

ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERALD PARKER, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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ORIGINAL

QUESTIONS PRESENTED

Whether the prosecutor's exclusion of the only African-American prospective jurors and the judge's refusal to require the prosecutor to provide reasons for doing so violates appellant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution as enunciated by this Court in *Batson v. Kentucky*,¹ *Johnson v. California*,² *Miller-El v. Dretke*,³ and *Snyder v. Louisiana*.⁴

Whether a trial court is required to conduct a comparative juror analysis, when requested, in determining at step one of the *Batson* analysis whether an inference of discrimination in the exercise of a peremptory challenge can be drawn.

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

² *Johnson v. California*, 545 U.S. 162 (2005)

³ *Miller-El v. Dretke*, 545 U.S. 231 (2005)

⁴ *Snyder v. Louisiana*, 552 U.S. 472 (2008)

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Gerald Parker respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of California affirming his conviction and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, Gerald Parker, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on June 5, 2017, reported as *People v. Parker*, 2 Cal.5th 1184 [218 Cal.Rptr.3d 315, 395 P.3d 208] (2017). A copy of the opinion is attached as Appendix A. Rehearing was denied on

August 9, 2017. A copy of the order is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment by denying rehearing on August 9, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, a black man, was convicted of the first degree murder of six white women. The jury found true the special circumstance allegations (eligibility factors) that he was convicted of more than one offense of murder in this proceeding and that he committed the murders while he was engaged in the commission or attempted commission of the crimes of rape and burglary. App. A at 1-28.

Petitioner asserted the prosecution committed error under *Batson v. Kentucky*, 476 U.S. 79 (1986) in excusing the only two African-American jurors from the panel. App. A at 28-33. The trial court denied the motion. App. A at 33-35.

On direct review, the California Supreme Court independently reviewed the record and concluded the record does not support an inference of discriminatory

intent on the part of the prosecutor in peremptorily challenging the prospective jurors:

Even assuming the basis of defendant's argument is factually accurate - that Prospective Jurors Nos. 719 and 213 were the only two African-Americans in the 136-person jury pool, a fact neither conceded nor confirmed at trial - the bare circumstance that all African-American prospective jurors were struck from the pool would be insufficient in this case to support an inference that the two were challenged because of their race.

App. A at 36.

The court acknowledged that Petitioner is African-American, but found the prosecutor did not use a disproportionate number of his peremptory challenges against the group. The prosecutor exercised a total of 22 peremptory challenges, only two of which were exercised against African-American prospective jurors. App. A at 37. Nor was the prosecutor's voir dire of the two prospective jurors at issue desultory or cursory. App. A at 37. Finally, the Court declined appellant's request to conduct a comparative juror analysis and found that the information elicited in voir dire showed race-neutral reasons for excusing both prospective jurors. App. A at 38.

In sum, defendant fails to demonstrate that the totality of relevant circumstances gives rise to an inference of discriminatory purpose in the prosecutor's exercise of peremptory challenges against these two prospective jurors. As the trial court found no prima facie showing and the prosecutor did not state reasons for the excusals, we further decline defendant's request to conduct a comparative analysis of the prospective jurors' responses on the jury questionnaire for the first time on appeal.

App. A at 38.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE CALIFORNIA SUPREME COURT'S REFUSAL TO INFER DISCRIMINATION FROM THE PROSECUTOR'S REMOVAL OF THE ONLY AFRICAN-AMERICAN PROSPECTIVE JURORS IN THIS CASE VIOLATES PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION

A. Introduction

The use of peremptory challenges to exclude prospective jurors based on race or gender is prohibited under the Fourteenth Amendment to the United States Constitution. *Batson v. Kentucky*, *supra*, 476 U.S. at 97; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-131 (1994).

There is a rebuttable presumption that peremptory challenges are being exercised properly and the burden is on the opposing party to demonstrate impermissible discrimination. To do so, a defendant must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Once the defendant has made out a *prima facie* case, the burden shifts to the State to explain adequately the exclusion by offering permissible justifications for the strikes. If such a justification is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. *Snyder v. Louisiana*, *supra*, 552 U.S. at 476; *Johnson v. California*, *supra*, 545 U.S. at 168.

A defendant makes a *prima facie* showing at *Batson's* first step merely by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *Johnson v. Finn*, 665 F.3^d 1063, 1068 (9th Cir. 2011).

“[T]he burden of proof required of the defendant is small, especially because proceeding to the second step of the *Batson* test puts only a slight burden on the government.” *United States v. Collins*, 551 F.3^d 914, 920 (9th Cir. 2009). “This is a burden of production, not a burden of persuasion.” *Green v. Lamarque*, 532 F.3^d 1028, 1029 (9th Cir. 2008); accord *Johnson v. California*, 545 U.S. 162, 170-71, 125 S.Ct. 2410, 162 L.Ed.2^d 129 (2005).” *Id.* at 919.

In the case at bar, California’s Supreme Court has applied these well-established principles in a manner which violates petitioner’s Fourteenth Amendment right to equal protection.

