No. 20-5085

# In the Supreme Court of the United States

**JOE EDWARD JOHNSON,**

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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## QUESTIONS PRESENTED

1. Whether the trial court correctly denied as untimely petitioner's request to represent himself under *Faretta v. California*, 422 U.S. 806 (1975).

2. Whether petitioner established a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

## DIRECTLY RELATED PROCEEDINGS

United States Supreme Court:

*Johnson v. California*, No. 88-7245, order denying petition for certiorari entered October 2, 1989.

Supreme Court of California:

*In re Johnson*, Nos. S238385 & S222737, habeas petitions, transferred to Superior Court, Sacramento County February 26, 2020.

*People v. Johnson*, No. S029551, judgment entered November 25, 2019; modified on denial of rehearing February 11, 2020 (this case below).

*Johnson v. Superior Court*, No. S024537, petition for review denied February 2, 1992.

*Johnson v. Superior Court*, No. S018157, petition for review denied November 5, 1990.

*Johnson v. Superior Court*, No. S017788, petition for writ of mandate transferred to California Court of Appeal, Third District, October 5, 1990.

*People v. Johnson*, No. S004381, judgment entered December 22, 1988.

California Court of Appeal, First District:

*Johnson v. Superior Court*, No. A089833, petition for writ of mandate denied February 3, 2000.

*Johnson v. Superior Court,* No. A053763, petition for writ of mandate denied June 27, 1991.

California Court of Appeal, Third District:

*Johnson v. Superior Court*, No. C012468, petition for writ of prohibition denied December 19, 1991.

*Johnson v. Superior Court,* No. C009817, petition for writ of mandate denied October 25, 1990.

Superior Court of the State of California, Sacramento County:

*In re Johnson,* No. 20HC00308, pending habeas petition.

*In re Johnson,* No. 20HC00309, stayed habeas petition.

*People v. Johnson*, No. 58961, judgments entered October 28, 1992, and May 28, 1981.

Superior Court of the State of California, Sonoma County

*People v. Johnson*, No. 9970-C, trial proceedings transferred to Superior Court, Sacramento County September 26, 1980.

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## STATEMENT

1. In 1981, petitioner was convicted of the murder of Aldo Cavallo, the separate rape of Mary S. and assault with the intent to murder her, and other related offenses. Pet. App. 35. The jury found that the prosecution had proven as a special circumstance that the murder of Cavallo occurred during a home-invasion robbery. *Id.* Following a penalty-phase trial, the jury returned a verdict of death. *Id.*

The California Supreme Court reversed the rape and assault convictions because Mary S.'s identification of petitioner violated certain state-law requirements. *People v. Johnson*, 47 Cal. 3d 576, 599-601 (1988). The court also reversed petitioner's death sentence for the murder of Cavallo because of an error in the penalty-phase jury instructions. *Id.* at 602-603. But the court affirmed the jury's guilty verdict as to the murder of Cavallo and the associated special circumstance. *Id.* at 604. This Court denied petitioner's petition for a writ of certiorari. *Johnson v. California*, No. 88-7245, *cert. denied*, 493 U.S. 829 (1989).

2. Petitioner was retried twice as to the penalty for his murder conviction. Pet. App. 35-36.[1] At the first retrial, petitioner brought four motions—two of them mid-trial—requesting that the court appoint petitioner

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[1] The prosecution elected not to retry petitioner on the rape and assault charges. Pet. App. 36.

himself as co-counsel to his existing lawyers or appoint a new lawyer to replace Elliott Daum, the public defender who was petitioner's primary counsel. *See* 4 CT 1137.6.[2] Concerns were also raised at various points about petitioner making threats to Daum. *See* 23 RT 8027; 29 RT 9849.[3] The initial penalty-phase retrial ended in a mistrial in February 1991. Pet. App. 54. Afterwards, Daum moved to have his entire public defender's office disqualified on grounds of a conflict. Instead, the trial court disqualified only Daum himself, appointing Charles Ogulnick, another lawyer from that office, as petitioner's primary counsel. At petitioner's second penalty-phase retrial, the jury imposed the death penalty. *Id.* at 36. That is the verdict from which this petition arises. Before this Court, petitioner challenges two aspects of the pretrial proceedings.

a. Petitioner's first claim concerns a request for self-representation that the trial court denied as untimely. *See* Pet. 7-19. After the 1991 mistrial, petitioner's second retrial was scheduled to begin June 22, 1992. Pet. App. 54. On June 8, petitioner filed four motions. In the first motion, petitioner requested discovery of documents relating to his primary counsel. *Id.* at 54-

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[2] CT refers to the Clerk's Transcript in the trial court, and ACT refers to the Augmented Clerk's Transcript. RT refers to the Reporter's Transcript.

[3] The details of those threats and defense counsel's subsequent disqualification motion were discussed in proceedings from which the prosecutor was absent and the transcripts sealed, presumably to protect petitioner's communications with his counsel. So far as we are aware, petitioner has not moved to unseal those transcripts, and respondent does not have access to them, although they seem to have figured in the trial court's later disposition of some of the rulings at issue in this petition. *See infra* pp. 4, 18-19.

