No. _____

IN THE

Supreme Court of the United States

JAMELLE EDWARD ARMSTRONG,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

GLEN NIEMY
245 Lafayette St, Unit 1 D
Salem MA 01970
Telephone: (207) 699-9713
gniemy@yahoo.com
COUNSEL OF RECORD for Petitioner
Jamelle Edward Armstrong

CAPITAL CASE

QUESTION PRESENTED

Did the California Supreme Court improperly decide the issue of the race-neutrality of respondent's exercise of its trial peremptory challenges to excuse all four male African-American potential jurors on the venire panel in that said court completely failed to consider the factors mandated to be considered by this Court in *Batson v. Kentucky*[1] and its progeny to the extent that said court decided an important federal question in a way that conflicts with several relevant decisions by this Court?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

TABLE OF CONTENTS

INDEX TO APPENDIX

* * * * * *

TABLE OF AUTHORITIES

Federal Cases

California Cases

United States Constitution

Federal Statutes

California Statutes

IN THE

Supreme Court of the United States

JAMELLE EDWARD ARMSTRONG,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The California Supreme Court issued its opinion in Case No. S126560 on February 4, 2019, reported as *People v. Armstrong*, 6 Cal.5th 735 (2019). A copy of the California Supreme Court's opinion in this case is included in the Appendix as Appendix A, pp. 1-117.

JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C. section 1257 (a). The decision of the California Supreme Court to be reviewed was filed on February 4, 2019. The California Supreme Court denied petitioner's petition for rehearing on March 20, 2019 (Appendix B, page 118), making the due date for the filing of this Petition June 18, 2019. Therefore, this Petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees the defendant a jury selected from a cross-section of the community and reads in pertinent part "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed …."

The Fourteenth Amendment provides in pertinent 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 equal protection of the laws."

STATEMENT OF THE CASE

On April 23, 2004, a Long Beach (Los Angeles County) jury found petitioner guilty of the December 30, 1998 murder of Penny Keptra (aka Sigler), California Penal Code section 187. Six separate special circumstances were found true; that the murder was committed while Petitioner was in the commission of rape, robbery, kidnaping, kidnaping for rape, rape with a foreign object, and torture. Petitioner was sentenced to death on July 16, 2004.

The facts of the crime are relevant to the legal issues raised in this Petition only to the extent that Petition was a black male, who along with two other black male companions were accused of the attack on Ms. Sigler, a white woman. This Petition is based on the state court's affirmance of the trial court's dismissal, pursuant to the challenge of prosecutor, of four black African-American prospective jurors in a case involving the black petitioner being charged with the murder of a white woman under racially charged circumstances.

CONSTITUTIONAL UNDERPINNINGS

The Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit a state prosecutor from discriminatorily exercising peremptory challenges on the basis of a juror's race or membership in an

otherwise "cognizable group," such as religion or national origin. *Batson v. Kentucky*, 476 U.S. 79, 84-87 (1986); *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). In addition, this prohibition also rests upon a defendant's state and Sixth Amendment federal constitutional right to an impartial jury drawn from a representative cross-section of the community. *Batson,* 476 U.S. at 89. It is clear that the prosecutor has the right to peremptorily challenge any prospective juror for non-discriminatory purposes. The differentiation of the discriminatory use of peremptory challenge and a "race-neutral" challenge has been the pivotal question that has occupied both this Court and the United States Supreme Court when deciding "*Batson/Wheeler*" cases.

To this end, a three-part inquiry has been developed by the High Court. First, the defendant is initially burdened with establishing a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168 (2005), citing to *Batson,* 476 U.S. at 93-94.

Secondly, "once the defendant has made to a prima facie case, the 'burden shifts to the State to explain adequately the racial

exclusion' by offering permissible race-neutral justification for the strikes." *Johnson,* 545 U.S. at 168, citing to *Batson,* 476 U.S. at 94.

Finally, "[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination," by a preponderance of evidence. *Johnson,* 545 U.S. at 168. Petitioner will not trouble this Court with an extensive re-statement of the law of *Batson*, which had been fully discussed in the briefings and referenced by this Court in its Opinion. However, this Court also confirmed that the central question that must be answered is whether the explanations given by the prosecutor for her challenges were indeed "race-neutral," that is, not motivated by a desire to exclude certain racial groups from the jury. *Johnson*, 545 U.S. at 168. As stated above, the burden lies with the defense to prove this by as preponderance of the "totality" of circumstances. *Id.* at 170.