B. Factual Background

71 of 136 prospective jurors who survived hardship screening, including both African-American prospective jurors in the panel, were questioned on voir dire. 10 CT 3113-3116;⁵ 5 RT 757; 6 RT 1117, 1188, 1203-1204. 17 were excused for cause and/or hardship without objection. 5 RT 858-860, 873-875, 980-981, 993-994; 6 RT 1019-1022, 1065-1067, 1070-1076, 1126-1133, 1144-1145, 1155-1158, 1164-1172. The prosecutor peremptorily challenged 19 of the remaining 54 prospective jurors, including both African-American prospective jurors, 5 RT 903, 919, 944, 955, 964, 971-972, 987, 997; 6 RT 1009, 1031, 1034, 1039, 1044, 1055, 1070, 1096, 1099, 1109, 1123, and three prospective alternate jurors. 6 RT 1154, 1164, 1176. The defense

⁵ “CT” refers to the clerk’s transcript; “CTHS” refers to the clerk’s transcript of exhibits 1-9 (hardship applications); “CTJQ” refers to the clerk’s transcript of exhibits 12 & 13 (juror questionnaires); and “RT” refers to the reporter’s transcript.

peremptorily challenged 14 prospective jurors, 5 RT 910, 937, 951, 961, 964, 980, 992; 6 RT 1019, 1048, 1065, 1082, 1105, 1121, 1126, and two alternate prospective jurors. 6 RT 1181, 1185.

1. Juror No. 719

The prosecutor's fourth peremptory challenge was to Juror No. 719, an African-American woman. 5 RT 929, 955; 6 RT 1117, 1203.

a. Hardship Application

On September 29, 1998, the sixth day of jury selection, Juror No. 719 asked to be excused due to hardship, specifically low-back pain caused by sitting. 1 CTHS 140. Her request was denied. See 3 RT 454-457; 4 RT 593-595, 754-755, 759, 761. 767-768; 5 RT 825-826, 855-857, 881-882.

b. Juror Questionnaire

Juror No. 719 wrote that she was an unemployed, disabled, 51-year-old widow who had worked as a cook for the Tustin Unified School District for 17 years. She lived in a rented apartment with her 23-year-old son. She had never lived outside Orange County. 6 CTJQ 1872-1873. She had completed the 12th grade. She had never testified in court and had never served on either a grand or trial jury. 6 CTJQ 1874-1875. She thought the only thing that might preclude her from being a good juror was that she could not sit for a long period of time due to a bad lower back. 6 CTJQ 1876.

Both her father and her son had experienced problems with alcohol. She did not totally abstain from the use of alcohol for religious reasons. She was neither a

follower nor a leader; she “liked to listen to the problem first.” She had ever been the victim of a sexual assault or rape. She had no pressing business and nothing pressing in her personal life that might cause her to wish to expedite the process of decision-making in the jury room. 6 CTJQ 1877. She had ever seen or been treated by a psychiatrist or psychologist. She “hurt” for people with drug or alcohol problems and believed they would be better off without them. She had never heard about this case. 6 CTJQ 1878-1879.

She had religious beliefs which would impair her ability to serve as a juror on this type of case. Asked to explain, she wrote “Death.” She did not like the death penalty but she could set aside her personal views regarding what the law ought to be and follow the law as the court explained it. Her views had not changed in the last few years. 6 CTJQ 1884-1886. She knew of no reason why she would not be a completely open-minded and impartial juror in the case. 6 CTJQ 1886-1887.

c. Voir Dire

On voir dire, Juror No. 719 told the judge she was a 51-year-old widow who had graduated from high school. She was disabled and was unable to work. Her spouse was deceased. She had never been the victim of a crime and had no bad experiences with courts and law enforcement. She had no friends in law enforcement, did not own any weapons, and had no prior jury trial experience. Her bad lower back might preclude sitting for a long period of time. 5 RT 919-920. She assured defense counsel she could analyze the evidence, including appellant’s video-taped statement, and listen to his answers to determine whether or not he had the

required mental state. She agreed that nothing could be more serious than trying appellant for his life. 5 RT 921-923. She told the prosecutor she had a problem with the death penalty for religious reasons and she would find it difficult to impose because of her personal and religious beliefs. She probably would always elect life without possibility of parole over death. The prosecutor challenged her for cause. 5 RT 923-924.

The judge retired to his chambers with counsel and the prospective juror. There, he asked, "Are you telling the court and the parties that under no circumstances would you ever vote for the death penalty?" She replied, "I just don't believe in it. I'm being honest." 5 RT 924. The judge continued:

Q. I take it that your feelings are so strong that no matter what evidence is presented, no matter what evidence is going to come in, you would never, under any circumstances, vote for the death penalty.

A. I won't say that. It depends on the evidence also, I'd take that in consideration. But I just don't believe in it because we can't give life. And that's one reason. And I just don't believe in taking life.

Q. Okay. And this is based on your religious beliefs?

A. Yeah.

[¶ ¶]

Q. Okay. Are you saying that it's a very small likelihood that you would ever consider yourself considering the death penalty?

A. It depends on the evidence. It really -- it depend on the evidence. What else can I say? What is presented to me.

Q. Would you be willing to look at that evidence?

A. Oh, yeah.

Q. Would you be willing to talk about the evidence with the other jurors?

A. Oh, yes. Oh, definitely, yes. Yes.

Q. All right. And if they convinced you that even though you have a lot of reservations about the merits of the death penalty because, you know, we don't give life kind of situation --

A. Right. Right.

Q. -- would you nevertheless, if they convinced you it was appropriate,

could you see yourself voting for it?

