No. 24-_____

IN THE

Supreme Court of the United States

SIR MARIO OWENS,

Petitioner,

v.

THE STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether expressly linking a black juror's remark in a jury questionnaire indicating that he had an "unpleasant experience" with police (namely, "driving while black") to the fact the defendant is also black and involved in the criminal justice system constitutes a "race-neutral" justification for peremptorily striking the juror under *Batson v. Kentucky*, 476 U.S. 79 (1991), in the absence of any direct evidence that the juror mistrusted police or harbored negative feelings about the criminal justice system?

2. Whether back-to-back peremptory strikes of two black jurors, resulting in the empanelment of an all-white jury in a racially-charged homicide case, runs afoul of the "all relevant facts and circumstances" analysis set forth in *Flowers v. Mississippi*, 588 U.S. 284 (2019), when (i) the first juror was struck on the basis of a combination of plainly race-based and dubious race-neutral reasons, and (ii) the second juror was subjected to a lengthy inquisition concerning her ability to fairly sit in judgment of a black defendant, only to be struck on ostensibly race-neutral grounds the trial court had previously found incredible?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner (the appellant/defendant below) is Sir Mario Owens.

Respondent (the appellee/plaintiff below) is the State of Colorado.

No party is a corporation.

RELATED PROCEEDINGS

Trial and Direct Appeal

People v. Owens, No. 06CR705 (Arapahoe Cnty. Dist. Ct. December 8, 2008) (entry of judgment of conviction and sentence)

People v. Owens, No. 09CA145 (Colo. Ct. App. April 16, 2009), *as modified on denial of reh'g* (June 25, 2009) (appeal dismissed)

People v. Owens, No. 08SA402 (Colo. February 20, 2024), *reh'g denied* (March 25, 2024) (judgment of conviction affirmed)

State Postconviction Proceedings[1]

People v. Owens, No. 06CR705 (Arapahoe Cnty. Dist. Ct. September 15, 2017) (entry of order denying postconviction relief)

People v. Owens, No. 08SA402 (Colo. April 11, 2024) (appeal of order denying postconviction relief, stayed during pendency of instant petition for writ of certiorari to the United States Supreme Court)

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[1] Postconviction proceedings pursuant to Colo. Crim. P. 32.2 and section 16-12-201 *et seq*, Colo. Rev. Stat. (2019) (collectively, the "Unitary Review Statute" or "URS"), are related only to the extent that the URS governed this case prior to repeal of the death penalty in Colorado, and the subsequent commutation of Owens' death sentence, in 2020. The URS dictates that direct and postconviction appeals in capital cases must be litigated and decided together in unitary fashion, and that is how this case initially proceeded. *See People v. Owens*, 219 P.3d 379, 381-85 (Colo. App. 2009). The Colorado Supreme Court has since determined that the URS is no longer applicable to this case and has elected to transfer the appeal of the order denying postconviction relief to the Colorado Court of Appeals (if these proceedings do not resolve the case).

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Petitioner Sir Mario Owens respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court (CSC).

OPINION BELOW

The CSC's opinion is published at 2024 CO 10, 544 P.3d 1202, and is reproduced in the Appendix hereto **at Pet. App. 1a-63a**.

JURISDICTION

The CSC issued its opinion affirming the judgment of conviction on February 20, 2024. Owens petitioned for a rehearing, which the CSC denied on March 25, 2024. Pet. App. at 64a.

On June 21, 2024, Justice Gorsuch granted Owens' application for an extension of time to July 23, 2024, within which to file a petition for a writ of certiorari. *See* Docket No. 23A1126.

This Court has jurisdiction over the above-captioned matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

An all-white jury convicted Sir Mario Owens – a young black man – of capital murder and sentenced him to death in a case predominated by intersecting issues of race and urban gang culture.[2] State prosecutors engineered the racial composition of the jury by exercising consecutive peremptory challenges to strike the only two death-qualified, black jurors who could have participated in deciding Owens' fate. All the relevant facts and circumstances strongly suggest that the prosecution did so because they presumed these two jurors, by virtue of their race and lived experience as Black Americans, would be more sympathetic to Owens.

"Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson v. Kentucky*, 476 U.S. 79, 85 (1991). The Equal Protection Clause thus "'forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were [our courts] to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.'" *Flowers v. Mississippi*, 588 U.S. 284, 299 (2019) (quoting *Batson*, 476 U.S. at 97-98); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or

[2] On March 23, 2022, Colorado's Governor commuted Owens' death sentence to life imprisonment without the possibility of parole, after the state legislature prospectively abolished the death penalty. Colo. Exec. Order C-2022-002 (https://tinyurl.com/52cpcebc). Hence, this is no longer a capital case.

competence. 'A person's race simply 'is unrelated to his fitness as a juror.'") (quoting *Batson*, 476 U.S. at 87).

These prohibitions could not be more clear, and establish well-defined boundaries circumscribing the improper use of peremptory challenges to exclude jurors based on race. And yet – as here – courts oftentimes struggle to give effect to these constitutional commands when issues of race and the lived and historical experiences of minority jurors overlap.[3] While the most overt forms of racial discrimination in jury selection largely have been eliminated over time by adjustments in prosecutorial behavior, courts must now contend with the fact that "the use of race- and gender-based stereotypes in the jury-selection process [have become] better organized and more systematized," as well as more subtle, making it increasingly difficult to draw clear distinctions between race-based and race-neutral

[3] Commentators have noted that the "[*Batson*] framework does not account for the reality that due to systemic racism, Black Americans are more likely to distrust law enforcement and experience negative interactions with police. … Indeed, participation in the jury selection process may even facilitate these negative opinions about the judicial process in minority communities, which in turn can be used as a reason for striking a minority venireman." Finley Riordon, *The Objective Observer Strikes Out: A Comparative Analysis of* Batson *Reform in Washington State*, 13 Wake Forest J.L. & Pol'y 103, 107 (2023) (footnotes and citations omitted); *see also* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 Colum. L. Rev. 249, 285 (2019) (observing that the current analytical framework has permitted courts to create "a safe haven for prosecutors to strike from juries individuals who hold negative views of police officers, even if prospective jurors say that they could be impartial in assessing the evidence in the case") (footnotes and citations omitted); Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Policy Rev. 387, 408 (2016) ("Blacks are much more likely to have been discriminatorily arrested so it is very likely their thoughts towards law enforcement will be deservedly more negative. … It is unfair to exercise a peremptory strike because the police target communities of color … [E]xcluding jurors who have had negative experiences with police defeats one of the purposes of a jury of 'peers:' members of the community who will base their judgment on the experiences of the community.") (footnotes and citations omitted).

justifications for the use of peremptory strikes to remove a black jurors. *See Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) (citing authorities).

