***** CAPITAL CASE *****

No. 21-7455

In the Supreme Court of the United States

DON'TE LAMONT MCDANIEL,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITOIN

This petition raises the question of the proper application of mixed motives analysis in the *Batson*[1] context. Petition for Certiorari (Pet.) at ii (Question Presented). As respondent openly admits, this is a legal issue which deeply divides jurisdictions throughout the nation, and which has resulted in a quagmire of conflicting approaches in the lower courts. *See* Brief in Opposition ("BIO") at 12 ("McDaniel is correct that the lower courts do not follow a uniform approach to analyzing mixed-motive *Batson* cases"). Such an entrenched and persistent division of authority is just the sort of legal issue that ordinarily would warrant this Court's intervention. Respondent, however, contends that the better course is to decline petitioner's invitation to resolve the dispute and instead to allow this decades-long division to linger. None of respondent's contentions survives careful scrutiny.

I. BECAUSE THE PROSECUTOR ENTERED JURY SELECTION INTENT ON DISCRIMINATING ON THE BASIS OF RACE, THE CALIFORNIA SUPREME COURT SHOULD HAVE ANSWERED THE QUESTION OF WHETHER THE STRIKE AGAINST JUROR HERMAN TANIEHILL WAS MOTIVATED IN PART BY THE VERY SAME RACIAL BIAS THAT INFECTED HIS OTHER, DISCRIMINATORY STRIKE

Respondent's primary contention is that this case presents no issue of discrimination in the first place, and thus no occasion for this Court to resolve the three-way lower court conflict on how to assess mixed motives in *Batson* cases when discrimination is identified. To be more accurate, respondent admits there was *a*

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

finding of racial discrimination in jury selection in Mr. McDaniel's case, just no finding of discrimination *as against Herman Taniehill*,[2] the juror at issue in this appeal.

Respondent does not and cannot deny that the trial court found that the prosecutor was discriminating on the basis of race during jury selection in Mr. McDaniel's case. A finding of discrimination during jury selection is plain in the record below, a fact which respondent concedes. *See* BIO at 9 ("totality of the circumstances" before the California Supreme Court "include[ed] the fact that the judge found a *Batson*[] violation" against the prosecutor during Mr. McDaniel's trial). Nor does respondent deny that the very same prosecutor caught violating *Batson* in Mr. McDaniel's case continued his open defiance of the constitutional prohibition of racial discrimination in the co-defendant's trial, where the prosecutor was *again* found to have violated *Batson* by discriminating against Black jurors. Pet. at 12-13.

According to respondent, however, the fact that the prosecutor was engaged in discrimination in Mr. McDaniel's trial against one juror (Prospective Juror No. 46) does not present an issue of mixed motives against Mr. Taniehill. Echoing the faulty reasoning of the California Supreme Court, respondent argues that the finding that the prosecution was engaged in anti-Black discrimination during jury selection was merely "a relevant circumstance" to consider in assessing whether the

[2] The Brief in Opposition refers to Mr. Taniehill as Prospective Juror No. 28.

prosecutor's other peremptory challenges against Black jurors were also infected with the very same racial bias that infected his strike against Prospective Juror No. 46. BIO at 9 (citing *People v. McDaniel*, 12 Cal. 5th 97, 123 (2021) (*McDaniel*). Respondent, like the California Supreme Court below, grossly understates the meaning and effect of a finding that the prosecutor entered jury selection ready and willing to discriminate against Black jurors.

If a prosecutor is found to have exercised peremptory challenges in a racially discriminatory manner in a particular case—much less in two consecutive trials against two co-defendants in the same case—that finding has a particular meaning. Implicit in such a finding is that the prosecutor 1) believed that his trial strategy would be advanced by eliminating Black jurors (based on a wrongheaded notion that Black jurors are uniformly less favorable to his case) and 2) had abandoned his ethical and constitutional duties and allowed his discriminatory belief system to impact jury selection strategy.

