No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY ADAMS, JR.,

Petitioner,

v.

ROBERT NEUSCHMID, ACTING WARDEN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After the prosecutor admitted misrepresenting her actual reasons for striking a prospective juror, the trial judge was "troubled by" some of the prosecutor's reasons and found all of them implausible under an "objective standard" but denied a *Batson* objection because "I don't even really get to apply the objective standard." The state appellate court affirmed by considering only the evidence supporting the ruling and disregarding any contrary evidence instead of the "totality of the relevant facts," failed to shift the burden to the State in light of the prosecutor's admitted dissembling about strikes, refused to factor in the prosecutor's disparately aggressive questioning of one African-American juror, dismissed the prosecutor's disparate application of her purported criteria for striking jurors because no two were identical, and without considering the persuasiveness of the prosecutor's justifications.

The question is:

Whether the Ninth Circuit properly applied 28 U.S.C. § 2254(d) to a *Batson* claim when the California courts' decisions relied upon legal principles inconsistent with this Court's *Batson* jurisprudence.

LIST OF PARTIES

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INTRODUCTION

During the hearing on Jerry Adams's *Batson* objection, the prosecutor admitted having embellished the reasons for her strikes after the trial judge bluntly told her "I don't find that explanation credible." 2 R.T. Aug. 296. Although ultimately overruling the objection, the trial judge expressed disbelief "about both of the challenges" because "under an objective standard, I'm not sure your explanations make that much sense." 2 R.T. Aug. 298-99. The state appellate court affirmed only after ignoring or contravening several different principles of federal constitutional law affirmed, some repeatedly, by this Court. Nonetheless, the lower federal courts denied Adams's request for habeas relief by applying the deferential standard of 28 U.S.C. § 2254(d) without acknowledging or addressing whether the state court's decision was "contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

When rejecting Adams's appeal under *Batson*, the state court ignored this Court's affirmation that a prosecutor's invocation of an "explanation unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination," *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003), and that a discredited reason "naturally gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008). The state court also contravened this Court's instructions that, once one of the

prosecutor's reasons is found pretextual, "the burden shifts to the [prosecution] . . . to show that this factor was not determinative." *Snyder*, 552 U.S. at 485. Rather than shift the burden to the prosecution, the state court improperly credited as a sign of "good faith" that the prosecutor stopped discriminating against Black prospective jurors after defense counsel objected. By treating the prosecutor's admitted dissembling as inconsequential, the state court's treatment was contrary to clearly established federal law.

The prosecutor accepted five white jurors who had *personally* been arrested or convicted and had family members arrested or convicted within the past 5 years, but rationalized striking an African-American sales representative for a Fortune 50 company purportedly because her father had been imprisoned nearly 15 years earlier. When affirming, the state court's ignored and contradicted this Court's long-standing recognition that "a prosecutor's reasons for striking a black panelist [that] applies just as well to an otherwise-similar non-black panelist who is permitted to serve . . is evidence tending to prove purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

Rather than treat the contradiction as evidence of discrimination, the state court excused the prosecutor's differential treatment because the sales representative had a small, discrete tattoo on the back of her ear (a reason

the trial judge found disingenuous). The state court's reasoning also ran roughshod on this Court's instruction that 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." *Miller-El II*, 545 U.S. at 247 n.6.

Moreover, by applying only the most deferential level of review to the issues and ignoring contrary evidence, the state court disregarded this Court's command that lower courts must consider "the totality of the relevant facts about a prosecutor's conduct." *Miller-El II*, 545 U.S. at 239.

PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry Adams respectfully prays for that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, App. 1a, is unpublished but available at *Adams v. Swarthout*, 749 Fed. Appx. 499 (9th Cir. 2018). The Magistrate Judge's Report and Recommendation, App. 6a, and the United States District Court's order adopting the Report and Recommendation, App. 4a, are unpublished.

The opinion of the California Court of Appeal, App. 59a, is unpublished but available at *People v. Gholston*, 2011 WL 579175 (Cal. Ct. App. 2011). The California Supreme Court's order denying Adams's petition for review is unpublished. App. 97a.

JURISDICTION

The judgment of the Court of Appeals was entered September 5, 2018. App. 1a. A timely petition for rehearing was denied November 29, 2018. App. 58a. On February 21, 2019, Justice Kagan extended the time for filing a petition for writ of certiorari until March 29, 2019. No. 18A843. This Court has jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2254(d) of Title 28, U.S.C., provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Circumstances of the Underlying Charges

Everett Gholston and Correyan Jefferson, two African-American young men, participated in two shootings at two locations only hours apart. Gholston and Jefferson were accompanied by one other person at the time of the first shooting. A few hours later, Gholston and Jefferson were accompanied by a small posse of six or more young men. They were all reputedly members of a local gang.