A. I can't give you that answer.

Q. Okay. But would you be willing to listen to the --

A. I would be, yes.

Q. Would you look at the evidence before you made that decision?

A. Yes.

Q. And would you be willing to look at the law that goes with that?

A. Right, apply to that particular question.

Q. And you would you make your best efforts to apply the law in an evenhanded manner?

A. That's correct.

5 RT 925-927.

The prospective juror reiterated that she had a lower-back problem and that it was painful for her to walk a long distance or to sit for a long period. She did not know if using a pillow would alleviate the pain. 5 RT 927-928. She agreed with the prosecutor that her religious and personal beliefs against the death penalty would make it very difficult for her to vote to put someone to death. However, when he suggested that she would "certainly be leaning against the death penalty strongly because of your religious beliefs," she said, "I won't say that's a true statement because I have to look at the evidence. Depend on the evidence." 5 RT 928.

d. Appellant's First *Batson* Motion

Outside the prospective juror's presence, the judge said, "I'm going to disallow the challenge for cause. And so if there's a peremptory challenge, do you have a *Wheeler* situation? And if so, we better make a record of it." One of appellant's attorney's, Mr. Enright, responded that the juror was obviously a black woman and "we have probably in this group maybe three Afro-Americans." Nonetheless, he felt "that you've made the record that Mr. Jacobs probably would

not get - not be in a *Wheeler* situation because of her answers. I think that she gave answers that would probably give him reason to use his peremptory in a nonracial manner." 5 RT 929.

A lengthy discussion ensued between the prosecutor and the judge concerning the court's ruling on the challenge for cause. 5 RT 930-934. Mr. Enright then advised the court that he had changed his mind:

Mr. Enright: . . . Mr. Zimmerman feels that I was being too generous in my statement about *Wheeler*, and feels --

Mr. Jacobs: You want to back out?

Mr. Enright: We are going to back out.

Mr. Jacobs: You want to back out.

Mr. Enright: Jacobs' adamant position with the court's fine ruling and the situation leads me to believe that we may very well be getting into a *Wheeler* situation.

Mr. Zimmerman: There's only three blacks in the whole room.

Mr. Enright: There's only three blacks out there.

The Court: You want to say something?

Mr. Zimmerman: Given the limited reservoir pool of potential black jurors, kicking any one off puts us in *Wheeler*. And I'd like to know if and when Mr. Jacobs exercises a peremptory --

Mr. Jacobs: I think we can assume I'd use a challenge sometime today. They haven't made a prima facie case for *Wheeler* whatsoever. None.

The Court: In view of the comments here, I'm not going to find any *Wheeler* error once Mr. Jacobs excuses this juror. But I wanted to put that on the record so we don't have to come back in here and do this again.

Mr. Enright: I want to make one thing clear, I think, where *Wheeler* directs itself to a problem but totally misses the boat. And the problem they direct themselves is if it were up in Los Angeles and we have a pool of black jurors and Mr. -- and I can show that Mr. Jacobs is setting a pattern, the very pattern that he's setting is going to kill him eventually because he's going to have black jurors eventually on that panel. But what *Wheeler* fails to realize, if you only have one black juror and the prosecutor exercises his peremptory on that black juror, the defense can't say, well, he's setting a pattern because there's no pattern to set. They only can say wait a minute, this is the very

damage we have to worry about.

Mr. Jacobs: I have to say you don't need a pattern under *Wheeler*.

That's not a showing right now.

Mr. Enright: I think you have to show that.

Mr. Jacobs: You have to show some kind of abuse of the peremptory challenge. I don't believe you have to have systematic showing anymore.

Mr. Enright: All right.

Mr. Jacobs: You either have a good reason to use a peremptory or you don't.

The Court: And applying what I heard to be Enright's assessment of the juror's responses and the likelihood that a good prosecutor would challenge such a juror, I don't find any prima facie evidence of misconduct on the part of the prosecutor. And I enjoy listening to the law from Jacobs and I'll listen to the law from Enright, that's fine, it's an enjoyable part of the trial. But here I don't find any basis for a *Wheeler* type of an objection, and I just wanted to make that record before we go back out there.

5 RT 934-936.

The prosecutor excused Juror No. 719 with his fourth peremptory challenge.

5 RT 955. The judge revisited his *Wheeler* ruling at the next break:

The Court: Now, during the in-chambers conversation there was a topic came up as to whether the defense is being precluded from having other black jurors serve on this case, and this conversation came up in reference to (juror 719), who was excused by the people. I'll simply note that my observation is at this stage in the proceeding the defendant, from the court's perception, has not been denied the opportunity to have other black jurors serve. And the defendant has not unduly been denied the opportunity to have minorities serve as a -- as a juror on this case. And I have directed my clerk, even before the topic came up, that we would keep records of all requests of prospective jurors who are asking to be excused, whether they were stipulated to by the parties or not, just because my observation is, that in Orange County, we do have a sizeable number of citizens from the community who come from ethnic minority, who come to the court as prospective jurors. They may not end up serving for particular reasons, whether it's English, health, financial. But, I think we have a good record as to who came here, and who asked to be excused, and what the party's responses were to that. That's all contained in the hardship forms that

are being logged as court documents. And I simply wanted to state that for the record. If either side disagrees with the court's observations, other than the objection raised by the counsel for defendant as to the challenge being made by the people as to prospective juror (juror 719), this is the time to make the record.