55. In the second, petitioner requested new counsel. *Id.* In the third, petitioner requested that he be permitted to represent himself under *Faretta v. California*, 422 U.S. 806 (1975). *Id.* In the last, petitioner requested that trial be continued for a "'substantial'" and "'considerable'" time to enable that self-representation. *Id.* at 55. In seeking the continuance, petitioner stated that he would need "'considerable time'" to "'rev[ie]w documents,'" "'investigate possible defense strateg[ie]s,'" and "'deal with any and all matters p[er]taining to putting forth a creditable [sic] defense.'" *Id.* Petitioner stated, for instance, that in order to represent himself effectively, he would require time to "interview and hire" an "[i]nvestigator, legal runner, [and] law clerk." *Id.* And he requested time to "'interv[ie]w attorneys for advisory counsel pos[i]tion,'" *id.*, noting that "there are areas of this case [that] will require the knowledge and service of an attorney," 4 CT 1137. The prosecution objected to these requests, arguing that petitioner's recent conduct demonstrated that the *Faretta* motion was "made solely for the purpose of delay." *Id.* at 1137.13; *see, e.g., id.* at 1137.6 (recounting that at prior retrial, defendant attempted to switch counsel between the jury's selection and swearing-in); *id.* at 1137.7-1137.8 (recounting petitioner's statement that he would not participate in prior retrial). At a hearing on June 12, petitioner's counsel stated that they were ready to proceed with trial on the June 22 trial date, and on June 22 the judge was assigned to conduct that trial. Pet. App. 55.

That judge conducted an extensive, multi-day inquiry into petitioner's motions. Pet. App. 55-57. When asked how much time petitioner would need to prepare to represent himself at trial, petitioner "responded that it would be premature for him to give a specific time period." *Id.* at 57. His counsel, however, estimated that petitioner would need about a year to prepare, and the trial court observed that, "'at [a] minimum,'" "'many months . . . would be required.'" *Id.* Petitioner said that his disagreements with Charles Ogulnick, the public defender who had replaced Daum, became evident ten months prior. *Id.* at 55-59. Petitioner stated that he had considered filing a motion for self-representation in September 1991 and again in January or February 1992. *Id.* at 57-58. He finally filed the motion in June 1992, because "'nothing . . . changed'" to make him feel more "comfortable." *Id.* at 58.

The trial court denied the request for self-representation. Pet. App. 59-60. The court noted that, despite ample opportunity, petitioner had not made his motion until two weeks before the scheduled trial date. *Id.* at 59. Having reviewed the transcripts concerning petitioner's complaints about his counsel from the preceding retrial, the court found petitioner's complaints about his current counsel to be "'striking[ly]'" similar. *Id.* Given those similarities, petitioner's explanation for why he did not bring these motions sooner than the "'eve of trial'" were not persuasive. *Id.* at 59-60; *see also* 32 RT 10956-10959. A "'substantially significant time period would be required'" for petitioner to prepare for trial, Pet. App. 60, and the court stated that "a strong suspicion

arises that the whole process . . . has an element in it of interrupting the orderly process and bringing about delays," 32 RT 10957. Those delays would "be 'considerable'"; would "'interrupt any kind of orderly litigation of this case'"; and would "'significantly prejudice[]'" the prosecution due to problems with witness availability and memory. Pet. App. 61. Petitioner proceeded to trial represented by Ogulnick and his second defense attorney.[4]

b. Petitioner's second claim is that the trial court should have further inquired into allegations of discrimination against Black jurors during jury selection. Pet. 20-31. Of the twelve jurors who delivered petitioner's death sentence, three identified themselves as Black, one as Latino, seven as White, and one as mixed-race. Pet. App. at 73. Petitioner alleges that the prosecution discriminated by using peremptory challenges against three other potential jurors who were Black, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. 24-31, 28 n.10.

The trial court required prospective jurors to complete an eleven-page questionnaire prior to individual voir dire. Pet. App. 69. Before the prosecutor had exercised any peremptory challenges, the parties and the court engaged in a colloquy regarding the questionnaire completed by a particular Black juror,

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[4] During jury selection, petitioner filed additional documents, including correspondence about a State Bar disciplinary proceeding involving Ogulnik. Pet. App. 62. The trial court noted that petitioner had not previously raised such a concern about Ogulnick, and it re-opened the *Faretta* hearing to allow petitioner to address it. Pet. App. 62; 34 RT 11341-11342. Petitioner said, however, that he had "no comment." Pet. App. 62; *see* 34 RT 11342.

Kenneth M., which petitioner invoked in his subsequent *Batson* challenges. *Id.* In responding to the questionnaire, Kenneth M. had denied ever being convicted of or arrested for a crime and denied any difficulty with alcohol abuse. *Id.* In fact, he had recently been convicted in the same courthouse for driving under the influence; before that he had another drunk driving conviction, and he had additionally pleaded guilty to misdemeanor battery and received diversion. *Id.*; 39 RT 12804-12805, 12991-12996. The prosecutor, who stated that these discrepancies had become apparent when his secretary checked some jurors' names in a database, asked the court to inquire into them. Pet. App. 69. Defense counsel asked the prosecutor if he had run criminal record checks only on Black prospective jurors. *Id.* The prosecutor responded, "'I don't think I am obliged to answer that inquiry.'" *Id.* The court stated that it could not at that stage compel the prosecutor to explain his reasoning, but observed that the prosecutor's state of mind would be relevant if the defense later raised any objection under *People v. Wheeler*, 22 Cal. 3d 258 (1978), California's state-law analog to *Batson*. Pet. App. 70; *see Davis v. Ayala*, 576 U.S. 257, 263 (2015). The prosecutor explained that he did not have time to check all of the panelists, but would "'check certain jurors when they spark [his] interest,'" and he offered to run a check on any panelist requested by defense counsel. Pet. App. 70. Defense counsel wanted to know whom the prosecutor had looked into, and what he had discovered, because a "'*Wheeler* motion is always something that could occur in any case of this nature, and I

think we should always be aware of what's . . . happening with respect to any potential *Wheeler* motion that may be made.'" *Id.* The prosecutor responded that a *Wheeler* motion required "'a prima facie case,'" which was lacking here. *Id.* The trial court agreed it could not compel a response. *Id.* at 70-71.

