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

No. 18-7094

# In the Supreme Court of the United States

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FLOYD DANIEL SMITH,
*Petitioner*,

v.

STATE OF CALIFORNIA,
*Respondent*.

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

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## REPLY TO BRIEF IN OPPOSITION

MARY K. McCOMB
State Public Defender
*ELIAS BATCHELDER
Senior Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
(510) 267-3300
elias.batchelder@ospd.ca.gov

**Counsel of Record*

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## REPLY TO BRIEF IN OPPOSITION

This case presents two important questions concerning the application of *Batson v. Kentucky*, 476 U.S. 79 (1986) (*Batson*) that deeply divide the lower courts.

First, how should courts respond when prosecutors use racially linked criteria, unrelated to the case, to justify eliminating black jurors? Here – in a racially charged trial of an interracial murder – the prosecutor justified striking all four prospective black jurors based on their attitudes towards the O.J. Simpson trial. Petition for Writ of Certiorari ("Pet.") at 2-4, 6-9.

The Simpson trial was one of the most racially divisive proceedings within the American criminal justice system in recent memory. The case so seared itself into the public discussion of race that it has been described as almost "synonymous with race, race issues, and racial prejudice."[1] Respondent nonetheless contends that this case presents a poor vehicle for Question 1 because the prosecutor's justifications did not "refer[] expressly to race." Brief in Opposition ("BIO") at 20. This argument ignores that the racially polarizing nature of the Simpson trial rendered explicit reference to race unnecessary.

Respondent's claim that Mr. Smith did not raise the problems of the Simpson justifications with the California courts (BIO at 17-18) is wholly meritless; in fact, he did so at every opportunity. Despite his efforts, none of the courts below examined the

[1] LENA HALL, A COMPREHENSIVE SURVEY OF SOCIAL BEHAVIORS IN THE O.J. SIMPSON CASE, FROM A TO Z, 171 (1999).

racially charged nature of these justifications. Notwithstanding respondent's creative efforts to manufacture novel (and legally unsupported) procedural bars, this case presents an appropriate vehicle to address the widely recurring issue of racially charged justifications, unrelated to the case, utilized to excuse black jurors.

Second, Mr. Smith raises the question of whether reviewing courts may simply hypothesize distinctions between seated jurors and similarly situated black jurors stricken by the prosecutor. Can reviewing courts engage in such post-hoc analysis when these distinctions were neither articulated by the prosecutor at trial nor, in this case, by the state's attorneys on appeal? Currently, the answer to that question depends on the jurisdiction in which the trial occurred.

Respondent replies that the California court correctly "limited its analysis to the reasons stated by the prosecutor." BIO at 24-25. The assertion does not respond to the issue tendered. All that it asserts is that the court below engaged in a comparative juror analysis – *i.e.*, it compared the stricken jurors with seated jurors to whom the asserted justifications also applied. The legal issue is whether, in doing so, the reviewing court may dismiss these comparisons based on purported distinctions between the stricken and seated jurors that were never voiced by the prosecutor, but were instead cherry-picked by the reviewing court from the questionnaires and voir dire record. This issue, too, deeply divides lower courts and demands resolution – a split was recently exposed by the divided Fifth Circuit decision in *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) (en banc) (*Chamberlin*). *See* Pet. at 31.

Regardless, *Flowers v. Mississippi*, No. 17-9572 (*Flowers*) will surely provide additional guidance on comparative analysis (and on other *Batson* issues). At a minimum, this Court should hold this case pending resolution of *Flowers*.

## I. Respondent's Claim That Question 1 Is Procedurally Barred Has No Basis In Law Or Fact

Respondent suggests that the claim is not properly before the Court because Mr. Smith "did not object to the prosecutor's citation of juror's views on the Simpson verdict as non-race-neutral." BIO at 17. The suggestion fails both because 1) there is no precedent – either in this Court or the California courts – for requiring such an objection; and 2) Mr. Smith's counsel did so object.

This Court has never required further objections at *Batson* step two. To the contrary, in *Hernandez v. New York*, 500 U.S. 352 (1991) (*Hernandez*), this Court proceeded to the merits of the step two challenge despite the absence of a second objection to the non-race-neutrality of the justification. *Id.* at 359. The California court is in accord. *See People v. Gutierrez*, 2 Cal.5th 1150, 1167-68 (2017) (*Gutierrez*) (addressing step two challenge on the merits despite absence of additional objection).