Minimizing the meaning of an express finding of discrimination—downgrading it to the second-tier status of a "relevant circumstance," *McDaniel*, 12 Cal. 5th at 123, does not eliminate the need for a mixed motives analysis. The prosecutor in this case entered jury selection with the very "mind to discriminate" that *Batson* long ago recognized as the poisonous origin of unlawful challenges. *Batson*, 476 U.S. at 96. As such, the California Supreme Court *should* have analyzed whether the prosecutor's discriminatory mindset infected his strikes against other jurors. Yet nowhere in the opinion below is there an answer to the

obvious question posed by the facts of this case: why would the prosecutor, when striking Mr. Taniehill, be completely unaffected by the discriminatory stereotypes that infected his near-simultaneous strike against Prospective Juror No. 46?

Respondent posits several reasons excusing this analytic failing, none of which should stand in the way of this Court answering the obvious mixed motives question presented by this record.

A. The California Supreme Court Opinion Ignores and Misstates the Most Central Facts Pertinent to Discriminatory Intent

First, respondent contends that the premise that the prosecutor was, at least in part, motivated by discriminatory bias "contradicts the conclusion—reached by two lower courts—that the prosecutor exercised the strike of [Mr. Taniehill] on race-neutral grounds, not on the basis of any race-based considerations." BIO at 15. But a closer look at both lower court findings demonstrates that neither the trial court nor the California Supreme Court took proper—and perhaps any—account of the meaning of the discriminatory animus plain from the face of the record.

The trial court appears to have overlooked its own finding of discrimination entirely. The trial court initially ruled with respect to all five Black jurors at issue in the *Batson* motion below that "I am accepting of the articulated reasons that have been advanced here." 5 RT 1085. But this oblique statement was made *before* the trial court reconsidered its own ruling and found that the prosecutor was discriminating on the basis of race with respect to Prospective Juror No. 46. *Ibid* (finding that the justification provided for striking Prospective Juror No. 46 was

"not valid" and ordering that juror reseated). After ultimately concluding that the prosecutor *was* in fact harboring discriminatory bias (and providing pretextual excuses to hide it), the trial court made no mention of the impact of this finding on the remaining challenges. The trial court's failure to take into account uniquely powerful evidence of discrimination provides little reason to accord deference to its implicit finding that the strike against Mr. Taniehill was unaffected by racial bias.

The California Supreme Court opinion only compounded the trial court's oversight, providing only the most cursory analysis of the impact of the discriminatory strike against Prospective Juror No. 46 on the strike of Mr. Taniehill. The portion of the opinion below discussing the prosecutor's act of race discrimination consisted of a single sentence. The lower court concluded that, while a discriminatory strike was a "relevant circumstance" to be considered, "the trial court here was well aware of the violation when it ruled on all five strikes at the same time." *McDaniel*, 12 Cal. 5th at 123. This statement is a chronological impossibility.

As explained above, the trial court made its ruling on "all five strikes at the same time" *before* it reconsidered and found the strike against Prospective Juror No. 46 was in fact motivated by racial bias. The California Supreme Court thus offers a nonsensical contention: that the trial court was "well aware" of a finding of discrimination which it had not yet made—and in fact had initially rejected—when it made its ruling. The record demonstrates trial court was *not* aware of the *Batson*

violation when it first denied the *Batson* motion as to all five jurors at issue. And nothing in the record suggests the trial court later took that finding into account.

B. This Court's Cases do not hold that a Prosecutor's Intentional Act of Racial Discrimination is Merely a "Relevant Circumstance" that has no Direct Bearing on Other Strikes

Next, respondent claims that the petitioner's mixed motives premise—that discriminatory bias as to one Black juror necessarily flows to other Black jurors—"is in substantial tension with this Court's precedents[.]" BIO at 16. Specifically, respondent claims that this Court has recognized that a finding of racial discrimination against one juror is merely another "relevant circumstance for a court to consider" in assessing bias in other strikes. BIO, citing *McDaniel*, 12 Cal.5th at 123. This Court has held no such thing.

