No. 19-8332

In the Supreme Court of the United States

ROBERT BOYD RHOADES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the California Supreme Court correctly concluded that the facts in this case did not establish a prima facie case of discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986).

DIRECTLY RELATED PROCEEDINGS

Superior Court of the State of California, Sacramento County:

> *People v. Rhoades*, No. 98F00230, judgment entered September 10, 1999 (this case below).

Supreme Court of the State of California:

> *People v. Rhoades*, No. S082101, judgment entered November 25, 2019 (this case below).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

STATEMENT

1. In May 1996, eight-year-old Michael Lyons went missing while walking home from school in Yuba City, California. Pet. App. A 30. A search team found his body the next day along the banks of a river. *Id.* He had died from multiple stab wounds and evidence showed he had also suffered injuries from sexual assault. *Id.* Less than a half-mile downstream, sheriff's deputies found petitioner Robert Boyd Rhoades sitting in his truck and seized a fishing knife—with traces of blood matching the boy's DNA—from the tailgate. *Id.* at 31. The boy's footprints were found on the inside of the truck's windshield, and other physical evidence obtained from the victim and from Rhoades tied Rhoades to the murder. *Id.*

2. The State charged Rhoades with numerous offenses, including one count of first degree murder with multiple special circumstances, making the murder punishable by death. Pet. App. A 29. At the trial's guilt phase, the jury convicted Rhoades of first degree murder and found true special-circumstances making Rhoades eligible for the death penalty. *Id.*[1] The jury was unable to reach a verdict on the penalty, and the court declared a mistrial. *Id.*

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[1] The jury also convicted Rhoades of several other offenses, including torture, forcible sodomy and sexual offenses against a child. Pet. App. A 29. The trial court imposed sentences up to life for those convictions, which have been stayed. *Id.* at 30.

During jury selection at the penalty-phase retrial, each prospective juror completed a 162-question, 44-page questionnaire. Pet. App. A 44-45. After hardship excusals, voir dire, and challenges for cause, the parties exercised peremptory challenges on prospective jurors seated in the jury box, alternating their challenges until the jury was accepted and sworn. *Id.* at 44. Rhoades raised his first *Batson* motion after the prosecution had struck three African-American women, Shirley R., Adrienne A., and Alice S. *Id.*[2] The trial court denied the motion, noting that the prosecution had also used peremptory challenges against two white prospective jurors and that "there are a number of other jurors in the venire in the courtroom." *Id.* The prosecution later excused two additional white prospective jurors and a fourth African-American woman, Alicia R., which prompted Rhoades to renew his *Batson* motion. *Id.*

None of the four African-American jurors had been challenged for cause. Pet. App. A 45-46. The record revealed the following about the four prospective jurors. Shirley R. declined to answer several questions about the death penalty in her juror questionnaire but indicated she had strong opinions about it. *Id.* at 45. She considered life in prison without the possibility of parole to be "more of a punishment than the death penalty" and believed that the Biblical verse "an eye for an eye" has been "grossly misinterpreted and misused." *Id.* When asked whether she would always vote for life, if given the choice between life

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[2] Rhoades's motion was also made under the state equivalent to *Batson*, *People v. Wheeler*, 22 Cal.3d 258 (1978).

in prison without parole or death for a person convicted of first degree murder with special circumstances, she responded "yes." *Id.* During questioning by Rhoades's attorney, she stated that while she had strong opinions about the death penalty, "I would truthfully be able to consider both penalties after hearing the evidence." *Id.* When asked whether she agreed that the death penalty was the appropriate punishment in some cases, she answered, "No, I can't truthfully say that," and explained, "I try to lead a Christian life, and my Bible says thou shalt not kill. It doesn't say give me any exceptions . . . ." *Id.* On further questioning, she retreated from an absolute position and agreed that the death penalty might be appropriate sometimes, and she could possibly vote for it in "just really a horrible case." *Id.*