The standard for making this decision rests squarely upon the sincerity of the prosecutor, or in other words, the genuineness of the "race-neutral" reasons she gave, not the objective reasonableness of the reasons given. *Miller-El v. Dretke,* 545 U.S. at 251-252; Appendix A, page 36. This means even if there was an objective race neutral reason for such a peremptory, it does not figure in the analysis unless

the prosecutor included this explanation in her reasons for the challenge.

Often, one of the most indispensable tools for determining the true reason for the prosecutor's peremptory strikes is the use of a comparative analysis consisting of "side-by-side" comparisons of the members of the cognizable group with other prospective jurors who were allowed by the prosecutor to serve. *Miller-El v. Dretke,* 545 U.S. at 241. As stated in *Miller-El,* "If a prosecutor's proffered reason for striking a black panelist applied just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Ibid.*; *People v. Lenix*, 44 Cal.4th 602, 621 (2008).

Further, "a per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable: potential jurors are not products of a set of cookie cutters." *Miller-El,* 545 U.S. at 247, n.6. To truly isolate whether or not race was the reason for the prosecutor's challenge, the jurors compared must be comparable in all respects that the prosecutor proffered in his or her explanation for the challenge. *Miller-El,* 545 U.S. at 247.

Ultimately, "[i]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters

are the real reasons why they were struck." *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004).

REASONS WHY THE A WRIT OF CERTIORARI IS APPROPRIATE IN THIS CASE

It is not the Petitioner's position that certiorari be granted because the California Supreme Court came to a conclusion at odds with that which may have been reached by this Court. The reason behind this petition is that the California Supreme Court ignored large parts of the record so that it could reach a conclusion that supported the conviction by finding race-neutral reasons for the peremptory challenges of all four of the African-American prospective jurors. The California Supreme Court did not use the wrong law. However, it applied this law to a version of the record that utterly failed to establish well-established factors that overwhelmingly supported the opposite conclusion; that the prosecutor's reasons for its peremptory challenges were racially motivated. *Foster v. Chatman*, 136 S.Ct. 1737 (2016).

The last time the California Supreme Court granted relief to a defendant on *Batson* grounds was 18 years ago in *People v. Silva*, 25 Cal.4th 345, 376-386 (2001). It did do only because the prosecutor actually admitted that he challenged the prospective jurors in

question because he did not want Mexican-Americans on the jury. Since that time there have well over one hundred direct appeals to the California Supreme Court on *Batson* grounds in death penalty cases. The state court has denied relief in *each and every one* of these cases.

Therefore, the state court's general record of disfavor, if not outright hostility, to such claims cries out for a review from this Court. This case is a particularly good opportunity to conduct such a review as it was only a single vote that sustained the conviction, and a very strong 3-vote dissent that recognized the legal insufficiency of the state court review. Appendix A, pp. 93-116.

As stated above, Petitioner will not ask this Court to readjudicate the state court's determination of factual issues. Such would be an inappropriate request for a Petition such as this. However, he does strongly urge this Court to review *how* the state court went about its ultimate *Batson* determination. This sort of result driven analysis runs contrary to the mandate of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendments to the United States Constitution.

Perhaps most importantly, this Court in *Batson* specially made clear that the rationale for its holding went far beyond pigmentation or the chance place of national origin. Its holdings were fundamental

to the founding principles of this country; that the primary function of the United States Constitution is to protect the people from an over aggressive sovereign who abuses the power it has been granted by them.

In so holding, *Batson* made it clear that the ban on this sort of racial discrimination not only rests upon the aforementioned constitutional rights of the accused. With an emphasis on the founding principles of this nation, the *Batson* Court stated "The harm from discriminatory jury selection extends beyond that inflicted upon the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermines public confidence in the fairness of our system of justice." *Batson,* 476 U.S. at 87. As stated in *Miller-El v. Dretke,* 545 U.S. at 238, "... the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality.'" [Citation omitted.]

The Greater Los Angeles Community has sadly been one of the nation's epicenters of racial turmoil in the last several decades. The entire community needs to be able to rely upon a system of justice that is fair and impartial. More specifically, the African-American needs to be able to be secure that its voice will be heard in the jury room when one of its members stands accused of a capital crime by

the state. It is time to examine the process that allowed for the excusal of the only black male jurors in a case as racially charged as this one without considering factors that weighed heavily in favor of the opposite result.

FACTUAL BASIS FOR PETITION

I. California Supreme Court Failed to Consider the Fact that All Four Black Male Prospective Jurors on the Venire Panel Were Peremptorily by the Prosecutor.

