No._____

In The

Supreme Court of the United States

JOE EDWARD JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, as the overwhelming majority of jurisdictions hold, a request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975), is timely if made prior to trial, or whether instead—as California and a handful of other jurisdictions maintain—even a pre-trial *Faretta* request can be held to be "untimely" based on an amorphous "totality of the circumstances" test?
2. Has California continued to defy this Court's holding and opinion in *Johnson v. California,* 545 U.S. 162 (2005)[1], by consistently imposing a standard for the first (or *prima facie*) step of the analysis required by this Court's opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), that is, as a practical matter, impossible to satisfy?

[1] Though this case shares a caption with this earlier Johnson case, they are unrelated. To avoid confusion Mr. Johnson will refer to this Court's earlier case and the decision below in this case using their full case titles.

RELATED CASES

- *People v. Joe Edward Johnson*, No. 58961, California Superior Court, Sacramento County. Judgement entered May 28, 1981
- *People v. Joe Edward Johnson*, No. S004381, Supreme Court of California. Judgement entered December 22, 1988
- *Johnson v. California*, No. 88-7245, Supreme Court of the United States. Order Denying Petition for Writ of Certiorari entered October 2, 1989.
- *People v. Joe Edward Johnson*, No. 58961, California Superior Court, Sacramento County. Judgement entered October 28, 1992
- *People v. Joe Edward Johnson*, No. S029551, Supreme Court of California. Judgement entered November 25, 2019; modified on denial of rehearing February 11, 2020.

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OPINION BELOW

The opinion of the Supreme Court of California is reported as *People v. Johnson*, 8 Cal. 5th 475 (2019) and is attached as Appendix A. That court's order denying Mr. Johnson's petition for rehearing and modifying its opinion is attached as Appendix B.

JURISDICTION

The California Supreme Court issued its opinion in Mr. Johnson's automatic appeal from a judgment of death following a penalty phase retrial on November 25, 2019.[2] Appendix A. Mr. Johnson timely filed a petition for rehearing. On February 11, 2020, the California Supreme Court issued an order modifying its original opinion and denying the petition for rehearing. Appendix B. This petition is timely under this Court's order issued on March 19, 2020 extending the time for filing a petition for writ of certiorari to 150 days from the date of, *inter alia*, the denial of a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

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[2] This appeal involves only the penalty phase retrial. The California Supreme Court previously upheld Mr. Johnson's murder conviction, but reversed the death sentence. *People v. Johnson*, 47 Cal. 3d 576 (1989).

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive a person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Joe Edward Johnson, a Black man, was convicted of the murder of a white man and the rape of a white woman and sentenced to death. The California Supreme Court reversed the rape conviction and the death sentence. *People v. Johnson,* 47 Cal. 3d 576 (1989). The prosecution chose not to retry Mr. Johnson on the rape charge and to retry only the penalty phase. *People v. Johnson*, 8 Cal. 5th at 481.

At issue here are two pretrial rulings made by the trial court and affirmed by the California Supreme Court. First, the court denied as untimely Mr. Johnson's request to represent himself, made two weeks before the scheduled trial date, almost three weeks before the parties first appeared before the trial judge, and

seven weeks before jury selection began. Second, the court denied Mr. Johnson's *Batson* motion after the prosecutor had struck three of five Black jurors.[3]

A. Mr. Johnson's Requests to Represent Himself Before Trial

The first penalty phase retrial ended in a deadlocked jury on February 7, 1991. (4CT 984; 30RT 10034.)[4] On May 17, the trial court set the next penalty retrial for September 23, 1991. (30RT 10077.) On August 19, 1991, the defense moved for a continuance of the trial date because new lead trial counsel, Charles Ogulnik, had not been assigned until approximately July 3. (49RT 10542). That motion was granted, and the trial date was continued to November 18, 1991. (30RT 10085-10086.) On November 15, 1991, the defense successfully moved for a continuance of the trial date to June 22, 1992. (30RT 10092.)

From the outset Mr. Johnson had conflicts with lead counsel Ogulnick. Mr. Ogulnick had contacted Mr. Johnson's family against his instructions and then lied to him about it and wanted to mount what Mr. Johnson saw as a "sympathy" defense rather than attacking the evidence of guilt, essentially mounting a lingering doubt defense, as Mr. Johnson wished. (49RT 10545-47.) During the period before the June 22 date Mr. Johnson also discovered that Mr. Ogulnick had been disciplined by the State Bar. Mr. Johnson made diligent efforts to obtain

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[3] The facts of the crime and trial, which are largely not relevant to the issues raised in this petition, are set forth in the California Supreme Court's decision at 8 Cal. 5th at 481-93.

[4] RT refers to the Reporter's Transcript of the proceedings below. CT refers to the Clerk's Transcript.

information about the discipline, sending multiple letters to the Bar. (S*ee* 6CT 1149.16-1149.21.) He ultimately discovered that Mr. Ogulnick had been suspended from the practice of law for three years for incompetence, that all but six months of the three years had been suspended, that the suspension had ended only three months before he was assigned to Mr. Johnson's case, and that he was still on probation with the State Bar. (6CT 1149.24-1149.45.)

Upon discovering that Mr. Johnson was considering seeking to have Mr. Ogulnick removed as counsel, second counsel Donald Masuda, who had also assisted in Mr. Johnson's first penalty retrial, urged him to wait. (49RT 10654; 50RT 10984-86.)

On June 8, 1992, Mr. Johnson filed a written motion to represent himself. (4CT 1123.) At the same time, he filed a request for new counsel under *People v. Marsden*, 2 Cal. 3d 118 (1970) (4CT 1122.1), a motion to continue (4CT 1136), and a motion for discovery of documents relating to a California State Bar disciplinary hearing regarding Mr. Ogulnik (4CT 1125). The prosecutor filed opposition to appellant's *Faretta* and continuance motions on June 12. (4CT 1137.3.) Also, on June 12, during a discovery hearing, the trial court said the *Faretta* motion was set to be heard June 22. (30RT 10106.) But on that date, the master calendar judge did not hear the motion, and informed the parties that the case would be adjourned until July 6, having been assigned to a different judge who would preside over the trial. (30RT 10108-10109; 4CT 1137.14.)