The California Supreme Court did cite this Court's decision in *Snyder v. Louisiana*, 552 U.S. 472 (2008) (*Snyder*) as support for the proposition urged by respondent: that a finding of discrimination by the prosecutor in the trial at hand is merely a "relevant circumstance." Trivializing as merely "relevant" the uniquely powerful evidence of an actual finding of discrimination by the prosecutor, in a strike made moments after the disputed strike, is not mandated by *Snyder*. Nor is it suggested by any of this Court's cases.

In *Snyder*, this Court considered claims of discrimination against two Black jurors, Jeffrey Brooks and Elaine Scott. *Snyder*, 552 U.S. at 477. The Court found that because the trial court "committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim

regarding Ms. Scott." *Id* at 478. Shortly thereafter, the Court explained that "if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks. In this case, however, the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error." *Ibid*.

Respondent claims that *Snyder* supports the California Supreme Court's "relevant circumstance" formulation and that the case rejects any "per se" rule acknowledging that discriminatory views deployed against one Black juror would necessarily flow (at least in part) to other Black jurors. BIO at 16. This argument misreads *Snyder*.

Snyder merely explained that, "if there were persisting doubts" as to discrimination against one juror, those doubts should be held in mind when assessing another doubtful strike against another juror. *Snyder*, 552 U.S. at 478. Notably, such an assessment is mandatory: a court is "required" to consider doubts as to one strike "for the bearing it might have upon the [other] strike[.]" *Ibid*. However, *Snyder* says nothing at all about when a prosecutor is *found* to have discriminatory bias against one Black juror in a given *Batson* motion. Nor does *Snyder* counter the uncontroversial proposition that a prosecutor striking one Black juror on account of racial stereotypes necessarily harbors some degree of racial bias against all Black jurors he has stricken.

The very premise of *Batson* is that "prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'" *Miller-El v. Dretke*, 545 U.S. 231, 237–238 (2005) (quoting *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994)). Such stereotypes, by definition, apply an attribute to *all members* of a particular group. Roger Enriquez, & John W. Clark, III, *The Social Psychology of Peremptory Challenges: An Examination of Latino Jurors*, 13 Tex. Hisp. J. L. & Pol'y 25, 32 (2007) ("Stereotypes are beliefs to the effect that all members of specific social groups share certain traits or characteristics") (internal citations omitted). Nothing in *Snyder* holds that prejudicial stereotyping of Black jurors applied by the prosecutor in Mr. McDaniel's case towards Prospective Juror No. 46 would not also—like all stereotypes—be applied in some degree to other members of the same group.

II. RESPONDENT'S SUGGESTION THAT THE TRIAL COURT MISAPPLIED *BATSON* IS A RED HERRING

As a second basis to oppose review, respondent suggests that the trial court's finding of discrimination against Prospective Juror No. 46 was itself somehow faulty. BIO at 15-16 & n.12 (claiming the petition "assumes that the trial court's *Batson* ruling with respect to Prospective Juror No. 46 was correct"). This is a red herring.

Respondent's assertion is premised upon a motion for reconsideration filed by the prosecutor after he was found to have violated *Batson*, in which the prosecutor accused the trial court of employing an incorrect "for cause" standard. BIO at 6; 9

CT 2302-2313. The motion seized upon the trial court's statement during the *Batson* hearing that the fact that Prospective Juror No. 46 listened to a particular public radio station (which both the prosecutor and defense also listened to), 5 RT 1081-1082, was "not a valid reason" and that the juror "looked like an acceptable juror." 5 RT 1085-1086. In the prosecutor's motion, it claimed this language demonstrated that the trial court had applied an erroneous "for cause" standard to the strike. BIO at 6. The same argument—that the trial court employed a "for cause" standard, was raised by respondent on direct appeal. *McDaniel*, 12 Cal.5th at 123 (noting the dispute on the issue).

Respondent's suggestion that the trial court employed the incorrect standard overlooks entirely the context of the *Batson* hearing itself. The record of that hearing illustrates the trial court was perfectly familiar with the appropriate legal standards under *Batson* and was never applying a "for cause" standard. Indeed, far from suggesting that the trial court was ignorant of the governing legal standards, the record affirmatively demonstrates that the extremely experienced[3] trial judge had a keen interest in *Batson* law: the very morning of the challenge the trial court had been reading an article on *Batson* law. 5 RT 1084.

