No. 18-9648

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

CAPITAL CASE

SUPPLEMENTAL BRIEF OF PETITIONER

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Petitioner files this Supplemental Brief under Rule 15.8 of this Court to call attention to the Court's recent decision in *Flowers v. Mississippi,* 588 U.S. ___, 139 S.Ct. 2228 (2019) which was decided after the filing of his Petition for Writ of Certiorari.

I. WHY REVIEW IS NECESSARY / *FLOWERS v. MISSISSIPPI*.

On June 10, 2019, Petitioner filed his Petition for Writ of Certiorari in the capital case (hereinafter known as "Petition"). This Petition was based upon the

California Supreme Court's rejection, by a 4-3 vote, of Petitioner's direct appeal argument that the prosecutor misused her peremptory challenges in a racially motivated way to remove all four black males from the jury panel in violation of the law set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). *People v. Armstrong*, 6 Cal.5th 735 (2019).

On June 21, 2019, this Court decided the case of *Flowers v. Mississippi,* 588 U.S. ____, 139 S.Ct. 2228, a case that not only restated the law, but injected a new urgency and imperative in the enforcement of the equal protection clause as it related to petit jury selection. In doing so, this Court carefully explained the overarching importance of preventing the racially motivated exercise of peremptory challenges by the prosecutor. For the first time, this Court traced the importance of *Batson* in terms of this nation's history of the enslavement of Afro-Americans and subsequent governmental policies and actions designed to keep this cognizable group in a position of relative inferiority and vulnerability under the law.

This Court could have decided *Flowers* without this exegesis into our country's sad past. However, by engaging in this historical analysis, this Court wanted to unmistakably make clear that *Batson* violations went beyond possible unfair verdicts in criminal trials. Justice Kavanaugh's powerful voice reframed the *Batson* narrative, emphasizing how the type of violations seen in the instant case strike at the very fiber of our nation's journey away from the enslavement and enforced degradation of black Americans that once dominated American law

and society.

It is for this reason, Petitioner files this Supplemental Brief. In light of Justice Kavanaugh's powerful and unequivocal equivalency of *Batson* violations with the continued suppression of the fundamental rights, dignity, and freedom of our black fellow citizens, this Court needs to review this case. The prosecutorial violation in this case was so blatant, and the state supreme court's analysis so faulty in its avoidance of the pertinent record that, if *Flowers* is to have any meaning, this Court must grant certiorari examine the state court's decision. This is especially true in the light on the incontrovertible fact that the California Supreme Court has not reversed a capital case due to a *Batson* violation since *People v. Silva*, 25 Cal.4th 345 (2001) and then only because the prosecutor actually admitted that he used his challenges to exclude members of the Hispanic community because these were the jurors that prevented a death verdict in Mr. Silva's first penalty trial. *Silva*, 25 Cal.4th at 375 et seq. The fact that 105 consecutive *Batson* arguments in capital cases, with the exception of *Silva,* have been rejected by the California Supreme Court in the last 20 years can no longer be attributed to the weakness of the respective arguments.[1]

Flowers specifically warned both trial courts and reviewing courts to take care to avoid "backsliding" into legal mechanization that have had the result of unequal treatment of black Americans. *Flowers,* 139 S.Ct. at 2243. This case is

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[1] Supplemental Appendix A lists 105 cases by the California Supreme Court decided in the last 20 years that rejected an appellant's *Batson* claim.

the epitome of this backsliding through governmental abuse of a legal device (peremptory challenges) to effect a recurrence of the "oppression of those who had formerly exercised unlimited dominion over (black Americans)" *Flowers,* 139 S.Ct. at 2238. The voices of the former slave community, the community the Fourteenth Amendment was promulgated to protect, were silenced by the prosecutor's improper peremptory challenge of each and every black male on the panel. This silencing was done by a prosecutor who in the California Supreme Court's opinion was held to have violated Petitioner's right to a properly constituted jury under *Witt* by illegally excusing *four* qualified jurors. It was silenced by a prosecutor who was roundly condemned by the state reviewing court, again in the same case, for intentionally misleading the jury.

Despite this, the California Supreme Court chose to simply ignore the facts on the record that clearly indicated a race based and unconstitutional exercise of by the prosecutor of her peremptory challenges. The California Supreme Court did not dispute Petitioner's citation of these facts and their application to his argument. They simply acted as if they did not exist in order to justify the rejection of yet another *Batson* claim in a capital case. *See* Armstrong Dissent, Appendix A, pp. 93-116.

II. HOLDING OF *FLOWERS*.

At the outset of *Flowers,* this Court made plain the paramount importance of the right of all Americans to sit on a jury. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the

democratic process." *Flowers,* 139 S.Ct. at 2238; *People v. Powers*, 499 U.S. 400, 407 (1991).