Over the course of several court dates, on July 7, 9, 14, and 21, the trial court held a series of proceedings, both public and *in camera*, regarding the *Faretta* motion. (49RT 10622-23, 10651-62; 50RT 10981-82.) On July 21 the court denied the motion. (32RT 10955-57.) On July 23 petitioner filed additional documents in support of his motion. (6CT 1149.1-1149.52.) The court agreed to reconsider its decision but adhered to it. (34RT 11341-42.) Jury selection began on July 28 (33RT 11251) and opening statements on August 25. (40RT 13286.)

B. The Prosecutor's Investigation and Strikes of Black Jurors and the Defense *Batson* Motion

During jury selection, Mr. Johnson, who is Black and stood convicted of the murder of a white man and faced aggravating evidence alleging that he had raped a white woman, challenged the prosecution's removal of Black jurors under *Batson*. The trial court denied the motion.

Immediately before prospective juror Kenneth M. was questioned on voir dire, the prosecutor revealed that he had run a criminal history check on "some of the jurors" and discovered that Kenneth M. had two misdemeanor convictions for driving under the influence and an arrest for domestic violence. (39RT 12804-12805.) Kenneth M. had indicated on his questionnaire that he had never been arrested for a crime. (39RT 12805.)[5]

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[5] During voir dire Kenneth M. explained that he had pleaded no contest to driving under the influence charges the preceding year (39RT 12990-12991), and that charges stemming from a dispute with his wife had been dropped after he completed a diversion program (39RT 12995). Neither side challenged Kenneth M. for cause. (39RT 13005.) The prosecutor ultimately removed Kenneth M. with a

Defense counsel then asked if the prosecutor "just checked all the [B]lack prospective jurors with respect to any criminal record" (39RT 12807) In response the prosecutor said, "I don't think I am obligated to answer that inquiry." (*Id.*) The prosecutor admitted, however, that he had not checked all the jurors and that he was only checking jurors who "sparked my interest." (39RT 12807, 12809.) The trial court ultimately refused to require the prosecutor to reveal any information about his investigations. (39RT 12810.)

Once jury selection commenced a pattern developed in the prosecutor's strikes of Black jurors. Once two Black jurors had been seated the prosecutor immediately used a peremptory strike on any additional Black juror added to the panel. That is, the prosecutor would not allow the number of Black jurors to exceed two.[6] After the third such strike, the defense raised the *Batson* challenge at issue here. (40RT 13125.)

At that point, the prosecutor had struck 60% of the Black jurors (3 of 5) and 34.2% of the white jurors (12 of 35). *People v. Johnson,* 8 Cal. 5th at 529 (Liu, J., dissenting.)[7] Overall during jury selection the prosecutor "used 21 percent of his

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peremptory challenge during the selection of alternate jurors. (40RT 13155-13156.) This resulted in another *Batson* challenge by Mr. Johnson. (40RT 13157.) No alternate jurors were used during the trial and that *Batson* challenge is not at issue here.

[6] The prosecutor did allow a third Black juror to be seated *after* Mr. Johnson's *Batson* challenge.

[7] The majority uses the numbers at the end of jury selection rather than at the time of the motion, thus artificially reducing the numbers to 50% and 33%. *Id.* at 507-08. The majority does not explain this choice.

strikes (4/19) to remove African American jurors—which was 62 percent higher than their representation in the relevant pool." *Id.* at 542 (Cuéllar, J., dissenting.)

REASONS FOR GRANTING THE WRIT

I. The Writ Should be Granted to Resolve a Split Between State and Federal Courts About When a Defendant's Motion for Self-Representation is Timely

In *Faretta v. California*, 422 U.S. 806 (1975), this Court established that a criminal defendant has a constitutional right to choose self-representation. The right to defend is personal and "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834. In *Faretta* this Court established two requirements for a valid request: that the request be knowing and intelligent, after advisement of the dangers of self-representation, and that it be unequivocal. *Id.* at 835. This Court subsequently required that the defendant be competent. *Indiana v. Edwards,* 554 U.S. 164, 177-78 (2008). Other than *Edwards*, this Court has not revisited the requirements for a valid *Faretta* request since it decided that case.

While this Court mentioned that the request in *Faretta* was made "weeks before trial," it otherwise established no time limit for making a request. *Faretta*, 422 U.S. at 835. This has led to the current divided state of the law as to what constitutes a timely *Faretta* request and even what the benchmark should be for calculating timeliness. This Court should grant this petition to resolve this conflict and settle this important question of federal law.

A. The California Supreme Court's Ruling that Mr. Johnson's *Faretta* Motion was Untimely is Contrary to the View of the Majority of Federal and State Courts and Inconsistent with the Importance of Autonomy as a Component of the Right to Counsel

While this Court has never explicitly imposed a timeliness requirement on a defendant's request for self-representation under *Faretta*, every court that has considered the issue appears to have imposed some form of timeliness requirement and all hold that a timely request must be granted as of right. However, there is a significant split in authority as to what constitutes a timely request.

In this case the California Supreme Court took a position on the timeliness of a *Faretta* request in keeping with its precedents. The court said that a *Faretta* request made "on the eve of trial" is untimely. *People v. Johnson*, 8 Cal. 5th at 499. As examples of the eve of trial it referred to cases where the request was made on or a few days before trial. *Id.* (citation omitted). The court also said that motions "made long before trial are timely," citing cases where the requests were seven months and two years before trial. *Id.* at 499-500 (citation omitted). The court said its "'refusal to identify a single point in time at which a self-representation motion filed before trial is untimely indicates that outside these two extreme time periods, pertinent considerations may extend beyond a mere counting of the days between the motion and the scheduled trial date.'" *Id.* at 500 (quoting *People v. Lynch*, 50 Cal. 4th 693, 723 (2010), *abrogated on other grounds by People v. McKinnon*, 52 Cal. 4th 610 (2011)). That court has applied a "totality of the circumstances test in determining whether a defendant's pretrial *Faretta* motion is timely" when it falls into that large grey area. *Id.* That test considers "not only the time between the

motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." *Id.* (quoting *Lynch*, 50 Cal. 4th at 726).