At each stage, the trial court affirmed its correct understanding that that the ultimate question under *Batson* was purposeful discrimination. At *Batson*'s first

[3] The since retired trial judge, the Honorable Robert Perry, has the distinction of holding the record for most men sentenced to death in the state of California in the modern death penalty era.

stage, the trial court found a "prima facie case of excusals *based on race*." 5 RT 1075 (emphasis added). After receiving the prosecutor's justifications and evaluating them at stage three, the trial court asked defense counsel immediately preceding the grant of the *Batson* motion regarding prosecutorial pretext: "are you arguing that this – that [the prosecutor] *is making false representations* to the Court and that this panel should be dismissed?" 5 RT 1085 (emphasis added). In other words, the trial court was clearly applying *Batson's* well-established requirement that a strike be invalidated only where "the defendant has shown purposeful discrimination" demonstrated by the prosecution's attempt to "proffer . . . [a] pretextual explanation." *Snyder*, 552 U.S. at 485 (citations and quotations omitted).

Most importantly, respondent's suggestion that the trial court employed the wrong legal standard fails to accord any weight to the fact that the trial court held a full hearing on the prosecutor's motion for reconsideration and rejected it conclusively. 16 RT 3055-3061. The trial court explained to the prosecutor that it had found a *Batson* violation not based on a faulty "for cause" legal standard but because the prosecutor's justifications failed comparative analysis. 16 RT 3060-3061 (motion for reconsideration denied: prosecutor's justifications were not "valid under the circumstances because I think there were other jurors who said similar statements as this juror"); see also 5 RT 1082 (defense counsel noting during *Batson* hearing that not only Prospective Juror No. 46, the prosecutor, and himself, but also numerous "conservative jurors" listened to public radio stations).

The California Supreme Court, for whatever reason, chose not to resolve the disputed issue of what standard the trial court applied in granting the *Batson* challenge. *McDaniel*, 12 Cal. 5th at 123. However, the California Supreme Court decision expressly and unambiguously assumed that the trial court applied the correct standard. *Ibid*. This assumption (an assumption overwhelmingly supported in fact), poses no barrier to review by this Court.

In resolving its cases, this Court routinely assumes issues previously assumed by lower courts. *Kentucky v. King*, 563 U.S. 452, 471 (2011) (Kentucky high court assumed the existence of exigent circumstances so "[w]e, too, assume for purposes of argument that an exigency existed"); *Lambrix v. Singletary*, 520 U.S. 518, 526 (1997) ("Like the Eleventh Circuit, . . . we assume, arguendo" that "jury instructions . . . failed to provide sufficient guidance to limit the jury's discretion"); *Fahy v. Connecticut*, 375 U.S. 85, 87 (1963) ("We assume, as did the Connecticut Supreme Court of Errors, that [admitting certain evidence] . . . was error because this evidence was obtained by an illegal search"). Particularly in light of the clear record demonstrating that the trial court was employing the appropriate legal standard, this Court can and should likewise assume the correctness of the trial court's ruling granting the *Batson* motion as to Prospective Juror No. 46.

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III. RESPONDENT'S ATTEMPT TO MANUFACTURE A REQUIREMENT THAT MIXED MOTIVES BE BRIEFED IN A LOWER COURT IN ORDER TO BE RAISED BEFORE THIS COURT HAS NO BASIS IN PRECEDENT OR LOGIC

Respondent's final argument against review by this Court is that the issue of mixed motives was not briefed below and has not been decided by the California Supreme Court. BIO at 16-17. This position lacks grounding in logic or precedent.

