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

PETITIONER REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner files this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari under Rule 15.6 of this Court.

INTRODUCTION

Respondent's Brief in Opposition was essentially a recapitulation of the procedural trial and appellate history of this case. It barely touched upon the arguments Petitioner made in his Petition for Writ of Certiorari or Supplemental Brief. It instead simply assumed that the California Supreme Court considered all relevant factors in making its decision regarding the *Batson*[1] issue, without citing to any part of the record that evidenced analysis by the state court using the totality of circumstances test to determine whether the prosecutor's reasons for challenging all of the jurors was race-neutral or not.

SUMMARY OF RESPONDENT'S ARGUMENTS

A summary of Respondent's argument can be found in the first paragraph of its Argument section on page 12 of its Brief in Opposition:

> Armstrong concedes that "[t]he California Supreme Court did not use the wrong law," and specifies that he is not contending that "the California Supreme Court came to a conclusion at odds with that which may have been reached by this Court." [Citation omitted.] Nor does he assert that the opinion below conflicts with other lower court opinions or departs from this Court's well-established *Batson* framework. Rather, Armstrong takes issue with the California Supreme Court's review of the trial court's factual findings, accusing the court below of "ignor[ing] large parts of the record." [Citation omitted.] That is incorrect: The state court carefully reviewed the record and

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

> the record amply supports the affirmance of the factual determinations made by the trial judge. In any event, certiorari is not warranted to review the fact-intensive arguments Armstrong advances.

PETITIONER'S POINT-BY-POINT REBUTTAL TO RESONDENT'S CONTENTIONS

A. Rebuttal to General Contention.

The above statement is at best a half-truth which resulted in a misstatement of the contentions made in both of Petitioner's briefs. While Petitioner stated in his Petition for Writ of Certiorari that the California Supreme Court did not use the wrong law, he was hardly giving any sort of endorsement as to the way this case was decided.

Obviously, what Petitioner was conveying to this Court was that the state court did not misstate the basic law of *Batson* embodied by this Court's decisions in cases such as *Batson v. Kentucky*, 476 U.S. 79, 84-87 (1986); *Johnson v. California*, 545 U.S. 162, 168 (2005); *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005); *Snyder v. Louisiana*, 552 U.S. 472, 478-480 (2008).)

However, the fact that the state court mechanically recited this law does not mean that it followed the letter of it or its spirit. As fully discussed in both the Petition for Writ of Certiorari and Petitioner's Supplemental Brief, the opinion of the 4-3 majority failed to take into account the undeniable factual arguments Petitioner raised which provided great weight

to Petitioner's ultimate conclusion that the prosecutor's challenges to all of the four black male panelists were racially motivated. As stated repeatedly in the opinions cited above, it is the subjective genuineness of the prosecutor's race-neutral explanations that must withstand the scrutiny of the reviewing court. *See Johnson v. California,* 545 U.S. at 172. *Johnson* made clear that in a situation such as this, which involved a black defendant and a white victim, under racially charged circumstances, the prosecutorial peremptory challenge of all members of defendant's cognizable group "certainly looks suspicious." *Johnson v. California,* 545 U.S. at 167. This inherent suspicion demanded that an intense and thorough analysis of *all* factors relating to said genuineness must be considered in the ultimate decision of race neutrality.

The statement that Petitioner did not assert that the state opinion conflicted with other "lower court" opinions or other opinions of this Court is profound only in its irony. Indeed, one of Petitioner's main points, made predominantly in his Supplemental Brief, was that the state court's opinion indeed was in full comportment with its past one hundred plus *Batson*-related opinions; an unbroken streak of denial after denial of petitioners' claims. (*See* Appendix to Petitioner's Supplemental Brief.) Saying that the California Supreme Court acted in comportment with this culture of resistance to *Batson* claims is hardly a ringing endorsement of the conduct of said court in this case. The contention that Petitioner never asserted that the

state court opinion conflicted with the decisions of this Court is utterly without merit. If that was Petitioner's contention, then Petitioner should have saved the time and trouble of filing his Petition to this Court in the first place. In fact, that was Petitioner's entire contention; that California Supreme Court's method of analyzing the facts of this case ran contrary to the mandates of this Court. (Petition, at p. 14.)