The trial court proceeded to question Kenneth M., who clarified that he had been arrested for "D.U.I." in "April of last year." 39 RT 12990. He said that he had pleaded no contest, quit drinking as a result, and was taking court-ordered classes. *Id.* at 12990-12991. Although Kenneth M. did not mention any other arrests in response to the court's question, when defense counsel questioned him he added that he had also been arrested for a domestic violence charge, leading to a night in jail and a restraining order. *Id.* at 12995. After that testimony, the prosecutor withdrew his for-cause objection to Kenneth M. Pet. App. at 71.

Jury selection began the next afternoon. Pet. App. 71. After hardship excusals, fifty-six prospective jurors returned for individual questioning. *Id.* at 69, 71. Seven of those (12.5%) had identified themselves as Black on their questionnaire. *Id.* at 71. The jury that was eventually seated to try petitioner's case consisted of twelve jurors, of whom three (25%) were Black, seven (58%) were White, one (12.5%) was Latino, and one (12.5%) was mixed-race. *Id.* at 73.

The first twelve prospective jurors seated were White. 4 CT 1166; 40 RT 13096-13097. The prosecution exercised its first peremptory challenge against

one of them, causing the first Black juror, Danella D., to be seated. Pet. App. 71. Danella D. remained throughout the process and served as a juror. *Id.* at 71-73. The prosecutor used his second through fourth strikes to remove three more White jurors, *id.* at 71, and used his fifth strike to remove a panelist of "Irish, Filipino, and Cherokee" heritage, *id.*; *see* 17 ACT 4817-4829. That caused a second Black juror, Hazel D., to join the panel. 40 RT 13109. Hazel D. also remained throughout the process and served on the jury. Pet. App. 71-73; 4 CT 1166; 40 RT 13144.

The prosecutor exercised his sixth through ninth strikes against White jurors, after which Lois G. was seated. Pet. App. 71; 40 RT 13108-13112. Lois G., a school administrator who was Black, was absent that day by agreement of the parties. Pet. App. 71. The prosecutor struck her from the jury—his tenth strike overall, and his first against a Black juror. *Id.* Following that strike, petitioner raised his first *Batson* objection. *Id.* The trial court held that there was no prima facie showing of discrimination. *Id.*; *see* 40 RT 13114-13116 (noting that prosecutor had, at that point, exercised nine of his ten strikes against White jurors and had not challenged two other Black jurors).

The prosecutor used his eleventh and twelfth strikes to remove White jurors, *see* 40 RT 13120; 16 ACT 4573; 17 ACT 4898, after which Sharon H. was seated, Pet. App. 72; 40 RT 13121. Sharon H., who was Black, had "worked extensively with abused and troubled adolescents" and "stated that she had a 'heart' for 'what we call throw-away kids.'" Pet. App. 81-82 n.7. The prosecutor

used his thirteenth strike to remove her. *Id.* at 72. The prosecutor then exercised his fourteenth strike to remove a White juror, *see* 40 RT 13123; 16 ACT 4598, causing a Black juror, Shanna H., to be seated, *see* 40 RT 13124; 15 ACT 4393. Shanna H. had informed the court that her teenage son had been arrested for rape a year and a half before, that he had pleaded guilty, and that she considered the process "unfair." 39 RT 12750-12751. She believed that the system sometimes coerced people into pleading guilty to crimes they had not committed. *Id.* at 12752. The prosecutor used his fifteenth strike to excuse Shanna H. Pet. App. 72. Petitioner again raised a *Batson* objection, and the trial court held that a prima facie case had not been established. *Id.* at 72, 75; *see* 40 RT 13129 (reasoning that two Black jurors had remained in the box unchallenged by the prosecution, and that the challenge to three of five Black potential jurors at that point was not indicative of discrimination given the overall challenges each side had exercised).

The prosecutor exercised his sixteenth strike against a White juror. 40 RT 13131; 17 ACT 4803. At that point, both the prosecution and defense elected not to exercise their remaining peremptory challenges and accepted the seated jury. Pet. App. 72; 40 RT 13131-13132. When one seated juror asked to be excused, however, the prosecutor used his seventeenth challenge to remove her. Pet. App. 72; *see* 40 RT 13142 (exploring juror's newfound realization that she did not believe she would be capable of voting for death

penalty even if the evidence "strongly indicate[d] that it's appropriate").[5] The defense used its four remaining strikes to remove each juror who was seated in the excused juror's place, causing Wade B., who was Black, to be seated. Pet. App. 72. The prosecutor, who had several strikes remaining, accepted the jury. *Id*. The final seated jury—which ultimately decided petitioner's case—was composed of three Black jurors, seven White jurors, one Latino juror, and one mixed-race juror. *Id*. at 73.