Jerry Adams was an African-American high school student. He had no history of affiliating with any gang, let alone Gholston's and Jefferson's gang. Adams had no tattoos, gang-affiliated or otherwise. There was no evidence Adams dressed in gang attire or possessed any gang paraphernalia.

There were only two eyewitnesses to the first shooting. Both identified Gholston and Jefferson and said a third person was present with them. The two eyewitnesses were approximately 50 to 70 feet away from the car

Gholston and Jefferson were driving and from which shots rang out. The two initially believed Jerry Adams was the third person in the car with Gholston and Jefferson. Both eyewitnesses significantly hedged in their testimony, although confirming it was a car that looked like Jefferson's car, the lighting and distance made it difficult to confidently identify the people in the car. At the time of the second shooting, Gholston was firing the gun that had been brandished by his and Jefferson's morning accomplice.

It was undisputed that Jerry Adams was not present at or involved with the second shooting.

Although Adams was still a minor, the prosecution filed a consolidated indictment charging him with participating in the first shooting and five others with crimes arising out of both shootings.

No physical, forensic, scientific, or biological evidence connected Adams to either incident.

The prosecution hypothesized that both shootings were motivated by gang rivalry between Gholston and Jefferson's gang and another rival gang. Adams had no gang tattoos, no prior gang affiliations, and no gang moniker. 7 R.T. 1347-48. A search of social media came up with no photographs of Adams with other gang members or displaying support or affiliation for any gang. 7 R.T. 1353-54. A search of Adams's home came up with no gang clothes, graffiti, posters or paraphernalia. 7 R.T. 1349. Although charging

Adams with participating in the shooting to benefit a gang, the prosecution's expert conceded during an *in limine* hearing that he had no evidence Adams was a member of any gang at the time of the shooting. 4 R.T. 661-62.[1]

B. The Course of Voir Dire

1. The Prosecutor's Case Exploited Racial Dynamics

The nature of the crime – a drive-by shooting between purported members of rival gangs – undisputedly perpetrated by young African-American men inevitably brought race to the forefront of the case.

Jerry Adams was Black. So were all his co-defendants.

Trying to rationalize unhelpful testimony from some of the African-American witnesses who testified for the State, the prosecutor urged the jurors to discount the inconsistent statements as an inexplicable product of "their" culture and "their" norms because of "where they live and what they go through on a daily basis. It is a different place" than where the jurors were from. 10 R.T. 1920, 1922-23, 1944.

The prosecutor was aided in making this coded argument by removing qualified Black jurors from the jury panel. After the prosecutor struck Emma

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1. Allowed to testify to the gang connections of the other defendants, the prosecution's expert blurted out in front of the jury, without prior disclosure to the defense, that he nonetheless believed Adams to be a member of Gholston's gang. 6 R.T. 1273-74.

Hamilton and Patrick Belton, the defense objected.

The trial judge had no difficulty finding a prima facie showing, clarifying "frankly, I'm concerned about both of the challenges." 2 R.T. Aug. 298.

Following an extensive hearing where the trial judge expressed disbelief of every single reason the prosecutor offered – and even prompted her to admit that she had lied about her reasons for striking other jurors – the trial judge ultimately denied the *Batson* motion. 2 R.T. Aug. 299. Thereafter, the prosecutor stopped striking Black prospective jurors.

As explained below, the trial court was right to be skeptical of the prosecutor's stated reasons. They were implausible on their face. The trial judge found they were objectively wrong. They were not evenly applied to non-Black jurors. The trial court erred, however, by misjudging his assignment as evaluating the prosecutor rather than evaluating the prosecutor's reasons.

2. The Prosecution Struck Two Black Jurors, Different from Each Other, But Similar to Non-Blacks Accepted on the Panel

The trial judge commended Emma Hamilton, the first prospective juror to undergo voir dire, for doing "an excellent job of demonstrating the process." 1 R.T. Aug. 60. Ms. Hamilton was a single black woman with a 6 year old son

who worked as a sales representative for Verizon Wireless. 1 R.T. Aug. 58.

Except for race, she had little in common with Patrick Belton, the other African-American prospective juror struck by the prosecutor before the *Batson* objection. Mr. Belton was a married man who worked as a transit bus driver. He and his wife, who worked was an administrator for the County of Los Angeles, had several children – all adults in their late 30's. 2 R.T. Aug. 272.