Adrienne A. stated on her questionnaire that she did not believe the death penalty served any purpose. Pet. App. A 45. She believed that in "some or most" cases the death penalty is unnecessary; expressed that she would eliminate the death penalty "if she were making the laws"; and stated that she had not supported its reinstatement because "I can't support actions to kill a human as a sentence even if that individual has killed someone." *Id.* But she indicated that the death penalty was appropriate for premeditated murder and that she would not always vote for a life-without-parole sentence for a person convicted of first degree murder with special circumstances. *Id.* She explained later during voir dire that she would vote for the death penalty if it were the

"just verdict," though she also stated that she had not yet heard about any such case. *Id.*

Alice S. was the mother of a six-month-old infant and expressed doubt about her ability to serve on the jury while caring for her baby, noting that her husband travels "so I get very stressed at times." Pet. App. A 45. She also thought serving on Rhoades's case would touch on "a very sensitive area" for her because her brother had been convicted of a sexual offense. *Id.* During voir dire, Alice S. stated that she believed her brother had not committed the crime. She added that his alcohol use had resulted in him being "pretty much homeless," and as a result, he "basically had no accountability." *Id.* Alice S. agreed, however, that if a person actually committed a crime, "they should be held responsible if there was alcohol or drugs and they're convicted." *Id.* When asked whether she could vote for the death penalty where she thought it was the appropriate verdict, she initially answered, "I can't really answer that," though she ultimately agreed when pressed that she could impose the death penalty. *Id.*

Alicia R. wrote in her questionnaire that she had no strong opinions about the death penalty. Pet. App. A 46. But when asked about the Old Testament verse, "an eye for an eye," she wrote that she did not adhere to that view because "Christ died on the cross for everyone's sin." *Id.* In response to a question about whether her views on the death penalty had changed over time and why, she wrote: "Clara Fay Tucker has changed my position because she

proved that some people can change." *Id.*[3] The questionnaire asked for her views on the statement that "[a] defendant who is convicted of sexual assault and murder of a child should receive the *death penalty* regardless of the facts and circumstances of his background or mental state," and Alicia R. responded that it "[d]epends" on the facts of the case. *Id.* But she "agreed somewhat" with the statement that a "defendant who is convicted of sexual assault and murder of a child should receive *life in prison without possibility of parole* regardless of the facts and circumstances of his background or mental state[.]" *Id.* Later, when the prosecution asked Alicia R. whether she would vote for the death penalty if she "made that kind of mental decision that . . . the death penalty objectively appears to you to be the correct decision," she replied, "I suppose." *Id.*

In addressing Rhoades's second *Batson* motion, the trial court acknowledged that the prosecution had exercised four of its eight peremptory challenges against African-Americans. Pet. App. A 44. Defense counsel argued that there were "no other discernable differences" between the struck jurors and those still in the box. *Id.* One of the prosecutors replied, "I think there are significant differences," but when the court asked her to elaborate, she declined on the ground that the defense had not yet made a prima facie case

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[3] "Karla Faye Tucker, who through media coverage of her impending execution 'came to be known . . . as a soft-spoken, gentle-looking, born-again Christian pleading for mercy,' was executed in Texas on February 4, 1998." Pet. App. A 46 n.13.

and thus the burden had not shifted to the prosecution. *Id.* The court asked defense counsel about "specific similarities" between the dismissed jurors and jurors who had not been struck, and counsel cited the following similarities: "Relatives in prison"; "Formerly victims of assault"; "Strong religious views"; and "Volunteers somehow related to WEAVE" (an organization assisting survivors of domestic and sexual violence). *Id.*

The trial court denied Rhoades's second *Batson* motion at step one of the analysis, relying on *People v. Howard*, 1 Cal.4th 1132, 1154 (1992), which required proof of a "strong likelihood" of discrimination to establish a prima facie case. Pet. App. A 44. In doing so, the trial court cautioned the prosecutors "that any further matters of this kind will weigh heavily on this Court." *Id.* "I'm very close, I'm going with *Howard* for the time being, but if I see very much more of this, I'm going to indicate to you, you may well have a serious problem on your hands." *Id.* at 44-45. The prosecution exercised three additional strikes before both sides accepted the panel. *Id.* at 45. The record contains no information about the jury's racial or ethnic composition. *Id.* At the end of the penalty retrial, the jury returned a verdict of death. *Id.* at 29-30.