Mr. Enright: Well, your honor, I think we have made the record as to (juror 719). And I feel that there may, in the remaining jury pool there might be two other African Americans. And you're in a much better vantage position to look back there. But, that's just been my observation.

The Court: Well, I'm reluctant to make any generalization as to the ethnic background of any prospective juror simply from my looking at the appearance of a person. And, so, I just want -- I don't want to add to the issue, but I want to keep a clear record as to the fact that we have had, and continue to receive prospective jurors who come from different ethnic backgrounds that may not end up serving for variety of reasons. And all I can do at this stage of the proceeding is try to keep careful accounting of who is coming in, who is asking to be excused, and whether the parties stipulated or whether the court found cause. And what I'm doing in that regard is these request for hardships are just being retained for, permanently, so we have a record as to what took place.

5 RT 1001-1003.

2. Juror 213

The prosecutor's 17th peremptory challenge was to Juror No. 213, an African-American man. 6 RT 1099, 1116-1117, 1203.

a. Hardship Application

On September 29, 1998, the sixth day of jury selection, Juror No. 213 asked to be excused due to hardship. He indicated that he had served as a juror before, that he had not asked to be excused when he received the jury summons, and that he had time and date problems, specifically doctors appointments on October 1st and 7th and an important school department meeting on October 5th, and he planned to

be out of town on November 16th and 17th. "And last but not least, I'm head basketball coach - and basketball season starts Dec 1st! Our schedule could (during that month) coincide with the trial. And I must be on the bus or at the games." 1 CTHS 1-9 122. His hardship request was denied. See 3 RT 454-457; 4 RT 593-595, 754-755, 759, 761. 767-768; 5 RT 825-826, 855-857, 881-882.

b. Juror Questionnaire

Juror No. 213 wrote that he was 51 years old and lived alone in the single family home he owned. He had been a teacher and a coach at Los Amigos High School in Fountain Valley for 28 years. He had supervisory responsibilities. 6 CTJQ 2057. In addition to California, he had lived in Illinois and Ohio. 6 CTJQ 2058.

He had two masters degrees, but no special education or training in law, medicine, criminal justice, psychology, pharmacology, or psychiatry. 6 CTJQ 2059. In 1979 or thereabouts a close college friend had been charged with killing his father and he testified as a character witness. He served as a juror in an Orange County murder case in which the jury reached a verdict. He had no particularly positive or negative experiences with law enforcement, prosecution, defense, the courts, or lawyers. 6 CTJQ 2060-2061.

His feelings about those who abuse drugs or alcohol depended "on how much, when, if they affect lives or other lives, how long, etc." He had seen or been treated by a psychiatrist or psychologist, an experience he classified as totally positive. He had never been hospitalized as the result of a psychiatric or psychological problem. He had no bias either for or against psychiatric or psychological testimony. 6 CTJQ

2063.

He had “mixed feelings” about the death penalty. “Basically, I try really hard not to think about it. I do feel if you’ve done something wrong you have to pay for it somehow!” He thought the death penalty was sometimes used too seldom, “but it’s important for the innocent to have a fair trial and a chance for a rebuttal!” His views about the death penalty had been “fairly consistent” and had not really changed in the last few years. He could set aside his personal views regarding what the law ought to be and follow the law as the court explained it. 6 CTJQ 2069-2071. He had no moral or religious beliefs which would impair his ability to serve as a juror on this type of case. He knew of no reason why he would not be a completely open-minded and impartial juror. The only thing that might affect him was the fact that “I do coach basketball and if it lasts longer than the 30th of Nov then we could have a game and I’m the only coach! I can try and schedule practices around the court as much as possible but game I can not!” 6 CTJQ 2072.

c. Voir Dire

The initial voir dire of Juror 213 was conducted in chambers. 6 RT 1082.

The Court: We’re in chambers with the next prospective juror, and counsel. And Juror 213 has submitted a statement of hardship. It’s indicated about three or four dates that he might have some need to not be here because of doctor’s appointments. But, the last portion which I’ll read: “Last but not least I’m head basketball coach, and basketball season starts the 1st of December. Our schedule could during that month coincide with the trial, and I must be on the bus or at the games.”

[¶ ¶]

Prospective Juror 213: . . . The problem I have with December 1st is that after December 1st it’s okay because most of our games are going

to be in the evening. But, see, I was on a jury trial before, I was on a murder trial, and I know how serious this really is, and I don't want - you might be in the middle of something that is very important to you for your client and he would say well, we're going to have to break right now because coach (Juror 213) has to go to his kids. And that would make me feel bad on general principles, because this is a man's life. This is not just something out of the clear blue sky. My biggest problem I know will be toward Christmas, because then tournaments. When you have tournaments, which you already know they could be at nine in the morning until night, and I cannot change those.