Neither had ever served as a juror before. 1 R.T. Aug. 58; 2 R.T. Aug. 272.

Like TJ8 and TA1,[2] Ms. Hamilton and Mr. Belton both resided in the city of Corona. 1 R.T. Aug. 58; 2 R.T. Aug. 272, 318, 350. Although Ms. Hamilton was unmarried, so too were TJ5, TJ10, and TA3. 1 R.T. Aug. 85; 2 R.T. Aug. 268, 349. The other jurors were married, as was Mr. Belton.

Mr. Belton's occupation as a transit driver was comparable to TJ8's work as commercial livery driver. 2 R.T. Aug. 272, 318. His wife's occupation as a county administrator was similar to TJ7's employment as a planning and

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2. California law seals all identifying information about seated jurors absent a court order authorizing their release. CAL. CODE CIV. PROC. §§ 194(o), 237(a)(2). The seated jurors are designated in this transcript as "TJ" and a number associated with the seat they occupied during the trial. The alternates were identified as TA1, TA2, and TA3.

In contrast, the names of prospective jurors is presumptively public information and is disclosed absent court order to the contrary. *Id.*, § 237(a)(1). As such, the prospective jurors are all identified by name in the transcript.

operation's analyst for Riverside County, TJ11's work in the Riverside County Assessor's and County Clerk Recorder's office, and TJ12 and her husband who both worked doing quality assurance for the federal government. 1 R.T. Aug. 81; 2 R.T. Aug. 218, 272, 325. Ms. Hamilton's white collar employment as a sales representative for Verizon was not very dissimilar from TJ2's service as a group sales agent for Amtrak. 1 R.T. Aug. 58, 60. Like Ms. Hamilton's work as a sales representative, TA2's job as a nursing assistant at Riverside Regional Medical Center, TJ10's work at a skilled nursing facility, and TA3's job as a legal assistant were all occupations requiring a clean and professional presentation and regular interaction with the public. 1 R.T. Aug. 85; 2 R.T. Aug. 349, 365.

Mr. Belton's children were all adults, just like TJ4's, TJ7's and TA2's. 1 R.T. Aug. 63, 81; 2 R.T. Aug. 349. Ms. Hamilton's son was 6 years old, just like the child of TA1. 1 R.T. Aug. 58; 2 R.T. Aug. 350.[3]

More discrete than TJ8 who had "a tattoo spread across the back of his neck," 4 R.T. 808, Ms. Hamilton, the Verizon representative, had a small, inconspicuous tattoo "on the back of [her] ear." 1 R.T. Aug. 124. Asked about it by the prosecutor, Ms. Hamilton explained it was a "my son's [zodiac] sign. He's a Scorpio." 1 R.T. Aug. 124.

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3. TJ8 had a young child, like Ms. Hamilton. In addition to school-age children, TJ1 and TJ11 also had adult children like Mr. Belton. 1 R.T. Aug. 148; 2 R.T. Aug. 219, 272, 318.

Although Ms. Hamilton had personally never had any adverse contact with law enforcement, not meaningfully different from TJ1, TJ6, TJ7 and TJ12, a family member of hers had. 1 R.T. Aug. 82, 149; 2 R.T. Aug. 271, 325. In Ms. Hamilton's case, it was her late father who'd served time in prison 12 years earlier. 1 R.T. Aug. 59. TJ1's son had been arrested as an adult only two years earlier. 1 R.T. Aug. 148-49. TJ7's husband had been arrested 20 years earlier. 1 R.T. Aug. 82. TJ6's father in law had been arrested for drunk driving. 2 R.T. Aug. 271-72. TJ12's brother had been arrested "a few times." 2 R.T. Aug. 325. The prosecutor also accepted the panel at a time when it included Prospective Juror Simpson, someone who had been *personally* arrested 6 years earlier, in addition to having several family members who had been arrested. 2 R.T. Aug. 269-70.

Like all the seated jurors, Ms. Hamilton bore no grudge toward the judicial system and believed her father had been "treated fairly by the system." 1 R.T. Aug. 59. Nothing about her father's situation influenced her for or against either side: "No. My father always told me it was something he did. It was basically his choice and the consequences he had to pay." 1 R.T. Aug. 60.

The trial judge remarked that the large number of prospective (and seated) jurors who had relatives with criminal encounters "is no surprise to

me." 1 R.T. Aug. 59.[4] The experienced trial judge observed that "almost everybody answers yes to [that question]. It is hard to go through life without having some of those kind of experiences or someone close to you have those experiences." 1 R.T. Aug. 59.