In this case the court cited a number of factors including that the request was filed two weeks before the "scheduled trial date," that Mr. Johnson was requesting a continuance, that Mr. Johnson could have made his request earlier, and that he had made similar complaints about his counsel during his first retrial. *People v. Johnson*, 8 Cal.5th at 501. The court also noted that the trial court's "strong suspicion" that Mr. Johnson's purpose was delay based on those last two factors. *Id.* The court did not note that jury selection did not commence until seven weeks after Mr. Johnson made his *Faretta* request. It did not explain why Mr. Johnson's consistent desire to have the defense of his choice was "suspicious." It did not note that he was urged by counsel to delay his request. And it dismissed the fact that during the period of delay Mr. Johnson was diligently investigating counsel's recent discipline by the Bar. *Id.* at 501, n.4.

It its opinion below the California Supreme Court acknowledged that its view is out of step with that of many federal circuits. *Id.* at 502 (citing *Fritz v. Spalding,* 682 F.2d 782, 784 (9th Cir. 1982); *United States v. Lawrence,* 605 F.2d 1321, 1325 (4th Cir. 1979); *Chapman v. United States*, 553 F.2d 886, 894 (5th Cir. 1977)). It also noted one state that has taken a similar view to its own. *Id.* (citing *Lyons v.*

State, 796 P.2d 210, 214 (Nev. 1990) (if *Faretta* request can be granted without need for a continuance, request should be granted; otherwise, request may be denied as untimely if there is no reasonable cause to justify the late request)[8]; *Guerrina v. State*, 419 P.3d 705, 709 (Nev. 2018) (*Faretta* "'nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case'") (quoting *Lynch*, 50 Cal.4th at p. 724). While not discussed by the California Supreme Court, three additional states hold a similar view. *See Russell v. State,* 383 N.E.2d 309, 314 (Ind. 1978) ("right of self-representation must be asserted within a reasonable time prior to the day on which the trial begins"); *State v. Fritz*, 585 P.2d 173, 178 (Wash. Ct. App. 1978) ("(a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.") (citing *People v. Windham,* 19 Cal. 3d 121, 127-28 (1977)); *Scott v. State*, 278 P.3d 747, 753 (Wyo. 2012) (same) (citing *Fritz*, 585 P.2d at 178).

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[8] The Nevada Supreme Court subsequently abrogated a portion of its decision in *Lyons* that held, as the California Supreme Court did in *Lynch*, 50 Cal. 4th at 726, that the complexity of the case is a valid consideration in determining whether to grant a *Faretta* request. *See Vanisi v. State*, 22 P.3d 1164, 1172 & n. 14 (Nev. 2001).

The opinion below fails to acknowledge the extent to which its view is out of step with the majority of both state and federal courts.

The Ninth Circuit has repeatedly granted habeas corpus petitions in cases in which the California Supreme Court has taken too narrow a view of what constitutes a timely *Faretta* request. *See, e.g. Tamplin v. Muniz,* 894 F.3d 1076, 1088-89 (9th Cir. 2018) (even under the deferential AEDPA, 28 U.S.C. § 2254, standard a *Faretta* motion filed two weeks before the scheduled trial date is timely as a matter of clearly established United States Supreme Court law); *Burton v. Davis,* 816 F.3d 1132, 1141 (9th Cir. 2016) ("had Burton asked to represent himself weeks before trial and had the trial court denied his request as untimely, we would conclude that the denial was contrary to *Faretta* and would issue the writ on that basis"); *Avila v. Roe*, 298 F.3d 750, 753 (9th Cir. 2002) ("a *Faretta* request is timely if made before jury impanelment, 'unless it is shown to be a tactic to secure delay.'" (quoting *Fritz v. Spalding,* 682 F.2d 782, 784 (9th Cir.1982)). In reaching this conclusion the Ninth Circuit has relied in part on this Court's apparent conclusion in *Faretta* itself that a request made "'weeks before trial'" was timely. *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997) (quoting *Faretta,* 422 U.S. at 835).

Most federal circuit courts have adopted a similar rule. See e.g., *United States v. Betancourt-Arretuche*, 933 F.2d 89, 96 (1st Cir. 1991) ("in general" request is timely if it is asserted before the jury is empaneled); *Williams v. Bartlett,* 44 F.3d 95, 99 (2d Cir.1994) (right is unqualified if request made before start of trial); *Buhl v. Cooksey,* 233 F.3d 783, 795 (3d Cir. 2000) (request made several weeks before

trial timely); *United States v. Bankoff,* 613 F.3d 358, 373 (3d Cir. 2010) (right is unqualified until jury has been empaneled); *United States v. Lawrence,* 605 F.2d 1321, 1325 (4th Cir. 1979) (right of self-representation must be asserted before meaningful trial proceedings have commenced; thereafter its exercise rests within the sound discretion of the trial court); *Chapman v. United States,* 553 F.2d 886, 894 (5th Cir.1977) (right is unqualified until jury is sworn); *United States v. Johnson*, 223 F.3d 665, 668 (7th Cir. 2000) ("a motion for self-representation is timely if made before the jury is empaneled unless made for the purpose of delaying or disrupting the trial") (citations omitted); *United States v. Smith,* 830 F.3d 803, 809 (8th Cir. 2016) ("'[A] motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay.'") (quoting *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982)); *United States v. Tucker*, 451 F.3d 1176, 1181 (10th Cir. 2006) ("a motion for self-representation is timely if it is made before the jury is impaneled, unless it is a tactic to secure delay"); *United States v. Young*, 287 F.3d 1352, 1354 (11th Cir. 2002) ("a defendant's request to proceed *pro se* is untimely if not made before the jury is empaneled").

