the very "definition of discrimination" is "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring).

For decades, however, the Supreme Court of California has resisted the robust analysis employed by this Court in *Batson* cases, and has been particularly hostile to the use of side-by-side comparisons of seated and stricken jurors sharing the same allegedly undesirable characteristics. Although the

California Supreme Court initially recognized the importance of this invaluable tool (*see People v. Trevino*, 39 Cal. 3d 667 (1985)), in 1989 that Court (with a different cohort of justices) made an abrupt about-face, holding that such an approach put "undue emphasis" on comparisons which were "difficult, if not impossible" for appellate courts to evaluate. *People v. Johnson*, 47 Cal. 3d 1194, 1221 (1989) (overruling *People v. Trevino*, *supra*). For more than a decade, California all but forbade the use of comparative juror analysis in *Batson* cases at every level of review, claiming that such comparisons were "one-sided" and that it was "not realistic" to expect trial judges to engage in them. *People v. Box*, 23 Cal. 4th 1153, 1190 (2000).

In response to obvious conflict with this Court's cases, the California Supreme Court has tempered its statements, but has not changed its practice. After this Court's opinion in *Miller-El I*, the California court announced that comparative juror analysis – though still "largely beside the point" – was "not *irrelevant*." *People v. Johnson*, 30 Cal. 4th 1302, 1323 (2003) (emphasis in original) *reversed by Johnson v. California*, 540 U.S. 1045 (2003). Recognizing that the prior doctrine prohibiting all comparative analysis was clearly untenable, the state supreme court first refashioned its rule into one forbidding comparative analysis "for the first time on appeal" – claiming that the (newly formulated) rule was exactly what it had been saying all along. *People v.*

Johnson, 30 Cal. 4th at 1318-1325.[11] Then, after this Court's opinion in *Miller-El II* and *Snyder* rendered that approach indefensible, the state court grudgingly endorsed appellate comparative analysis – but protested that it was an "exceptionally poor medium to overturn a trial court's factual finding." *People v. Lenix*, 44 Cal. 4th 602, 624 (2008).

Despite this reluctant theoretical acceptance of comparative juror analysis, the California court has continued to find ways to derail its practical application. The California Supreme Court has issued more published *Batson* decisions than any other court in the country since its initial rejection of comparative analysis in 1989.[12] Yet over the course of those three decades, the state court has *never* found that a comparison between stricken and seated jurors proved a prosecutor's reasons were pretextual.[13] "[T]he nearly absolute uniformity of results produced by [California Supreme Court's] *Batson*

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[11] *Cf. id.* at 1331 (Kennard, J., dissenting) (explaining that this reinvention of prior caselaw was unsupported).

[12] See Appendix D.

[13] Out of the 137 *Batson* decisions issued since 1989, California has found violations only three times. *People v. Silva*, 25 Cal. 4th 345 (2001) was an extreme case "where the prosecutor, believing that the jury in the first trial had "'hung . . . on racial grounds,'" struck all five Hispanic members of the venire and "all but announced his desire not to have any Hispanic person serve on the second jury." *People v. Harris*, 57 Cal. 4th 804, 885 (2013) (Liu, J., concurring). In another case, the prosecutor was found to have violated *Batson* only "a few months earlier" and then used "[ten] of his first 11 challenges" on black jurors: leading one judge to remark that he "failed—or refused—to learn his lesson." *People v. Fuentes*, 54 Cal. 3d 707, 712 (1991); *id* at 722 (Mosk, J., concurring). Most recently, the court reversed a case in which it found comparative analysis unnecessary because the prosecutor's asserted justification was completely inexplicable. *People v. Gutierrez*, 2 Cal. 5th 1150, 1154-1175 (2017).

jurisprudence is striking." *People v. Harris*, 57 Cal. 4th 804, 886 (2013) (Liu, J., concurring).

The instant case illustrates the most recent device adopted by the California court to vitiate comparative analysis. Mr. Smith's case was the first in over thirty years in which the court actually acknowledged that comparative analysis undercut some of the prosecutor's explanations. *See Smith*, 4 Cal. 5th at 1153 (several reasons for excusing Ms. Sam "do not withstand comparison to the prosecutor's treatment of other jurors"); *id.* at 1157 & n.5 (complaints about Mr. Dredd "undermined" by comparative analysis). However, each time that it identified apparently similarly situated seated jurors whom the prosecutor nonetheless accepted, the court cited differences between these jurors and stricken jurors – differences that were never articulated by the prosecutor nor noted by the trial court. *Smith*, 4 Cal. 5th at 1150, 1153 fn. 3, 1156, 1161.