The prosecutor did not follow-up with Ms. Hamilton to ask her any questions about her father's conviction or her thoughts about the judicial system.

Some prospective jurors were skittish about the fact that all four defendants were children being charged as adults. 1 R.T. Aug. 120. Not Ms. Hamilton. When the prosecutor challenged whether she would be unduly sympathetic based on the defendants' youth, Ms. Hamilton demurred. "What is right is right. What is wrong is wrong." Their age didn't matter to her. 1 R.T. Aug. 121.

3. The Prosecutor Picked a Fight with Prospective Juror Belton Despite Answers She, and the Trial Court, Said Were "Fair"

Knowing she would be unable to prove who caused which injury during the second shooting, the prosecutor probed prospective jurors' attitudes regarding aiding and abetting liability. Her questions – which often turned

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4. At least 20 of the prospective jurors reported having one or more family members with one or more criminal law encounters. 1 R.T. Aug. 59, 67-68, 70, 81, 83, 88, 149; 2 R.T. Aug. 217, 224, 225, 269-71, 274, 325, 346, 348, 352.

into speeches – frequently drew objections, many of which were sustained or prompted the trial judge to reframe the question properly. 1 R.T. Aug. 117-19, 125-26, 128-29; 2 R.T. Aug. 291.

The prosecutor grilled Mr. Belton about his attitudes towards joint criminal liability. In response to the prosecutor's question, Mr. Belton affirmed that he would have no hesitation holding the defendants responsible for their violence regardless of their reason, just like Juror TJ5. 2 R.T. Aug. 281-82. Unlike some of the other prospective jurors, Mr. Belton had no trouble holding minors accountable as adults, even if they were only 15. If the facts demonstrated guilt, he accepted "that's the law." 2 R.T. Aug. 283-84.

Following a lunch break, although nothing in his answer suggested any doubts about his willingness to return a conviction, the prosecutor returned to him immediately after court resumed, seeking another answer to the same question. 2 R.T. Aug. 285. He gave the same answer: "they should all be charged." 2 R.T. Aug. 285. He agreed that if an escalation were foreseeable, "they could be held responsible for that." 2 R.T. Aug. 286.

Having failed to elicit a problematic answer, instead of following up with another juror, the prosecutor asked Mr. Belton whether he ever had negative interactions with gang members, a question she notably asked of no

other member in either of the two venire panels. 2 R.T. Aug. 287.[5]

After asking TJ6 to embrace joint liability, the prosecutor, once again, returned to Mr. Belton. The prosecutor asked him to draw inferences about circumstantial evidence. Although he agreed that certain inferences could be drawn, he recognized that the circumstances the prosecutor hypothesized could be deceiving, a hole in her hypothetical that the prosecutor agreed was a "fair" observation. 2 R.T. Aug. 288.[6] Mr. Belton, however, completely agreed with her that circumstantial evidence was useful and reliable in addition to direct evidence. 2 R.T. Aug. 289.

When the prosecutor tried to make Mr. Belton commit that the facts of her incomplete hypothetical established guilt, Mr. Belton replied "No, I disagree with you . . . . You have to have more facts." "Simply because there should still be some [more] facts, I think, to it." 2 R.T. Aug. 289. The prosecutor conceded, once again, that Mr. Belton had made "a good point." 2 R.T. Aug. 289.

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5. He'd had no trouble with gang members who boarded his bus. Although there had been problems with graffiti when he first started 30 years earlier, with "cameras and things like that, [] graffiti is almost nonexistent." *Id.*

6. Mr. Belton noted that the fact a person was holding bank loot after a robbery could be incomplete "simply because the bank robbers were running through the neighborhood where lots of people are dressed the same and dropped their money, and a kid happened to pick it up and policeman drive up on them." 2 R.T. Aug. 288.

When Mr. Belton accurately estimated the prosecutor's height as 5'6", she elicited close but mildly different estimates from other jurors estimating her as possibly an inch or two taller. Mr. Belton agreed with the prosecutor that people could misjudge height and that "a little discrepancy" didn't undermine the convincing nature of the evidence. 2 R.T. Aug. 290.

Notwithstanding Mr. Belton's *agreement* with the prosecutor about the possible sufficiency of circumstantial evidence, the prosecutor *challenged* Mr. Belton as if he had said he would *demand* eyewitness testimony. Once again, he agreed circumstantial evidence could be sufficient but "you got to have something in concrete in that area . . . I mean you just can't assume anything." 2 R.T. Aug. 291.