Like the Ninth Circuit, *see, e.g.*, *Fritz*, 682 F.2d at 784, several federal circuits have drawn a bright line at jury empanelment—a request before the jury is empaneled must be granted if it meets *Faretta's* requirements of being knowing and intelligent and unequivocal. (*E.g., Betancourt-Arretuche*, 933 F.2d at 96 (First Circuit); *Bankoff,* 613 F.3d at 373 (Third Circuit); *Chapman,* 553 F.2d at 894 (Fifth Circuit); *Johnson*, 223 F.3d at 668 (Seventh Circuit); *Smith,* 830 F.3d at 809 (Eighth

Circuit); *Tucker*, 451 F.3d at 1181 (Tenth Circuit); *Young*, 287 F.3d at 1354 (Eleventh Circuit). Those courts would all deem Mr. Johnson's request timely.

Other circuits have drawn the line at the "commencement of trial" without clearly defining that term. *E.g., Williams,* 44 F.3d at 99 (Second Circuit; before start of trial); *Lawrence,* 605 F.2d at 1325 (Fourth Circuit; before meaningful trial proceedings have commenced). However "commencement of trial" is defined, a motion submitted two weeks before trial was scheduled to begin and almost three weeks before the parties first appeared before the trial judge should qualify.

Even the circuits with the most stringent view of timeliness would have found Mr. Johnson's request timely. For example, the Sixth Circuit has held, in the context of federal habeas review of a state conviction governed by the AEDPA, 28 U.S.C. 2254, that "to the extent that *Faretta* addresses timeliness, as a matter of clearly established law it can only be read to require a court to grant a self-representation request when the request occurs weeks before trial." *Hill v. Curtin*, 792 F.3d 670, 678 (6th Cir. 2015). Under this standard the denial of Mr. Johnson's request, which came two weeks before the "scheduled trial date" and seven weeks before jury selection commenced, would be timely and would merit federal habeas relief.

The majority of state courts also take this view.[9] Again, it does not appear that any of these states would have found Mr. Johnson's request untimely. Indeed,

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[9] *See, e.g., State v. Cornell*, 878 P.2d 1352, 1364 (Ariz. 1994) (a defendant's right to discharge counsel and proceed in propria persona is a qualified right after

even in states that use the less precise line of the commencement of "meaningful trial proceedings," the request here would have been timely. For example, the Pennsylvania Supreme Court has said that "trial commences 'when a court has

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trial has begun); *Pierce v. State*, 209 S.W.3d 364, 371 (Ark. 2005) (request made before trial commenced timely); *Akins v. State*, 955 S.W.2d 483, 488 (Ark. 1997) (error to deny request made four days before trial); *Martin v. State*, 434 So. 2d 979, 981 (Fla. Dist. Ct. App. 1983) ("when a defendant, prior to trial, requests permission to represent himself, the court must make inquiry to determine whether the defendant's decision to represent himself is intelligently and voluntarily made and that he is knowingly waiving his right to counsel, and the trial court should also determine whether unusual circumstances exist which would preclude the defendant from representing himself"); *Thaxton v. State*, 390 S.E.2d 841, 843 (Ga. 1990) ("[a]n unequivocal assertion of the right to represent oneself, made prior to trial, should be followed by a hearing to ensure that the defendant knowingly and intelligently waives the right to counsel and understands the disadvantages of self-representation"); *State v. Meyers*, 434 P.2d 224, 227 (Idaho 2019) ("'a motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay'") (quoting *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982)); *People v. Bell*, 363 N.E.2d 1202, 1206 (Ill. App. Ct. 1977) ("the right of a defendant to represent himself is unqualified if invoked prior to the start of trial."); *State v. Cromwell*, 856 P.2d 1299, 1307 (Kan. 1993) (right to self-representation is unqualified if asserted before trial), *holding modified on other grounds by State v. Willis*, 864 P.2d 1198 (Kan. 1993); *Swan v. Commonwealth*, 384 S.W.3d 77, 94 (Ky. 2012) (holding that a request a week before trial is timely made and quoting *United States v. Bishop,* 291 F.3d 1100, 1114 (9th Cir.2002) to the effect that a request is "timely if made before meaningful trial proceedings have begun.... [A] request is timely if made before the jury is selected or before the jury is empaneled, unless it is made for the purpose of delay"); *People v. Crespo*, 112 N.E.3d 1243, 1244-45 (N.Y. 2018) (to be timely request must be made before jury selection begins); *State v. Torkelsen*, 752 N.W.2d 640, 655 (N.D. 2008) (right to self-representation is unqualified if it is demanded before trial); *Commonwealth. v. El*, 977 A.2d 1158, 1163 (Pa. 2009) (a request for pro se status is timely when it is asserted before "meaningful trial proceedings" have begun); *State v. Fuller*, 523 S.E.2d 168, 170 (S.C. 1999) ("The request to proceed *pro se* must be clearly asserted by the defendant prior to trial. . . . If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge"); *McDuff v. State*, 939 S.W.2d 607, 619 (Tex. Crim. App. 1997) ("An accused's right to self-representation must be asserted in a timely manner, namely, before the jury is impaneled.").

begun to hear motions which have been reserved for time of trial; when oral arguments have commenced; or when some other such substantive first step in the trial has begun.'" *Commonwealth. v. El*, 977 A.2d 1158, 1165 (Pa. 2009) (citation omitted). None of the benchmarks had yet been reached when Mr. Johnson made his request.

The California Supreme Court identified only one state, Nevada, that holds a view of timeliness akin to its own. *People v. Johnson*, 8 Cal. 5th at 502 (citing, *Lyons v. State* 796 P.2d 210, 214 (Nev. 1990) (if Faretta request can be granted without need for a continuance, request should be granted; otherwise, request may be denied as untimely if there is no reasonable cause to justify the late request); *Guerrina v. State* 419 P.3d 705, 709 (Nev. 2018) (*Faretta* "'nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case'" (quoting *Lynch,* 50 Cal. 4th at p. 724)). As noted above, three other states appear to apply a similar rule. *See Russell*, 383 N.E.2d at 314; *Fritz*, 585 P.2d at 178 (citing *Windham,* 19 Cal. 3d at 127-28); *Scott*, 278 P.3d at 753 (citing *Fritz*, 585 P.2d at 178).