Even were a second objection necessary, Mr. Smith did so. As respondent concedes, Mr. Smith's African-American counsel took particular offense to the justifications based on the Simpson case, arguing that they were "not a factor to be considered" as they were not "related to this particular case" and failed to show any "particular bias." 8RT:2610; BIO at 17. Respondent attempts to characterize this objection as somehow distinct from an allegation that the Simpson-based justifications

lacked race neutrality. BIO at 17. But respondent ignores what the terms "specific bias" or "relating to the particular case" mean under California law. These phrases have been "defined" in California as anything other than impermissible "group bias." *People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216. So when Mr. Smith's counsel objected to the Simpson justifications as not "related to this particular case" and failing to show "particular bias," she was most certainly challenging their race-neutrality.

Mr. Smith does not, however, mean to suggest that the existence of this additional objection is irrelevant. The fact that Mr. Smith specifically objected to the O.J. Simpson justifications makes all the more inexplicable that both the trial court and the California Supreme Court simply overlooked their problematic nature.

Respondent is similarly mistaken in claiming that Mr. Smith "did not assert that he was entitled to relief at *Batson* step two" before the California Supreme Court. BIO at 17. As respondent again concedes, Mr. Smith articulated that the black jurors' attitudes towards the Simpson verdict was "questionably race-neutral," and that the prosecutor used a "thinly veiled facially neutral justification" that allowed the prosecutor to use "a racially polarized issue as a proxy for race." BIO at 17; Appellant's Second Supp. Opening Br. 10, 43. The term racial "proxy" is precisely the term the California Supreme Court (and others) use to characterize justifications that do not pass muster at *Batson*'s step two. *Gutierrez*, 2 Cal.5th at 1167; *United States v. Bishop*, 959 F.2d 820, 826 (9th Cir. 1992) (*Batson* prohibits neutral justifications "acting as a discriminatory racial proxy"); *see also Hernandez*, 500 U.S. at 379 (Stevens, J.,

dissenting) ("An explanation that is 'race neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice"). In his briefing below, Mr. Smith, citing a step two challenge addressed in the recent *Gutierrez* decision,[2] argued that his case "presents a justification that threatens to function as a proxy for race – black jurors' failure to be 'upset with' the O.J. Simpson verdict." Appellant's Second Supp. Opening Br. at 43; *see also id.* at 53 ("Using such a racially divisive question, wholly unrelated to the case, as a reason to excuse black jurors poses an unacceptable risk of discrimination"). And Mr. Smith dispelled any remaining ambiguity by addressing the point in great detail in his petition for rehearing. *See* Petition for Rehearing, Attached as Appendix E, at 14-18 (arguing that "twice excluding all black jurors in the box by repeatedly citing their responses to questions about the O.J. Simpson trial is not race neutral" under *Batson* step two and explaining that the "[t]he opinion fails to address this argument"). The issue was squarely presented to the California Supreme Court.

## II. Respondent's Other Claims That The Case Presents A Poor Vehicle To Address Question 1 Are Not Supported

Respondent tenders several other reasons why this case represents a poor vehicle for Question 1. None are persuasive.

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[2] The defendants in *Gutierrez* contended that the prosecutor's reasoning (relating to a juror's residence in the overwhelming Hispanic town of Wasco) "was not neutral, because he was effectively using an individual's residence in Wasco as a proxy for Hispanic ethnicity." *Gutierrez*, 2 Cal.5th at 1167. In his briefing below, Mr. Smith explicitly likened the Simpson justification to the "Wasco issue" in *Gutierrez*. Appellant's Second Supp. Opening Br. at 43.

First, respondent attempts to distinguish the instant case from the many step two cases cited in the petition because in some of those cases the justifications "referred expressly to race," while in others – even though race was not overtly cited – the justification "so closely correlate with race that they cannot satisfy *Batson*'s second step." BIO at 19-21. It is true that striking black jurors based on their attitudes towards the Simpson case does not require explicit reference to race. But as Justice Souter drily observed during oral argument in *Snyder v. Louisiana*, 552 U.S. 472 (2008) (*Snyder*), a person who cannot connect the O.J. Simpson case and race hardly exhibits "a critical mind at work." Tr. of Oral Arg. at 37, *Snyder*, 552 U.S. 472. Thus the attempted distinctions fails because – as demonstrated in the petition – justifications based on African-American jurors attitudes toward the Simpson trial do in fact "closely correlate with race" just as meaningfully as the various other racial proxies rejected by the many jurisdictions cited in the petition.