When the prosecutor argued "you don't think that would be enough even if that is all I have," the trial judge interrupted to cut off the harassment.

> [I]t depends on what it is counsel. I think he is saying it depends on how much it is, how you weigh it, how credible it is, whatever. And to tell him you got to find him guilty because there is some circumstantial evidence I think is an unfair inference to expect him to agree to.

2 R.T. Aug. 291.

The prosecutor asked Mr. Belton no more questions. The moment Mr. Belton was called to replace a juror, the prosecutor struck him from the panel. 2 R.T. Aug. 294.

4. Although Finding The Prosecutor's Reasons Implausible and Incredible, the Trial Judge Overruled Adams's *Batson* Objection

After the prosecutor peremptorily struck both Ms. Hamilton and Mr. Belton, the defense objected. 1 R.T. Aug. 168; 2 R.T. Aug. 294.

Based both on "what the Court has observed and what has been argued by counsel," the trial judge found a prima facie showing of discrimination and ordered the prosecutor "to explain their reasons for excusing the first juror, Ms. Hamilton, and then Mr. Belton." 2 R.T. Aug. 296.

The prosecutor offered two reasons for striking Ms. Hamilton and one reason for striking Mr. Belton, each of which the trial court found implausible.

The prosecutor first explained that she struck Ms. Hamilton because of the "tattoo behind her ear." The trial judge found it "very difficult to find that explanation credible." 2 R.T. Aug. 296, 298-99. The prosecutor rationalized that people with a visible tattoo "don't respect or don't have the respect for society" because "they personally have chosen to put the tattoo in a place where you can see it." 2 R.T. Aug. 299.

The trial judge rejected that explanation's credibility "given the amount of tattoos out in our society now." 2 R.T. Aug. 298. He saw absolutely no correlation between tattoos and respect for social norms:

Most of the cops here have tattoos in my courtroom. I go to

> a gym where I see everybody in less clothing than you see here in the courtroom, and I feel kind of odd that I don't have a tattoo.
>
> There are prosecutors in the district attorney's office that have tattoos. There is a female prosecutor in the homicide [unit] who has tattoos. The assistant district attorney has a tattoo.

2 R.T. Aug. 298.

The prosecutor's second reason for striking Ms. Hamilton ultimately didn't sit well with the trial judge either. Apart from the tattoo, the prosecutor claimed she struck Ms. Hamilton because of her "father having just been convicted in 1996." 2 R.T. Aug. 296. She assured the court she intended to "kick everybody up there who has had some family member that had some negative contact with law enforcement." 2 R.T. Aug. 297. Elsewhere, however, she clarified her concern was with people who "have a family member arrested *recently*." 2 R.T. Aug. 296.

Regardless of whether a facially plausible reason in general, the prosecutor then added that even though "he gave all the perfect answers," she had struck "a white man" off the jury because "of his brother having been incarcerated on multiple occasions." 2 R.T. Aug. 296.[7]

The trial judge scoffed "I don't find that explanation credible. Because of his brother's experience? I think you kicked him off because he is a pastor and soft hearted." 2 R.T. Aug. 296.

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7. Prospective Juror Armstrong reported having "an older brother who was incarcerated for a couple of years, but this was at least 40 plus years ago. So I have no problems or issues with that." 2 R.T. Aug. 217-18.

Rather than dispute the trial judge's reason for disbelief, the prosecutor backed down and conceded that, even if not "one of the main reasons," there were "multiple reasons" and it was at least "one of them." 2 R.T. Aug. 296.

The prosecutor contrasted Ms. Hamilton and Mr. Armstrong with two others on the panel. "Ms. Simpson, I plan to kick off. She was arrested. The only one, TJ7, I plan on keeping. Her husband was arrested over 20 years ago." 2 R.T. Aug. 297. Although Ms. Hamilton's father's incarceration from 13 years ago "is not a short time ago," 2 R.T. Aug. 299, the prosecutor made no reference to TJ1, a white woman who was already seated and whose son had been arrested as an adult two years earlier, or TJ6 a white woman whose father-in-law had been arrested for DUI. 1 R.T. Aug. 148-49; 2 R.T. Aug. 271-72.

The prosecutor's sole rationalization for striking Mr. Belton elicited the trial judge's skepticism as well. She characterized Mr. Belton's responses to her confusing and aggressive questions as indicating, to her, that "he would have a difficult time with the concept of circumstantial evidence" and "wouldn't be able to follow the law." 2 R.T. Aug. 297.