The court then seated three alternate jurors, one of whom was Kenneth M. Pet. App. 73; *see supra* pp. 5-7. California law gave each side three more peremptory strikes against the alternates. 40 RT 13154; *see infra* p. 22 n.10. The prosecutor used his first strike against a White juror, 40 RT 13155-13156; 16 ACT 4504, and his second strike against Kenneth M, Pet. App. 73. The defense again raised a *Batson* objection, which the trial court denied for lack of a prima facie case. *Id.*; *see* 40 RT 13158 (noting that the main jury now contained three Black jurors, whom the prosecution had not challenged, and that the court found "no fault in [the prosecutor] conducting his limited investigation of jurors and disclosing the outcome of it").

c. During the penalty-phase trial that followed, the prosecution presented evidence about petitioner's murder of Cavallo and about five other violent attacks. Pet. App. 36-42. One of the other attacks was the assault and

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[5] That juror was Pakistani-American. 15 ACT 4314.

rape of Mary S. *Id.* at 38-40. Another was petitioner's stabbing his girlfriend, Verna O., in her neck and chest, and leaving her to die—a charge for which he was on bail when he murdered Cavallo. *Id.* at 40. A third attack was petitioner's assault on correctional officer Steven Laughlin and escape from prison. *Id.* at 41. A fourth was his attack on a fellow prisoner, T. Scott, in a state medical facility. *Id.* at 40-41. And the fifth was his attack against his pregnant sister-in-law, Florence M. *Id.* at 41-43. That incident occurred when petitioner was on parole and living with his step-brother, Florence M.'s husband. *Id.* Petitioner repeatedly stabbed Florence M. in the face, hands, legs, stomach, and back. The attack was so violent that the knife broke into pieces—and petitioner stopped only because the step-brother arrived when petitioner was returning with a new knife. *Id.* at 40-42. After the attack, petitioner called Florence M. and threatened to harm her if she testified against him. *Id.* at 43. When she and her husband later visited petitioner in custody, petitioner did not apologize to Florence M. for the attack or ask about her baby. *Id.* at 43, 94; 42 RT 13815-13816.

The jury returned a verdict of death, and the trial court sentenced petitioner to death. Pet. App. at 36.

3. The California Supreme Court affirmed. Pet. App. 36. As relevant here, the court first agreed with the trial court's conclusion that petitioner's *Faretta* request was untimely under the facts of the case. *Id.* at 54, 65-67. The court observed that petitioner had filed his *Faretta* motion just two weeks

before the trial date. *Id.* at 66. Trial counsel was ready to proceed as scheduled, but self-representation would have caused a substantial delay. *Id.* The court reasoned that such delay would harm the prosecution. *See id.* at 67. The court agreed that petitioner "had numerous opportunities to assert his right of self-representation earlier," and that the trial court was reasonable to suspect that "defendant brought the *Faretta* motion with the purpose of interrupting the process and creating delay." *Id.*

The court also rejected petitioner's challenge to the jury selection process. Pet. App. 69. Between the time of petitioner'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 it was unclear whether the trial court had applied the standard as stated in *Johnson*, the state high court reviewed the record and applied that standard "independently." Pet. App. 74. The court concluded that the standard had not been met. *Id.* at 75. In reaching that conclusion, the court observed that the prosecutor had used three of seventeen challenges (18%) to remove Black panelists from the seated jury, and four of nineteen (21%) when alternates were taken into account. *Id.* at 76. Black jurors constituted seven of fifty-six jurors in the venire (13%), and ultimately comprised 25% of the seated jury. *Id.* at 76-77. The prosecutor repeatedly accepted panels with the first two Black panelists who had been seated, and

accepted the final jury with a third Black juror, despite available strikes. *Id.* at 77.

The court rejected petitioner's argument that an inference of discrimination should be drawn from the prosecutor's statements regarding Kenneth M. Pet. App. 78. Although there would "plainly" be a prima facie case of discrimination if the prosecutor had targeted only African Americans for background checks, the evidence did not establish that that happened here. *Id.* at 78 n.5. Instead, the evidence established only that the prosecution conducted background checks on some larger set of jurors that included Kenneth M. *Id.* at 78. While such a practice could be "probative" of discriminatory intent in combination with other facts, it did not support an inference of discrimination here given the absence of any sign of discriminatory purpose. *Id.* Nor did the prosecutor's refusal to answer defense counsel's questions about the background checks constitute an implicit admission of discrimination: prosecutors are not required to "respond to questions from defense counsel"; and this prosecutor gave the nondiscriminatory explanation that he was exercising his right not to explain peremptory challenges unless the court determined that a prima facie case had been made. *Id.* at 78-79. Finally, the court did not find any basis for inferring discrimination from the fact that petitioner was Black and Cavallo and Mary S. were White. *Id.* at 80-81. The prosecution's case also included evidence of petitioner's violent acts against four additional victims whose races were not discussed in the record.

*Id*. at 80. In a case with three Black jurors and seven White ones, the fact that the known race of two of the six victims was the same as that of a "bare majority" of the seated jurors did not support any inference of discrimination. *Id*. at 81.

Justice Liu and Justice Cuéllar dissented with respect to the *Batson* claim, stating that the prima facie standard had been satisfied, and the prosecutor should have been required to explain his reasons. *See* Pet. App. 110-122 (Liu, J.); *id*. at 123-139 (Cuéllar, J.).

## ARGUMENT

Petitioner raises two claims, one concerning the denial of his motion for self-representation and the other alleging discrimination in jury selection. Neither claim warrants this Court's review.

