No. 20-5085

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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

Respondent concedes that "courts do not follow a uniform approach to determining timeliness" of a request for self-representation under *Faretta v. California,* 422 U.S. 806 (1975). Op. Cert. at 16-17. Respondent does not deny that this is precisely the sort of split in authority that this Court should resolve. Rather, respondent claims that "no jurisdiction appears to view *Faretta* as requiring that a self-representation motion be granted where it is made for purpose of delay." Op. Cert. at 17.

This assertion is neither accurate as a matter of law, nor relevant as a matter of fact.

Respondent cites only to Mr. Johnson's petition to support its legal claim. Op. Cert. at 17, citing Pet. at 11-12. But a review of the cases cited therein shows that they do not support it. While it is true that *some* courts so qualify the *Faretta* right, even before jury empanelment, others do not. *Compare*, *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. 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"), *with 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"). Indeed, the California Supreme Court conceded below that its view of *Faretta* timeliness was inconsistent with that of several federal courts. *People v. Johnson,* 8 Cal. 5th 475, 502 (2019). This clear disagreement emphasizes the need for this court's intervention.

Respondent makes a related claim that "[t]his Court has recently denied other requests to set a uniform rule for when a trial court may deny a *Faretta* request as untimely." Op. Cert. at 16. This claim is supported only by citations to two denials of writs of certiorari. *Id.*, citing *Crespo v. New York*, No. 18-7694, *cert. denied*, ___ U.S. ___, 140 S. Ct. 148 (2019); *Kelley v. United States*, No. 15-248, *cert. denied*, 577 U.S. 877 (2015). Of course, as this Court has "'often stated, the denial of

a writ of certiorari imports no expression of opinion upon the merits of the case.'"[1] *Teague v. Lane*, 489 U.S. 288, 296 (1989), quoting *United States v. Carver,* 260 U.S. 482, 490 (1923) (Holmes, J.).

Even if respondent's primary assertion were accurate as a legal matter, there is no factual finding in this case that Mr. Johnson's *purpose* in making the *Faretta* motion was to delay the trial. The closest the trial court comes to making such a finding is its statement that it had a "strong suspicion" that Mr. Johnson was seeking to delay the proceedings. 32RT 10957. Respondent, without authority or explanation, seeks to transform that "suspicion" into a finding that the trial court "plainly viewed petitioner's belated motion as having been made for the purpose of delaying" the trial. Op. Cert. at 17. However, no matter how much respondent may wish the trial court had made such a finding, it did not. In short, whether or not it is proper to deny a *Faretta* motion made "for the purpose of delay" there is no *finding* in the record of this case that Mr. Johnson had such a purpose.

Indeed, the California Supreme Court did not rest its decision below on the notion that Mr. Johnson's purpose in making the motion was delay. Rather, it cited its minority approach of looking at the totality of the circumstances in determining the timeliness of a *Faretta* motion, even when it is made well before trial. While it

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[1] Respondent also notes that this Court has, in the past, denied certiorari in cases involving California's timeliness standard, though the most recent such denial was twenty-three years ago. Op. Cert. at 16, n. 6, citing *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)

included the trial court's "suspicion" in that analysis, its ultimate finding, like that of the trial court, was *not* that Mr. Johnson's motion was rightly denied because his purpose was to delay, but because his motion was untimely. Pet. at 8-9; *People v. Johnson,* 8 Cal. 5th at 502 ("We therefore conclude the trial court did not err when it determined that defendant's *Faretta* motion was *untimely and denied it on that basis*.") (emphasis added). This is the very issue on which respondent concedes there is a split of authority. Op. Cert. at 16-17.

Pivoting from its purpose of delay theory, respondent asserts that the motion, filed on June 8, 1992, was untimely because it was filed "only" two weeks before the notional trial date of June 22, 1992[2] and that the seven weeks between the filing of Mr. Johnson's *Faretta* motion and jury selection was so lengthy only because of the time required to decide that motion.[3] Op. Cert. at 19-20. Again, timeliness is the

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[2] As discussed in the petition June 22 was never an actual trial date and the first appearance before the trial judge took place on July 6. Pet. at 4-5, 17.