The record made it perfectly clear that every single black male on the jury panel was peremptorily by the prosecutor. However, the California Supreme Court did not even take this into account in reaching its decision. Instead it approached each of the challenged jurors in a vacuum without reference to the other three.

The state court ignored one of the most critical factors that must be employed in judging the prosecutor's subjective sincerity; the proportion of the cognizable group that has been challenged. What may appear to be a race neutral explanation for a single member of the cognizable group, rapidly loses that appearance when confronted with the fact that *all* members of that cognizable group have been so challenged No reliable decision by a reviewing court could be reached without consideration of this crucial factor. This Court in *Miller-El v. Dretke,* 545 U.S. at 241, made it clear that the

fact that the prosecutor exercised a disproportionate number of challenges against the cognizable group in question in a critical factor in determining prosecutorial intent.

"The numbers describing the prosecution's use of peremptory challenges are remarkable. Out of 20 black members of the 108 person venire panel for Miller-El's trial, only one served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution .... The prosecution used their peremptory strikes to exclude 91% of the eligible African-American venire members .... Happenstance is unlikely to produce this disparity." *See also Johnson v. California*, 545 U.S. at 168.

In the instant case, the prosecutor did not excuse 91% of the African American male jurors. She challenged 100% She removed each and every black male juror from the panel, eliminating the voice of a critical segment of the Los Angeles County community whose perception and life lessons may well have been less conducive to convictions and condemnation than other segments. *Batson,* 476 U.S. at 86-87.

The dissent immediately recognized the legal significance of this clear pattern of challenges. Appendix A, pp. 93-94. It recognized that the state court refused to even factor this into their decision, instead, looking at each challenge separately, ignoring the numbers

that obviously suggested racial motivation. This failure to consider the "totality of circumstances" was despite the obvious racial nature of the case. *Johnson v. California,* 545 U.S. at 167*,* emphasized the importance of considering the racial identity of the people involved in the crime and whether the crime could be considered racially motivated. In *Johnson,* this Court condemned the failure to consider the "highly relevant" circumstance that a black defendant was charged with killing his white girlfriend's child. This Court stated that the excusal of all three African-American venire panel members in light of the circumstances of the crime "certainly looks suspicious." *Ibid.*

Once again, the three dissenting justices fully acknowledged this.

The failure to address these issues was just one of many critical factors that the state court failed to consider.

II. The State Court Specifically Censured the Prosecutor for Intentional Misconduct for Her Unrelated Conduct During the Trial.

Again, without discussing this Court's analysis of each individual determination of prosecutorial "genuineness," it is appellant's position that review by this Court is necessary because the of more global oversights in the state court's analysis. In addition

to failing to consider the fact that all black males were challenged, in the very same opinion wherein the state court praised the genuineness in jury selection, it strongly admonished this prosecutor for a campaign in which she deliberately tried to mislead the jury. Yet California Supreme Court's acknowledgment of the prosecutor's lack of ethics was never factored into the determination of the *Batson* issue.

The state court fully accepted appellants argument (Appendix D, pp. 333-350) that the trial court erred in excluding evidence that the victim in this case shouted out racial epithets to appellant and his two companions *before* the attack. At trial, the defense attempted to introduce into evidence via the statement of Mr. Armstrong to the police that Ms. Sigler directed emotionally charged racial epithets toward appellant and his two companions prior to any contact. Appendix A, p. 67. These epithets were part of the victim's pre-assault invectives to the three defendants of the nature of "I hope you all die, niggers," and "[f]uck you niggers" or "the niggers are going to die." Appendix A, p. 68.

The trial court excluded this part of appellant's statement on the ground urged by the prosecutor; that it was self serving hearsay and did not qualify as a hearsay exception under California Evidence Code section 1220. The state court found error in this exclusion,

stating that section 356 of the California Evidence Code mandated that this part of appellant's statements to police need by included to give his statement a complete context under what this Court termed "the rule of completeness." Appendix A, p. 69.

In doing so, the state court agreed with trial counsel that the purpose of the inclusion of this statement was not to prove it's truth, but, rather, to "explain the subsequent conduct of Armstrong and his companions and to support a conclusion that when they assaulted Sigler, their motive was revenge, rather than robbery nor rape." Appendix A, p. 69. Therefore, not only was this evidence admissible under 356, it was also admissible because it was not admitted to prove the truth of their content, hence, not hearsay. Appendix A, p. 69.