California's standard thus stands in sharp contrast to that of the majority of jurisdictions in both its stringency and its uncertainty. As discussed *ante*, in its decision here the court defined a grey area that begins somewhere between seven months to a year before trial and ends somewhere around two days before trial. *People v. Johnson*, 8 Cal. 5th at 499. Requests made in that vast period are subject to a vaguely and inconsistently defined "totality of the circumstances" test. *Id.*

Such an amorphous standard leaves an already disadvantaged pro se defendant with no way to know when to make a *Faretta* request. It is particularly problematic in a case such as this where Mr. Johnson was essentially negotiating with counsel to forgo a traditional penalty phase defense, which he regarded as a "sympathy" defense, in favor of a defense focused on lingering doubt. Moreover, Mr. Johnson was simultaneously investigating his lead counsel, who had been suspended from the practice of law for misconduct until shortly before his assignment to Mr. Johnson's case and was still on probation with the Bar. And, during this time, second counsel was urging Mr. Johnson to be patient and delay seeking to have first counsel removed.

The problems inherent in California's approach are exacerbated by the California Supreme Court's use, at least in this case, of the date "trial was scheduled to commence" as the benchmark for timeliness. The Fifth Circuit has explained the problems with using such a notional date, as opposed to the actual start of trial as defined by empanelment of a jury:

> If there is to be a Rubicon beyond which the defendant has lost his unqualified right to defend pro se, it makes far better sense to locate it at the beginning of defendant's trial, when the jury is empaneled and sworn, than when defense counsel announces "ready. . . ." the declaration "ready" at a calendar call bears no functional relation to the pro se right or to the actual beginning of trial; there may be many cases on a court's docket, and delays as long as the eleven days in this case between "ready" and trial are not uncommon. . . ., [and] the expense of any delay rises dramatically once the jury is empaneled. Finally, a mid-trial change to a pro se defense may be thought to disrupt the continuity of ongoing proceedings, a danger not present when the defendant asserts his right to defend himself before the jury is sworn

Chapman, 553 F.2d at 894.

These concerns are borne out by what happened here. Mr. Johnson made his *Faretta* request two weeks before a "scheduled trial date" of June 22, 1992. (4CT 1123.) But the case had also been set for trial on September 23, 1991 (30RT 10077), and November 18, 1991 (30RT 10092). It is not clear how Mr. Johnson would have been expected to know that June 22, 1992 was *the* trial date, especially since it was not. Mr. Johnson filed his *Faretta* motion on June 8 (4CT 1123), having sent it to second counsel, Mr. Masuda, to file a week earlier (6CT 1149.51). The first appearance before the trial judge was on July 6, almost three weeks after the *Faretta* motion was filed. That judge did not decide the motion until July 23, six weeks after it was filed. Jury selection did not begin until July 28, seven weeks after the motion was filed. (33RT 11251.) And it was not until August 25, eleven weeks after Mr. Johnson asserted his constitutional right to represent himself, that opening statements began. (40RT 13286.) Petitioner has identified no case outside of California that found a *Faretta* request made this far in advance to be untimely.

The difficulties faced by a criminal defendant are further compounded by the California Supreme Court's inconsistency in selecting the critical date for measuring timeliness. It has generally referred to the commencement of trial, not the scheduled trial date, as the appropriate touchstone. *See, e.g., People v. Jenkins,* 22 Cal. 4th 900, 959 (2000); *People v. Burton* 48 Cal.3d 843, 852 (1989); *People v. Moore,* 47 Cal. 3d 63, 79 (1988). Indeed, even in this case the court, while treating the *scheduled* trial date as the critical date, *People v. Johnson,* 8 Cal. 5th at 501, also said that it has "long held that a *Faretta* motion is timely if it is made 'within a

reasonable time prior to the *commencement* of trial,'" *Id.* at 499 (quoting *Windham*, 19 Cal. 3d at 128) (emphasis added).

California reached this wrong turning in the law in part by misreading this Court's precedents. In its opinion the California Supreme Court quoted its decision in *Lynch,* which in turn quotes this Court, for the principle that "'a trial court may "make scheduling and other decisions that effectively exclude a defendant's first choice of counsel."'" *People v. Johnson*, 8 Cal. 5th at 500 (quoting *Lynch,* 50 Cal.4th at 725, quoting *United States v. Gonzalez-Lopez,* 548 U.S. 140, 152 (2006)). In quoting *Gonzalez-Lopez* the *Lynch* court elided critical language. The full quote from that case is: "*This is not a case* about a court's power to . . . make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." *Gonzalez-Lopez*, 548 U.S. at 152 (emphasis added). Thus, the California Supreme Court relied on language that was not simply dicta but related to a proposition that this Court specifically said it was *not* deciding.

The court below also quoted *Lynch*, again quoting *Gonzalez-Lopez*, for the principle that "'the high court has "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness [citation], and against the demands of its calendar."'" *People v. Johnson*, 8 Cal. 5th at 500 (quoting *Lynch*, 50 Cal.4th at 725, quoting, *Gonzalez-Lopez,* 548 U.S. at 152). That portion of *Gonzalez-Lopez*, which concerned whether violation of the right to choice of retained counsel could be harmless error, was also dicta. Moreover, *Gonzalez-Lopez* cited to this Court's decision in *Morris v. Slappy,* 461 U.S. 1 (1983), which explicitly did not

involve a Sixth Amendment issue. Rather, this Court there rejected a claim that the Sixth Amendment provided a right to a "meaningful" attorney-client relationship. *Id.* at 14. Thus, the quoted language was both dicta and had no connection to any constitutional right.

California, and the small number of states that have followed its path, have departed from the view of *Faretta* timeliness that the majority of federal and state courts adhere to. This approach inevitably leads to the denial of criminal defendants' right to self-representation, a critical component of the "constitutional right to conduct [their] own defense." *Faretta*, 422 U.S. at 835. This court has recently reiterated that a defendant's autonomy is a critical component of the rights guaranteed by the Sixth Amendment. *McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500, 1508 (2018); *see also McKaskle v. Wiggins,* 465 U.S. 168, 176-77 (1984) ("The right to appear pro se exists to affirm the dignity and autonomy of the accused.").