[3] Respondent ignores that when counsel first appeared before the trial court there were at least eight motions filed by defense counsel pending, all of which were filed approximately a month *after* Mr. Johnson filed his *Faretta* motion. See e.g. motions filed on July 6, 1992: Notice of Motion and Motion to Determine Admissibility of The Testimony of Florence Morton, 5CT 1138. 72; Notice of Motion and Motion to Oppose Introduction of Prior Acts in Aggravation, 4CT 1138.18; Motion to Dismiss Based Upon Double Jeopardy, 4CT 1138.22; Notice of Motion and Motion to Bar Evidence of The July 18, 1979 Rape of Mary S. On Due Process Grounds, 5CT 1138.55; Motion in Limine objecting to admission of prior testimony of Canniff, 5CT 1138.66; Notice of Motion and Motion to Pre-Instruct Prospective Jurors on Parole Misconception, 5CT 1138.60; motions filed on July 9, 1992: Motion in Limine To Strike Special Circumstances and Bar the Death Penalty as discriminatory charged and imposed, 5CT 1140.1; Motion to Exclude the prior testimony of witnesses Sodini And Crawford, 5CT 1139.57.

very issue on which there is a split in authority and this argument seems to implicitly concede that a motion filed seven weeks before jury selection is generally timely. In any event, respondent cites no case in which any court has accepted such an argument as a basis for denying a *Faretta* motion. Nor can there be a basis in reason for thwarting a defendant's right to self-representation because a court fails to timely rule on that motion.

As Mr. Johnson demonstrated in his petition, and respondent does not dispute, few if any courts outside of California would find untimely a *Faretta* motion made two weeks before the scheduled date for pretrial motions, as opposed to trial, much less one made seven weeks before the beginning of jury selection and eleven weeks before opening statements.[4] Pet at 11-15.

What remains is the undisputed fact that the outcome of a motion made by a criminal defendant seeking to exercise the constitutional right to self-representation

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[4] In claiming that June 22 was the trial date respondent asserts that "on June 12, petitioner's counsel stated that they were ready to proceed with trial on the June 22 trial date." Op. Cert. at 3 citing Pet. App. at 55. While language to that effect appeared in the California Supreme Court's original decision the decision was modified upon the denial of rehearing and that language was removed and replaced with the following:

> At a discovery sanctions hearing on June 12, the court confirmed the scheduled June 22 trial date, and counsel for both parties indicated that they *anticipated proceeding with pretrial motions on that date.*

Pet. App. at 142. (emphasis added). (This corrected language appears in the published decision at 8 Cal. 5th at 494.)

is currently dependent on the jurisdiction in which that defendant sits, and that in a majority of jurisdictions Mr. Johnson's motion seeking to exercise that right would have been granted. It is fundamental that certiorari should be granted where such a division exists regarding the exercise of a fundamental constitutional right. Sup. Ct. R. 10. The petition should, therefore, be granted.

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

According to respondent, Mr. Johnson "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." (Op. Cert. at 20.) This ignores what Mr. Johnson actually argued—that while giving lip service to this Court's *Batson*[5] jurisprudence, the California Supreme Court has consistently failed to adhere to it. Mr. Johnson's argument is not simply that the California Supreme Court misapplied the rules in *this* case, though it did. It is that the court has consistently misapplied those rules for over 30 years. In his dissent in a case decided the same day as this one Justice Liu 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 393, 458 (2019) (Liu, J., dissenting) (citation omitted), *petition for cert. filed,* April 16, 2020 (No. 19-8332.)

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[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

In addressing Mr. Johnson's argument, respondent blithely dismisses the long history of the California courts' affirmance of *Batson* denials, without addressing the critical point that that these denials came in cases in which the trial court had applied an unconstitutional standard. (Pet. at 21-22.) The only assertion respondent makes in opposition to this claim is that Mr. Johnson "does not acknowledge that this Court has denied certiorari in many" of those cases. (Op. Cert at 28.) It is not clear why respondent believes this worthy of acknowledgement since, as this Court has "'often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane*, 489 U.S. 288, 296 (1989) (citation omitted). What respondent fails to explain is how the California Supreme Court can be properly applying this Court's *Batson* jurisprudence while consistently holding that *Batson* claims decided at the trial level under an unconstitutional standard, were nevertheless *all* correctly decided.