Mr. Jacobs: Christmas isn't the problem. We know for sure we'll be done by December 11th -- we hope we will be. That's the outside parameters that I think the court gave everybody.

Mr. Enright: And most likely we'll be done by the end of November.

Prospective Juror No. 213: Either way, if it's by December 11th I might only have maybe one or two at the most. We haven't gotten our schedule yet and the times. But, we wouldn't have more than three or four games before December 11th. We wouldn't have more than three games before December 11th.

Mr. Jacobs: Could I ask you this: December 1st, does that start your game schedule?

Prospective Juror 213: December 1st would be our first game. You can't start before that. You guys took care of the scrimmage we have, because you took that week off at Thanksgiving, and we always have a scrimmage Tuesday of that Thanksgiving, that Thanksgiving week. And you said we're going to be off. So, that took care of that one, and that was the one I was most afraid of.

Mr. Jacobs: What about practice?

Prospective Juror 213: Donny and I, we talked about it and I told him about it, and he said he will try his best to work around the schedule of the court, as much as possible. The worst thing that can happen is that we have practice at 3:30 or four. We're trying to work it out on the girls right now.

Mr. Jacobs: Court usually runs until 4:30.

Prospective Juror 213: Right.

Mr. Jacobs: Does that mean that you would be deprived of practicing with your team the entire time that you're sitting on the jury?

Prospective Juror 213: No, I'm going to try and make it - well, see, we have to get together as a group, you know, with the girls because of the, you know, the girls and the boys having to share that. We have to go and talk with them. The girls coach is not around right now, and we have a call in to her. I told him if I got picked, then I would for sure have to talk to them about that.

Mr. Enright: Schedule it after 4:30?

Prospective Juror 213: Yeah, I would have to go night. I would have to go -- like that would be kind of tough, but I'd have to go night.

Mr. Jacobs: That would be tough on the kids?

Prospective Juror 213: Yes.

Mr. Jacobs: Usually --

Prospective Juror 213: Well, they're freshmen, and the freshmen parents rather would have them home by six.

Mr. Jacobs: Practice at 3:30?

Prospective Juror 213: Yeah, 3:30, or something around there.

Mr. Jacobs: So if you're in the trial, they're going to have to practice after five?

Prospective Juror 213: They're going to have to practice probably five to seven, that's the next time slot.

6 RT 1083-1086. The judge inquired about the prospective juror's medical appointments. He responded, "if we don't start until 9:30, I can move one of them to eight and be here by 9:30 easily. But the problem I'm having is the one, the one on the 14th is impossible to change." 6 RT 1086-1087.

Juror No. 213 exited chambers and the judge asked, "What's your folks' feelings?" Mr. Enright responded, "We want him." The prosecutor said, "no, I'd be willing to stipulate, they just want to see if I'm going to challenge them (sic), so I'm going to play the game. I'll play the game. They want the kids to practice at 5:30 and seven, so, we'll play the game." 6 RT 1087.

The proceedings reconvened in open court where Mr. Enright indicated that the defense had no further questions for Juror No. 213. 6 RT 1087. The prosecutor asked:

Q. You've sat as a juror before in a homicide trial; is that correct?

A. Yes, sir.

Q. Was that in this county, or L.A. county?

A. It was in this county.

Q. This building?

A. Yes, sir.

Q. I don't want to go into the fact, was it similar to this case, or a different type of case?

A. I was foreman of a murder trial.

Q. Were the charges involved anything like rape or anything like that, or was it different?

A. No, there was no rape involved.

Q. Okay. Without telling me what the result is, did you reach a verdict, or not?

A. Yes, sir.

Q. You reached a verdict?

A. Yes, sir.

Q. And how many years ago was that?

A. This is '99 -- probably '95.

Q. About four or five years ago?

A. Yeah.

Q. Now, you've also had occasion to testify a number of years ago in a trial; is that correct?

A. Yeah.

Q. And was it a close friend of yours who was accused of murder; is that what happened?

A. Yeah, a guy next door to me that moved in about two years, when we lived in the apartments, my little brother and I lived in the apartments, and he used to take care of my little brother, so, I got to know him.

Q. He became a friend of yours?

A. Yes, sir, he did.

Q. And I guess what you say, he was charged with killing his father?

A. Correct.

Q. And you testified as a defense witness or a character witness at his trial; is that what happened?

A. Yes, sir. To him?

Q. Is that what happened; you testified?

A. Oh, yeah.

Q. I'm not going into what happened to him. Okay. And that was up in Los Angeles; is that correct?

A. No, it was out here in Orange County.

Q. It was here in Orange County also?

A. Yes, sir.

Q. And you mentioned something, and if it's something you want to keep private or don't want to talk about, I believe you mentioned something about having some kind of psychology or some counseling; is

that correct?

A. That was in high school.

Q. That was in high school, just a kid?

A. Basic.

Q. Basic counseling?

A. Basic.

Q. You had a positive experience?

A. Girl friend thing.

Q. We won't go into it.

A. Okay.

Q. Had some problems, I take it you're an assistant basketball coach; is that correct?

A. Head basketball.

Q. Head basketball coach?

A. Yes.

Q. Freshman at what high school?

A. Los Amigos, Fountain Valley.

Q. And when do they start practicing?

A. 14th of November.

Q. November 14th?

A. Yes.

Q. And if you're selected on the jury, if we go past the 14th, you'll have to put practice back late so that you'll be there?