This Court should grant the petition to resolve the conflicting interpretations of timeliness under *Faretta* and settle this important question of federal law to protect defendants' Sixth Amendment right to self-representation.

II. This Court Should Grant Certiorari Because the California Supreme Court has Consistently Failed to Heed this Court's Teaching in *Johnson v. California* and Refused to Protect Criminal Defendants' and Potential Jurors' Constitutional Right to Unbiased Jury Selection

Fourteen years ago, in *Johnson v. California*, 545 U.S. 162 (2005), this Court held that the California Supreme Court's requirement to show a "strong likelihood" of discrimination at *Batson's* first step was an unconstitutionally high bar. In the 14 years since, the California Supreme Court has conducted merits review of 42 first-stage *Batson* cases in which the trial court applied that standard and found error in none of them. *People v. Johnson,* 8 Cal. 5th at 534 (Liu, J., dissenting).

In *Johnson v. California* this Court made clear that the standard for establishing a prima facie case is low: "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. . . . The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Johnson v. California*, 545 U.S. at 172 (citing *Batson*, 476 U.S. 97-98 and n. 20). Yet the California Supreme Court has consistently refused to ask that "simple question." In 14 years, the state court has not found a single case that cleared the low hurdle of establishing "suspicions and inferences" of discrimination. *Id.*

While the California Supreme Court claims to be following the standard this Court established in *Johnson v. California,* see e.g., *People v. Johnson*, 8 Cal.5th at 506; *People v. Rhoades*, 8 Cal. 5th 393, 428-29 (2019), *petition for cert. filed,* April

16, 2020 (No. 19-8332), that court's virtually unblemished record of denying *Batson* claims and the facts of this case demonstrate the standard it actually applies is unattainable. This case exemplifies the California Supreme Court's failures in this area for, "if the facts of this case do not give rise to an inference of discrimination, then I am not sure what does." *People v. Johnson,* 8 Cal. 5th at 528-29 (Liu, J., dissenting) (citation omitted).

A. Over the Last Thirty Years the California Supreme Court has Consistently Failed to Heed this Court's Clear Directives for Evaluating Claims of Racial Discrimination in Jury Selection

The California Supreme Court's 14 year record of finding no error in 42 first-stage *Batson* cases is particularly remarkable given that in all of those cases, including this one, the trial court's decision was made under the "strong likelihood" standard, *People v. Johnson,* 8 Cal. 5th at 534 (Liu, J., dissenting), a standard this Court rejected as too "onerous" and thus an "inappropriate yardstick by which to measure the sufficiency of a prima facie case," *Johnson v. California*, 545 U.S. at 168, 170. Moreover, because the trial court used that erroneous standard, those cases were purportedly subjected to *de novo* review. *See People v. Johnson,* 8 Cal. 5th at 534 (Liu, J., dissenting).

However, that record is only part of the story. As Justice Liu pointed out, the California Supreme Court has not found *any Batson* error involving a Black juror in 30 years. *Id.* More broadly, between 1989 and 2019 that court reviewed 142 *Batson* cases and found error only three times (2.8%). Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory*

Exclusion of Black and Latinx Jurors 23 (2020) ("Berkeley Law Report") (available at ¶https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf (last visited July 3, 2020)).

California's lower appellate courts have followed the Supreme Court's lead. From January 1, 2006, through December 31, 2018, the California Court of Appeal decided 683 cases that included a *Batson* claim. The court's six appellate districts found *Batson* error in only 18 cases (2.6%) and remanded three cases (0.4%) for the trial court to rehear the *Batson* motion. Berkeley Law Report at 24 & n. 237.

In contrast, since 1993, the Ninth Circuit Court of Appeals has granted relief in 21 of the 140 (15%) *Batson* cases it reviewed from California state courts. *Id.* at 25. Eighteen of those 21 cases were decided under the stringent standards of the Antiterrorism and Effective Death Penalty Act of 1996. *Id.;* 28 U.S.C. § 2254.

In a case decided the same day as this one, also rejecting a first stage *Batson* claim, Justice Liu noted in dissent his court's "remarkable uniformity of results" and expressed concern "that this court has 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.'" *People v. Rhoades*, 8 Cal. 5th at 458 (Liu, J., dissenting). Justice Liu urged that these "decisions are the latest steps on what has been a one-way road, and . . . it is past time for a course correction." *Id.*

Racial discrimination in jury selection has a long history in the United States, as this Court recently recounted in *Flowers v. Mississippi*, ___ U.S. ___, 139

S. Ct. 2228, 2238-2242 (2019). This Court also emphasized the importance of eliminating such discrimination: "In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Id.* at 2243 (citing *Foster v. Chatman*, ___ U. S. ___, 136 S. Ct. 1737 (2016): *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005)).

This steadfast enforcement is critical because, "the frequent and disproportionate exclusion of fully capable and qualified [B]lack citizens from jury service breeds distrust of law enforcement and 'undermine[s] public confidence in the fairness of our system of justice.' It is for this reason that the high court in *Batson* said '[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.'" *People v. Johnson*, 8 Cal. 5th at 535 (Liu, J., dissenting) (quoting *Batson*, 476 U.S. at 87).

Recent events have reinforced the importance of excising racial bias from the criminal justice system and ensuring that all receive equal justice regardless of race. "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers*, 139 S. Ct. at 2242. But the California Supreme Court has failed to uphold that principle. "Today, as when *Batson* was decided, it is a troubling reality, rooted in history and social context, that our [B]lack citizens are generally more skeptical about the fairness of our criminal justice system than other citizens." *People v. Johnson*, 8 Cal. 5th at 535 (Liu, J.,

dissenting) (citation and internal quotation marks omitted). Upholding *Batson* is particularly important in this regard because discrimination in jury selection violates the rights not only of the defendant, but of the jurors. *Batson*, 476 U.S. at 87. Those jurors are often, as in this case, Black and their exclusion is "an assertion of their inferiority, and a stimulant to . . . race prejudice." *Flowers*, 139 S. Ct. at 2239. Their experience of discrimination can only increase distrust in the criminal justice system among this country's Black citizens. California has, for decades, failed to heed this Court's call to vigorously enforce *Batson's* mandate and ensure equal justice.