Consider the scenario this case presents: (1) a prospective black juror is peremptorily struck because he noted, in response to a standard question vaguely inquiring about "pleasant or unpleasant" experiences with law enforcement, that he had been stopped for "driving while black," but otherwise expressed no distrust of, or animus towards, police, and, (2) the prosecution uses its very next peremptory challenge to remove the only other black juror likely to deliberate – a juror whom it had subjected to a lengthy inquisition about her ability to sit in judgment of a member of the "black community" – but predicates the challenge on a race-neutral justification (conflicted feelings about the death penalty). Can the first challenge be deemed "race-neutral," even though both the prosecution and the trial court conceded that it had "racial overtones" and the record as a whole confirms not only that the juror harbored no animus toward law enforcement, but was comparatively favorable to the prosecution? Does the fact that the second challenge was predicated on a race-neutral justification necessarily end the inquiry into whether it was animated by discriminatory intent, when all of the relevant facts and circumstances – the prosecution's explicitly race-based inquiry of the juror during voir dire, its exercise of back-to-back peremptories against the only two black jurors who were likely to deliberate, and the trial court's prior rejection of the asserted race-neutral justification in the context of a causal challenge to the juror – tend to establish that considerations of race likely drove the prosecution's decision to strike the juror?

This case vividly illustrates the limitations and shortcomings of the *Batson* framework – even in the wake of this Court's best efforts over the last 20 years to "vigorously enforce[e] and reinforc[e] th[at] decision … [and to guard] against any backsliding," *Flowers*, 588 U.S. at 301 (collecting cases) – in ferreting out discrimination in jury selection. When the prosecution is permitted to impanel an all-white jury in a racially-charged capital case involving a young black defendant by (1) asserting a justification for striking a black juror that directly implicates race and relies upon assumptions about bias or partiality based on the shared experiences of many Black Americans, and (2) using its very next peremptory to strike the only other black juror likely to deliberate on issues of guilt and punishment on facially race-neutral grounds, even though all of the relevant facts and evidence establish that the proffered justification was both incredible and pretextual, something is fundamentally broken with the existing legal framework for litigating and resolving these issues. This case provides an ideal vehicle for filling the interstitial gaps in the *Batson* framework that have rendered it largely incapable of addressing the subtle, and more nuanced, ways in which peremptory challenges are now deployed to exclude minorities from jury service.

STATEMENT OF THE CASE

1. The Underlying Allegations

On July 4, 2004, hundreds gathered for a rap competition at Lowry Park ("Lowry") in Aurora, Colorado. Arguments erupted. A melee ensued. Multiple shots were fired from at least two weapons. Event organizer Gregory Vann was fatally

shot. Vann's friend and fellow organizer, Javad Marshall-Fields, and Vann's brother, Elvin Bell, were also shot, but survived. Pet. App. at 5a.

Witnesses reported that Robert Ray, as well as another unnamed individual (later identified as Owens), participated in the shootings. Pet. App. at 6a. Ray and Owens were close friends and there was evidence that they, along with others, subsequently took various steps to conceal their involvement in the shootings. Pet. App. at 5a-6a. Prosecutors ultimately charged Ray as an accessory to the Lowry shootings. He was released on bond, no one else was charged, and the Aurora Police Department ceased investigating. Pet. App. at 6a.

Ray and Owens later reviewed a discovery packet provided by Ray's attorney and learned that Marshall-Fields and another individual, Askari Martin, had given statements to the police identifying Ray as the driver. Pet. App. 6a-7a. They further learned that neither witness had identified Owens by name. Pet. App. at 6a. Owens thereafter told Ray that he was going to "take care of" Marshall-Fields, and allegedly said in the presence of Ray's wife that "Snitches, shit, they need to die." Pet. App. at 6a.

Over the course of the next several months, efforts to prevent Marshall-Fields and Martin from testifying – through persuasion, intimidation, or actual violence – ran along multiple tracks: Owens allegedly focused his attention on intimidating or eliminating Marshall-Fields; Ray, for his part, took steps to dissuade Martin from testifying, but also set up contingency plans with others – entirely independent of Owens – to either pay off Marshall-Fields in exchange for his silence or to put out a

"hit" on him if his silence could not be bought. Pet. App. at 7a. Martin eventually assured Ray that he had no intention of testifying. Pet. App. at 7a. Ray therefore focused his attention to the threat posed by Marshall-Fields and became more active in trying to thwart his testimony, vowing that he would "take things into his own hands." Pet. App. at 7a-8a.

On June 20, 2005, approximately a week before Ray was set for trial in the Lowry case, Marshall-Fields was killed, along with his fiancée, Vivian Wolfe, in a drive-by shooting on Dayton Street ("Dayton") in Aurora. Pet. App. at 8a. This apparent witness-killing triggered renewed interest on the part of law enforcement in the Lowry shootings, and individuals came forward implicating Owens in Vann's murder. Pet. App. at 8a. Separately, law enforcement came into possession of evidence allegedly linking Owens and an associate, Perish Carter, to the Dayton murders. Pet. App. at 8a.

2. The Charges

Prosecutors eventually charged Owens with first-degree murder and attempted first-degree murder in connection with the Lowry shootings. Pet. App. at 8a.

In March 2006, a grand jury indicted Owens, Ray, and Carter for the Dayton murders and related charges. The indictment charged Owens with first-degree murder after deliberation, conspiracy to commit first-degree murder, and multiple counts of witness intimidation. Pet. App. at 8a-9a.

Owens pled not guilty in both cases. He proceeded to trial first in the Lowry case and was convicted and sentence to life imprisonment without the possibility of parole, plus an additional term of years. Pet. App. at 8a.

Prosecutors sought the death penalty in connection with the Dayton murders, and after extensive pretrial litigation, capital jury selection commenced on March 10, 2008, and concluded nearly a month later.

3. Jury Selection

During the final phase of jury selection, prosecutors exercised back-to-back peremptory challenges to strike Juror C.W. (#5166) and Juror J.C. (#4664) – both of whom were death-qualified black jurors who would have deliberated, had prosecutors not excluded them. Pet. App. at 11a-18a. Owens objected to both strikes on *Batson* grounds, but the court denied his challenges, concluding that prosecutors proffered credible, race-neutral explanations. Pet. App. at 99a-103a, 131a-137a.

The relevant facts and circumstances surrounding each peremptory challenge are as follows:

a. Juror C.W.