Courts across the country have decided the issue of mixed motives in a variety of procedural postures, unrelated to whether the issue has been litigated in prior proceedings. For example, several of the decisions cited in the petition addressing the issue of mixed motives are federal habeas decisions in which the issue of mixed motives did not arise on direct appeal and was only raised in federal court. See, e.g., *Wallace v. Morrison*, 87 F.3d 1271, 1273 (11th Cir. 1996) (issue of mixed motives first arose in district court); *Cook v. LaMarque* 593 F.3d 810, 813 (9th Cir. 2010) (same). The reason for this is that the issue of mixed motives is generally raised *by the government*, in an attempt to salvage a case in which discriminatory motive has been identified. Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 Md. L. Rev. 279, 320 (2007) ("mixed-motive analysis has tended to insulate discriminatory jury-selection tactics from reversal"). The defendant's task, as petitioner's was in the courts below, is simply to convince the trial court and appellate court that discrimination is afoot. Respondent fails to cite a single case holding, or even

suggesting, that the issue of mixed motives cannot be addressed unless it was raised at some point in the lower courts.

The view that mixed motives is not an issue that needs to be raised to be reviewable is confirmed by this Court's decision in *Snyder*, a decision which confronted the issue of mixed motives without the doctrine of mixed motives being raised *by either party*. In *Snyder,* this Court did not ultimately decide whether the mixed motives framework applied in the *Batson* context or, if it did, what legal standard obtained. *Snyder*, 552 U.S. at 485. However, it determined that the defendant would win in any event because the strike in that case was "motivated in substantial part by discriminatory intent[.]" *Ibid*. In other words, this Court can assess whether a defendant would be successful under any conceivable mixed motive standard regardless of whether the issue was raised by the parties. If this Court can assess the outcome of a mixed motives analysis under *any* standard without either party raising the issue below, there is nothing precluding it from assessing mixed motives after deciding which standard correctly applies.

Additionally, even were there a requirement to raise the pertinent issue to the lower court, petitioner did so. Although not invoking the precise wording of "mixed motives," petitioner present the below argument to the California Supreme Court in his petition for rehearing.

> The opinion provides no explanation for why the prosecutor, when striking Prospective Juror No. 28, would have been completely unaffected by the discriminatory stereotypes that infected his strike against Prospective Juror No. 46. Indeed, it is hard to imagine how any prosecutor would be able to completely cabin his discriminatory

> stereotypes and motivations in a strike against one juror without them spilling over to strikes against others.
>
> . . .
>
> A discriminatory strike against a Black juror indicates that 1) the prosecutor believes as a general matter that Black jurors are unfavorable to his case and 2) the prosecutor, at a minimum, will not always refrain from acting on that belief to gain strategic advantage in the case. Holding otherwise requires accepting the conclusion that the prosecutor is wholly unaffected by his existing motivation to discriminate, and for some reason constrains (but only intermittently) his strong impulse to act on those motivations notwithstanding clear rules prohibiting it.
>
> Perhaps one could imagine a prosecutor able and willing to discriminate who nonetheless acts differently towards two different jurors because those two jurors are remarkably different in character. A strike against a juror who is relatively middle-of-the-road might be motivated by race, whereas a strike against another juror who is clearly and obviously unfavorable to the prosecution might be, at least theoretically, entirely unmotivated by race. In other words, if the prosecutor's justification for striking juror A was extremely strong, whereas his strike against juror B was relatively weak, a court could conclude that the prosecutor's act of discrimination against juror A was untainted by the discrimination that infected the strike of juror B.

Petition for Rehearing, Pet. Appendix B, at 9, 12.

This language perfectly tracks the mixed motive argument presented in this petition, and is more than sufficient to raise the issue before the California Supreme Court, were it required.

Finally and relatedly, respondent suggests that this Court should not consider this legal issue without the California Supreme Court having first had the opportunity to weigh in on the ongoing split of authority. BIO at 17. As demonstrated in the petition, the conflict in the lower courts has spanned several decades, encompasses a variety of legal approaches, and involves countless opinions

coming to differing conclusions. Pet. at 18-21. Such an entrenched and well-developed conflict will not profit from additional development in the lower courts. This Court should address the issue now.

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CONCLUSION

Wherefore, petitioner prays that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California.

Dated: June 8, 2022

Respectfully submitted,

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