The instant case presents a perfect exemplar of the state of *Batson* jurisprudence in California. Reviewing courts are permitted – indeed are required – to "scour the record for statements by the struck jurors that might support the prosecutor's explanations" even though "the prosecutor did not specifically rely on any of the statements that the court cites[.]" *People v. Williams*, 56 Cal. 4th 630, 721 (2013) (Liu, J., dissenting). Indeed, this case takes the crippling of *Batson* analysis one step further. Because the California Supreme Court found and relied upon distinctions between seated and stricken

jurors never even articulated by the state's appellate attorneys, Mr. Smith and his attorneys learned of them for the first time reading that court's opinion.

B. Lower Courts Conflict on the Propriety of Reviewing Courts Inferring Distinctions Between Seated and Stricken Jurors that Were Never Cited at Trial

In defending a prosecutor's strikes of black jurors on appeal, the State may not add new reasons upon which the prosecutor did not rely. "[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." *Miller-El II*, 545 U.S. at 252. Given that prosecutors must rest on reasons actually supplied (the "stand-or-fall principle"), a "powerful" tool in ferreting out pretextual justifications is side-by-side comparisons of seated jurors who share the stricken jurors' allegedly disqualifying characteristic. *Id.* at 241.

The application of these two principles – the "stand-or-fall" principle and comparative juror analysis – has created a substantial split of authority. The conflict arises because State attorneys have frequently sought to undercut the persuasive force of comparative analysis by conceding that stricken and seated jurors share the characteristic the prosecutor cited, but then arguing that seated jurors possess *other* characteristics – never cited by the prosecution at trial – that (they speculate) account for the differential treatment. *See*, *e.g.*, *Miller-El II,* No. 03-9659*,* Brief for Respondent at 19-20, 2004 WL 2446199 at *19-20;

Snyder, No. 06-10119, Brief for Respondent at 43, 2007 WL 3307731 at *43; *Foster,* No. 14-8349*,* Brief for Respondent at 36-37, 2015 WL 5302540 at *36-37.

Miller El II explicitly rejected this tactic. 545 U.S. at 245, n.4 (declining to consider "other reasons" why nonblack panel members "who expressed views . . . similar to [the stricken juror] were otherwise more acceptable to the prosecution" because they "focus[] on reasons the prosecution itself did not offer."); *see also id.* at 247, n.6 (a "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.") Thus, most state and federal courts have conducted comparative analysis without relying on hypothetical distinguishing characteristics of seated jurors not cited by the prosecutor. *See*, *e.g.*, *Green v. LaMarque*, 532 F.3d 1028, 1030 (9th Cir. 2008) ("Two jurors do not have to have all the same characteristics to be similarly situated."); *United States v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir. 2008) ("it is not necessary to show that the excluded venire panelist was similarly situated to a white potential juror in all respects"); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 519 (Tex. 2008) (shared characteristics between seated and stricken jurors "suggest that the stated reason . . . was pretextual"); *State v. McFadden*, 191 S.W.3d 648, 654 (Mo. 2006) (accord); *Sharp v. State*, 151 So. 3d 342, 388 (Ala. Crim. App. 2010) ("the likelihood of two potential jurors sharing all the same characteristics and having no differences at all is remote, at best,

which is why such a view has been expressly rejected by the United States Supreme Court."); *Broady v. Com.*, 16 Va. App. 281, 285 (1993) (if the state does not provide a ground for distinguishing seated jurors at trial, the fact that a particular "reason asserted for the strike is equally applicable to other members of the venire of a different race" is "not a satisfactory race-neutral explanation").