This Court then discussed how the improper exercise of peremptory challenges serve to frustrate that process, discussing the issue from a historical prospective. "This case arises at the intersection of the peremptory challenge and the Equal Protection Clause. And to understand how equal protection law applies to peremptory challenges, it helps to begin at the beginning." *Flowers,* 139 S.Ct. at 2238.

This Court then cited to the precise wording of the Fourteenth Amendment before citing to *Slaughter-House Cases*, 16 Wall. 36, 71 (1873), which stated that the primary objective of the equal protection clause was "the freedom of the slave race, and the protection of the newly made freeman and citizens from the oppressions of those who had formerly exercised unlimited dominion over him." *Flowers,* 139 S.Ct. at 2238.

This Court then cited to the 1875 Civil Rights Act, 18 U.S.C. § 243, designed to enforce the provisions of the equal protection clause. *Flowers,* 139 S.Ct. at 2238. "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand and petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude." *Flowers,* 139 S.Ct. at 2238-39.

This Court then moved on to a discussion of *Strauder v. West Virginia*, 100 U.S. 303 (1880), which held a West Virginia statute limiting jury service to

whites unconstitutional. *Flowers,* 139 S.Ct. at 2239. In *Strauder,* this Court pointed out that the Sixth Amendment demanded that the law must be the same for all. (*Ibid*.) Extending the above axiomatic concept to jury service, the *Flowers* Court cited to the following passage in *Strauder*.

> "The very fact that colored people are singled out and expressly denied by a statute the right to participate in the administration of the law, as jurors, because of their color, though they are citizens. And may be in other respects fully qualified, is practically a brand against them, affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to others."

Flowers, 139 S.Ct. at 2239*; Strauder,* 100 U.S. at 308. From these cites there can be no doubt that this Court has essentially drawn a direct lines from slavery, itself, to the exclusion of blacks from our juries.

This direct line was then extended from the attempts to statutorily exclude blacks from the jury to the misuse of peremptory challenged by the prosecutor:

> But critical problems persisted. Even though laws barring blacks from serving on juries were unconstitutional after *Strauder,* many jurisdictions employed various discriminatory tools to prevent black persons from being called for jury service. And when those tactics failed, or were invalidated, prosecutor could still exercise peremptory strikes in individual cases to remove most or all prospective jurors.

Flowers, 139 S.Ct. at 2239.

This Court then proceeded to discuss the post-*Strauder* history of the use peremptory strikes to eliminate blacks from juries, calling this racial exclusion "widespread" and "deeply entrenched." *Flowers,* 139 S.Ct. at 2239. The *Flowers*

Court relied upon "simple math" to explain how peremptory challenges succeeded in circumventing the United States Constitution:

> Given that blacks were a minority of the population, in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So prosecutor could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white juries.

Flowers, 139 S.Ct. at 2239-40.

This Court then made clear that the exclusion of black jurors had simply become more covert than in the post-Civil war days, but the "results were the same for black jurors and black defendants, as well as for the black communities confidence in the fairness of the American criminal justice system." *Flowers,* 139 S.Ct. at 2240.

The *Flowers* Court then referenced *Swain v. Alabama*, 380 U.S. 202 (1965), a case that held that a defendant could not object to the State's use of peremptory strikes in any given case. *Flowers,* 139 S.Ct. at 2240-41. This Court completed its review of this aspect of Equal Protection history with a discussion of the *Batson* case and how it overruled *Swain*. *Flowers,* 139 S.Ct. at 2240-42.

While in no way attempting to limit the totality of circumstances to be considered in determining whether a *Batson* violation occurred, the *Flowers* Court underscored three long-standing "important evidentiary and procedural issues" that must be considered in any determination as the constitutionality of the prosecutor's use of his or her preliminary challenges.

The first of these were the factors to be considered by the trial judge in making this determination. These were:

- the statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutors disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in this case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- a relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

III. APPLICATION OF *FLOWERS* TO THE INSTANT CASE.

As stated in the Petition for Certiorari in this case filed on June 10, 2019, the California Supreme Court ignored large parts of the trial record so that it could reach a series of factually unsubstantiated conclusions that supported the their ultimate holding that the prosecutor's peremptory challenges to all four black male jurors were race-neutral. Petition at p. 12.

Argument II of Appellant's Opening Brief (Appendix D at pp. 220-332) is replete with instances of all of the factors to be considered by the trial judge reiterated in *Flowers* that heavily favor the finding that the trial court erred in finding the prosecutor's complained of challenges were "race-neutral." *Flowers*, 139 S.Ct. at 2240.