Juror C.W. was an older black male. In his written questionnaire, Juror C.W.:

- reported an unpleasant experience with law enforcement:

"Driving While Black";[4]

[4] This term "describe[s] the practice of law enforcement officials [stopping] African-American drivers without probable cause. The practice particularly targets African-American males." *E.g.*, Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. Marshall L. Rev. 439, 440-42 (2004); *accord* Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 Law & Psychol. Rev. 127 (2000); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999). The practice is not uncommon. David A. Harris, *The Stories, The Statistics, and the Law:*

- claimed to have witnessed a "crime" in the firing of numerous U.S. Attorneys early in George W. Bush's Presidency;
- like all jurors ultimately seated, indicated his belief that capital punishment was appropriate in some cases, and that he could return a death verdict if he deemed it appropriate in Owens' case; and,
- noted he consulted various news sources, including MSNBC, Air America Radio, C-Span, and other news outlets.

Pet. App. at 11a.

During individual voir dire, Juror C.W. responded as follows to questioning by both court and counsel:

- He indicated that, in light of his prior exposure to information about the death penalty and his general awareness of news reports about wrongful convictions, he might be hesitant about returning a death verdict if it was a "50/50" proposition.[5] But, after the court advised him that he could not consider any outside information he might receive from news outlets or other

Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 266 (1999); *see also* Jamila Jefferson-Jones, *"Driving While Black" As "Living While Black,"* 106 Iowa L. Rev. 2281, 2298-99 (2021) ("The higher rate of Black civilian-police contact through traffic stops, coupled with Black people's greater risk of being victims of police-involved killings, makes the 'open road' a fraught space for Black motorists."). Notably, a report issued by the Colorado Attorney General in 2021 confirmed that there has long been a pattern and practice of racially-biased policing in Aurora. *See* https://tinyurl.com/3sfs3yrj.

[5] C.W. later indicated that while he did not know much about Colorado's capital sentencing process, based on what he learned during jury selection, it appeared a "reasonable process," fair to both defendant and victims. Pet. App. at 79a-80a.

extraneous sources in reaching his verdict, C.W. affirmed he would avoid any reports on criminal justice issues and vowed fairness to both sides.

- He affirmed that, if deliberations reached the capital sentencing process's final step, he could fairly and equally consider both life imprisonment and the death penalty as potential punishments.[6]

- He clarified that his interactions with law enforcement generally had been negative, and that when he stated in his questionnaire that he had "witnessed" the "crime" of U.S. Attorneys being fired, he was merely noting he had seen news coverage about those events.

- He expressed general antipathy towards criminal activity – even indicating his own children would be "on their own" if accused of criminal misconduct. He affirmed his willingness to impose the death penalty if convinced beyond a reasonable doubt it was the appropriate punishment.

Pet. App. at 66a-98a. Neither side challenged C.W. for cause. Pet. App. at 96a.

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[6] Although C.W. suggested he would first "look at life in prison" when evaluating sentencing options, he reaffirmed he would be open to considering the death penalty and could give appropriate weight to both aggravation and mitigation. Pet. App. at 90a-93a. C.W.'s suggestion he would start with a presumption of life comports with Colorado law. *See People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990) (citing Beth S. Brinkmann, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351, 367-71 (1984)).

During final jury selection, prosecutors peremptorily struck C.W. Owens objected on *Batson* grounds, noting the paucity of African-Americans on the panel and the fact that "[C.W.] was the first one who made it into [an] actual non-alternate seat." Pet. App. at. 100a-101a.

Prosecutors initially offered three justifications for removing C.W.:

- **Negative Interactions with Law Enforcement**: They expressed concern that C.W.'s negative experiences with law enforcement – "driving while black" and its "racial overtones" – "indicated a distrust of police and police are wrongfully targeting people of that race and obviously Mr. Owens' race."
- **U.S. Attorney Firings**: They faulted C.W. for claiming he had "witnessed a crime," insisting this "was not a crime … but perhaps a civil matter."
- **Exposure to Information About Death Penalty and Wrongful Convictions**: They noted C.W. had "done reading on the death penalty," and "ha[d] recent information about the topic." They expressed concern about his general awareness of reports of wrongful criminal convictions, and suggested this might "sway his decision," despite acknowledging he had repeatedly affirmed he could set that information aside and decide the case based solely on the evidence presented.

Pet. App. at 101a-103a.

Defense counsel pointed out that the prosecution's unease with C.W.'s prior negative experiences with, and allegedly discriminatory treatment by, law enforcement was an explicitly race-based justification, and questioned the accuracy of the prosecution's recollection regarding C.W.'s purported statements about researching the death penalty. Despite acknowledging that "driving while black … has a racial overtone to it," the court nevertheless found prosecutors' asserted justifications race-neutral. Pet. App. at 15a-17a, 101a-102a.

Although the court had already rejected the *Batson* challenge, prosecutors then offered additional justifications, averring that C.W. asserted in his questionnaire and during individual voir dire that "he could be convinced of death penalty appropriately but only if irrefutable proof of the crime." Pet. App. at 103a. C.W. never said anything in his questionnaire or during individual voir dire to this effect. Rather, he repeatedly affirmed his openness to imposing the death penalty, if convinced beyond a reasonable doubt it was warranted. Pet. App. at 85a-87a, 91a-95a. Finally, prosecutors cited C.W.'s affinity for Air America Radio, which it characterized as "a very liberal talk radio show." Pet. App. at 103a. The court never addressed these *post hoc* justifications.

b. Juror J.C.

Juror C.W. was a middle-aged black woman. The jury questionnaire offered prospective jurors a menu of four options best representing their death penalty views. J.C. chose Option (d): "I believe that the death penalty is appropriate in some cases,

but because of my personal beliefs and feelings, I could never vote to impose it myself." Pet. App. at 13a. She nevertheless declared she could be fair and impartial.

Despite the views expressed in her questionnaire, J.C. stated in response to court questioning that she could fairly and equally consider both life imprisonment and the death penalty. Pet. App. at 13a-14a, 108a-109a. She said Colorado's four-step deliberative process for guiding jurors in their decision as to whether to impose the death penalty[7] seemed "fair" and "pretty self-explanatory," found this reassuring, and indicated she could follow the law and deliberate through each step. Pet. App. at 110a-111a, 115a-118a. While admitting she probably "would lean more towards" a life sentence, and that she didn't "agree with the death penalty," she insisted she could set her beliefs aside and consider both possible penalties. Pet. App. 13a-14a, 116a-120a.

In response to prosecutors' questioning, J.C. reaffirmed her general discomfort with capital punishment, and reiterated she would hesitate before returning a death verdict. But she agreed there were cases in which death was an appropriate punishment and again insisted she could vote to impose the death penalty in such a case. Pet. App. at 13a-14a, 122a-125a.