As for Mr. Belton's responses, the prosecutor acknowledged that "the Court didn't feel I explained it properly." 2 R.T. Aug. 297. Rather than a product of Mr. Belton's inability to understand or follow the law, the trial judge put the blame for Mr. Belton's responses squarely on the prosecutor.

The trial judge made clear that any ambiguity in Mr. Belton's answers was, as the prosecutor herself had earlier conceded, "is largely, frankly, in my opinion a product of the way you asked the questions." 2 R.T. Aug. 298.

Rather than endorse the prosecutor's view of this Black man as unintelligent, the trial judge concluded quite the opposite: that Mr. Belton "seemed to be kind of a critical thinker." 2 R.T. Aug. 298. The prosecutor, the judge noted, "tried to give him over-simplified hypotheticals, he said, well, there is other stuff you would want to look at, *which is exactly what you would want [jurors] to do*." 2 R.T. Aug. 298.

Ultimately, the trial judge disbelieved the credibility of all the prosecutor's expressed reasons. 2 R.T. Aug. 299 ("I'm not sure your explanations make that much sense."). Although finding himself "more troubled by Ms. Hamilton," 2 R.T. Aug. 298, the trial judge denied the *Batson* motion because "I'm going to find that *you're* credible" even though the reasons she gave were not credible. 2 R.T. Aug. 299.

C. State and Federal Proceedings

Adams was convicted of assault and shooting at an inhabited dwelling, along with an enhancement for participating in a criminal street gang. 5 C.T. 1227; 6 C.T. 1245-52. For a crime committed when he was 16 years old, Adams was sentenced to an indeterminate sentence of 15 years to life. 6 C.T.

1429-31, 1521-24.

The California Court of Appeal affirmed the denial of the *Batson* objection in an unpublished opinion. App. 59a. The appellate court considered it "significant" and a sign of "good faith" that the prosecutor did not strike any more African-American prospective jurors after the *Batson* motion was overruled ultimately resulting in two African-Americans being seated on the final jury. App. 81a [DCA Op. 23 & n.14].

Rather than evaluating "the totality of the relevant facts," *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005), the appellate court reviewed only for "substantial evidence," App. 77a [DCA Op. 19], the "most difficult standard of review" to meet because "the appellate court accepts the evidence most favorable to the order as true and discards the unfavorable evidence." *Phillips v. Campbell*, 2 Cal.App.5th 844, 850 (2016).

As for four of the seated jurors who had close family members with recent criminal contacts, the state court rationalized that "it was not solely the incarceration of [Hamilton's] father, but also the presence of [Hamilton's] tattoo . . . The other jurors who had family members with an arrest history did not possess that additional factor." App. 80a [DCA Op. 22]. The appellate court also reasoned that prosecutor's acceptance of one of the jurors with both personal and family history of criminal justice contacts was ameliorated by the fact that the prosecutor subsequently struck her when jury selection was

re-opened. App. 79a [DCA Op. 21].

Notwithstanding the trial judge's observation that Mr. Belton was a "critical thinker" whose approach was "exactly what you would want [jurors] to do," 2 R.T. Aug. 298, the appellate court endorsed the prosecutor's assertion that Mr. Belton "may have had trouble applying the concept of circumstantial evidence," App. 81a [DCA Op. 23], an assertion that relied on the stereotypical assumption of ignorant Black men who lacked sufficient intelligence to serve on a jury.

The California Supreme Court denied Adams's petition for review. App. 97a.

Reviewing Adams's claims under the restrictive lens of § 2254(d), the district court opined that the state courts' "rejection of petitioner's *Batson* claim was not contrary to, or an unreasonable application of, clearly established federal law." App. 42a.[8] The district court eventually granted Adams a certificate of appealability. U.S.D.C. Dkt. #42.

The Ninth Circuit Court of Appeals affirmed in an unpublished

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8. Contrary to this Court's clear instruction that "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis" for a strike but requires "a prosecutor . . . to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives," *Miller-El II*, 545 U.S. at 252, the magistrate judge combed the voir dire and manufactured reasons the prosecutor could have had for striking other jurors. App. 40a [R&R 35]. Contrary to what one might infer from reading the magistrate's report, the prosecutor never identified the reasons for any of her other strikes.

memorandum. App. 1a. Echoing the trial court's disbelief of the prosecutor's proffered justifications, the federal appellate panel acknowledged that "reasonable minds certainly could doubt the veracity of the prosecutor's explanations for the challenges at issue." App. 2a-3a.

Without acknowledging, let alone resolving, Adams's argument that the state court's adjudication was contrary to clearly established federal law, the Ninth Circuit limited its analysis to review under 28 U.S.C. § 2254(d), concluding "we cannot say that, on this record, the state court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude Adams had shown a *Batson* violation." App. 3a (brackets and internal quotations omitted).