One federal jurisdiction, however, recently joined California in rejecting this majority approach. *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) (en banc) (*Chamberlin*). The Fifth Circuit circumvented the stand-or-fall principle by a simple act of "repackaging" – what was once "a new reason for striking the black jurors is now a new reason for keeping the white juror." *Id.* at 853 (Costa, J., dissenting) (collecting federal cases which contradict approach adopted by the Fifth Circuit majority). The tactic applied by the Fifth Circuit in *Chamberlin* is a familiar one in California, which has long discounted comparative analysis by inferring grounds of distinction never set forth by the prosecutor. *People v. Williams*, 56 Cal. 4th at 721 (Liu, J., dissenting). Indeed, the California Supreme Court has taken tactical evasion of comparative analysis to yet another level, holding that compared jurors must have "expressed 'a substantially similar *combination* of responses,' in all material respects, to the jurors excused." *People v. Winbush*, 2 Cal. 5th 402, 443 (2017) (emphasis in original). This embellishment in California's caselaw is in direct conflict with this Court's admonition that potential jurors are not products of "cookie cutters." *Miller-El*

II, 545 U.S. at 247, fn. 6; *cf. People v. Winbush*, 2 Cal. 5th at 490 (Liu, J., concurring) (California doctrine contradicts High Court precedent on this point).

The prosecutor's "kitchen sink" approach in Mr. Smith's case – in which he propounded fully a dozen bases for excusing a single juror – exposes the folly of this approach. It would be highly unlikely (to say the least) for *any* two jurors to have shared *all* of the characteristics cited by the prosecutor – much less for them to have additionally shared all of the other purported distinguishing points culled from the record by the reviewing court. If all prosecutors need to evade rigorous comparative analysis is numerous justifications, they will be more than happy to oblige. *See* Karen Nelson, *Batson Basics* (2004) at 26, available at https://www.themarshallproject.org/documents/2461886-batson-basics (last visited Dec. 14, 2018) (training manual urging Texas prosecutors to "give multiple reasons" because "multiple reasons may save a case under a dual motivation theory"); *but cf. Foster v. Chatman*, __ U.S. ___, 136 S. Ct. 1737, 1748 (2016) (criticizing prosecutor's "laundry list of reasons"). Yet despite this Court's customary practice of applying comparative analysis to given justifications (and not combinations of justifications), other courts have begun to follow the same dubious path as California. *People v. Beauvais*, 393 P.3d 509, 525 (Colo. 2017) ("female potential jurors exhibited unique combinations of traits that materially distinguished them from the empaneled male jurors"); *cf. id.*at 528 (Marquez, J., dissenting) ("*Foster* plainly rejects this approach").

C. This Case Presents an Appropriate Vehicle to Clarify the Proper Application of Comparative Analysis

The trial court itself recognized that this case presented a "close[] question." 8RT:2613. For its part, the reviewing court acknowledged that the prosecutor's reasons for striking the black jurors were often flawed: lacking support in the record, logic, or comparison with the views of seated jurors. Examining *only* the flaws conceded by the state high court demonstrates that they existed for each and every stricken juror. *See*, *e.g.*, *Smith*, 4 Cal. 5th at 1149, 1151, 1153-1154, 1161. This is just the sort of case in which a proper analysis would impact the outcome.

Moreover, the California Supreme Court applied precisely the same flawed techniques enumerated above to Mr. Smith's case in order to dismiss his comparative analysis. When it wished, the court took the opportunity to comb through the questionnaires itself for points not raised by the prosecutor. But it repeatedly failed to perform comparative analysis regarding the most fraught justifications of them all: those premised on the O.J. Simpson Question. These justifications failed comparative analysis spectacularly.

The prosecutor again and again cited black jurors' views on the Simpson case. Yet at the same time he willingly accepted juror after juror who expressed similar views – so long as they were not black. Almost half of the jurors accepted by the prosecutor were not upset with the verdict in the Simpson case. *supra* at p. 9-10. Yet a reader of the opinion below would have no idea of this.

The state court simply ignored this powerful evidence of pretext. Instead, that court rested acceptance of Simpson-based strikes on the slender reed that it had previously found such justifications "race-neutral," or by simply reciting the stricken juror's answers. *Smith*, 4 Cal. 5th at 1148, 1153, 1156.