For reasons unclear – because nothing in J.C.'s questionnaire or prior responses during individual voir dire invited such an inquiry – the prosecution then pursued an explicitly race-based line of questioning by asking questions regarding

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[7] For an explanation of Colorado's somewhat unique four-step process, see *Dunlap v. People*, 173 P.3d 1054, 1088 (Colo. 2007).

the "black community's" response to, or perceptions of, criminal prosecutions of black defendants, and whether J.C. had any hesitation about Owens being "a young black man charged with a very serious crime looking at a very significant penalty":

> Over the years talking to lots of jurors of various races, genders, defendants of different races, different genders, et cetera, it's been interesting to me that people in the black community have a wide variety of attitudes and feelings when it comes to the prosecution of a case of a black defendant. I've talked to some jurors who feel that they are biased against the defendant and in favor of the prosecution because they think that a black defendant engaging in criminal behavior is an embarrassment to the community. Keeps the negative image, things of that nature. I've had other jurors who voiced a bias in favor of the defendant because they feel that the black community is not treated fairly by the system. There are some unproportionate [sic] number of blacks who are convicted of crimes, and things of that nature. And then there are people who are all over in the middle.
>
> Do you have any concerns for yourself, or do you have any feelings one way or another about the fact that Mr. Owens is a young black man charged with a very serious crime looking at a very significant penalty? We're asking for the death penalty in this case. Do you have any feelings about that?

Pet. App. at 14a, 125a-126a.

J.C. responded she "could still be fair," she's a "pretty fair person," and she "absolutely" would be fair to prosecutors. Pet. App. at 126a.

Neither side challenged J.C. for cause, but after J.C. was told to report for the next jury selection phase, prosecutors belatedly insisted on making the following record:

> The People wanted to make a record of [J.C.'s] physical demeanor while she was being questioned. When [defense counsel] asked her if she could vote for the death verdict, she crinkled up her face. There was a very long pause, and then she said I guess there would be some hesitation for me, or words to that effect. When I

> asked her a similar question, putting it to her that her decision would have a consequence on whether or not another person lived or died, again there was a very long hesitation. She shook her head back and forth in the negative. And then I would characterize her answer as reluctant. I'm sure I could do it. She again shook her head in the negative – what she stated was that she could do it when I asked a second time a little bit later. I just wanted to put that in the record.

Pet. App. at 15a, 128a-129a.

The court offered a significantly "different interpretation":

> I saw the shaking of the head in the negative to be not an indication of no, to me…. Initially, I thought it was a case of no. And then I believe it was an indication it's a very difficult decision for her. And, you're right when you describe her answer with regard to [defense counsel]. But I was looking at *Wainwright v. Witt*, 469 U.S. 412, 419 to 421…. The Court reasoned such affect did not demonstrate the jurors were unwilling or unable to obey their oaths.
>
> That's what I saw from [J.C.]. Her answers did contradict the question under potential punishment, where she said as to death penalty she could not follow the law. In my view she changed here while talking, and the change seemed [sincere] to me. She is obviously concerned with the seriousness and the gravity of her decision, but she said several times I can. That's all she said, very deliberate, I can, with regard to whether she could sign the death certificate. That's my record.

Pet. App. at 15a, 17a, 129a-130a.

Prosecutors then showed their hand, basically admitting they were making this record to justify a future peremptory challenge: "We were not challenging her for cause. I just wanted to make a record so we have her physical demeanor on the record as well when we come to the position of general voir dire, if it's needed." Pet. App. at 130a.

Immediately after striking C.W., prosecutors moved to strike J.C. Pet. App. at 17a, 132a. Defense counsel objected, citing *Batson*: "She is the second African American in [a] row placed in the jury where it's not an alternate and the People exercised [a] peremptory against her." Pet. App. at 17a, 133a.

The court asked prosecutors for a race-neutral justification for the strike. Pet. App. at 17a, 133a. Harkening back to the record strategically made in anticipation of this very moment, prosecutors stated:

> [J.C.] indicated on her questionnaire with respect to her feeling on the death penalty she answered, I think the death penalty is appropriate in some cases but because of my personal feelings and belief I would never be able to impose it myself. And while she did have a change of heart verbally, I made a record concerning her demeanor when these questions were asked of her…. I was not making a challenge for cause. But the court said on the record that it found her change of heart to be genuine and credible but respectfully that's not something that the People have to stick with.
>
> I mean this is the person who had serious doubts about her ability – not rising to the level of cause. I don't think the person changes feelings about the death penalty in two week's time particularly when feelings are based in part on religion. … It has nothing to do with her race. [Juror W.K. (#4850)] was our first challenge. [8] He is a white man. He also said with respect to his opinion on the death penalty and we challenged him for the same reason.

Pet. App. at 133a-134a.

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8 Unlike J.C., W.K. confessed during individual *voir dire* that he probably could not consider the death penalty as a possible punishment and expressed doubts about whether he would be bound by anything he said in *voir dire*. TR 3/12/08, pp.159-63. Unlike J.C., prosecutors moved to excuse him for cause. *Id.* at 167:14-23. Prosecutors also cited their decision to strike J.J. (#4632) – a white woman – as further evidence that race played no role in their exercise of peremptory challenges. TR 4/7/08p.m., p.175:18-20. J.J., however, not only expressed serious reservations about the death penalty, but apparently had an emotional breakdown after individual *voir dire* that was concerning enough to prosecutors that they requested the court conduct further inquiry. TR 3/26/08, pp.22-23; TR 4/7/08a.m., pp.5-6, 11-14.

The defense responded:

> I believe that her record with respect to the individual voir dire speaks to her opinion in these matters. I think there are a number of white Caucasian jurors who have expressed their doubts about the death penalty and their difficulty with imposing it and the fact that it's difficult is part of the process. I don't believe that's sufficient, race-neutral reason for the People to be excusing this juror.

Pet. App. at 134a. The court initially concurred, but after extended back-and-forth with prosecutors as to whether the asserted race-neutral justification was permissible, ultimately overruled the objection. Pet. App. at 17a-18a, 134a-138a.

When jury selection concluded, prosecutors made an additional record regarding their decision to strike these black jurors. They argued Owens, too, had exercised peremptory challenges against black jurors. TR 4/7/08,192:6-17. The trial court did not address this contention.

4. Trial and Penalty Phase Proceedings

On December 8, 2008, the district court entered a judgment of conviction memorializing the jury's verdicts of guilty on two counts of first-degree murder-after deliberation and other felonies, as well as the separate finding, following the conclusion of capital sentencing proceedings, that Owens should be sentenced to death for commission of those class 1 felonies. Pet. App. at 26a.