The defining characteristic the instant case shares with the others cited is that the highly racially-correlative reason given had nothing to do with the case being tried. The point is readily illustrated by a brace of cases discussed by respondent. BIO at 20-21. *Turnbull v. State*, 959 So.2d 275, 276-277 (Fla. Dist. Ct. App. 2006) and *People v. Mallory,* 993 N.Y.S.2d 609, 609 (App. Div. 2014) both dealt with jurors' feelings towards the existence of racial profiling. Although racial profiling is a sensitive topic, a prosecutor in a given case (say, one that focused on a defense of racial profiling) might legitimately harbor concerns about jurors' views on this charged issue. The problem in

both cases was not simply mention of race, but that racial profiling was wholly unrelated to the defense and thus could not serve as a race-neutral justification. Pet. at 16-18. So too here. The O.J. Simpson trial had nothing to do with Mr. Smith's case. Selectively utilizing questioning on this racially charged event to strike all black jurors – two trials in a row – affirmatively betrayed the prosecutor's racial bias.

Even after incorrectly removing many cases from petitioner's list, respondent *still* acknowledges a solid split of authority. BIO at 21. Many jurisdictions refuse to allow prosecutors to employ justifications – regardless of whether they contain an express reference to race – if they are nonetheless racially charged and unrelated to the case. *See id.* (citing examples). According to respondent, however, such cases are "highly fact-specific" and none (that it chooses to cite) involved jurors' views about the Simpson trial. *Id.*; *but see* Pet. at 18-20 (citing cases from Georgia, Mississippi, Texas, and California in which prosecutors offered justifications related to the Simpson trial). But the only thing that is "highly fact specific" is the variety of racial proxies used as justifications (neighborhood, hairstyle, linguistic style, reading magazines targeted at black audiences, etc.). *See* Pet. at 15-16, 19. The Simpson justifications are therefore an ideal vehicle to discuss this issue. No one – neither Mr. Smith, nor respondent, nor amici, nor this Court (excepting possibly the California Supreme Court) – overlooks the reality that the O.J. Simpson trial was at a bare minimum highly racially polarizing.

Respondent next argues that, although Simpson justifications are highly racially polarizing, the California courts "appropriately addressed" the issue "only in the

context of step three of the *Batson* inquiry." BIO at 18. Respondent's position echoes the reasoning (if not desired result) of amici, who argue that certiorari should be granted to establish that when "a factor that is highly correlated to race. . . is offered as a purportedly race-neutral justification for a pattern of racial strikes, it should receive extra scrutiny" at *Batson* step 3. Brief for American Civil Liberties Union et al., *Smith v. California*, No. 18-7094 at 20. Respondent adopts almost identical phrasing: arguing that when a prosecutor's stated justification "may correlate with race" such justification "certainly warrants close judicial scrutiny" and urging that "[a] trial court *must consider* the fact that a facially neutral justification could result in the disproportionate exclusion of African-American prospective jurors as part of the third step of the *Batson* analysis." BIO at 19 (emphasis added).

Petitioner still maintains that the O.J. Simpson justifications fail at *Batson* step two. But whether at step two or step three, the California courts' analysis of the Simpson justification fail under the very approach suggested by the State of California. Respondent again and again claims that the trial court and California Supreme Court undertook the requisite "careful" review of Mr. Smith's claims. BIO at 4, 8, 9, 15, 16 & n.4. But there is nothing remotely resembling "close judicial scrutiny" of the Simpson justifications – which respondent concedes is called for (BIO at 19) – by *any* California court. The trial court, though the issue was brought directly to its attention, simply ignored it. And the California Supreme Court, while mentioning the O. J. Simpson justifications, gave them no meaningful analysis (much less "close judicial scrutiny" of

the fact that the justifications were closely correlated with race and wholly unrelated to Mr. Smith's case). In fact, though urged to, the California court didn't even undertake comparative analysis of the justifications. *See* Pet. at 33-34.

The California courts' failure to identify even the *potential* for a problem with the Simpson justifications leads to respondent's next contention. Respondent excuses the oversight by arguing that both the trial court and the California Supreme Court "viewed the prosecutor's *primary* reasons" as other justifications, or worded differently that the prosecutor "treated views about the [Simpson] verdict as *less important* than views on the death penalty or the standard of proof." BIO at 22 (italics added), 19 n.4 (italics added). This argument mischaracterizes the record. The prosecutor discussed a "laundry list" of justifications and questionnaire responses for each juror. There is little indication from the prosecutor as to which justifications predominated, and certainly no indication that the Simpson justifications were an afterthought.