However, the state court did not merely discuss this issue in terms of technical evidentiary error. This Court's opinion made it clear that it did not consider this error a product of an honest dispute over two competing, but honestly held, positions of the admissibility of a discrete piece of evidence. The error was due to an intentional action by the prosecutor to mislead the jury by "mischaracateriz(ing) the facts." Appendix A, p. 71. As stated in the opinion, this misleading impression was that "the three men approached Sigler because she

was a woman walking alone at night and began the encounter by asking her to engage in an act of prostitution." Appendix A, p. 71.

In addition, the state court found error in the court's granting the prosecutor's motion to exclude Ms. Sigler's toxicology report, that would have revealed her to be intoxicated at the time of the assault. Appendix A, pp. 71-72; Appendix D, pp. 333-345. The state court agreed with both trial and appeal counsel that this evidence would have a tendency in reason to explain why a single woman would shout such coarse racial invectives to three men on a dark street. Appendix A, p. 72.

The state court never expressly stated whether it believed that the prosecutor's successful attempt to exclude the toxicology report was part of her plan to mislead the jury. However, the state court removed all doubt of its evaluation of the sincerity of the prosecutor when it reviewed the appellant's claim that the prosecutor's committed intentional misconduct in her summation.

After such a review, the state court agreed with appellant that the prosecutor committed intentional misconduct by misleading the jurors in her guilt phase summation by telling them that in response to appellant's initial loud comments about looking forward to the New Year, Ms. Sigler yelled back "Happy New Year." Appendix A, pp.

84-85; Appendix D, pp. 356-359. The state court made clear that there was no evidence to support this statement. Appendix A, p. 85.

This state court also made it perfectly clear that this incorrect statement from the prosecutor could not logically be attributed to anything but a deliberate attempt to mislead the jury. "Some inaccuracies in closing argument may flow from innocent mis-recollection, but it is difficult to credit that explanation here when what Sigler said was a principle point of contention. The prosecutor moved to redact from Armstrong's initial police statement the assertion that Sigler yelled racial slurs before the attackers encountered her on the street. (Citation omitted). She also persuaded the court to exclude evidence of Sigler's intoxication." Appendix A, p. 85.

The state court made clear that this type of misrepresentation where the prosecutor urged the jury to consider facts not in evidence to be "a highly prejudicial form if misconduct." Appendix A, p. 86, citing to *People v. Bolton*, 23 Cal.3d 208, 212 (1979). The opinion also cited to the classic formula of *Berger v. United States*, 295 U.S. 78, 88 (1935) which stated, "the prosecutor may prosecute with earnestness and vigor– indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Appendix A, p. 86.

However, using the standard of *People v. Watson*, 46 Cal.2d 818, 836 (1956), this Court held the above discussed error harmless in that it is "not reasonable probable that a result more favorable ... would have been reached." Appendix A, p. 87.

Immediately thereafter, the state court stated this error may have resulted in more prejudice to appellant in the penalty phase but, as the death judgment has been overturned on jury selection grounds, no further discussion was necessary. Appendix A, pp. 87-88.

Although no further analysis was necessary, the state court felt compelled to conclude the discussion of prosecutorial misconduct with the following quote from *People v. Hill*, 17 Cal.4th 800, 847-848 (1998):

> Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system. In the vast majority of these cases, the men and women perform their difficult jobs with professionalism, adhering to the highest ethical standards of their calling. This case marks an unfortunate exception.... We are confident the prosecutors of this state need no reminder of the high standard to which they are held, and the rule prohibiting reversals for prosecutorial misconduct absent a miscarriage of justifies the type of misconduct that occurred in this case.

Appendix A, p. 88.

As it should be assumed that a state high court never engages in gratuitous comment, there can be no doubt that it was delivering a very stern warning to this prosecutor and all prosecutors who were wont to engage in similar egregious conduct. The state court clearly felt that the instant case was not in the "vast majority" in which the prosecutor acted with high ethical and professional standards.

Whether or not the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process" is not argued here. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The point to be taken here is that it is simply impossible to reconcile this sort of dishonest conduct with the Court's multiple *Batson* credibility determinations that favored the prosecutor.

The state court resolved every question of race-neutral sincerity in the exercise the challenges in question in favor of a prosecutor that it, in the same opinion strongly condemned for deliberate prosecutorial misconduct. More importantly, there was no indication that the state court even considered this glaring contradiction in deciding the *Batson* issue.

III. The Trial Court Initially Granted the *Batson* Motion as to Prospective Juror Reginald Payne.

Another major part of the totality of the circumstances that was completely ignored by the state court was the indisputable fact that the trial court initially granted appellant's fourth challenge, the challenger to juror Reginald Payne. Appendix D, pp. 322 et seq. However, after an emotional rant by the prosecutor, which included no new race neutral justifications for the challenge, the trial court did an about face, praising the prosecutor for her "passion." *Ibid*; Appendix D, p. 266.