B. This Case Exemplifies the California Supreme Court's Systemic Failure to Faithfully Apply this Court's *Batson* Precedents

This case vividly demonstrates the California Supreme Court's refusal to abide by this Court's *Batson* jurisprudence. As Justice Liu put it in his dissent below, "if the facts of this case do not give rise to an inference of discrimination, then I am not sure what does." *People v. Johnson,* 8 Cal. 5th at 528-29 (Liu, J., dissenting) (citation omitted). In many respects this is a prototypical *Batson* case. It involves a Black defendant, on trial for the murder of a white man, and aggravating evidence that included the rape of a white woman. It is also "paradigmatic," *id.* at 535 (Liu, J., dissenting), in that it involves the removal of Black jurors, a situation that "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." *Powers v. Ohio*, 499 U.S. 400, 416 (1991). And it involves a trial that occurred in a county that was, at

the time, 75.1% white and 9.3% Black. *People v. Johnson*, 8 Cal. 5th at 599 (Liu., J. dissenting.)

Most significantly, the state court majority blithely dismissed the most damning evidence—the investigation of a Black prospective juror and the prosecutor's refusal to reveal whether he had only run criminal history checks on Black jurors. By obfuscating those facts, the court engaged in "mischaracterizing the worst of the prosecutor's misconduct." *Id.* at 537 (Cuéllar, J., dissenting).

The majority below speculated that "[a] prosecutor may have numerous innocuous reasons for not engaging with defense counsel, including not wanting to encourage further probing into a topic relating to jury selection or trial strategy." *Id.* at 509.

However, as both dissenting Justices noted, *id. at* 532 (Liu, J., dissenting), 540 (Cuéllar, J., dissenting), defense counsel's initial inquiry—whether the prosecutor was only running background checks on Black jurors—was a simple yes or no question. An honest no answer would have revealed nothing about the prosecutor's strategy.

> What would make the question daunting for the prosecutor to answer, though, is if he was in fact racially profiling the African American jurors. To say yes would be admitting to what the majority calls "a prima facie case of discrimination." . . . To say no would be lying to a tribunal, an ethical violation. . . . A natural inference from the prosecutor's actual response — "I don't think I am obliged to answer that inquiry" — is that the prosecutor wanted to avoid making that choice.

Id. at 540 (Cuéllar, J., dissenting).

The suspicious nature of the prosecutor's actions was compounded by his statement that he was not checking all jurors, but only those whose questionnaire answers "sparked my interest." (39RT 12809.) Yet neither respondent nor the majority below could identify anything in Kenneth M.'s questionnaire that was in any way noteworthy. *See People v. Johnson*, 8 Cal. 5th at 531 (Liu, J., dissenting), 540 (Cuéllar, J., dissenting). The majority mentioned the "spark my interest statement" without addressing that it is further evidence of prejudice. *Id.* at 509 (majority opinion).

Facing such a "disparate" investigation in *Flowers,* this Court said that "[a] court confronting that kind of pattern cannot ignore it." *Flowers*, 139 S. Ct. at 2248. Yet ignore it is exactly what the California Supreme Court did here.

The state court majority also repeatedly engaged in exactly the sort of "needless and imperfect speculation" that this Court warned against in *Johnson v. California*, 545 U.S. at 172. In its discussion of Kenneth M. the majority offered that "[a] prosecutor *may* have numerous innocuous reasons for not engaging with defense counsel," *id.* at 509 (emphasis added), essentially conceding that there "may" also be reasons that are not innocuous. Similarly, in discussing the statistical evidence presented by Mr. Johnson, the majority below conceded that the evidence was subject to a "variety of interpretations." *Id.* at 508. Again, this essentially concedes that some interpretations of the statistical evidence were suspicious. In both cases the majority engaged in forbidden speculation that the suspicious interpretation was not the correct one.

The majority below also largely ignored the fact that the dismissed Black jurors appeared to be quite favorable jurors for the prosecution. Justice Liu explained in detail that the excused jurors were "qualified to serve" and "none said anything on the juror questionnaire or during voir dire that would have raised an obvious concern for the prosecution." *People v. Johnson,* 8 Cal.5th at 529-31 (Liu, J., dissenting). The majority relegated this issue to a footnote, and even then, only discussed two of the three jurors at issue, asserting, in yet more improper speculation, that there were "obvious race-neutral grounds for the prosecutor's strikes." *Id*. at 510, n. 7; *see Johnson v. California*, 545 U.S. at 172, citing *Paulino v. Castro,* 371 F.3d 1083, 1090 (9th Cir. 2004) ("[I]t does not matter that the prosecutor might have had good reasons ...[;] [w]hat matters is the real reason they were stricken" (emphasis deleted). The state court majority could not even identify a *speculative* reason why the prosecutor would remove Lois G. the moment she was seated. Of course, "[u]nder the Equal Protection clause . . . even a single instance of race discrimination against a prospective juror is impermissible." *Flowers,* 139 S. Ct. at 2242.

The majority's discussion of Lois G. illustrates another defect in the California Supreme Court's approach—its failure to consider "the totality of the relevant evidence." *Johnson v. California,* 545 U.S. at 168. The majority conceded that she "presented no . . . obvious grounds for excusal." *People v. Johnson*, 8 Cal.5th at 510, n.7. Not only did the court apparently not find this suspicious, it

went on say that "the existence of readily apparent grounds for three of the four[10] disputed prospective jurors would undercut, to some degree, whatever possible inference of discrimination that might otherwise arise from the pattern of excusals considered in isolation. *But once again, here we conclude that the statistics alone did not give rise to an inference of discrimination*." *Id.* (emphasis added). This echoes an earlier statement by the majority that the statistics "do not *by themselves* suggest an inference of discrimination." *Id.* at 507 (emphasis added).