5. Postconviction Proceedings, Commutation, and Direct Appeal

Post-conviction proceedings were conducted in due course,[9] and on September 15, 2017, the district court issued P.C. Order (SO) No. 18 denying SOPC-163, Owens' petition for capital postconviction relief.

On September 21, 2017, Owens timely filed a unitary notice of appeal in accordance with Colo. App. R. 4(d)(2), Colo. Crim. P. 32.2(c)(1), and section 16-12-207, Colo. Rev. Stat., and the appellate record was thereafter certified and transmitted to the CSC. After years of delays stemming from glaring deficiencies in the appellate record, and unrelenting efforts to ensure that the record was complete and accurate, the CSC permitted Owens to amend his notice of appeal on October 11, 2019. On February 7, 2020, the supreme court issued a *Notice of Filing of Supplemental Record* and set a briefing schedule.

In the interim, while Owens' appeal remained pending, the Colorado General Assembly considered legislation to abolish the death penalty as a legally sanctioned punishment for all class 1 felonies charged in Colorado state courts on or after July 1, 2020. After extended comment and debate, the legislation passed out of both the Senate and the House, and eventually was transmitted to Governor Polis on March 13, 2020, for signing and enactment.

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[9] As previously explained, *see* note 1, *supra*, Colorado's URS requires that state capital postconviction proceedings be conducted and concluded before direct appellate review of the judgment and sentence may proceed. If postconviction relief is denied, the CSC reviews both that order and any issues directly arising from the underlying judgment and sentence as part of a unitary appeal. *See People v. Owens*, 219 P.3d 379, 383-84 (Colo. App. 2009).

The Governor signed the legislation on March 23, 2020, and furthermore issued an Executive Order commuting Owens' death sentence to life imprisonment without the possibility of parole. Pet. App. at 26a.

The CSC then bifurcated the unitary appeal, with the direct appeal proceeding first. On February 20, 2024, the CSC issued its opinion affirming the judgment of conviction.

REASONS FOR GRANTING THE WRIT

I. EXPRESSLY LINKING A BLACK JUROR'S REMARK IN A JURY QUESTIONNAIRE INDICATING THAT HE HAD AN "UNPLEASANT EXPERIENCE" WITH POLICE (NAMELY, "DRIVING WHILE BLACK") TO THE FACT THE DEFENDANT IS ALSO BLACK AND INVOLVED IN THE CRIMINAL JUSTICE SYSTEM CANNOT CONSTITUTE A "RACE-NEUTRAL" JUSTIFICATION FOR PEREMPTORILY STRIKING THE JUROR UNDER *BATSON*, IN THE ABSENCE OF ANY DIRECT EVIDENCE THAT THE JUROR MISTRUSTED POLICE OR HARBORED NEGATIVE FEELINGS ABOUT THE CRIMINAL JUSTICE SYSTEM.

A. Background

Here, Juror C.W. – an older black man – noted a negative experience with police (which he referred to as "DWB" or "driving while black") in response to a section of the juror questionnaire inquiring about "pleasant or unpleasant experiences with law enforcement." Pet. App. at 40a. The prosecution moved to strike C.W. primarily on grounds that he "indicated a distrust of police and police are wrongfully targeting people of that race and obviously Mr. Owens' race," even though C.W. never openly expressed any distrust of, or animus toward, law enforcement during voir dire. Pet. App. at 16a, 101a-102a. The prosecution cited other reasons as well, almost all of which turned out to be demonstrably false or equally applicable to white jurors who

were ultimately seated. Pet App. 15a-16a, 101a-103a. Although the prosecution acknowledged, and the trial court concurred, that its asserted justification had a "racial overtone," the court nevertheless overruled Owens' *Batson* objection and dismissed the prospective juror. Pet. App. at 16a-17a, 102a-103a.

The CSC held that because the prosecution offered a number of additional reasons supporting its peremptory strike – "namely, Juror C.W.'s reading and views about the death penalty and wrongfully convicted defendants who had spent many years in prison, his allegedly having 'witnessed' the firing of U.S. Attorneys (which he erroneously viewed as a crime), and his distrust of the police" – the strike was "indisputably race-neutral" on its face. Pet. App. at 37a. In so holding, the supreme court effectively glossed over the question of whether the prosecution's primary justification for the challenge was race-neutral. And, as will be discussed further in Part II, *infra*, the other race-neutral justifications cited by the CSC were either fabricated or exceedingly dubious in light of all the facts and circumstances.

B. Law and Argument

The Equal Protection Clause of the Fourteenth Amendment prohibits purposeful discrimination in jury selection. *Batson*, 476 U.S. at 86. Every defendant has the "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id*. at 85-86. The right is not merely personal to the defendant, it "touch[es] the entire community," because discrimination by the State in jury selection both "undermines public confidence in the fairness of our system of justice" and "shamefully belittles minority jurors who report to serve their civic duty

only to be turned away on account of their race." *Id.* at 86-87. Accordingly, exercise of even a single race-based peremptory challenge is unconstitutional. *Foster v. Chatman*, 578 U.S. 488, 499 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)).

At the core of the Equal Protection Clause lies the principle that black venirepersons should not be excluded from jury service "on the assumption that they will be biased in a particular case simply because the defendant is black." *Flowers*, 588 U.S. at 299 (quoting *Batson*, 476 U.S. at 97-98); *see also Powers*, 499 U.S. at 410 ("Race cannot be a proxy for determining juror bias or competence. 'A person's race simply 'is unrelated to his fitness as a juror.'") (quoting *Batson*, 476 U.S. at 87). As Justice Thurgood Marshall observed in his concurrence in *Batson*: "Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience, or moral integrity to be entrusted with that role." 476 U.S. at 104-05 (internal quotation marks and citations omitted).

Batson outlines a three-step process for determining whether a peremptory challenge was purposefully discriminatory. *Id.* at 95-98.

First, the objecting party must make a *prima facie* showing that the striking party exercised a peremptory challenge based on race or gender. *Foster*, 578 U.S. at 499. This step was not contested below, and therefore is not at issue.

Second, if the objecting party establishes a *prima facie* case, then the striking

party must offer a non-discriminatory – or race-neutral – reason for the strike. *Foster*, 578 U.S. at 499. A neutral explanation in this context is "an explanation based on **something other than the race of the juror**." *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (emphasis added). If a discriminatory purpose is "inherent in the prosecutor's explanation," the reason offered cannot be deemed race-neutral. *Id.* Furthermore, an explanation is not race-neutral when the striking party attempts to rebut the objecting party's *prima facie* case "by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race." *Batson*, 476 U.S at 97.