3. On automatic appeal, the California Supreme Court affirmed the judgment of conviction and the death sentence. Pet. App. A 29, 62. As relevant here, Rhoades argued that the trial court incorrectly concluded that he failed to make a prima facie showing of discrimination after the prosecutor had

exercised peremptory challenges to strike four African-American women. *Id.* at 43-52.[4] Between the time of Rhoades's trial and his appeal, this Court clarified in *Johnson v. California*, 545 U.S. 162, 170 (2005), that a defendant satisfies the requirements of *Batson*'s first step by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Because the trial court had used the more demanding standard under *Howard*, the California Supreme Court reviewed "the record independently to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis." Pet. App. A 46-47.

Exercising that "independent review on appeal," the California Supreme Court concluded that the "totality of circumstances surrounding the prosecution's use of peremptory challenges does not give rise to an inference of discrimination." Pet. App. A 47. While it was true that the prosecution had used four of its eight peremptory challenges to eliminate every African-American seated in the jury box, the court reasoned that neither *Batson* nor *Johnson* required a finding of a prima facie case "based on the pattern of strikes alone." *Id.* at 47, 51, 52. Instead, quoting *Batson*, the court considered "all relevant circumstances" in its review. *Id.* at 47. The court reasoned that the

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[4] The state court observed that Rhoades's *Batson* challenge focused in substance on race rather than sex, and the court did the same in assessing his claim. Pet. App. A 47 n.14.

case "did not involve a situation in which '[r]acial identity between the defendant and the excused person,' or between the victim and the majority of remaining jurors" would raise "heightened concerns about whether the prosecutor's challenge was racially motivated." *Id.* Neither Rhoades nor "the victim were African-American—both were [w]hite—and the record reveal[ed] no other case-specific reason why a prosecutor would be motivated to exclude a particular class of jurors." *Id.* Although the court acknowledged that "stereotypes and biases can influence jury selection in any case," it was "less inclined to find a prima facie case based solely on the prosecutors' disproportionate use of peremptories against one group" in the absence of any case-specific reason to suspect discrimination or "any indication these particular prosecutors habitually employed group bias in their selection of juries." *Id.* at 47-48. In addition, the court observed that there were no apparent disparities in the nature or extent of questioning of the African-American jurors versus prospective jurors of other backgrounds. *Id.* at 48.

Finally, the court concluded that the record disclosed readily apparent, race-neutral grounds for striking each of the four African-American prospective jurors, dispelling any inference of bias. Pet. App. A 48. While the court acknowledged that speculating about the reasons prosecutors "*might* have had for striking the jurors would go beyond [the court's] proper role in assessing the prima facie case," it also reasoned that "*obvious* race-neutral grounds for the prosecutor's challenges to the prospective jurors in question"

can "definitively undermine any inference of discrimination an appellate court might otherwise draw from viewing the statistical pattern of strikes in isolation." *Id.*; *see id.* (explaining how a court may consider nondiscriminatory reasons that are "apparent from and clearly established in the record . . . and that necessarily dispel any inference of bias").[5] Shirley R. and Adrienne A., for example, each expressed strong views against the death penalty on their questionnaires and during voir dire. *Id.* at 48-49. Alicia R. also expressed doubt about her willingness to impose the death penalty in general, noted her belief in the possibility of redemption for persons "who commit even the most serious crimes," and stated that "'an eye for an eye' is wrong" based on her religious beliefs. *Id.* at 50.

Alice S.'s responses also offered "readily apparent bases for objection from a prosecutorial view that tend[ed] strongly to dispel any inference of bias." Pet. App. A 49. She expressed uncertainty about her ability to serve as a juror while caring for a six-month old baby and the California Supreme Court observed that she "was clearly not a good choice" for sitting through a two-month long penalty phase retrial. *Id.* She had also expressed her belief that