What *is* known is that even for the most problematic juror – Ms. Davis – the prosecutor claimed that her views on the Simpson case rose to the level of a "main concern" and that Mr. Dredd's relatively bland answers about the Simpson case (answers mirrored by seated white jurors) rendered him "anti[-]prosecution." 8RT:2594; 8RT:2599.[3] And O.J. Simpson was the *only* specific justification applied to all

[3] Respondent correctly notes that the prosecutor also claimed that Ms. Davis's death penalty views rose to the level of his "main concern." BIO at 1 n.1. But this does not support respondent's argument that the prosecutor viewed one as more important than the other. And indeed, the prosecution applied Simpson-based justifications even to Ms. Sam, who held strongly pro-prosecution views on the death penalty. *See* Pet. at 11 n.7.

four black jurors. True, the California Supreme Court avoided meaningful analysis of the Simpson justifications, and focused analysis on other explanations – many of which the court conceded were unsupported by the record or refuted by comparative analysis. Pet. at 12-13. But the California courts' failure to correctly address the unsupportable Simpson justifications is hardly a worthy reason to evade this Court's review.

Respondent next suggests that resolving Question 1 will not affect the outcome. BIO at 22. Not so. Rarely do Attorneys General concede in *Batson* cases that numerous prosecutorial justifications are "wanting" because they either "lack record support" or do not "withstand comparison to the prosecutor's treatment of others." BIO at 11, 16, 24. California does so here. And – though beyond the scope of this reply – these concessions are only a sampling of the flaws in the prosecutor's justifications in the instant case. Setting aside a full accounting of each deficiency in the prosecutor's "laundry list," a conclusive determination by this Court that the Simpson justifications were not race-neutral would almost certainly change the result.

Respondent also claims that Mr. Smith himself agrees that reversal on Question 1 would not "in itself, change the outcome in this case." BIO at 22. That is inaccurate. Although Mr. Smith declined to predict the future with absolute certainty, he stands by his original analysis: a ruling in his favor on Question 1 would "almost surely change the outcome." Pet. at 24. Indeed, under the law that currently applies in California, he would be entitled to automatic reversal. *People v. Douglas*, 22 Cal. App. 5th 1162, 1172-76 (Cal. Ct. App. 2018) (one race-based justification taints the selection process).

To be sure, the California Supreme Court upon remand (or this Court) could revisit the rule applicable to mixed-motives – itself a deeply entrenched split of authority. Pet. at 23. But whichever test applies, this is hardly the sort of "slam dunk" case in which identifying an overtly race-conscious decision-maker is unlikely to change the outcome.

## III. The California Courts' Approach To Comparative Juror Analysis Is Fatally Flawed

The California Supreme Court's methodology for comparative juror analysis involves distinguishing seated and stricken jurors using bases not cited by the prosecutor or discussed at trial. Pet at 28. As most courts considering the issue have concluded, this is an inevitably flawed approach. *See Chamberlin*, 885 F.3d at 855 & n.8 (Costa, J., dissenting) (discussing split of federal court authorities); Pet. at 30-31 (citing additional cases). Because in this process a prosecutor never says anything to distinguish stricken juror A from seated juror B, the approach necessarily requires reviewing courts to make assumptions – based on scant evidence but mostly on the appellate judges' personal predictions – regarding how the prosecutor might have distinguished between two jurors. If the goal of comparative analysis is to detect racial subterfuge by prosecutors, this method is unworkable. It is almost always possible to conjure a distinction between jurors based upon lengthy questionnaires and the whole record of voir dire. The proof in that flaw is in the pudding: in well over a hundred *Batson* opinions issued since it first voiced distaste for the utility of comparative analysis, the California high court has never held that it has demonstrated pretext. Pet. at 27; *see also Chamberlin*, 885 F.3d at 845-846 (Costa, J., dissenting) ("you can

count on one hand the number of cases from this court finding the discriminatory use of a preemptory strike"). By regularly dismissing identical responses of seated and stricken jurors on flimsy grounds not raised at trial, the rule employed in California (and the Fifth Circuit) allows racism to infect the criminal justice system.