A. We'll have to move it later in the day.

Q. Okay, so that would have to be at like --

A. Five -- I think what we -- well, see, we haven't put the schedule together because they've been waiting for me. But I think the schedule was -- before it was two to 3:30 for the freshman. But that will be changed, so, usually we go in blocks of two hours, and so it would -- usually it's two to four, four to six, six to eight. But, usually they let the freshmen, we go outside the last half hour so they can start on the hour and go 3:30 to 5:30. 5:30 to 7:30. 7:30 to 9:30. They get the older guys out of there by 9:30, they're home by 10.

Q. The freshmen would be 3:30 to 5:30?

A. Usually it would be two to 3:30.

Q. Two to 3:30?

A. But we had talked about me going back in there 3:30 to four if this wasn't a problem. But I'd have to tell them it's got to be later.

Q. I take from it some things you said and the way you walked to the jury box, you're not thrilled; is that a bad way to state it?

A. That's a bad way to state it.

Q. Well, you put it in your words then.

A. Okay. I had -- honestly, honestly, when I first came I knew I would

be a good juror. I knew that. I wasn't even worried about it. And I listened in the courtroom all yesterday and I still knew I would be a good juror. But, my problem was it's just a matter of this trial is very, very important. The person's life is at stake. And that is very important. And I'm dealing with high school kids who everything they do is way more important than anything else in your life. So, I'm trying -- I'd have to deal --

Q So you're torn?

A Yeah.

Q You have a responsibility to the high school players, and you realize the responsibility here; is that what you're trying to say?

A Yes, this is a very big responsibility, as much as that is a big responsibility, too. If we can work out, if I can get it so they're both on different keels, it's fine with me. Because I don't have to worry about anything. I don't have to worry until I get to the game. Then I worry about that.

Q Okay. Let's talk about the death penalty. You say -- what are your feelings about the death penalty?

A That I voted for it. It's a necessary thing that we must have to deter crime of a very, very violent nature.

Q You said you have mixed feelings about it and you try not to think about it? Is that something you wrote in your questionnaire?

A Yeah.

Q Could you elaborate on that a little bit for me?

A I was a little hungry at that time so I'm not really sure what I was thinking.

Q It's funny, a lot of people have said the same thing, you know?

A My brain was off center.

Q On page 14 you're just writing down whatever came, huh?

A Uh-huh.

Q I take it then you said you had mixed feelings. It's not something you think about every day; is that basically what you're trying to say?

A Right.

Q There's more pleasant things to think about as we go through our day; is that correct?

A Yeah.

Q You voted for it, so I take it philosophically you believe in it?

A Yeah.

Q How about practical aspect, you know you heard my questions over the last couple of days. Are you the kind of person who thinks I believe in it, but let somebody else do it? Or do you think you're the kind of person who could actually vote to put someone to death?

A Well, the dealing with -- this is a smaller, much smaller scale.

Dealing with kids every day, you know the people who are -- people that really need to be punished correctly and kids that just really need to just be really talked to, and kids that just need to be hit in the head and they're all right.

Q There's a continuum.

A Yeah, and so when you're talking about the death penalty, it's almost in the same idea, that there are people who are -- that are hardened that you cannot help in any way. And if they have done something that is very, very wrong, it's very, very wrong, it has to be taken care of.

Q So, is what you're saying to me okay, you're saying to me that you can see it being imposed on someone?

A Yes.

Q The question, you know --

A Could I personally

Q And you know there's nothing wrong with saying I believe in it, it belongs there, some people it should be imposed, but I don't want to be involved, you know, or could I do it, you know.

A I thought about it because I've heard it all day yesterday and in the situation that it is, if it is -- if like most of the people said here, if it was proven to me, yes.

Q You mean if the facts of the crime --

A Right.

Q -- were proven, then you could have it as an option?

A Yes.

Q That you would actually do?

A Yes.

Q You don't question yourself in that?

A No.

Mr. Jacobs: Thank you, I'll pass for cause.

6 RT 1089-1096.

When the prosecutor excused Juror No. 213 with his 17th peremptory challenge. Mr. Zimmerman asked "Could we address the court another time about that?" The court said, "Yes." 6 RT 1099.

d. Appellant's Second *Batson* Motion

At the next break, appellant formally objected:

Mr. Zimmerman: As to the peremptory challenge exercised by the People as to (juror 213), we are interposing, once again, a *People* versus *Wheeler* objection on the basis that that was a systematic exclusion of African American potential jurors. I know that so far the proceedings we have not identified (juror 213) as being African American descent. That's apparent to all who have been here.

The Court: Why do you feel that there's a misconduct by the deputy district attorney by excusing that juror?

Mr. Zimmerman: We only had three black individuals, three African Americans in the whole room, and two of them have been excused by peremptory challenge by the people. I'm just making my record in that regard.

The Court: Well, I'm hesitant to accept the conclusion that you folks have put on the record that there's only three African Americans in the prospective jury pool.

Mr. Enright: I don't think there's three, I think there's two.