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[5] The California Supreme Court stressed that a trial court should not ordinarily "search the record for reasons for the peremptory challenges instead of asking the attorney who exercised them for his or her reasons as part of a second-step inquiry." Pet. App. A 48. But it also noted that appellate courts have "the benefit of being able to examine the record in more detail, and at a great deal more leisure," when called to review a "no-prima-facie-case ruling many years or even decades after it was made[.]" *Id.*

her substance-abusing brother had been wrongly convicted of a sexual offense. *Id.* "Given the evidence of [Rhoades's] substance abuse during the relevant timeframe and the nature of his lingering doubt defense," Alice S.'s response "would have raised concerns for any reasonable prosecutor trying the penalty phase of" Rhoades's case. *Id.*

The California Supreme Court also reasoned that comparing the struck jurors to the seated jurors did not "negate the force of these readily apparent reasons for peremptory challenge." Pet. App. A 49. While some seated jurors did express reservations about the deterrent value of the death penalty, none "expressed the sort of unqualified opposition to the death penalty" that the struck jurors conveyed. *Id.* And though some seated jurors stated that "some persons may benefit from rehabilitation," as Alice R. did, those seated jurors also stated that the death penalty might be appropriate for defendants who "kill[] a child." *Id.* at 50. Considering "all relevant circumstances" as dictated by *Batson*, the court concluded that the totality of circumstances did not give rise to an inference of discriminatory purpose. *Id.* at 47, 52.

Justice Liu dissented. Pet. App. A 63-71. In his view, the circumstances supported an inference of discrimination, and he drew support from the trial court's comment that the circumstances were "very close" to establishing the more demanding standard of a "strong likelihood" of discrimination under *Howard*. *Id.* at 64, 66. Justice Liu also criticized the practice, at the first step of the *Batson* inquiry, of considering whether "the record discloses readily

apparent, race-neutral grounds for a prosecutor to use peremptory challenges" against the jurors in question. Pet. App. A 66. While acknowledging that "there can be instances where a juror's death penalty views . . . present an obvious concern to the prosecution," he concluded that the prospective jurors at issue here "simply gave the type of 'equivocal or confused answers' we often see in capital jury selection—the type of answers that the high court found unilluminating and irrelevant in *Johnson v. California*." *Id*. at 68, 70. He proposed a rule that would make it "generally impermissible" at the first step of *Batson* to consider reasons apparent in the record that dispel an inference of bias. *Id*. at 69-70. Alternatively, he recommended eliminating the first step altogether, so that prosecutors would be required to explain their reasons for any strikes at issue in a *Batson* challenge. *Id*. at 70.

ARGUMENT

Rhoades contends that the California Supreme Court incorrectly concluded that he failed to make a prima facie case of discrimination at step one of the *Batson* analysis. He asserts that the facts of his case are "virtually identical" to the facts in *Johnson* and seeks summary reversal (Pet. 6) of what he believes to be an erroneous application of *Johnson* to the particular facts of this case. But the state court correctly applied this Court's *Batson* precedents in determining that the totality of the relevant facts did not give rise to any inference of discriminatory purpose. That holding does not warrant any further review, let alone summary reversal.

1. The Equal Protection Clause forbids a prosecutor from striking potential jurors solely on the basis of race. *Batson*, 476 U.S. at 89. In evaluating a challenge to a prosecutor's use of a peremptory challenge, a trial court is required to undertake a three-step analysis. *Id.* at 96-98; *see Johnson*, 545 U.S. at 168. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson*, 545 U.S. at 168. Second, if a defendant has made such a showing, the burden shifts to the prosecutor to explain his or her challenges by providing race-neutral explanations. *Id.* Third, if a race-neutral explanation is offered, the trial court "'must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" *Id.*

Beyond those basic rules, *Batson* "decline[d] . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99. Instead, "[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

2. The California Supreme Court followed this Court's *Batson* jurisprudence, including *Johnson*. Quoting directly from *Batson* (Pet. App. A 46) and *Johnson* (*id.* at 43), the court acknowledged its obligation to consider "the totality of the relevant facts" to determine whether they give rise "to an

inference of discriminatory purpose." *Id.* (quoting *Johnson*, 545 U.S. at 170). In conducting that assessment, the state court recognized that the prosecution used half of its peremptory challenges to strike the four African-Americans seated in the juror box. But as the court also properly observed, neither *Batson* nor *Johnson* dictate that "the pattern of strikes alone" necessarily must give "rise to the inference of discrimination" in every case. *Id.* at 51. Although numerical evidence may permit an inference of discrimination in certain cases, this Court has never concluded that statistics must, as a categorical matter, always support an inference of discrimination.[6] Rather, as the state court observed, "context matter[s]." *Id.*; *see also Batson*, 476 U.S. at 96-97 ("a 'pattern' of strikes against black jurors included in the particular venire *might* give rise to an inference of discrimination") (emphasis added); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (courts may consider all "relevant circumstances that bear upon the issue of racial discrimination").