Respondent contends that California's approach is appropriate because the novel points of distinction are made "only in response to petitioner's argument that a comparison with the seated juror supported an inference of pretext." BIO at 25. Respondent ignores the identified circuit split on this issue and never even cites *Chamberlin*. It also overlooks the tension between California's approach and the central teaching of *Miller-El v. Dretke* 545 U.S. 231 (2005) (*Miller-El II*): that where a justification applies equally to both the seated and stricken juror there exists powerful evidence of pretext, even if the prosecutor might have had reasons for distinguishing between the two. *Id.* at 241. While the force of the comparison may be dispelled where the record reveals truly gross differences between two jurors, the entire process of comparative analysis is eviscerated when the reviewing court discards the comparisons based on trivial or even middling distinctions it hypothesizes. Once courts permit themselves to manufacture such distinctions, there is no limiting principle – there are simply too many possible differences between jurors. *See Miller-El II,* 545 U.S. at 247 n.6 (jurors are not "products of a set of cookie cutters").

The flaws in the process applied by California are on full display in this case. The California high court differentiated seated and stricken jurors based on extremely

subtle differences. Respondent finds this irrelevant, because the distinctions cited in the petition, though never articulated by the prosecutor, at least related to the general topic of his justification: lingering doubt. BIO at 24-25. But it is far from certain that the prosecutor ever conceived of – much less relied upon – the distinctions offered by the lower court. To take the cited example: Ms. Sam, Mr. Dredd, and Seated Juror No. 46 all expressed a desire in death penalty cases to be "absolutely" sure about guilt and/or wished that guilt to be proven "without a doubt' or that there exist "no doubt." Pet. at 34-35. Although seated and stricken jurors thus expressed the exact same concern, respondent asserts that the California Supreme Court correctly dismissed this comparison by citing a single additional occasion when Ms. Sam repeated the same idea – that she wanted to be sure of guilt in death cases – and two occasions when Mr. Dredd did so. BIO at 24-25; *People v. Smith,* (2018) 4 Cal.5th 1134, 1152, 1156.

Given the sheer size of the venire (over 100 prospective jurors) and the many days and volumes of reporter's transcripts of voir dire, it is difficult to believe that the prosecutor even *knew* how many times Juror 46, Ms. Sam, and Mr. Dredd respectively referred to terms "no doubt" or "without a doubt" – the basis for the claimed distinction. Unless he had a photographic memory, it is at best highly unlikely that the prosecutor would have made this distinction had he been asked.

Yet the California court was completely confident that *this* was the basis that the prosecutor would have chosen. Why? One explanation may be that California has been openly hostile to comparative analysis for thirty years and during that time has

never applied it to grant relief. Pet at 25-29. Another may be that it lacked adversarial briefing on the topic. Pet at 28-29; Appendix E at 5-14. Whatever the reason, the California Supreme Court applied an easily manipulated rule allowing it to manufacture a basis of distinction, without first giving the parties an opportunity to point out why it might not make sense. As discussed in the petition, most courts do not follow this path. Pet at 30-31. These courts accept this Court's teaching that identical characteristics shared by seated and stricken jurors is *always* evidence (though not necessarily conclusive proof) of pretext. California refuses to. *Compare Miller-El II*, 545 U.S. at 232 (describing comparative analysis as "powerful" evidence of pretext) *with People v. Lenix*, 44 Cal.4th 602, 624 (2008) (comparative analysis is "exceptionally poor" evidence of pretext). This split, between the nation's largest judicial system and the weight of authority elsewhere, will persist until this Court resolves it.

**IV. This Court Should Hold This Case Pending Resolution Of *Flowers***

Mr. Smith argued in the petition that, if the Court does not now grant *certiorari* to review the case, it should be held pending the resolution of *Flowers* because of three central similarities: 1) the prosecutors in both cases repeatedly struck all black jurors in sequential cases against the same defendant, 2) the same flaws in comparative juror analysis apply in both cases, and 3) both cases involve justifications which lower courts conceded were false. Pet. at 37-40. Respondent counters that because the original Question Presented in *Flowers* referred specifically to the prosecutor's history of "adjudicated purposeful race discrimination," *Flowers* has no bearing on this case. BIO

at 26-27. But this Court specifically rewrote the question presented in *Flowers* to sweep far more broadly. *See Flowers v. Mississippi,* No. 17-9572 (Nov. 2, 2018) (new Question Presented: "Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U. S. 79 (1986), in this case"). The *Flowers* decision will undoubtedly provide guidance on the application of *Batson*, which will likely touch one, if not all three, of the similarities noted above and in the petition. At a minimum, the Court should hold this case pending resolution of *Flowers*.

## 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: March 4, 2019

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

**/s/ Elias Batchelder**

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ELIAS BATCHELDER
Senior Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
(510) 267-3300
elias.batchelder@ospd.ca.gov

**Counsel of Record**

Counsel for Petitioner
Floyd Daniel Smith