The Court: Well, and that's an interesting observation, but, the Court is not accepting that. So, from my perspective there might be more. But, beyond that, other than that conclusion that you stated, which I take it is based on you looked at the jury pool that's out there and you saw two or three people that you thought were African American, is there another reason that you're putting forward to the court as, you know, you need to show prima facie why there's been misconduct?

Mr. Zimmerman: Yes, because (juror 719) was excused yesterday. She was African American descent, also. So, we're contending that that establishes a systematic exclusion of the African American potential jurors. One thing, your honor, we haven't acknowledged (Juror 213) is of African American descent.

The Court: I will accept that representation based on my contact with (juror 213). The only thing I was quibbling about, you folks keep saying there's only three out there. And I don't know that that's the case. However, is there anything else, other than --

Mr. Zimmerman: No, that's my objection.

The Court: I'm going to disallow the challenge. I don't find any basic finding that the district attorney is engaging in misconduct, that he systematically is excluding all Afro-Americans from serving as jurors on this case, or that he is systematically excluding any other minority group from serving on this particular case. (Juror 213) did submit a request to be excused for hardship, and we have that on the record, we'll keep it. In our discussion in chambers he indicated his reticence about serving, although he did opine that if actually selected, he will find a way to make his job work consistent with the nature of the jury duty. But, just watching his expression, and I have to put two things

on the record: Yesterday when we broke in the evening one of the first prospective jurors to come up to the bailiff to get a hardship form was (juror 213). As you know, I emptied the courtroom so nobody could return anything at that time, so we got (juror 213's) request today. And then I had (juror 213) step out into the courtroom waiting whether there was going to be a stipulation or not. So, when I came back out and advised him what, that he needed to go take the jury seat, there was an audible groan and facial expression consistent with that as he moved from the clerk's area over to the chair. And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult. Plus some of the other information that was disclosed to the deputy district attorney upon further inquiry. So, I think we have to be careful, when you make a challenge of this nature, that the court give a legitimate consideration. And I don't mean to make less of the challenge. If I thought that it was even close, I would make the deputy district attorney state on the record his feeling as to why he was excusing this juror, (juror 719), but, there was ample reason to excuse both of those, other than dealing with race. And based on your offer of proof, I'm just denying the challenge.

6 RT 1116-1119.

C. Appellant Satisfied the Requirements of *Batson's* First Step by Producing Evidence Sufficient to Permit the Trial Judge to Draw an Inference That Discrimination Occurred and the Judge Should Have Ordered the Prosecutor to Provide Reasons for the Peremptory Challenges

The California Supreme Court found that "the bare circumstance that *all* African-American prospective jurors were struck from the pool would be insufficient in this case to support an inference that the two were challenged because of their race." App. A at 36.

The court, however, ignores the fact that other circumstances supported such an inference. The court, for example, fails to acknowledge and analyze the cross-racial nature of this case. Appellant is a black man who was charged with raping

and killing young white women. Black defendants are disproportionately sentenced to death when the victim is a white woman and the evidence suggests she was raped. See, e.g., Crocker, *Is the Death Penalty Good for Women* (2001) 4 Buff. Crim.L.Rev. 917; Crocker, *Crossing the Line: Rape-Murder and the Death Penalty* (2000) 26 Ohio N.U. L. Rev. 689; King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich. L. Rev. 63, 81-82 [summarizing studies]. Even a prosecutor who harbors no personal animus towards black defendants might think that white jurors would be more likely to convict because of the race of the individuals involved.⁶

The California Supreme Court also brushes aside the fact that Prospective

⁶ See, e.g., *Mahaffey v. Page*, 162 F.3rd 481, 484 (7th Cir. 1998) ["And lest we forget, the crimes at issue in this case were obviously racially-sensitive – *Mahaffey*, a young African-American male from Chicago's South side, was charged with murdering a White couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase.]; *Jones v. Ryan*, 987 F.2nd 960, 971 (3^d Cir. 1993) [taking into account that defendant was charged with a violent offense against a white victim in finding a prima facie case]; *Commonwealth v. Mathews*, 581 N.E.2nd 1304 (Mass.1991) ["[T]he interracial sexual aspect of the crime involved is a factor to be considered.... That factor made it highly possible that racial prejudice would play a part in the jury process."]; and *Williams v. Chrans*, 945 F.2nd 926, 944 (7th Cir. 1991) (cert. denied (1992) 505 U.S. 1208 ["In a case where the defendant is Black and the victim is White, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many White jurors as possible in order to enlist any racial fears or hatred those White jurors might possess."].

Juror Nos. 719 and 213 were the only African-Americans among the venire. App. A at 36. The record clearly establishes that the prosecutor peremptorily challenged all the prospective jurors who *appeared* to be African-American. Both of appellant's attorneys stated their belief that there were only two African-American prospective jurors among the venire. 5 RT 929, 934, 1003; 6 RT 1116 [Mr. Enright]; 5 RT 934; 6 RT 1116 [Mr. Zimmerman]. The trial court acknowledged that counsel "looked at the jury pool that's out there and you saw two or three people that you thought were African American", 6 RT 1117, but was "reluctant to make any generalization as to the ethnic background of any prospective juror simply from my looking at the appearance of a person." 5 RT 1003. "[Y]ou folks keep saying there's only three [sic] out there. And I don't know that that's the case." 6 RT 1117; see also 6 RT 1204. These statements establish that the trial court distinguished prospective jurors who appeared to be African-American from those who might be of African-American heritage. Thus, while there could have been other prospective jurors of African-American descent, Prospective Juror Nos. 719 and 213 were the only prospective jurors who *appeared* to be African-American. "[D]iscrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case under *Wheeler*. *People v. Motton* 39 Cal.3^d 596, 604 (1985).