Third, after the objecting party has been given an opportunity to rebut the striking party's race-neutral explanation, the trial court must decide whether the objecting party has established purposeful discrimination. *Id.* at 98. A peremptory strike is purposely discriminatory for purposes of step three if the strike was "motivated in substantial part by discriminatory intent." *Flowers*, 588 U.S. at 303 (quoting *Foster*, 578 U.S. at 513). It is at this stage that "implausible or fantastic [step-two] justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Because *Batson*'s third step represents the culmination of a framework "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," trial courts are required to provide more than a conclusory estimation of counsel's credibility. *Johnson v. California*, 545 U.S. 162, 172 (2005).

Regarding the third-step inquiry into whether the State was "motivated in substantial part by discriminatory intent," courts are obligated to consider "all of the circumstances" existing at the time a *Batson* challenge is lodged – including reviewing contemporaneous notes used by prosecutors during voir dire and conducting comparative analyses of the prosecution's treatment of white and non-white jurors in an effort to shed light on the intent of prosecutors. *Flowers*, 588 U.S. at 307-12. This duty exists even if such materials may not have been available to, or the opportunity to conduct a comprehensive comparative analysis may not have been feasible for, the trial court at the time of jury selection. *See Foster* 578 U.S. at 501-02; *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005); *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003).

Evidence that may be relevant to a *Batson* third-step determination includes: (1) a prosecutor's use of peremptory strikes against black, as compared to white, prospective jurors; (2) disparate questioning and investigation of black and white jurors in a case; (3) side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not; and (4) misrepresentations of the record in defending strikes during a *Batson* hearing. *See Flowers*, 588 U.S. at 302.

If a reviewing court establishes that a *Batson* violation has occurred, then the remedy is automatic reversal. *Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017).

i. A Black Juror's Negative Interactions with Law Enforcement Based on Their Race ("Driving While Black") Is Not A Race-Neutral Justification For Striking The Juror, Particularly When The Prosecution Links The Race of the Juror to the Race of the Defendant and When The Juror Otherwise Expresses No Hostility Towards, or Distrust of, Law Enforcement.

Here, we are focused on *Batson*'s second step. In response to Owens' *Batson* challenge, the prosecution cited C.W.'s complaint about "driving while black" as its primary justification for the peremptory strike. Pet. App. at 16a, 101a. Although they cited other ostensibly race-neutral reasons for the strike, the asserted reason for removing C.W. hinged on an explicitly race-based argument:

> The reality is that is part of his knowledge and experience in life. And so it is for those reasons having absolutely nothing to do – **the driving while black has a racial overtone. That indicated a distrust of police and police are wrongfully targeting people of that race and obviously Mr. Owens' race.**

Pet. App. at 15a-16a, 101a-102a (emphasis added).

The defense correctly observed that this explanation plainly was not race-neutral and, in fact, was premised wholly on the juror's experiences and identity as a black man. Pet. App. at 102a. The trial court, without analysis or explanation, said it did "not question the prosecutor's credibility" and summarily concluded that her asserted reasons were race-neutral, even while acknowledging that "driving while black … has a racial overtone to it." Pet. App. at 17a, 102a-103a.

Given this clear record, there can be no doubt that race was central to the prosecution's decision to strike C.W. and that the court's finding of a credible, race-

neutral explanation was both legally and factually incorrect. This must be regarded as a paradigmatic *Batson* violation.[10]

Although state and federal courts generally concur that a minority juror's negative experiences with law enforcement can be a race-neutral justification for peremptorily removing the prospective juror, particularly when they express a distrust of, or hostility towards, police, *see*, *e.g.*, *People v. Johnson*, 2024 CO 35, ¶¶ 40-41, 549 P.3d 985, 994 (surveying cases); *accord Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam), the law is less clear when the prospective juror simply acknowledges an unpleasant interaction with law enforcement that he believed to be connected to race, but does not express any particular animus towards police or lack of faith in the criminal justice system. The emerging view is that "negative experiences with, or attitudes toward, law enforcement" often is a proxy for race, *see*, *e.g.*, *People v. Triplett*, 267 Cal. Rptr. 3d 675, 683-93 (2020) (Liu, J., dissenting from denial of review) (surveying case law and authorities), but the Court need not resolve that issue here, because the prosecution's asserted justification was explicitly race-based in any event.

In this case, it is enough to say that striking a minority juror primarily on grounds that they had a negative interaction with police runs afoul of this Court's precedent in two ways: (1) if the prosecution's reason for the striking the juror

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[10] While not necessarily relevant at step two, it is worth noting that comparative analysis of white jurors ultimately seated only reinforces that this asserted justification was bogus and obviously race-based: numerous white jurors reported unpleasant or negative experiences with law enforcement, and yet prosecutors never raised it as an issue. SJQS, p.7409 (Juror E.G. (#5285)), p.6484 (Juror J.K. (#5131)); p.2242 (Juror T.L. (#4389)).

references the juror's race, as well as the race of the defendant, it is plainly **not** "an explanation based on **something other than the race of the juror**." *Hernandez*, 500 U.S. at 360 (emphasis added); and, (2) if the asserted justification for striking the juror is in any way predicated on the assumption – or intuitive judgment – that the juror would somehow "be partial to the defendant because of their shared race," then it is decidedly **not** race-neutral. *Batson*, 476 U.S at 97.

Because this is an issue that is arising with increasing frequency as race-based peremptory challenges have become both more systematized and subtle, and because there are interstitial gaps in the Court's *Batson* jurisprudence that have been exploited to allow what are plainly race-based peremptory challenges, the Court should grant a writ of certiorari to review the CSC's judgment in this case. *See* Sup. Ct. R. 10(b), (c).

II. BACK-TO-BACK PEREMPTORY STRIKES OF TWO BLACK JURORS, RESULTING IN THE EMPANELMENT OF AN ALL-WHITE JURY IN A RACIALLY-CHARGED HOMICIDE CASE RUNS AFOUL OF THE "ALL RELEVANT FACTS AND CIRCUMSTANCES" ANALYSIS SET FORTH IN *FLOWERS V. MISSISSIPPI*, 588 U.S. 284 (2019), WHEN (i) THE FIRST JUROR WAS STRUCK ON THE BASIS OF A COMBINATION OF PLAINLY RACE-BASED AND DUBIOUS RACE-NEUTRAL REASONS, AND (ii) THE SECOND JUROR WAS SUBJECTED TO A LENGTHY INQUISITION CONCERNING HER ABILITY TO FAIRLY SIT IN JUDGMENT OF A BLACK DEFENDANT, ONLY TO BE STRUCK ON OSTENSIBLY RACE-NEUTRAL GROUNDS THE TRIAL COURT HAD PREVIOUSLY FOUND INCREDIBLE.