While the court below repeatedly failed to conduct comparative analysis when doing so would expose pretext, when it *did* perform such analysis, it did so with an eye towards dismissing its relevance. The California court provided grounds for distinguishing seated jurors that the prosecutor – and even the state's attorneys – did not voice. For instance, the California high court dismissed a comparison between Ms. Sam and Juror 47 who, like Ms. Sam, wished to be completely sure of guilt prior to rendering a death sentence. *Compare* 17:7thSCT:4972 (Q. 76) (Ms. Sam's "general feelings" toward the death penalty were "I'm for [the death penalty] but we must absolutely prove guilt"), 4974 (Q. 79) (Ms. Sam's statement death appropriate "If it can be proven without a doubt by evidence the crime was committed.") *with* 22 SCT 6476 (Q. 74) (Juror 47's statement that death should not be considered unless the jury is "absolutely sure of guilt.") (emphasis in original)). Ignoring Juror 47's lukewarm death penalty views[14] and the enormous number of strongly pro-prosecution sentiments held by Ms. Sam, *see supra*, fn.6, the California Supreme Court

[14] 22SCT:6475 (Q. 76) (in explaining her "general feelings" on the death penalty, Juror 47 voiced "mixed feelings" and pointed to the dysfunction of the California death penalty which "doesn't seem to be carried out too often.")

discounted the comparison for this "lingering doubt" justification. Its reasoning: in Question 79, where Ms. Sam demanded solid proof of guilt for a death sentence, Juror 47 had responded that she would apply the penalty based upon "the evidence presented – not my opinion about punishment." *Smith*, 4 Cal. 5th at 1152. But the state court raised this distinction without any adversarial briefing to aid it. Because of this troubling practice, it overlooked the fact that Ms. Sam had said exactly the same thing in *her* questionnaire. *See* 17:7thSCT:4982 (she could "absolutely" set aside her "personal opinion on punishment and render a verdict based solely on the evidence" – "that's the whole idea of a fair trial and jury")(emphasis in original).

A similarly flawed approach was used in analyzing the strike of Mr. Dredd, a juror who had a close relative in law enforcement and who had supported the initiative to restore capital punishment in California. *See supra* fn.7. Mr. Dredd, like Ms. Sam and Juror 47, had asserted that he wanted solid proof of guilt, writing that "care should be used in sentencing someone to death. Their [sic] should be no doubt." He later reiterated the point: "I feel that the death penalty should be used in extreme cases where their [sic] is no doubt." *Smith*, 4 Cal. 5th at 1155; *cf. Miller-El II*, 545 U.S. at 258 (similar responses showed that juror was "unambiguously in favor" of the death penalty). When the topic arose in voir dire, Mr. Dredd initially reiterated that he would want "absolute proof" of guilt for a death verdict. *Smith*, 4 Cal. 5th at 1155. But after

the prosecutor explained to Mr. Dredd that "the prosecution need only present proof beyond a reasonable doubt, not absolute proof," Mr. Dredd immediately confirmed that he could accept the reasonable doubt standard. *Id.*; 8RT:2582.

The California Supreme Court defeated comparison of Mr. Dredd to Juror 47 by reinventing the prosecutor's justification. The prosecutor only cited Dredd's questionnaire. 8RT:2595,2599, 2605. But to the California Supreme Court, it was the additional fact that Mr. Dredd "repeated[]" the views in his questionnaire in voir dire (notably, because Mr. Dredd was asked to do so by the prosecutor). *Smith*, 4 Cal. 5th at 1155; 8RT:2582. Yet the prosecutor never brought up voir dire, presumably because in voir dire Mr. Dredd immediately accepted the prosecutor's explanation that only proof beyond reasonable doubt is required. *Id.* And the prosecutor's "lingering doubt" justification was not merely one factor among many: it was the reason the trial court credited as "the factor" rendering strikes of Ms. Sam and Mr. Dredd "not racially motivated." 8RT:2615. By allowing itself to sift through the record for differences not articulated by the prosecutor, the lower court was thus able to dismiss comparative analysis on the key justification upon which the trial court grounded its finding of no pretext.

Equally important, had Mr. Smith's counsel been presented with an opportunity to respond to the points of differentiation hypothesized by the California Supreme Court, he would have had a powerful response: the California Supreme Court's conjectures conflicted with the *actual grounds* to

distinguish similarly situated seated jurors presented by the prosecutor at trial. *See* 8RT:2620 (prosecutor's actual grounds for distinguishing seated and stricken jurors – they were "less confused or had less conflict in their various answers" about the death penalty).