1. Petitioner first claims that the trial court was wrong to deny as untimely his motion under *Faretta v. California*, 422 U.S. 806 (1975). Pet. 7-20. The trial court based its timeliness decision on circumstances indicating that petitioner's belated motion for self-representation was an improper attempt to delay trial. That was an accurate interpretation given petitioner's conduct in his prior retrial and during the period leading up to the filing of his *Faretta* motion, and it does not squarely implicate any conflict warranting this Court's review.

a. In *Faretta*, this Court recognized that defendants have a "right to self-representation" that is "necessarily implied by the structure of the [Sixth]

Amendment." 422 U.S. at 819. "As the *Faretta* opinion recognized," however, "the right to self-representation is not absolute." *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000). Rather, considerations related to the "integrity and efficiency of the trial" may at times require denial of a *Faretta* motion. *Id.* at 162. For example, a court may "terminate self-representation or appoint 'standby counsel'—even over the defendant's objection—if necessary"; "[t]he defendant must voluntarily and intelligently elect to conduct his own defense"; "and most courts require him to do so in a timely manner." *Id.* at 161-162 (citations and internal quotation marks omitted).

The decision below implemented the last of those principles. Petitioner's case had been pending for many years, and the penalty-phase mistrial had concluded 16 months before. Pet. App. 54. The June 1992 trial date had been set seven months before, in November 1991. *Id.* But petitioner sought new counsel or self-representation just two weeks before the trial date, when his defense attorneys were ready to proceed. *Id.* at 54-55. Petitioner stated that self-representation would require a "substantial" and "considerable" delay. *Id.* at 55. He refused to provide any estimate of that delay, but his counsel predicted that it would be a year, and the trial court predicted "many months at a minimum." *Id.* at 57. Petitioner's own explanation of his request was based on issues that he said had concerned him for many months, and there was no dispute that he had known all along of his ability to file a *Faretta* motion. *See id.* at 57-58.

After hearing out petitioner at length, over multiple hearings, the trial court voiced its "strong suspicion" that the purpose of petitioner's motion was to delay and obstruct the proceedings. Pet. App. 67. The trial court's decision to deny the request under those circumstances was not inconsistent with the principles underlying *Faretta.* As this Court has recognized, "the government's interest in the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez*, 528 U.S. at 162; *see also McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (right of self-representation is conditioned on the accused's ability and willingness "to abide by rules of procedure").

b. Petitioner principally contends (Pet. 6-16) that this Court should grant review to resolve a conflict among the lower courts "as to what constitutes a timely request" for self-representation. Pet. 8. This Court has recently denied other requests to set a uniform rule for when a trial court may deny a *Faretta* request as untimely. *See, e.g., Crespo v. New York*, No. 18-7694, *cert. denied*, 140 S. Ct. 148 (2019); *Kelley v. United States*, No. 15-248, *cert. denied*, 136 S. Ct. 284 (2015).[6] It should deny this one as well.

While there is general agreement that a *Faretta* motion can be denied if it is untimely, *see Martinez*, 528 U.S. at 162, courts do not follow a uniform

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[6] This Court has also declined requests to examine California's timeliness standard. *See Moriel v. Prunty*, No. 96-1501, *cert. denied*, 520 U.S. 1230 (1997); *Bunnell v. Armant*, No. 85-1305, *cert. denied*, 475 U.S. 1099 (1986).

approach to determining timeliness. As petitioner explains, California and certain other States permit courts to engage in a multi-factor inquiry, in which a *Faretta* motion brought before the beginning of trial may be denied as untimely after consideration of factors such as proximity to the trial date, delay in bringing the motion, and the delay that a belated change to self-representation would cause. *See* Pet. at 9-10. Other jurisdictions have adopted more specific inquiries, allowing defendants to bring *Faretta* motions up to some definite point in the proceedings, such as the beginning of trial motions, the beginning of jury selection, the swearing of the jury, the beginning of oral arguments, or some other substantial stage of the trial. *See id.* at 12-16 & n.9.

As indicated by petitioner's summaries of the cases on which he relies, however, no jurisdiction appears to view *Faretta* as requiring that a self-representation motion be granted where it is made for purposes of delay. *See* Pet. 11-12. Although the trial court here stated its concern in terms of a "strong suspicion," 32 RT 10957, it plainly viewed petitioner's belated motion as having been made for the purpose of delaying an already much-delayed trial.[7]

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[7] To the extent petitioner argues that there is a conflict between how California courts assess timeliness and how the Ninth Circuit assesses the issue in habeas cases arising from California state courts, Pet. 11, that conflict is not presented here. The Ninth Circuit, too, views intentional delay as a legitimate ground for denying a *Faretta* motion. *E.g., Sandoval v. Calderon*, 241 F.3d 765, 774 (9th Cir. 2000) ("A defendant may not invoke the *Faretta* right if the *Faretta* demand is . . . made for the purpose of delay.").

The trial court had a strong basis for that view. Petitioner coupled his request for self-representation with a request for a "substantial" and "considerable" continuance to undertake a long list of tasks. Pet. App. 55; *see supra* p. 3. Petitioner did not contest the trial judge's or his counsel's estimates that he would need between many months and a full year to prepare to try the case himself. *See supra* p. 4. If petitioner had raised his request in September 1991, or January or February 1992—when petitioner said his disagreements with counsel became severe enough to cause him to want self-representation, *see supra* p. 15—that additional period might not have caused substantial delay.[8] By choosing not to file his motion until June 8, 1992, petitioner ensured that the time he required for preparation would greatly delay a trial that was otherwise ready to begin.