But of course, "no one claims they do."[11] *Id.* at 543, (Cuéllar, J., dissenting.) In taking such a balkanized approach the court "artificially compartmentalizes the relevant facts to avoid confronting the disturbing mosaic these facts reveal. While it

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[10] The majority's reference to "three of the four disputed jurors" is an error. While a total of four Black jurors were ultimately struck by the prosecutor the Batson motion at issue was made after the third strike. The fourth juror was Kenneth M., who was struck during selection of alternate jurors. His removal was not raised by respondent on appeal, nor could it have been under California law as no alternate jurors were seated. *See People v. Roldan,* 35 Cal. 4th 646 (2005).

[11] The statistics, and the way the majority below treated them, are still worthy of note. At the time of the *Batson* motion the prosecutor had struck 60% of the Black jurors (3 of 5) and 34.2% of the white jurors (12 of 35). *People v. Johnson,* 8 Cal.5th at 529 (Liu, J., dissenting). The majority used the numbers at the end of jury selection rather than at the time of the motion, thus artificially reducing the numbers to 50% and 33%. *Id.* at 507-08 (majority opinion). The majority did not explain this choice and did not explain the extent to which it found the prosecutor's acceptance of an additional Black juror *after* the defense had made a *Batson* motion persuasive. It also ignored the fact that before the *Batson* motion the prosecutor had established a pattern of striking a Black juror *immediately* when the number of Black jurors rose above two. It was only after the *Batson* challenge that the prosecutor allowed a third Black juror to be seated. The majority also ignored that the prosecutor "used 21 percent of his strikes (4/19) to remove African American jurors—which was 62 percent higher than their representation in the relevant pool." *Id.* at 542 (Cuéllar, J., dissenting).

can thereby safely conclude that each isolated fact does not raise a discriminatory inference . . . that's not how we're supposed to review claims of discrimination in jury selection." *Id.* at 537 (Cuéllar, J., dissenting) (citing *Flowers,* 139 S. Ct. at 2235).

In another example of its piecemeal approach to the evidence, the majority below conceded that the fact that Mr. Johnson is Black and the victims were white is "relevant to whether a prima facie case existed" but went on to say that it would not "infer discriminatory intent based *solely* on the fact that the known race of two of the victims[12] is the same as that of a bare majority—7 of 12—of the jurors." *People v. Johnson*, 8 Cal. 5th at 510 (emphasis added). Again, of course, no one is suggesting the court decide anything *solely* on this basis.

As both dissenters make clear, when the totality of the evidence is examined—a Black defendant, white victims, the disproportionate exclusion of Black jurors, the investigation of one Black prospective juror and the prosecutor's refusal to say if he had only investigated Black jurors—that evidence is more than sufficient to meet the low prima facie standard at step one for "determining whether 'discrimination *may* have occurred,'" *People v. Johnson*, 8 Cal. 5th at 538 (Cuéllar, J., dissenting) (emphasis added) (quoting *Johnson v. California*, 545 U.S. at 173);

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[12] The court's reference to "two of the victims" refers to the fact that there was evidence regarding four other victims in aggravation whose race is not indicated in the record. *People v. Johnson*, 8 Cal.5th at 510.

see also, *id.* at 533 (Liu, J., dissenting) ("the record readily supports an inference of discrimination").

The court's determined effort in this case to evade the mandate of *Johnson v. California* is even more striking when viewed alongside another step one *Batson* case decided the same day.

In *People v. Rhoades*, 8 Cal. 5th 393, the prosecutor dismissed all four of the Black jurors available to be struck. *Id.* at 429. As here, the trial court in *Rhoades* applied the "strong likelihood" standard this court rejected in *Johnson v. California. Id.* at 428. The trial court nonetheless remarked that it was "very close." *Rhoades*, 8 Cal. 5th at 425. The California Supreme Court, however, disposed of the step one argument by conducting a detailed examination of each struck juror, searching for "obvious race-neutral grounds for the prosecutor's challenges to the prospective jurors." *Id*. at 431 (internal quotation marks and citations omitted). According to the majority, such reasons "can definitively undermine any inference of discrimination that an appellate court *might otherwise draw from viewing the statistical pattern of strikes in isolation*." *Id* (emphasis added).[13]

Justice Liu dissented again, pointing out that the *Rhoades* majority had simply used another means to set an impossibly high bar for a prima facie case, in contravention of *Johnson v. California.* As Justice Liu explained, the court's approach of,

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[13] The court also said that because the defendant was white while the struck jurors were Black it was "less inclined" to find discrimination. *Id.* at 430.

> relying on *hypothesized* reasons to conclude that there was no need for the prosecutors to state their *actual* reasons. . . . is hard to square with the high court's clear statement that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." (*Johnson v. California*, *supra*, 545 U.S. at 172 . . . .) No wonder the high court has never approved the consideration of hypothesized reasons in first-stage *Batson* analysis. (*Cf. Williams v. Louisiana* 579 U.S.___, 136 S. Ct. 2156, 2156 (2016) (Ginsburg, J., concurring, joined by Breyer, Sotomayor & Kagan, JJ.) (state rule permitting the trial court instead of the prosecutor to supply a race-neutral reason at *Batson*'s second step "does not comply with this Court's *Batson* jurisprudence").)

Rhoades, 8 Cal. 5th at 462 (Liu J., dissenting).

These two cases decided on the same day illustrate Justice Liu's concern that the California Supreme Court, in denying every step one *Batson* case involving a black defendant it has reviewed in 30 years, "'has 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.'" *Rhoades*, 8 Cal. 5th 393 at 458.

This Court should grant certiorari because the California Supreme Court has consistently circumvented *Johnson v. California* and thus failed to protect defendants' and potential jurors' constitutional right to unbiased jury selection.

CONCLUSION

Wherefore, petitioner respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgement of the Supreme Court of California affirming his death sentence.

Dated: July 10, 2020

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