As previously stated, the prosecutor challenged each and every black male juror with the result that there were no black males on the jury. Appendix D pp. 220-222. Said Brief also specifically discussed incident after incident of the disparate questioning of the white and black jurors. Examples of this include the extensive questioning of black male prospective juror Leonard as to whether he would find for death for a defendant's actions were a "first time evil." Appendix D at pp. 280-282. The prosecutor cited to his answers as a race-neutral reason for the challenge, but never asked any of the white jurors this question.

Regarding the questioning of the second challenged black male juror, Mr. Cook, the prosecutor intentionally provoked Mr. Cook by a repetitive, antagonistic series of questions in which she challenged his ability to find for death when he had no fixed opinions about the death penalty, in general. This type questioning was not employed in the voir dire of *any* of the white sitting jurors. Appendix D at pp. 298-302.

Regarding the third challenged black male juror, Mr. Walters, the prosecutor again used the same line of questioning as with Mr. Cook regarding the jurors general death penalty beliefs, again line of questioning not employed in questioning the sitting white jurors. Appendix D at pp. 313-314. In addition, Mr. Walters was questioned as to the nature of his job as an engineer and whether he can possibly be fair to the prosecution because of it. Appendix D at p. 316. Yet there was a sitting white juror who was also an engineer and no such questions were posed to him. Appendix D at pp. 315-316. Also extensive questions were

posed as to whether Mr. Walters' feelings that life might be worse than death, while such questioning was not imposed on the white sitting jurors. Appendix D at pp. 311-312. In addition, the prosecutor proffered a reason for challenging Mr. Walters the fact that he "knew too much law" because he understood the terms "aiding and abetting" and "intent." Appendix D at p. 318. Setting aside the utter absurdity of this reason, no sitting white jurors were questioned to assure they possessed the degree of ignorance the prosecutor claimed she required in her jury. Similarly, the final black male juror, Mr. Payne, was repeatedly questioned about his opinion as to which penalty was worse, death or life without parole, an issue left basically unexplored when it came to the sitting white jurors. Appendix D at p. 325.

The above are just some examples of the prosecutor's tactics. However, the prosecutor did not confine her tactics to disparate testimony. There were multiple incidents where the prosecutor struck black male jurors, who when compared side-by-side to sitting white jurors were "similarly situated" in their attitudes and beliefs. *Miller-El v. Dretke*, 545 US 231, 247, n.6 (2005); Appendix D at pp. 285-292 for Mr. Leonard; Appendix D at pp. 306-307 for Mr. Cook; Appendix D at pp. 314-316 for Mr. Walters; Appendix D at pp. 326-328 for Mr. Payne.

The prosecutor's use of misrepresentations of the record to justify her "race-neutral" reasons for her peremptory challenges literally permeated the record. Examples of this can be found as to Mr. Leonard at Appendix D at pp. 288-289, 293-294; as to Mr. Cook at Appendix D at pp. 300-302, 305, 308; as to

Mr. Walters at Appendix D at pp. 314, 316-319; as to Mr. Payne at Appendix D at pp. 323-325.

Finally, there were many incidents of highly questionable prosecutorial behavior that strongly suggested racial motivation behind these challenges. It must not be forgotten that this was a very racially charged case, with three black men being accused of rape and murder against a white victim. In addition, as stated in the Petition at p. 19, there was improperly suppressed evidence that prior to the attack, the victim drunkenly called the three men "niggers." The law clearly states in such a case, the peremptory challenging of a jurors of the same cognizable group as the defendant deserves special attention as it raises the specter of possible race-based reasons for the challenges. *Johnson v. California*, 545 U.S. 152, 167 (2005).

No such attention was paid by the California Supreme Court despite the abundance of relevant circumstances that pointed to the race based exercise of these four challenges. Before any questions were put to black juror Mr. Leonard, the prosecutor attempted to have him removed from the jury by making the absurd statement to the court that Mr. Leonard did not look like he was paying attention in that he was "looking straight ahead" and not "participating" in the jury selection process. Appendix D at pp. 294-295.

The prosecutor never bothered to explain what he expected Mr. Leonard to do to be participatory in a situation where each prospective juror was questioned *individually*. *Ibid.* Further, the trial court rejected the prosecutor's argument by

stating that the juror's attention was on the court. *Ibid*. That the prosecutor made such an absurd allegation against a black male juror before that juror even opened his mouth, simply adds to the enormity of the evidence proving the prosecutor's peremptory challenges were racially motivated.

The hostile and adversarial approach taken toward black juror Mr. Cook almost defied belief. Just as Mr. Leonard had to undergo an attack on his "participation" at a time when no participation was either required nor welcome considering the individual question of each juror separately, Mr. Cook was forced to endure the same question asked over and over, presented in a hostile challenging tone. In effect the prosecutor asked *five* separate times how the juror could find for death if he did not have a fixed belief system on the death penalty in general. Appendix D at pp. 298-304. Mr. Cook kept responding that his belief system was to follow the law, and he would do so if chosen as a juror. *Ibid*.