In considering the context here, the state court examined "all relevant circumstances." Pet. App. A 47 (quoting *Batson*, 476 U.S. at 96-97). It reasoned that—unlike in *Johnson*—Rhoades's case did not involve anything

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[6] *Cf. United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008) ("In any case, it is clear that even if bare statistics can make out a prima facie case, that does not mean that any statistical proffer will satisfy the burden."); *Carmichael v. Chappius*, 848 F.3d 536, 549 (2d Cir. 2017) ("Of course, as we have had occasion to observe before, the fact that numerical evidence may have permitted an inference of discrimination does not establish that a contrary conclusion must be an unreasonable application of *Batson* and its progeny.").

like "the highly relevant circumstance that a black defendant was charged with killing his [w]hite girlfriend's child." *Id.* at 51 (quoting *Johnson*, 545 U.S. at 167). And while accepting that "stereotypes and biases can influence jury selection in any case," the state court reasoned that there were no case-specific reasons here to believe that biases had influenced the jury selection process or that "these particular prosecutors habitually employed group bias in their selection of juries." *Id.* at 48. Under the specific facts of Rhoades's trial, the court was therefore "less inclined to find a prima facie case based solely on the prosecutors' disproportionate use of peremptories" alone. *Id.*

The state court also noted that there were no disparities in the nature and extent of the questioning of the challenged African-American jurors and other prospective jurors. Pet. App. A 48; *see also Flowers*, 139 S.Ct. at 2243 (totality of circumstances includes "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case"). There were also readily-apparent, race-neutral grounds for a prosecutor to use peremptory challenges against each of the four prospective jurors at issue, which tended to dispel any inference of discrimination. In particular, two of the prospective jurors expressed strong views against the death penalty; the third expressed a strong belief in the possibility of redemption for persons who commit heinous crimes; and the fourth was uncertain about her ability to serve on the jury, and had a brother whom she believed had been wrongly convicted of a sexual offense. Pet. App. A 48-49.

As the state court concluded, the record in this case did not "support an inference" of discrimination. Pet. App. A 52. "Although the prosecutors used half their peremptory challenges to excuse all the African-American prospective jurors seated in the box, this was not a case that raised heightened concerns about racial bias in jury selection." *Id.* "There were no apparent differences in the extent or manner of the prosecutors' questioning of prospective jurors of different racial backgrounds." *Id.* And, "most importantly, the record discloses readily apparent grounds for excusing each prospective juror, dispelling any inference of bias that might arise from the pattern of strikes alone." *Id.*

3. Rhoades argues that review is nonetheless warranted because his case is "virtually identical" to the facts in *Johnson*. Pet. 5; *see also* Pet. App. A 65-66 (Liu, J., dissenting).[7] But as the state court recognized, that is not correct. Pet. App. A 51-52. It is true that the pattern of strikes here was disproportionate (four out of eight challenges used to excuse all four prospective African-American prospective jurors seated in the jury box), like

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[7] Rhoades cites the dissenting opinion to suggest that "the California Supreme Court has refused to follow *Johnson* in 42 of 42 first-stage *Batson* cases[.]" Pet. 5. That is not an accurate characterization of the dissent. Justice Liu questioned whether, in deciding the last 42 first-step *Batson* cases over the past 15 years, the court had "'improperly elevated the standard for establishing a prima facie case beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike.'" Pet. App. A 64. In any event, the question presented here concerns the state court's decision under the particular facts of Rhoades's case.

the pattern of strikes in *Johnson* (three out of twelve challenges used to exclude all three African-American prospective jurors). Pet. App. A 47; *Johnson*, 545 U.S. at 165.[8] It is also true that the trial court here, assessing step one under *Howard*, stated "I'm very close." Pet. App. A 51; *see also Johnson*, 545 U.S. at 174 (trial court told parties "we are very close").