A. Background

i. Juror C.W.

In addition to the explicitly race-based rationale for striking C.W., the prosecution cited other, ostensibly race-neutral reasons for his removal: namely, the

fact that he claimed to have "witnessed crimes" in connection with the firing of U.S. Attorneys during the George W. Bush presidency, had read some "reports" critical of the death penalty, had allegedly expressed a willingness to apply the death penalty only in a case involving "irrefutable proof," and consumed arguably "liberal media." Pet. App. at 15a-16a, 69a-77a, 86a-87a, 91a-92a, 102a-103a.

Without conducting any real inquiry into whether these putatively race-neutral reasons were persuasive, or even valid, the CSC more or less summarily concluded that there was no reason to believe that they were pretextual or otherwise suggestive of discriminatory intent. Pet. App. at 41a-42a.

ii. Juror J.C.

After striking C.W., the prosecution deployed its next peremptory challenge to remove Juror J.C. – a black woman – whom it had questioned at unusual length regarding the "black community's" response to, or perceptions of, criminal prosecutions of black defendants, and whether J.C. had any hesitation about Owens being "a young black man charged with a very serious crime looking at a very significant penalty." Pet. App. at 14a-15a, 17a-18a, 125a-126a. Owens again lodged a *Batson* objection, which the prosecution parried by citing what it believed to be an insincere "change of heart" about her views of the death penalty. Pet. App. at 17a, 133a-134a. Despite the fact that the trial court had earlier found J.C.'s "change of heart" to be sincere and credible, it overruled the *Batson* objection and dismissed J.C. Pet. App. at 18a, 134a-137a.

The CSC concluded, in perfunctory fashion, that nothing about the asserted reason for striking C.W., or the surrounding circumstances, suggested pretext or a discriminatory impulse on the part of the prosecution; the exercise of back-to-back peremptories to remove the only death-qualified black jurors from the panel was perfectly reasonable; the prosecution's explicitly race-based questioning of the juror was unremarkable; and the fact that the court rejected as incredible the prosecution's justification for striking the juror was of no moment. Pet. App. at 42a-45a.

B. Law and Argument

Here, we are focused on *Batson*'s third step. Additional factors that courts should consider in evaluating whether a peremptory strike was substantially motivated by a discriminatory purpose include the following :

- **Mischaracterizing voir dire testimony or questionnaire responses**: While dissonance between a prosecutor's race-neutral explanation and the voir dire transcript or other relevant portions of the record does not necessarily prove the prosecutor lied to conceal racial discrimination, it may be indicative of ulterior motive. *See Flowers*, 588 U.S. at 302.

- **Pointing to defense use of peremptories to strike minority jurors**: Because a defendant's exercise of peremptory challenges is "flatly irrelevant" to the Batson inquiry, *Miller-El* , 545 U.S. at 255 n.14, prosecutorial focus on what the defense has done can itself give rise to a strong inference of discriminatory

intent. *See Johnson v. Vasquez*, 3 F.3d 1327, 1329-30 (9th Cir. 1993).

- **Advancing an explicitly race-based justification as one among other justifications**: Once an inappropriate explanation invoking racial considerations is made, a subsequent, valid reason for exercising the peremptory challenge cannot purge the racial taint. *See, e.g., Hart v. State*, 260 Md. App. 491, 515, 310 A.3d 1157, 1171 (2024) (collecting cases); *Pena-Rodriguez v. Colorado,* 580 U.S. 206, 209 (2017) ("The unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' The jury is to be a 'criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'") (citations omitted).

- **Advancing multiple, erroneous justifications**: When prosecutors advance multiple reasons for the strike – most of which are unsupported by the record or legally erroneous – there is reason to believe that the challenge was racially-motivated. *See Johnson*, 3 F.3d at 1331.

Factors reviewing courts should **not** consider, or give weight to, in evaluating a *Batson* claim include:

- **Conclusory denials that the peremptory strike was not race-based or "had nothing to do with race"**: A general denial of racial bias has little weight and is typically insufficient to rebut the defendant's prima facie showing, because "acceptance of such a non-reason would render the Equal Protection Clause 'a vain and illusory requirement.'" *Batson* 476 U.S at 98.
- ***Post hoc* justifications**: Offering *post hoc* justifications for a challenged peremptory strike – particularly after the court has concluded its *Batson* analysis and upheld the strike – is viewed with disfavor, and actually lends credence to the argument that the initial justifications were pretextual. *See Miller-El*, 545 U.S. at 252. Attempting to shore up the existing record after the fact is an implicit admission that the race-neutral justifications already offered were weak or unconvincing and, moreover, smacks of a guilty conscience.

Applying these various factors and considerations to this case, it is clear that the CSC's third-step analysis contravenes established precedent.

i. Prosecutors' asserted reasons for striking C.W. were clearly pretextual.

a. U.S. Attorney Firings

Prosecutors were wrong to characterize the U.S. Attorney firings as "not a crime … but perhaps a civil matter." Pet. App. at 15a-16a, 101a. At the time of voir dire, the dismissals were in fact the subject of a federal criminal investigation.[11] Additionally, the brief voir dire prosecutors conducted on this issue evinced that C.W. was being glib or imprecise when he indicated having "witnessed" this crime, because he readily admitted he had merely seen some news coverage. Pet. App. at 84a-85a. This was a manufactured justification based on a false premise.

b. Exposure to Information About Wrongful Convictions and Death Penalty

Prosecutors' purported concern that C.W.'s exposure to information about the death penalty and wrongful convictions might "sway his decision" likewise reeks of pretext. As prosecutors acknowledged, C.W. repeatedly affirmed he could set that information aside and decide the case based solely on the evidence presented. Pet. App. at 69a-77a, 86a-87a, 91a-92a, 101a-102a. By comparison, numerous white jurors ultimately seated indicated they had read about the death penalty or discussed it with others, which had informed – and in some instances, changed – their views about capital punishment. TR 3/11/08, pp.204-06; TR 3/13/08, pp.116, 122-24 (J.A. (#5132)); TR 3/18/08, pp.16-17 (J.S. (#4744)); TR 3/21/08, pp.68-69 (B.W. (#4788)); TR 3/24/08, pp.77-78 (I.G. (#5137)).