However, the prosecutor would not accept such an answer although several of the white sitting or alternative jurors demonstrated the exact same belief system without being questioned at all about it by the prosecutor. Appendix D at pp. 306-308.

After succeeding in antagonizing Mr. Cook with these repetitive and at times demeaning questions, the prosecutor then cynically relied on the friction she intentionally created with this black male juror to secure his removal from the panel through a peremptory challenge. Appendix D at pp. 309-310. Just as no other juror was accused on not "participating," although none of them did, no

other juror was confronted in the aggressive way as the prosecutor treated yet another black male juror.

The prosecutor engaged in other conduct that reeked of desperation and a desire to remove all black males from the jury at all costs. In perhaps her most outrageous action, after the court initially granted counsel's *Batson* motion as to black male juror Payne, the prosecutor essentially engaged in a rant accusing the court of calling her a racist. Appendix D at p. 323. Then, without any factual basis at all, she attacked the integrity of this juror as not only lying about his ability to find for death, but also being potentially instrumental in frustrating justice in that he has "basically told the defense if I am on the jury come see me" to nullify any death verdict. Appendix D at pp. 323-324.

As stated in the Petition, the California Supreme Court did not make mention of the fact that *all* of the black male jurors were removed. Further, there was nothing in their decision that indicated they considered that the nature of this case was, in and of itself of a racial nature, with three black males being accused of the sexual assault/murder of a white woman under racially tinged circumstances.

In addition, there was no indication in the state court's opinion that it took into account that said court, itself, called into question the prosecutor's ethics and honesty in other aspects of the case. As stated in the Petition, the same court than sung the praises of the prosecutor in her race-neutral use of the peremptory challenges against these four men, roundly condemned her for mischaracterizing

the facts of the fatal encounter. Petition at pp. 18-21. In addition to this finding, the California Supreme Court upbraided the prosecutor for intentionally misleading the jury in her guilt phase argument, calling this "a highly prejudicial form of misconduct," outside the ethical behavior of the vast majority of prosecutor. Petition at pp. 21-24.

Despite these serious criticisms of the district attorney's honesty and ethics, the California Supreme Court gave her credibility the benefit of every doubt when it came to her "race-neutral" explanations.

As stated in the Petition, the California Supreme Court also ignored the prosecutor's misconduct in the improper cause challenges to four separate prospective jurors perfectly legal fit to sit on a death penalty jury under the standard of *Wainwright v Witt*, 469 U.S. 412 (1985), improprieties that resulted in the reversal of the penalty phase. Petition at pp. 26-27. Further, there is no indication in its opinion that the California Supreme Court considered the general misconduct of the prosecutor described more fully in the Petition at pp. 27-28 and in this Supplemental Brief.

Further, it is of note that this same prosecutor also tried appellant's co-defendant, Warren Hardy. In that case, she exercised a peremptory challenge against the only black on the panel of prospective sitting jurors as well as challenging the only two black prospective jurors on the alternate juror panel before she exhausted her challenges. *People v. Hardy*, 5 Cal.5th 56, 73 (2018). The state reviewing court affirmed the trial court's denial of the *Batson* motions

in the *Hardy* case. *Ibid*. While this was never referenced in either the direct appeal briefings or the Petition, it was only after the *Flowers* decision that this factor became relevant to the *Batson* analysis.

What the California Supreme Court did in this matter is to allow the prosecutor to use tactics, while more subtle than state sponsored suppression of the constitutional rights of the black citizen by statute or hooded horsemen in the night, had the same results; "the oppression of those who had formerly exercised unlimited dominion over him."

In *Flowers,* this Court held that such prosecutorial misconduct is the misbegotten heir of the tragic legacy of slavery, itself. Flowers, 139 S.Ct. at 2239. Justice Kavanaugh's powerful demand for justice cannot be deferred to some other case. The California Supreme Court's continued failure to give its full attention to legitimate *Batson* claims must be addressed. The citizens of our largest state must be able to believe in the racial neutrality of its judicial system or we face the unacceptable risk of justice moving from our courtroom to the streets.

CONCLUSION

Accordingly, for the reasons set forth above and in the Petition, and in light of this Court's decision in *Flowers*, considering the paramount importance of ensuring that our trial courts provide a racially impartial forum for *all* of our people, certiorari should be granted.

Dated: August 19, 2019

Respectfully submitted,

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BATSON AFFIRMANCES IN CAPITAL CASES IN THE CALIFORNIA SUPREME COURT IN THE LAST 20 YEARS

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