The disjuncture between the state court's opinion and the prosecutor's own words exposes an obvious danger in appellate courts' speculating about grounds to distinguish similar jurors when those grounds were not provided below. In doing so, courts risk fabricating differences that never even occurred to prosecutors when making the record on which they are supposed to stand or fall. This practice runs afoul of a central *Batson* principle: "'It does not matter that the prosecutor might have had good reasons [for eliminating minority jurors]; . . . what matters is the real reason they were stricken.'" *Johnson v. California,* 545 U.S. 162, 172 (2005) (citation omitted). Because the issue of how to properly conduct comparative analysis deeply divides courts across the country, this Court should intervene to chart a proper course.

III. THIS PETITION RAISES ISSUES WHICH WILL LIKELY SOON BE DECIDED BY THIS COURT IN *FLOWERS V. MISSISSIPPI*

This Court has granted certiorari in *Flowers v. Mississippi,* No. 17-9572, ___ S.Ct. ___ , 2018 WL 3159779 (Nov. 2, 2018) (*Flowers*) to assess Curtis Flowers's claim that the prosecutor in his case illegally eliminated African-American prospective jurors on the basis of race. Numerous similarities between

the legal issues in Mr. Smith's case and Mr. Flowers's case militate in favor of holding this case pending resolution of *Flowers*.

A central feature in Mr. Flowers's case is evidence that the prosecutor had repeatedly stricken black jurors from the jury in prior trials of the same defendant, and that the lower court had given insufficient weight to this evidence. *See Flowers v. Mississippi*, No. 17-9572, Petition for Certiorari at i., 2018 WL 4929890 at *1 (original Question Presented). Although the pattern in Mr. Flower's case was particularly egregious, the prosecutor in Mr. Smith's case also struck all black prospective jurors from the jury in consecutive trials against Mr. Smith. And the California Supreme Court, like the Mississippi court, refused to give due consideration (or indeed any consideration) to this evidence. The California Supreme Court did not acknowledge anywhere in its opinion that there even *was* a prior *Batson* motion against the prosecutor in the first trial, or that he had repeatedly eliminated all seated black jurors in this interracial murder case. Because this Court will likely give guidance on how lower courts should assess such patterns of targeting black jurors, a remand may be appropriate to allow the California Supreme Court an opportunity to reevaluate its decision in light of this Court's resolution of the issue.

In addition, the Mississippi Supreme Court in *Flowers* repeatedly violated the tenets of comparative juror analysis laid forth in this Court's *Batson* jurisprudence and discussed above with respect to Mr. Smith's case. For

example, the Mississippi Court discounted Mr. Flowers's comparative analysis because one of the allegedly undesireable characterstics shared by numerous seated jurors was "not the sole reason given by the State" to excuse a particular juror. *Flowers v. State*, 240 So. 3d 1082, 1126 (Miss. 2017); *cf. Miller El II*, 545 U.S. at 245, n.4, (a rule requiring "exactly identical white juror[s]" would "leave *Batson* inoperable"); *People v. Winbush*, 2 Cal. 5th at 490 (Liu, J., concurring) (noting that California doctrine on this point contradicts controlling Supreme Court authority). As discussed above, the California Supreme Court in Mr. Smith's case repeatedly discounted the fact that identical characteristics were shared by seated and stricken jurors by pointing to the existence of other, allegedly undesireable, characteristics supposedly unique to the stricken jurors. A remand may be appropriate so that the California high court can correctly implement its flawed comparative juror analysis in light of the *Flowers* decision.

Finally, Mr. Flowers's case, like Mr. Smith's, involves numerous instances in which the justification proffered by the prosecutor were demonstrably false. *See, e.g.*, *Flowers v. State*, 240 So. 3d 1082, 1133 (Miss. 2017) (acknowledging that multiple justifications tendered were "not supported by the record"). Much like the lower court in *Flowers*, the California Supreme Court was forced to concede that multiple justifications given by the prosecutor were simply untrue. *Smith*, 4 Cal. 5th at 1153 (multiple justifications for Ms. Sam "lack record support" and failed comparative analysis); *id.* at 1154 (prosecutor's reasons for

striking Mr. Dredd. "raise much the same difficulty"). It is likely that the *Flowers* decision will provide lower courts with direction on how to assess justifications which plainly contradict the record. Remand therefore may be appropriate. At this juncture, Mr. Smith requests a grant and hold pending resolution of the *Flowers* case.

CONCLUSION

Wherefore, petitioner prays that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California.

Dated: December 14, 2018

Respectfully submitted,

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