Nor is California the only jurisdiction in which findings of *Batson* violations appear to be strikingly rare. For example, the North Carolina Supreme Court has reviewed seventy-one *Batson* cases since that seminal case was decided and has never found a substantive *Batson* violation. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Baston Record,* 94 N.C. L. Rev. 1957, 1961 (2016). In thirty-four cases involving a step one finding the North Carolina Supreme Court found a prima facie case three times, but after further proceedings none of those cases ended in reversal. *Id.* at 1961, 1965. The reasons for this remarkable record are strikingly similar to those present in

California, including the reviewing court's practices of searching the record for nondiscriminatory reasons at step one and improperly elevating the burden of proof this court set in *Johnson v. California*, 545 U.S. 162 (2005). Pollitt & Warren, *supra,* at 1965-71. See, also. *Eubanks v. State*, 291 So. 3d 309, 325 (Miss. 2020) (King, P.J., dissenting) (in 105 cases involving strikes of African-American jurors in which the trial court found no *Batson* violation, the Mississippi Supreme Court reversed five times); *Chamberlin v. Fisher*, 885 F.3d 832, 846 (5th Cir. 2018) (en banc) (Costa, J. dissenting) ("It appears that only two of the hundreds of *Batson* decisions in our circuit have ever found that a strike was discriminatory").

Respondent's discussion of the facts is consistent with the misguided approach the California Supreme Court has taken of ignoring this Court's mandate to consider the totality of the evidence and instead "artificially compartmentaliz[ing] the relevant facts to avoid confronting the disturbing mosaic these facts reveal." *People v. Johnson,* 8 Cal. 5th at 537 (Cuéllar J., dissenting).

This approach is perhaps most notable in respondent's discussion of potential juror Kenneth M. and the prosecutor's refusal to answer the simple question of whether he had only run criminal background checks on black jurors. Like the California Supreme Court majority, respondent emphasizes that the prosecutor was not obliged to answer the question, but does not address the implications of his decision not to answer. Op. Cert. at 13. No one argues that the prosecutor was *precluded* from answering. Thus, as the dissenting justices below argued, it is certainly reasonable both to ask why, if the prosecutor was not singling out black

jurors, he did not simply say so, and to find the refusal to answer raised a suspicion of racial bias. See, *People v. Johnson*, 8 Cal. 5th at 532 (Liu, J., dissenting), 540 (Cuéllar, J., dissenting). Of course, had the trial court asked this “simple question” *Johnson v. California*, 545 U.S. at 172 (citing *Batson*, 476 U.S. 97-98 and n. 20), we would now know the answer.[6] A yes answer would have been evidence of discrimination that a court “cannot ignore.” *Flowers v. Mississippi*, ___ U.S. ___, 139 S. Ct. 2228, 2248 (2019).

Similarly, in addressing the fact that Mr. Johnson is black and the two victims whose races are known are white respondent asserts that “the court did not find any basis for inferring discrimination from the fact that Mr. Johnson is Black and Cavallo and Mary S. were White.” Op. Cert. at 13. However, this is not what the court below said. Rather it said “we do not infer discriminatory intent based *solely* on the fact that the known race of two of the victims is the same as that of a bare majority—7 of 12—of the seated jurors.” *People v. Johnson*, 8 Cal. 5th at 510. Thus, respondent again fails to address one of the critical defects in the holding below—that the court viewed this evidence in isolation, rather than applying

[6] Respondent asserts that the 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.” Op. Cert. at 13. But the prosecutor’s refusal to say whether he had only run background checks on black jurors did not come in the context of a peremptory challenge, but rather occurred before the prospective juror’s initial voir dire. Pet. at 5-6.

totality of the evidence standard this Court's precedents require. *Johnson v. California,* 545 U.S. at 168.