REASONS FOR GRANTING THE WRIT

I. Because the State Court Ignored this Court's Binding Precedent when Ruling on Adams's *Batson* Claim, Resulting in a Ruling That Was Contrary to Clearly Established Supreme Court Law, Adams's *Batson* Claim Should Have Been Reviewed De Novo

This Court has clearly held that "The critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338-39; see also *Purkett v. Elem,* 514 U.S. 765, 768 (1995) ("implausible or fantastic justifications may (and probably will) be

found to be pretexts for purposeful discrimination"). The trial judge here erroneously focused only the prosecutor's personal credibility rather than "the persuasiveness of the prosecutor's justification."[9] Not only did the trial judge fail to recognize that "credibility can be measured by . . . how reasonable, or how improbable, the explanations are," *Miller-El I*, 537 U.S. at 339, but the state appellate court then evaluated the decision only for "substantial evidence," and disregarding any contrary evidence.

Clearly established federal law from this Court confirms that a prosecutor's invocation of a discredited reason "naturally gives rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485; accord *Miller-El II*, 545 U.S. at 241 (an "explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination"). Here, the trial court rejected the prosecutor's reliance on Ms. Hamilton's tattoo and scoffed at the prosecutor's claim that she struck Mr. Armstrong because of his brother's "40 plus years" old arrest. Yet, neither the state trial court nor the state appellate court factored in this natural inference of discriminatory intent.

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9. The trial judge recognized that "under an objective standard I'm not sure your explanations make that much sense." 2 R.T. Aug. 299. The panel similarly found that "reasonable minds could certainly doubt the veracity of the prosecutor's explanations." App. 2a-3a. Had the trial judge focused on the justifications, or the panel reviewed de novo, the result likely would have been different.

This Court has also held that, once a court finds one of a prosecutor's explanations pretextual, "the burden shifts to the [prosecution] . . . to show that this factor was not determinative." *Snyder*, 552 U.S. at 485. Notwithstanding the trial court's rejection of the tattoo rationale as to Ms. Hamilton and disbelief of the prosecutor's ancient family arrest reason for striking Mr. Armstrong, neither the trial court nor the appellate court shifted the burden to the State to disprove the natural inference of discriminatory intent.

Under this Court's established precedent, "differences in questions posed by the prosecutors are . . . evidence of purposeful discrimination." *Miller-El I*, 537 U.S. at 344. The trial judge cut off the prosecutor for haranguing Mr. Belton with "over-simplified hypotheticals" and asking improper questions of him after his answers reflected a willingness to consider all the relevant evidence, "which is exactly what you would want [jurors] to do." 2 R.T. Aug. 291, 298.[10] Yet neither the trial court nor the state appellate court factored in the prosecutor's disparate questioning of Mr. Belton.

The appellate court's analysis was deficient in two additional distinct

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10. The prosecutor herself acknowledged that Mr. Belton made "good points" in his "fair" responses to her questions. E.R. 259-60 [2 R.T. Aug. 288-89]. Mr. Belton was the only person the prosecutor asked about interactions with gang members. E.R. 257-58 [2 R.T. Aug. 286-87].

and critical respects.

The state court's purported attempt at conducting comparative juror analysis was fundamentally at odds with this Court's law. It is well settled that "a prosecutor's reasons for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve . . . is evidence tending to prove purposeful discrimination." *Foster v. Chatman*, 136 S.Ct.1737, 1754 (2016). The state appellate court declared that, although the prosecutor accepted *five* other jurors who had close family members who'd been arrested – including one whose son had been arrested only two years earlier – there was no other juror to compare to Ms. Hamilton because other jurors with family members who had been arrested did not also have a tattoo. App. 80a [DCA Op. 22].

Because the trial judge *discredited* the tattoo rationale, it should have had *no weight* in the appellate court's analysis.[11] Moreover, however, the Court has explained that a state court's finding that "a defendant cannot win

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[11] The appellate court's resurrection of reasons the trial court specifically rejected as implausible constituted an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2). It is also unreasonable because the prosecutor tendered the reasons as separate and independent, just like the trial judge treated them, not as a combined factor.

It was also unreasonable because it is counterfactual. The prosecutor made clear she was only concerned about people with a "recent" arrest, which should have included people like TJ1 whose son was arrested within the last two years, especially after the prosecutor acknowledged that the arrest of Ms. Hamilton's father was *not* recent.

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." *Miller-El II*, 545 U.S. at 247 n.6.