Finally, Respondent's final general claim that certiorari is not warranted to decide such a fact-intensive matter is yet another half-truth, as well as being off-point to this case. The Petition made it very clear that the Petitioner was not asking this Court to relitigate either the California Supreme Court's or the trial court's factual findings but to review the matter on the basis that the state reviewing court failed to even consider major factors that came down solidly on the side of a finding of racially motivated challenges to all four black male panelists. (Petition, at pp. 13-15.)

B. Rebuttal to Specific Contention — The California Supreme Court Did Not Take Into Account the Fact that All Four Black Male Panelists Were Challenged.

Respondent's first specific contention was related to Petitioner's claim that the California Supreme Court ignored the indisputable fact that all four black male panelists were peremptorily challenged. Respondent claimed that the proof that the court did not ignore this resided in said court's acknowledgment of this fact in its opinion. (Opposition Brief, at p. 13) The

fact the California Supreme Court stated the obvious prior to its discussion of the factors that it considered in making its determination does not mean that the court adequately considered this critical fact in the *making* of that decision. Indeed, Respondent does not cite to any part of the opinion that indicated that this critical factor was favored into the analysis of the prosecutor's genuineness, presumably because such an analysis never took place.

Respondent proceeded to contend that, while it was true that the prosecutor peremptorily challenged all four black males, the fact that there were "only four" members of this cognizable group on the jury panel somehow argues in favor of the prosecutorial behavior. (Opposition Brief, at pp. 13-14.) Respondent then compared this actual situation to that of *Miller-El* where there were 20 black members of the 108-person venire panel. (*Ibid.*) In *Miller-El*, 545 U.S. at p. 240, of these twenty, ten were excused by stipulation, nine were peremptorily challenged, and one actually served.

Apparently, Respondent feels that the *Miller-El set* of numbers is somehow more egregious than the challenge of all of the black male panel member in this case. How Respondent came to this rather dubious conclusion was left unstated. A much stronger argument is that the prosecutor "only" challenged four black male panel members because there were only four to challenge.

C. Rebuttal to Specific Contention — Comparative Juror Analysis Favors Petitioner, Not Respondent.

Respondent then rather gratuitously stated that "side-by-side" jury comparisons are probatively "far more powerful" than "bare statistics." Respondent then concluded, without any basis in fact at all, or specific factual refutation of Petitioner's contentions, that this comparative jury analysis somehow favored Respondent's cause. (Opposition Brief, at p. 14; Petition, at pp. 27-28.) However, as indicated in Petitioner's appellant's opening brief filed in the California Supreme Court, any impartial comparative analysis reveals that the prosecutor routinely accepted white jurors who felt the same as the four similarly situated black male panelists. (*See* Petition, Appendix D, at pp. 285-288; 306-308; 317-317; 326-328.)

D. Rebuttal of Specific Contention — The California Supreme Court Failed To Take Into Account that the Trial Court Originally Granted the *Batson* Motion as to Reginald Payne.

Respondent next argued that Petitioner was wrong when he stated that the California Supreme Court did not properly consider that the trial court initially granted trial counsel's fourth *Batson* motion regarding Reginald Payne. (Opposition Brief, p. 16) To support this contention, Respondent cited to Petitioner's Appendix A, p. 64, the opinion of the California Supreme Court where the court stated that it did consider this factor and decided that the trial court changed its ruling and ultimately denied the motion — not

because of a change in mind as to the neutrality of the prosecutor's reasons, but because the trial court originally used the law of *Witt* [2] and not *Batson.* (*Ibid.*)

While Respondent accurately portrayed what the California Supreme Court stated, what the court stated was not completely accurate. The trial judge initially granted the final *Batson* motion — not because it misapprehended the law but because it rejected the prosecutor's race-neutral reasons. (Petition, Appendix D, p. 265; 16 RT 3479-3480.) As stated in appellant's opening brief (Petition, Appendix D, p. 266), the trial court's change of mind was not preceded by a reasoned legal argument but by an almost hysterical diatribe by the prosecutor concerning her "outrage" that the court just accused her of racism, which decidedly did not.