Unlike *Johnson*, however, this case did not involve anything similar to the "highly relevant" circumstance of a racially charged prosecution with a black defendant and a white victim. Pet App. A 51. While neither *Batson* nor *Johnson* requires a "racial component" (Pet. 7), they do not forbid consideration of its absence. Also unlike this case, *Johnson* did not present the type of "readily apparent race-neutral reasons for exercising the strikes" present here. *Id.* And although the trial courts here and in *Johnson* both stated that the case was "close," the state court rightly observed that in this case it was "not clear the trial court meant it as a commentary on how suspicious (or not) the prior strikes had been, given the totality of circumstances," or that the statement implied "the existence of a prima facie case under a 'reasonable

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[8] Citing a footnote in *Johnson*, Rhoades also argues that the state court failed to consider the prosecutors' refusal to explain the basis for their strikes, a factor which, according to Rhoades, "would provide additional support for the inference of discrimination raised by a defendant's prima facie case." Pet. 8-9. But the cited footnote from *Johnson* referred to the second step of *Batson*, where the trial judge had already found that "the prima facie case was established." 545 U.S. at 171 n.6. A party exercising a peremptory challenge has no obligation to articulate a reason for the challenge until an inference of discrimination has been raised. *People v. Scott*, 61 Cal.4th 363, 387-388 (2015).

inference' standard." *Id.* at 52. In any event, the California Supreme Court explained that it was conducting an independent review of the record in this case—so it did not have to defer (or not) to the trial court's assessment of the same record. *Id.*

Moreover, *Johnson* did not hold that comparable comments by a lower court coupled with the fact that all prospective jurors of a particular race were excused is always sufficient to establish a prima facie case under *Batson*, as Rhoades suggests. *See* Pet. 5, 6-8. Rather, *Johnson* reaffirmed the standard set out in *Batson*: that "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" 545 U.S. at 169 (footnote omitted) (quoting *Batson*, 476 U.S., at 94). The state court's fact-intensive assessment of the jury proceedings under that settled standard presents no reason for further review.

4. Rhoades also argues that the California Supreme Court improperly permits state appellate courts conducting first-stage analysis to speculate about non-racial reasons the prosecutors might have had for exercising peremptory challenges. Pet. 9-14. That argument does not warrant further review.

The California Supreme Court stressed that trial courts evaluating *Batson* challenges should not "search the record for reasons for the peremptory challenge." Pet. App. A 48. It recognized, however, that "where the record

reveals '*obvious* race-neutral grounds for the prosecutor's challenges to the prospective jurors in question,' those reasons can definitively undermine any inference of discrimination" when an *appellate court* conducts its own review of a *Batson* claim. *Id.* (quoting *People v. Davis*, 46 Cal. 4th 539, 584 (2009)).[9] Thus, reviewing courts "may take into account 'nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record . . . and that necessarily dispel any inference of bias.'" *Id.* (quoting *Scott*, 61 Cal. 4th at 384). Even Justice Liu in his dissenting opinion "appear[ed] to agree that an appellate court may consider such readily apparent reasons for a strike[.]" *Id.* at 48 n.16 (citing dis. opn. of Liu, J., *id.* at 69).

Rhoades identifies no legal conflict among the federal courts of appeals or state supreme courts on the permissibility of this approach. He cites some federal appellate decisions (Pet. 10) that he contends forbid the approach. But those cases do not actually advance his argument. Some involved courts ignoring the *Batson* three-step process altogether.[10] Others involved courts supplying hypothetical reasons for a strike at step three, *after* a prosecutor had

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[9] *Accord People v. Taylor*, 48 Cal.4th 574, 616 (2010); *United States v. Stephens*, 421 F.3d 503, 516, 518 (7th Cir. 2005) ("courts considering *Batson* claims at the prima facie stage may consider apparent reasons for the challenges discernible on the record"); *cf. Williams v. Runnels*, 432 F.3d 1102, 1110 (9th Cir. 2006) ("refutation of the inference requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges").