Finally, rather than evaluate "the totality of the relevant facts about a prosecutor's conduct," *Miller-El II*, 545 U.S. at 239, the state appellate court constrained its review to ascertaining only whether there was some evidence "favorable to the order as true and discard[ed] the unfavorable evidence." *Phillips*, 2 Cal.App.5th at 850. Regardless of the fact that California's "substantial evidence" review is "considered the most difficult standard to meet," by applying a standard that "discards the unfavorable evidence," the state appellate court necessarily failed to consider "the totality of the relevant facts."

Because the state court's adjudication was contrary to clearly established federal law, a federal habeas court's "review of petitioner's underlying [] claim is unencumbered by the deference AEDPA normally requires." *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007). The panel did not reject or dispute petitioner's observation that the state court adjudication was contrary to federal law. Without explanation, the panel nonetheless subjected Adams's claim to the deferential review constrained by 28 U.S.C. § 2254(d).

II. Adams Likely Would Have Been Granted Relief if the Appropriate Standard of Review Were Applied

The panel erroneously considered itself guided by *Rice v. Collins*, 546 U.S. 333 (2006). App. 3a [Mem., at 3]. *Rice* addressed only whether a state court decision resulted in an unreasonable determination of the facts under § 2254(d)(2). *Rice* made clear that "the state courts in this case used the *correct analytical framework* in considering and ruling upon the objection to the prosecutorial strike." *Rice*, 546 U.S. at 336 (emphasis added).

Here, by contrast, where a state court decision applied principles "contrary to" Supreme Court law, review should have been "unencumbered by the deference AEDPA normaly requires." *Panetti*, 551 U.S. at 948.

Notwithstanding *Rice*, this Court has on several occasions reversed habeas denial of *Batson* claims because a prosecutor's reasons should have been recognized as pretextual. *E.g. Miller-El II*, 545 U.S. at 240-65; *Snyder*, 552 U.S. at 478-85; *Foster*, 136 S.Ct. at 1737. As the panel recognized, there is abundant reason to "doubt the veracity of the prosecutor's explanations." App. 2a-3a [Mem., at 2-3].

Had Adams's *Batson* claim been reviewed de novo, the panel would have recognized Adams was entitled to relief. The trial judge had no hesitancy in finding a prima facie showing and challenged the prosecutor on her reasons, ultimately finding them objectively unreasonable and

implausible. The trial judge ultimately denied the objection without having factored in the prosecutor's aggressive questioning of one Black prospective juror, admitted dissembling about her reasons for another prospective juror, and before the conclusion of jury selection when it became clear that the prosecutor was not applying her stated criteria consistently to non-Black jurors. The prosecutor struck Ms. Hamilton based on a reason ("recent" arrests) the prosecutor conceded did not apply while accepting *several* non-Black jurors who did have (or had family members with) *recent* arrests. Ultimately, the trial court erroneously gave undue weight to his faith in the prosecutor's office while ignoring "the critical question," "the persuasiveness of the prosecutor's justification." *Miller-El I*, 537 U.S. at 338-39.

It is not irrelevant that the prosecutor racialized the trial. The trial involved a confrontation between members of two rival gangs of African-Americans. Although Jerry Adams had no historical connection with any gang, the prosecutor lumped him in with other young Black gang members. Then, in summation, the prosecutor urged jurors to disregard weaknesses in her case because, referring to the Black witnesses and defendants, "their" norms and culture are different because of "what they go through on a daily basis. It is a different place" than where the jurors were from. 10 R.T. 1920, 1922-23, 1944. When excluding Patrick Belton, she invoked the stereotype of the ignorant Black man who, she claimed, would be incapable of

understanding basic legal principle, even though the trial judge recognized Belton was a "critical thinker." The prosecutor, notably, expressed no similar reservations about non-Black jurors who actually had affirmatively expressed difficulty grasping legal doctrines. 1 R.T. Aug. 128-29.

Because the Ninth Circuit employed the wrong legal standard in evaluating Adams's claims, and at a minimum failed to explain why it the state court's decision was not contrary to law, this Court should either grant certiorari or vacate and remand with instructions to adjudicate Adams's habeas petition de novo or explain why § 2254(d) nonetheless controls. *Sears v. Upton*, 561 U.S. 945, 956 (2010) (granting, vacating and remanding for lower courts' failure to apply proper prejudice standard); *Jefferson v. Upton*, 560 U.S. 284, 258-59 (2010) (granting, vacating, and remanding for failure to consider exceptions to 2254(d)).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully Submitted,

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