E. Rebuttal to Specific Contention — The California Supreme Court Did Not Take Into Account the Prosecutor's Misconduct During the Non-Jury Selection Portion of the Trial.

Respondent then contended that Petitioner was incorrect when he urged upon this Court that the California Supreme Court did not take into consideration the prosecutorial misconduct in other aspects of Petitioner's trial. (Opposition Brief, at p. 17.) This was misconduct that the California court fully acknowledged as *intentional*. (Petition, at pp. 18-23.) This was

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[2] *Wainwright v. Witt*, 469 U.S. 412 (1985).

done both by successfully suppressing evidence that the victim initiated the contact by shouting racial epithets at the defendants and by misleading the jury by injecting a fact not in evidence into her summation in which she claimed the victim wished defendants a Happy New Year before the assault. (*Ibid.*)

Respondent argued that "the misconduct that the court identified has no relationship to the *Batson* inquiry." (Opposition Brief, at pp. 17-18.) Respondent urges upon this Court the argument that it was irrelevant that the same state reviewing court that praised the prosecutor for her "genuineness" in the exercised peremptories intentionally mislead the jury in a manner that was "highly prejudicial." (Petition, Appendix A, at p. 85.) In fact, the court went so far as to issue a warning to this and all prosecutors that this sort of behavior fell short of the standards that this Court demands from prosecutors. (Petition, Appendix A, at p. 88.)

To claim that a prosecutor's clear and intentional efforts to mislead the jury on an issue that directly relates to the racial aspects of the case is irrelevant to the determination of the veracity of the prosecutor's race-neutral explanations demonstrated a fundamental misunderstanding of the entire *Batson* process. As stated above, the central consideration as to the ultimate issue of race-neutrality is the subjective *sincerity* of the prosecutor. To posit that the prosecutor's insincere and *intentional* attempts to mislead the jury,

in the context of a very racially charged aspect of the case, is irrelevant as to the ultimate issue of prosecutorial genuineness, defies all logic and reason.

It also clearly demonstrates that the California Supreme Court did not take into account the prosecutor's misconduct when determining the genuineness of her race-neutral explanations. Just as in *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019), where this Court affirmatively allowed evidence of prosecutorial misconduct in defendant's prior trials to prove the prosecution's insincerity in the latest trial, the evidence of prosecutorial manipulation and insincerity in other aspects of the *same* trial should be relevant to the genuineness of the proffered race-neutral explanations.

In addition, Respondent contended that the fact that the California Supreme Court reversed the penalty phase pursuant to four separate violations of *Witt* was irrelevant to the *Batson* issue, hence, was not a factor that the Court should have considered. This is untrue for the same reasons as stated above in reference to the prosecutorial misconduct in suppressing evidence and in her summation. The California Supreme Court made clear that not only did the prosecutor improperly challenge for cause four different prospective jurors, she did so by misrepresenting the jurors' positions, misrepresenting the law, and using disingenuous hypotheticals. (Petition, at pp. 26-27.)

Once again, the California Supreme Court showed a remarkable lack of consistent, broad focus in reaching its *Batson* judgment. Once again, the state court ignored its own evaluation of the prosecutor's less-than-honest conduct in making its determination of the genuineness of the prosecutor's race-neutral explanations for her peremptory challenges.

Respondent did not even address Petitioner's claims that the state court failed to even consider the multiple instances of prosecutorial misconduct directed toward these four otherwise qualified black men. (Petition, at pp. 27-29.) As stated in the Petition for Writ of Certiorari, these include misrepresentation of the jurors' positions, wild accusations that a juror would hang the jury, confusing questioning, and actually picking a fight with one of the black male panelists to create a "personality conflict."