Respondent similarly argues that "petitioner identifies only two of his six victims as White." Op. Cert. 27. In doing so Respondent elides critical facts. First *all* of the victims whose race is identified in the record were white. The other four victims' races are not identified in the record. Second the two victims identified as white were the victim of the murder for which Mr. Johnson was being sentenced and the victim of an alleged rape that was introduced in aggravation. This Court has said that a case in which the defendant and the excused juror are the same race "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). This Court has also found "'highly relevant' [the] circumstance that a black defendant was 'charged with killing his White girlfriend's child.'" *Johnson v. California,* 545 U.S. at 167, quoting *People v. Johnson,* 30 Cal.4th 1302, 1326 (2003). Respondent ignores these precedents. Moreover, petitioner is aware of no case in which this Court, or any court, has suggested that the *number* of victims of the opposite race is relevant to the *Batson* analysis, nor does respondent cite any.

Respondent also admits that, despite the availability of this technique under California's flawed interpretation of *Batson*, neither it nor the court below could even hypothesize a race neutral justification for striking potential jury Lois G. It then dismisses this startling fact by again viewing the evidence in isolation, and concluding, in *ipse dixit*, that the dismissal of the juror "does not lead to any

inference of discrimination." Op. Cert. at 25. But the discriminatory strike of even a single juror violates the Constitution. *Flowers,* 139 S. Ct. at 2242, and thus the lack of any race neutral reason for the elimination of this Black juror supports the inference that the strike was discriminatory.[7]

Respondent's final assertion is that California is taking care of the problem that it argues does not exist. Respondent first points to the Jury Selection Working Group created by the Chief Justice of the California Supreme Court. Op. Cert. at 29. Respondent neglects to mention that the plan to form the work group was first announced in January,[8] but its members were not named until July[9] and, as far as Mr. Johnson has been able to determine, the group has yet to meet. More importantly, the fact that the Chief Justice of the California Supreme Court herself has directly acknowledged that there has long been a problem with bias in the selection of juries in California supports, rather the undercuts, the need for this Court's intervention.

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[7] Respondent also notes the disagreement between the majority and dissent below as to the desirability of the stricken jurors from the prosecution's perspective. Op. Cert at 24, n. 12. This disagreement further illustrates that the court in this case should have proceeded to step three, where such disagreements can be resolved.

[8] See https://www.pressreleasepoint.com/supreme-court-announces-jury-selection-work-group (last visited October 26, 2020).

[9] https://newsroom.courts.ca.gov/news/california-supreme-court-names-jury-selection-work-group (last visited October 26, 2020).

Respondent next points to the passage of California Assembly Bill 3070, which, as respondent says, would effectively eliminate the first step of the *Batson* analysis in California. Op. Cert at p. 29, n. 17. Again, respondent neglects to mention several salient facts. First, the new statute does not go into effect until January 1, 2022, and is not retroactive. Assem. Bill No. 3070 (2019-2020 Reg. Sess.) §2.[10] Thus, it will not affect the many hundreds of cases, including many capital cases, currently either on appeal or pending resolution of state habeas petitions.

Respondent also ignores the legislature's finding that, contrary to respondent's claim that there is nothing to see here,

> peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that *the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination.*

Assem. Bill No. 3070 (2019-2020 Reg. Sess.) §1 (emphasis added).

That the California legislature, like the Chief Justice of the California Supreme Court, has frankly acknowledged that there is a problem with discrimination in jury selection in California, supports a grant of certiorari to address the numerous pending appeals infected by California's flawed doctrine.

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[10] The Secretary of State has not yet chaptered the new statutes. The provision regarding the effective date will be codified as Cal. Penal Code § 231.7(i).

This is particularly true where the same flaws have arisen in other states and federal jurisdictions.

Finally, respondent neglects to mention that in its opposition to the bill the California District Attorneys Association argued that it is unconstitutional. Sen. Com. On Public Safety, Rep. on Assem. Bill No. 3070 (2019-2020 Reg. Sess.) as amended July 28, 2020. Thus, there is no assurance that the statute will ever go into effect.

While the California Supreme Court's consistent failure to enforce the constitutional mandates of *Batson* and subsequent cases likely motivated the legislature's action, that action does not eliminate this Court's responsibility to ensure that California, and other states with similar records of noncompliance, are faithful to the Constitutional mandate this court established in *Batson.* This Court should, therefore, grant the petition.

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: October 30, 2020

Respectfully Submitted,

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