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[11] The historical record is clear that the dismissals were the subject of a formal criminal investigation by the U.S. Department of Justice (DOJ). *See, e.g.,* https://tinyurl.com/4ytwxx6h; https://tinyurl.com/36spat4t. DOJ eventually determined the dismissals did not rise to the level of criminal misconduct. *See, e.g.,* https://tinyurl.com/52fm8nj9.

C.W.'s repeated affirmations that he would decide the case based solely on the evidence – the sincerity and credibility of which prosecutors never questioned – coupled with the fact that prosecutors did not strike similarly-situated white jurors, confirm that this professed reason was pretextual.

c. Post Hoc Justifications

It is telling that, even after Owens' *Batson* challenge had been rejected, prosecutors felt compelled to offer two additional justifications for striking C.W. Pet. App. at 103a. As a threshold matter, the fact that prosecutors belatedly asserted these justifications itself gives rise to an inference that they were pretextual and merely an effort to shore up the weak rationales it had already offered. If this were not enough, closer examination of these belated justifications confirms they were contrived.

Because C.W. never said anything in his questionnaire or individual voir dire about imposing the death penalty only upon "irrefutable proof," the record conclusively rebuts this asserted reason. *Foster*, 578 U.S. at 504-05. Instead, what occurred is two white jurors stated they would demand nearly incontrovertible proof before imposing the death penalty, and yet prosecutors did not strike them. TR 3/10/08, pp.83 (D.K (#4958)) ("pretty definite," "no doubt"), 110-12 (M.F. (#4818)) ("indisputable," "beyond any doubt").

C.W.'s death penalty views can hardly be considered "liberal" or outside the mainstream: like many jurors, he expressed understandable reluctance about being required to decide whether to impose the death penalty, but affirmed that it was

appropriate in some cases and expressed the view that Colorado's capital sentencing procedures seemed fair and reasonable to all sides. The timing of this asserted justification and the fact that it could be applied equally to other, white jurors strongly suggest pretext.

ii. The prosecution's explicit focus on race when questioning J.C., together with its suspicious post hoc justifications, the fact that the strike occurred directly after its race-based removal of C.W., and the court's express findings concerning J.C.'s credibility and sincerity, strongly suggest the strike was racially motivated.

The prosecution's intention to remove prospective black jurors became painfully obvious when its struck J.C. immediately after striking C.W. Unlike the kitchen-sink approach prosecutors adopted when countering Owens' first *Batson* challenge, they initially asserted a two-pronged justification for striking J.C.: (1) her questionnaire answers rendered her excludable because she initially indicated that, while she believed the death penalty was appropriate in some cases, she couldn't personally impose it due to her religious convictions; and (2) prosecutors' belief that her "change of heart" during individual voir dire and her willingness to reexamine her death penalty views appeared insincere or incredible – based, in part, on her demeanor and affect – notwithstanding the court's express finding to the contrary. Pet. App. at 133a-134a.

Several factors suggest these asserted justifications were pretextual. First, numerous other white jurors who deliberated expressed serious hesitation about returning a death verdict, and, moreover, indicated their death penalty views had

changed. TR 3/10/08, pp.83-84, 88 (D.K. (#4968)), 110-12 (M.F. (#4818)); TR 3/11/08, pp.204-10 (L.R. (#4504)); TR 3/12/08, pp.9-18 (M.P. (#4547)); TR 3/13/08, pp.178-82 (T.O. (#4784)).

Second, the prosecution's decision to engage in highly improper, race-based questioning of J.C. and to make a later record about her supposed demeanor during voir dire (which the court refuted) in anticipation of insulating a peremptory challenge, gives rise to a strong inference of discriminatory intent. The short answer to prosecutors' demeanor-based justification is that the court rejected it as a factual matter, and never retreated from its view that J.C. was sincere and credible in her assertions that she could be fair to both sides and fairly consider both potential penalties. Pet. App. at 129a-130a, 136a-17a. The court's finding that the prosecution's explanation was race-neutral does not comport with its finding that J.C.'s "change of mind" was sincere. As the defense correctly observed, the prosecution's complaints about J.C.'s purported "change of heart" applied equally to numerous prospective white jurors who indicated they – either as a result of the immediacy of potentially being impaneled as jurors in this case, or as a result of independent research, self-reflection, or discussions with others – had changed their death penalty views. TR 3/11/08, pp.204-06 (L.R. (#4504)); TR 3/13/08, pp.179-82 (T.O. (#4784)); TR 3/18/08, pp.23-26; TR 3/24/08, pp.77-78 (I.G. (#5137)). While acknowledging that these white jurors expressed "changes of heart," the court overruled the *Batson* challenge. Pet. App. at 136a.

Third, the prosecution's belated record attempting to further justify its use of peremptories on black jurors by noting that the defense did the same must be viewed as little more than an attempt to provide cover for its discriminatory use of peremptories. Prosecutors' belated and improper attempt to further justify and explain away their racially-motivated peremptory strikes on C.W. and J.C. was further evidence they knew their asserted justifications were weak and contrived. The prosecution's efforts to cover its tracks are further evidence of discriminatory intent.

The strikes on C.W. and J.C. – while individually improper and supplying independent grounds for reversal – are united by the same discriminatory purpose and must be considered together in that regard. By happenstance, two of the only African-Americans in a position to sit as deliberating jurors found themselves lined up one behind the other during final jury selection. Prosecutors used back-to-back peremptory challenges to strike both, in a capital prosecution involving a young black man.

When prosecutors' asserted race-neutral reasons don't hold up, and "the racially discriminatory hypothesis" better fits the evidence, a trial court must uphold the *Batson* challenge, *Miller-El*, 545 U.S. at 266, to "prevent racial discrimination from seeping into the jury selection process." *Flowers* at 2243. The CSC's misapplication of this Court's precedent warrants further review. *See* Sup. Ct. R. 10(b), (c).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 23, 2024

Respectfully submitted,

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No. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

SIR MARIO OWENS, PETITIONER

vs.

STATE OF COLORADO, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

AFFIDAVIT OF SERVICE

MARK G. WALTA, a member of the bar of this Court, hereby attests that, pursuant to Supreme Court Rule 29, the preceding Petition for a Writ of Certiorari was served on counsel for Respondent by enclosing a copy of the same in an envelope, first-class postage prepaid and addressed to:

JOHN T. LEE & KATHARINE J. GILLESPIE
COLRADO ATTORNEY GENERAL'S OFFICE
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY, 9TH FLOOR
DENVER, CO 80203

and that the envelope was deposited with the United States Postal Service, Denver, Colorado 80206, on July 23, 2024, and further attests that all parties required to be served have been served.

/s/ Mark G. Walta

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MARK G. WALTA