Such delay tactics were not new for petitioner. *See supra* pp. 1-2. Indeed, having reviewed the transcripts of in camera proceedings concerning petitioner's complaints about prior counsel, 32 RT 10954, the trial court knew that petitioner's belated concerns about his current attorney "were 'in many rather striking ways similar to the objections he had against the earlier

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[8] The issue of self-representation was not new for petitioner. He also raised a *Faretta* claim in his appeal from his conviction and original sentence years before, and had filed a motion to serve as co-counsel to his appointed lawyers in his first retrial. *See People v. Johnson*, 47 Cal. 3d 576, 596 (1988) (rejecting petitioner's argument that trial court violated his *Faretta* rights by refusing to allow him to personally question witnesses as co-counsel to his attorney); *supra* pp. 1-2 (noting request at first retrial).

attorney, Mr. Daum,'" who was petitioner's lead counsel in the first retrial. Pet. App. 59; *see id.* at 54. Petitioner had attempted to delay the previous retrial by moving to substitute counsel at the end of the jury selection process, 32 RT 10958—part of a general pattern in which petitioner attempted to disrupt the prior retrial. *See, e.g.,* 4 RT 2520 (prior court's statement that petitioner "desires not to attend the trial, he desires not to have a trial, and his position is that he will not dress nor participate nor cooperate in any way").[9] Any review by this Court of the various standards lower courts apply to determine the timeliness of *Faretta* motions should await a case in which such purposeful delay is not present.

Finally, petitioner implies that the June 22 trial date was only notional, and that the timeliness of his motion should be assessed instead in relation to when his jury was actually chosen weeks later. Pet. 17. But one of the principal reasons why the jury was not selected until weeks after the scheduled trial date was that the trial court needed to carefully examine petitioner's motions for self-representation, for substitution of counsel, and for the related continuance that petitioner requested. That process involved review of the extensive transcripts from petitioner's prior proceedings, and open-court and

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[9] Petitioner's disruptive tactics continued into his second retrial. Even as his *Faretta* motion was being argued, petitioner insisted that he did not want to be present in the courtroom for any proceedings in his case if his attorney was not removed, *see* 32 RT 10961-11000, and asserted that he did not want to win his case, *id.* at 10976-10978.

in camera hearings held over multiple days. *See* 40 CT 1137.14, 1138, 1138.1, 1139, 1141, 1148. Petitioner told the court he wished to "waive time" for the trial and "to wait and have Judge Mering hear" his motions. 30 RT 10109. Petitioner cannot complain about the brief delay in starting his trial when his own motions contributed to the delay—and when he agreed to it.

2. Petitioner also challenges the California Supreme Court's application of this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Johnson v. California*, 545 U.S. 162 (2005). Pet. 20-31. He does not contend that the California Supreme Court has misstated the rules established by this Court's precedent or applied a rule that conflicts with decisions of other courts. Instead, he argues only that the California Supreme Court erred in applying established legal rules to the facts of his case. That argument is meritless.

a. The Equal Protection Clause forbids a party from exercising peremptory challenges against potential jurors because of their race. *Batson*, 476 U.S. at 89. When a peremptory strike is challenged on this ground, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). The trial court proceeds in three steps. *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.'" *Id.* Second, if a defendant has made such a showing, the prosecutor must explain his or her challenges by providing race-neutral

explanations. *Id.* Third, "'the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" *Id.* Beyond that, this Court has "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; *see also Powers v. Ohio*, 499 U.S. 400, 416 (1991).

The California Supreme Court accurately stated and applied that framework here. *See* Pet. App. 73-74 (quoting *Johnson*). It described the step-one burden as a "low threshold," in which the defendant must simply "'produc[e] evidence sufficient to permit the trial judge to draw an inference' of discrimination." *Id.* at 74. It acknowledged *Johnson*'s directive to consider the totality of circumstances. *Id.* As a result, it considered the "entire record." *Id.* at 74-78.

Given all the facts before it, the California Supreme Court reasonably concluded that there was no inference of discrimination. Of the twelve jurors seated on the jury that ultimately determined petitioner's sentence, three (25%) were Black, seven were White, one was Latino, and one was of mixed-race. Pet. App. 73. The percentage of Black jurors on the seated jury was twice the percentage of Black prospective jurors in the available pool: after for-cause excusals, seven of the fifty-six remaining jurors (12.5%) were Black. *Id.* at 71. Two Black panelists were seated early in the process; the prosecutor never challenged them and repeatedly accepted juries with them on it. *Id.* at 77. The prosecutor also accepted a jury with a third seated Black juror—even though

he had three peremptory challenges remaining. *Id.* at 72-73.[10] All told, the prosecutor used just three of his seventeen strikes (18%) to remove Black jurors from the seated jury. *Id.* at 76. Including challenges regarding alternates, the prosecutor used four of his nineteen total strikes (21%) on Black panelists. *Id.* There was no basis for inferring that the prosecutor was discriminating against Black jurors.

b. Petitioner's arguments to the contrary are not persuasive. First, petitioner selectively points to other statistics, which he says should have raised an inference of bias. Pet. 28 n.11. Instead of considering the composition of the jury that actually heard petitioner's case, or of earlier panels that the prosecutor accepted, petitioner argues that the California Supreme Court should have considered the prosecutor's rate of striking Black versus White jurors at the point of petitioner's second *Batson* motion. Pet. 6 n.7. At that precise point, petitioner argues, the prosecution had stricken three of five Black panelists but only twelve of thirty-five White panelists. *Id.* at 6, 28 n.11; *see* Pet. App. 75-76. As both the majority opinion and one of the dissenting

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[10] One of the dissenting Justices below believed that "the prosecutor did not have enough peremptory challenges left to remove each of the [three] remaining African American jurors and Kenneth M." Pet. App. 134 (Cuéllar, J., dissenting). That was incorrect. California law entitled each side in this case to twenty peremptory challenges for regular jurors. Cal. Code Civ. Proc. § 231. When the third Black juror, Wade B., joined, the prosecutor had used seventeen strikes and had three left. *See* Pet. App. 72-73. And the prosecutor would not have had any need to save additional strikes for alternate jurors such as Kenneth M., because California law gave each side additional strikes to use against the alternates. *See* Cal. Penal Code § 1089; *supra* p. 10.