F. Rebuttal to Specific Factors — Summary.

In summary, it is clear from its opinion that the California Supreme Court failed to consider a myriad of critical factors that, by operation of the law of this Court, should have been considered in making its *Batson* determination. That was always the central point of the Petition; that review was warranted not because the state court misweighed all relevant factors, but that it did not weigh or consider most of them at all.

1. *Flowers v. Mississippi.*

Respondent barely discussed *Flowers* at all. It gave *Flowers* short-shrift by briefly stating that the facts of that case are so different than those of the instant case that it is irrelevant to the discussion. Nothing could be farther from the truth. If *Batson* and its above stated progeny are the letter of the law, *Flowers* is its spirit. In *Flowers,* this Court took the extraordinary step of going beyond simply affirming the past law and applying the facts of the case thereto. Justice Kavanaugh, writing for the 7-2 majority, took that opportunity to trace the history of the degradation of black Americans back to the days of slavery itself, and draw a direct line from that execrable institution to the intentional race-based exclusion of black men and woman from our petit juries. To dismiss *Flowers* as simply a fact-driven case without greater significance is to misread both this Court's plain words and the profound meaning behind those words.

Flowers is nothing less than a mandate to every trial court in this country; a mandate that demands that these courts be on constant guard against prosecutorial pretense and/or judicial inattention that would lead to the silencing of the voice of those whom Lincoln and the Thirteenth Amendment to the Constitution of the United States freed from bondage.

Justice Kavanaugh made clear that this nation's history since the adoption of the Amendment that wiped that odious stain from the parchment

of our Constitution was replete with attempts to denigrate and degrade African-Americans by means that restored their chains, albeit this time, more invisible. According to this Court, the intentional removal of the descendants of the victims of slavery from our juries is just another of these artifices used to block the ultimate goal of this nation's Constitution — universal equality.

2. *Batson* Affirmances in Capital Cases in the California Supreme Court in the Last 20 Years.

Finally, Respondent did not address that part of Petitioner's Supplemental Brief that brought to this Court's attention that the California Supreme Court has not reversed on *Batson* in a capital case since 2001, affirming in 102 consecutive cases. Perhaps, the failure to address this is due to the simple fact that there is no way to rebut the obvious conclusion that the highest state court in California is hostile ground for any attempt to enforce a defendant's right to a jury free of racial taint.

G. Summary.

For the reasons stated in both the Petition for Writ of Certiorari and Petitioner's Supplemental Brief, this is the case upon which to change this judicial culture of routinely dismissing *Batson* claims on appeal. In this case, the affirmance of the guilt phase conviction was arrived at by only referencing that part of the record that supported the ultimate conclusion of

race neutrality. The affirmance of the California Supreme Court has all the hallmarks of a result-driven decision, a decision assiduously searching for those parts of the record that can serve to support it while just assiduously avoiding those parts of the records that logically argue against it.

If the message of *Flowers* is to be fully heard throughout this country, certiorari needs to be granted in this case. Otherwise, the lesson that this Court so eloquently tried to impart will turn into a cautionary tale to prosecutors to come up with more sophisticated prevarications, more subtle misdirections, more elaborate charades, to disguise their intention to win their case by excluding long-ignored and suppressed voices still waiting to be heard. Otherwise stated, *Flowers* will sadly become a primer to instruct counsel for the sovereign how to better cover their tracks.

It has been 230 years since the authors of the United States Constitution forged a union at the expense of the enslavement, denigration and debasement of an entire class of people. It is high time that all vestiges of that unspeakable institution be wiped from our courtroom and legal culture.

* * * * * *

CONCLUSION

Accordingly, for the reasons stated above, as well as in the Petition for Writ of Certiorari and Petitioner's Supplemental Brief, 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: October 14, 2019

Respectfully submitted,

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