[10] *See Paulino v. Castro*, 371 F.3d 1083, 1089-1090 (9th Cir. 2004).

already supplied his or her explanation for a strike at step two.[11] None considered the issue of whether, when reviewing a trial court decision that rejected a *Batson* claim at the first step of the *Batson* inquiry, an appellate court may consider obvious race-neutral grounds for the prosecutor's challenges that undermine an inference of discrimination. And this Court has recently denied certiorari in cases raising similar questions.[12]

In any event, the procedure followed by the state court below is consistent with *Batson*, which mandates consideration of "all relevant circumstances" to determine whether an inference of discrimination has been shown. 476 U.S. at 96. It is also consistent with *Johnson*, which did not suggest a departure from *Batson*'s "all relevant circumstances" standard. While *Johnson* generally cautioned against "judicial speculation to resolve plausible claims of discrimination," this Court did not categorically forbid an appellate court from considering reasons apparent in the record as it conducts an independent review. 545 U.S. at 173.[13]

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[11] *See Holloway v. Horn*, 355 F.3d 707, 724-725 (3d Cir. 2004); *United States v. Petras*, 879 F.3d 155, 161-162 (5th Cir. 2018), *Chamberlin v. Fisher*, 855 F.3d 657, 661-662 (5th Cir. 2017), *rev'd en banc*, 885 F.3d 832 (5th Cir. 2018), and *Bryan v. Bobby*, 843 F.3d 1099, 1111 (6th Cir. 2016)

[12] *Reed v. California*, No. 18-6411, *cert. denied*, 139 S. Ct. 1260 (2019); *Parker v. California*, No. 17-6923, *cert. denied*, 138 S. Ct. 988 (2018).

[13] Nor is there any significance to the fact that *Johnson* declined to consider potentially "obvious" race-neutral reasons that might have explained the challenged strikes. As the California Supreme Court explained below, "the reasons themselves [in *Johnson*] were not significant." Pet. App. A 51. The

To be sure, this Court has recognized—as the state court did below—that it is best for courts to avoid speculation when "a direct answer can be obtained by asking a simple question" to the prosecutor. Pet. App. A 48 (quoting *Johnson*, 545 U..S. at 172). The *Batson* framework "is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 173. But where independent appellate review occurs many decades after the trial, such direct inquiry may not be feasible:

> [I]n this court, which may conduct its review of a no-prima-facie-case ruling many years or even decades after it was made, asking the attorneys would be anything but simple—indeed, both defendant and the dissent argue that it would be impossible here. On the other hand, as an appellate court, we have the benefit of being able to examine the record in more detail, and at a great deal more leisure, than a trial court in the midst of jury selection. What is the soundest and most practical approach for trial courts is not necessarily the soundest and most practical approach for appellate courts, and vice versa.

Pet. App. A 48 n.16 (internal citations omitted).

Finally, Rhoades suggests that the state court erred in assessing what race-neutral grounds were supported by the record. For example, he contends that the state court failed to consider the possibility that the prosecutors were motivated in substantial part by impermissible racial reasons in removing the

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"rambling" responses there did not offer the sort of readily apparent reasons that would have dispelled any inference of discrimination arising from the pattern of excusals. *Id.*

four prospective jurors. Pet. 9-14. But the state court did, in fact, conclude that there was nothing in the record establishing that "stereotypes and biases" influenced jury selection. Pet. App. A 48. Rhoades also contends that the court may "have been influenced by the false—but widely held belief—that African-Americans, particularly women, are not favorable jurors for the prosecutor in a capital trial." Pet. 10-11. But the California Supreme Court rejected that argument, pointing out that "discrimination in this context cannot be assumed, it must be demonstrated." Pet. App. A 47 n.14. The court likewise rejected Rhoades's argument that the prosecutors' failure to challenge the four African-American jurors for cause demonstrates that their anti-death penalty views were not obvious reasons to excuse them. Pet. 11; *see* Pet. App. A 50. As the state court persuasively explained, for-cause challenges are "entirely distinct" from exercising peremptories. Pet. App. A 50.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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