justices below recognized, however, those numbers are of limited utility because the sample size was small. Pet. App. 76-77; *id.* at 133 (Cuellar, J., dissenting) (noting that small sample size limited "the import of these disparities"). Nor do this Court's precedents support the notion that the reviewing court should have blinded itself to the prosecutor's later decision to exercise strikes in a way that resulted in even higher Black representation on the jury. *Cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (*Batson* objection may be based on all "relevant circumstances that bear upon the issue of racial discrimination"); *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (defendant can make prima facie case based on "'the totality of the relevant facts' about a prosecutor's conduct during the defendant's own trial").

Next, petitioner portrays the prosecutor's repeated acceptance of juries that included Hazel D. and Danella D. as itself evidence of racism, arguing that the prosecution's strategy was to cap the number of Black jurors at two. Pet. 28 n.11; *see also* Pet. App. 117 (Liu, J., dissenting). But the prosecutor accepted the final seated jury, which had three Black jurors, even though he had multiple peremptory strikes remaining. *See supra* at 22 n.10. Petitioner observes that the third Black juror was seated after some of petitioner's *Batson* objections, and argues that those objections must have made the prosecutor change course. Pet. 28 n.11. But petitioner made his first *Batson* objection when the prosecutor challenged Lois G.—the prosecutor's first peremptory strike against a Black juror, and his tenth strike overall. Pet. App. 71. The

prosecutor struck two other Black jurors (and many non-Black jurors) after that, before eventually accepting a jury with a third Black juror and seven White jurors. *Id.* at 71-72. That sequence does not support petitioner's theory that the prosecution changed its approach in response to defense or judicial scrutiny. It is entirely consistent, however, with a prosecutor who accepted or struck jurors based on personal characteristics other than race.

Petitioner argues that "the dismissed Black jurors appeared to be quite favorable jurors for the prosecution." Pet. 27; *see also* Pet. App. 115 (Liu, J., dissenting). That does not accurately describe the jurors at issue.[11] For example, Shanna H.'s son "had been arrested twice, including once for rape." Pet. App. 81 n.7. She felt that he "may have been coerced into accepting a plea bargain for a crime he did not commit," *id.*—a view that would have raised obvious concerns given the evidence in this case.[12] And Sharon H. "had worked

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[11] Petitioner argues that it is improper, at step-one of a *Batson* analysis, for a court to consider even obvious nondiscriminatory reasons for a strike. Pet. 30-31. But he cites no case embracing such a view, and, this Court has recently declined to review other cases raising similar arguments. *See 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).

[12] One of the dissenting Justices below discounted the significance of this experience because Shanna H. said she was concerned about her son being coerced to accept a guilty plea, whereas petitioner had been convicted by a jury. *See* Pet. App. 114 (Liu, J., dissenting). But many of the aggravating incidents in petitioner's case—including his grisly attack on his sister-in-law—were also proven in part by evidence of guilty pleas. *See* 40 RT 13263-13264. For one of the aggravating incidents, the victim was deceased, leaving no live victim testimony to bolster the plea. *See* 40 RT 13244. In any event, given the defense's tactic of stressing lingering doubt, a juror who was convinced that

extensively with abused and troubled adolescents, including youths from juvenile courts." *Id.* at 81-82 n.7. Here, petitioner's mitigation case focused significantly on childhood abuse and neglect, and the inadequate support he had received from the juvenile court system. *See id.* at 44-48. The connection between Sharon H.'s occupation and that defense provided an obvious non-discriminatory ground for prosecutorial concern.[13]

The only juror at issue for whom no similarly obvious reason for prosecutorial concern was apparent was Lois G. *See* Pet. App. at 82 n.7. But she was only one of two jurors, of any race, not physically present during the exercise of peremptory strikes. *Id.* at 71; *see* 40 RT 13112-13113 ("The People would excuse juror number 2, Lois [G.], who's not here . . . physically.").[14] The striking of Lois G. does not lead to any inference of discrimination—particularly given that two other Black jurors were already seated and not stricken by the prosecution when Lois G. was struck (or thereafter).

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her own child had been wrongly convicted would pose an obvious and legitimate concern to the prosecuting attorney.

[13] *See, e.g., United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) (an "inference that a juror's employment might make the juror more sympathetic to a criminal defendant is a valid, race-neutral reason for striking a juror"); *Messiah v. Duncan*, 435 F.3d 186, 200 (2d Cir. 2006) ("[i]t is not implausible that the prosecutor would have believed that a full-time social service provider who had dedicated his professional life to helping others might have more sympathy for a defendant").

[14] The other absent panelist, Paul P., was excused by the defense. 40 RT 13123.

Petitioner directs much of his argument at the prosecutor's behavior with respect to prospective juror Kenneth M. Pet. 25-26. To be sure, before this Court, petitioner does not challenge the prosecutor's peremptory strike against Kenneth M. himself, who lied on his jury questionnaire about two criminal convictions and a domestic violence arrest. *See id.* at 28 n.10. Nor does petitioner take issue with the California Supreme Court's observation that there were no "significant disparities in the nature or extent of the prosecutor's questioning of the African-American prospective jurors . . . ." Pet. App. 78. As the California Supreme Court recognized, any evidence that Black jurors had been specially targeted for investigation would be highly relevant. *Id.* at 78 n.5. Here, however, the record established only that the prosecutor had investigated the backgrounds of some unknown number of jurors, one of whom was Black. *Id.* at 78. With no evidence about the others—and no other evidence of discrimination—the Kenneth M. issue was insufficient to establish a prima facie case of discrimination at step one of *Batson*.