In reversing the grant of the *Batson* motion, the trial court made no attempt to explain its sudden reversal. Instead, it responded to the prosecutor's irrelevant and overwrought protests that the court has branded her a racist by granting the motion.

Of course, the trial court did no such thing. As seen above, the law of *Batson* does not reference the prosecutor's character, but rather her motivations. She could be the least biased person in the world, but if her challenges seek to gain an advantage by racially motivated peremptory challenges, reversal is required.

IV. The Penalty Judgment was Reversed Due to the Prosecutor's Improper Cause Challenges in the "*Hovey*" Voir Dire.

Further, the state court completely ignored the circumstance that the penalty phase of the trial was reversed on *Witt/Witherspoon* grounds, the state court finding on at least four separate occasions, the prosecutor used confusing and disingenuous means to improperly exclude prospective jurors because of their perfectly legally acceptable opinions as to the death penalty.

In reversing the penalty phase, the state court found that on multiple occasions the prosecutor used unacceptable hypothetical questions, misrepresentations of the law and the excused potential jurors' positions. The state court criticized both the trial court and the prosecutor for adopting a clearly erroneous standard in challenging a potential juror for *Witt/Witherspoon* cause. The state court made it plain that it was clear error for the prosecutor to cull from the jury those who would be able to set aside their personal beliefs and are able to follow their oaths and the court's instruction on the law. Appendix A, p. 18. It criticized the prosecutor for using a form of questioning that emphasized "hypotheticals describing defendant, at or beyond, the outer reaches of death eligibility." Appendix A, p. 20. According to the state court, the prosecutor essentially excused most or all of these four potential jurors for not

being able to impose the death penalty in situations in which it was expressly barred by law. *Ibid.*

The state court specifically stated that the trial court "abused its discretion by applying an erroneous legal standard (and) making a ruling unsupported by the evidence." Appendix A, p. 21. This erroneous standard was generated by the prosecutor who defied the long standing and well-established rule of *Witt* and instead substituted a standard of her own, whether a juror would impose the death penalty in the most extreme situations of lack of moral culpability or where the punishment was even forbidden.

V. General Conduct of the Prosecutor.

In addition, the state court completely ignored the general voir dire conduct of the of the prosecutor. Before a single question was put to the first excused potential juror, Shawn Leonard the prosecutor misstated the law by stating that defense counsel could not base a *Batson* challenge on a single improperly exercise. The prosecutor then went so far as to cynically suggest sanctions might be in order. It was the prosecutor that foisted the wrong law on a trial court that apparently did not know the correct law.

The prosecutor then stated that Mr. Leonard during the voir dire of some of the *other* potential jurors, was not paying attention

like “all” of the other jurors. Appendix D, pp. 279-280. The trial court made short work of this “observation,” rejecting it out of hand. (*Ibid.*)

The prosecutor’s conduct toward the second challenged perspective juror was hostile, to say the least. As fully discussed in the AOB, the prosecutor baited Mr. Cook into a verbal altercation by her aggressive, intentionally provocative questioning. Appendix D, pp. 298 et seq.

Regarding the third challenged prospective juror, Ethan Walters, while the prosecutor did not directly exhibit any hostility toward him, as heavily emphasized by the dissent, a comparative jury analysis clearly demonstrated a bias toward this black juror not shown toward a sitting white juror who was in virtually an identical position to Mr. Walters. Appendix A, pp. 95 et seq.

The prosecutor’s conduct toward the final juror was perhaps the worst of all. After the trial court initially granted the *Batson* motion, the prosecutor launched into a tirade as to how Mr. Payne was going to intentionally hang the jury, in essence stating that he was a threat to the entire orderly jury process. Appendix D, pp. 323-324. None of these accusations were based on any rational factual analysis. Instead, as with the other black jurors, the prosecutor

proved she would stop at nothing to rid the jury of the voice of the black male community.

CONCLUSION

The opinion of the California State Supreme Court was not arrived at through an evaluation of the totality of the circumstances of the record. Many, if not most, of the circumstances that this Court ordered to be considered were ignored in the state court's decision.

The state court ratified the challenge four out of four prospective black male jurors without even considering the critical factors mentioned above. Considering the paramount importance of insuring that our trial courts provide a racially impartial forum for all of our people, a grant of certiorari is critical.

Dated: June 10, 2019

Respectfully submitted,

_____

GLEN NIEMY
Attorney for Petitioner