Petitioner contends that the prosecutor's decision to refrain from answering defense counsel's questions about who else the prosecutor had investigated supports an inference of discrimination. Pet. 25; *see also* Pet. App. 124 (Cuellar, J., dissenting). But in California, as elsewhere, "it is not incumbent on a prosecutor to respond to questions from defense counsel." Pet. App. 79; *see, e.g.,* J. Thomas Greene, *Advice to Old and New Lawyers*, 173 F.R.D. 328 (1996) ("Lawyers should not address remarks to each other."); ABA

Standards for Criminal Justice, Standard 3-5.2(b) (3d ed. 1993) ("When court is in session, the prosecutor should address the court, not opposing counsel, on all matters relating to the case.").

Finally, petitioner argues that the trial court should have been especially sensitive to the possibility of racial discrimination in jury selection because petitioner, who is Black, was being sentenced for the murder of a White victim, and because evidence of another White victim's rape was part of the prosecution's case in aggravation. Pet. 29. As the California Supreme Court correctly recognized, the existence of a racially charged trial may increase the likelihood of drawing an inference of discrimination when a prosecutor strikes members of the defendant's race. *See* Pet. App. 74-75. Here, however, petitioner identifies only two of his six victims as White, Pet. 29 n.12, and his offenses against the others were outrageous in their own right, *see supra* pp. 10-11; Pet. App. 38-43; 42 RT 13673-13674, 13729-13731, 13803-13816. Nor does petitioner point to anything in the trial transcript suggesting that the prosecutor attempted to stoke racial fears or exploit racial prejudice.

c. Finally, petitioner argues more generally that the California Supreme Court, in this and other cases, pays only lip-service to the *Johnson* standard, accurately reciting the *Johnson* and *Batson* test while silently applying a test that is effectively different and "unattainable." Pet. 20-21. But petitioner's *Batson* claim must rise or fall based on the facts of his case—not his allegations about other cases. In any event, petitioner's allegations about other cases are

not convincing. He focuses primarily on the rate of California appellate reversals of trial court *Batson* decisions. Pet. 21-22; *see also* Pet. App. 118-120 (Liu, J., dissenting). But he does not demonstrate that California courts were *wrong* to deny relief in any of those cases—and he does not acknowledge that this Court denied certiorari in many of the cases that are the basis for his statistics.[15]

In any event, California is actively addressing many of the policy concerns raised by petitioner and his amicus.[16] The California Supreme Court has admonished that, even when "the trial court has concluded no prima facie case has been established, it is the better practice to 'offer prosecutors the

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[15] *See, e.g., 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); *Sanchez v. California*, No. 16-7533, *cert. denied*, 137 S. Ct. 1340 (2017); *Harris v. California*, No. 13-9882, *cert. denied*, 134 S. Ct. 2851 (2014); *Jones v. California*, No. 13-8767, *cert. denied*, 134 S. Ct. 1944 (2014); *Lopez v. California*, No. 13-7574, *cert. denied*, 134 S. Ct. 1788 (2014); *Dement v. California*, No. 11-10917, *cert. denied*, 133 S. Ct. 237 (2012).

[16] Amicus Curiae California Attorneys for Criminal Justice argues that its collection of training materials from various district attorneys' offices shows that California prosecutors are "trained" to strike jurors for racial reasons. Amicus Br. 15. As support, however, amici point to the materials' advice to consider non-racial characteristics of the kind that *Batson* preserves as legitimate grounds for peremptory strikes by parties on either side. *See, e.g., id.* at 15-17 (quoting advice to seek jurors who are "'[m]ature,'" and to avoid those who have "'previous arrests or convictions . . . for the same/similar offense'"). Such considerations do not contradict the rule that (as one document cited by amicus puts it) "[y]ou cannot excuse jurors based on their membership in a protected class / cognizable group." *See* Ventura County District Attorney Training Materials, *Voir Dire Concepts*, March 14, 2014, at 2 (explaining "What You Cannot Do") (cited at Amicus Br. 16).

opportunity to state their reasons so as to enable creation of an adequate record for an appellate court . . . to determine whether any constitutional violation has been established.'" *People v. Reed*, 4 Cal. 5th 989, 999 n.6 (2018).[17] That court recently convened a working group to study further measures to "guard against impermissible discrimination in jury selection."[18] And California's Governor just last month signed into law a statute that, among other reforms to the process, will entirely eliminate defendants' need to establish a prima-facie case in California trials. *See* A.B. 3070, Cal. Stats. 2020, ch. 318 (signed Sept. 30, 2020). The new statute requires as a matter of state law that, whenever a *Batson* objection is made, "the party exercising the peremptory challenge *shall* state the reasons the peremptory challenge has been exercised." *Id.* § 2 (emphasis added) (enacting Cal. Code Civ. Proc. § 231.17(c), effective Jan. 1, 2022).

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[17] Such a practice effectively eliminates any step-one evaluation of whether the evidence preceding that explanation would have established a prima facie case. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.").

[18] *See* News Release, California Supreme Court Names Jury Selection Work Group, July 6, 2020, https://newsroom.courts.ca.gov/news/california-supreme-court-names-jury-selection-work-group.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 16, 2020

Respectfully submitted

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