The California Supreme Court finds it to be "impossible to draw an inference of discrimination from the challenge of one potential juror," and that "as a practical matter, the challenge of one or two jurors can rarely suggest a pattern of

impermissible exclusion.” App. A at 36. “A pattern of striking panel members from a cognizable racial group is probative of discriminatory intent, but a prima facie case does not require a pattern because ‘the Constitution forbids striking even a single prospective juror for a discriminatory purpose.’ *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); accord *United States v. Esparza-Gonzalez*, 422 F.3d 897, 904 (9th Cir. 2005) (holding that a prima facie case was shown where the prosecutor struck the only Latino prospective juror as well as the only Latino potential alternate juror).” *United States v. Collins*, *supra*, 551 F.3d at 919.

Moreover, the court overlooks the many cases where excusal of the only minority prospective jurors established a prima facie case of racial discrimination. In *Crittenden v. Ayers*, 624 F. 3d 943, 950 (9th Cir. 2010) for example, the sole African-American prospective juror was excused. In *United States v. Collins*, *supra*, 551 F.3d at p. 918, the only remaining African-American member on the panel was challenged. In *Ali v. Hickman*, 584 F.3d 1174, 1176 (9th Cir. 2009) the prosecutor used two peremptory challenges to strike the only African-Americans in the jury pool. In *Johnson v. California*, *supra*, 545 U.S. at p. 173, all three African-American prospective jurors were removed.

In *Johnson v. Finn*, *supra*, 665 F.3d 1063, the prosecutor peremptorily challenged all three African-Americans in the jury pool. The Ninth Circuit observed:

The fact that “three of the prosecution's peremptory challenges were exercised against the only three African-Americans in the jury pool,” is

enough to establish a prima facie case of racial discrimination. In multiple cases, we have held that a prima facie showing of racial discrimination had been made where prosecutors had stricken a lesser proportion of the racial minorities in a venire pool. See, e.g., *Paulino*, 371 F.3^d at 1091 (finding a prima facie showing where “the prosecution had struck five out of six possible black jurors”); *Fernandez*, 286 F.3^d at 1078 (finding a prima facie showing where “[t]he prosecutor [had] struck four out of seven Hispanics” and “the only two prospective African–American jurors”); *Turner v. Marshall*, 63 F.3^d 807, 812 (9th Cir. 1995), overruled on other grounds by *Tolbert v. Page*, 182 F.3^d 677, 681 (9th Cir. 1999) (en banc) (finding a prima facie showing where “the prosecutor had used peremptory challenges to exclude five African–Americans out of a possible nine African–American venirepersons”). As the Supreme Court observed in *Miller–El v. Cockrell*, 537 U.S. 322 (2003), in which the prosecutor had exercised peremptory strikes against ten out of the eleven black jurors not removed by strikes for cause or by agreement, “[h]appenstance is unlikely to produce this disparity.” *Id.* at 342. *The same is true where the prosecutor used peremptory strikes to remove all of the black jurors from the venire pool.*

(*Johnson v. Finn*, *supra*, 665 F.3^d at p. 1070, emphasis added.)

The prosecutor in *Johnson v California*, used 3 of his 12 peremptory challenges to remove the black prospective jurors. *Johnson v. California*, *supra*, 545 U.S. at p. 164. This Court concluded that California’s “more likely than not” standard was “an inappropriate yardstick by which to measure the sufficiency of a prima facie case.” *Id.*, at p. 167. It held that a prima facie case of discrimination could be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gave rise to an inference of discriminatory purpose. *Id.*, at p. 169.

We assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor’s explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge--on the

basis of all the facts, some of which are impossible for the defendant to know with certainty--that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Id., at p. 170.

The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, 90 L. Ed. 2d 69, 106 S. Ct. 1712. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino v. Castro*, 371 F.3d 1083, 1090 (CA9 2004) ("[I]t does not matter that the prosecutor might have had good reasons . . . [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (CA3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike).

Id., at p. 172.

In the case at bar, the California Supreme Court found there was no inference of discrimination largely because the "information elicited in voir dire showed race-neutral reasons for excusing both prospective jurors." App. A at 38.

[T]he existence of grounds upon which a prosecutor could reasonably have premised a challenge does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework." *Johnson v. Finn*, 665 F.3d 1063, 1069 (9th Cir. 2011) (emphasis added) (internal quotation marks omitted). That principle "was clearly established" for AEDPA purposes in 2005 — years before Currie's retrial — by the Supreme Court's decision in *Johnson v. California*. *Id.* *Johnson* noted that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," 545 U.S. at 172 (emphasis added), and quoted with approval our statement in *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) that "[i]t does not matter that the prosecutor might have had good reasons . . . [;][w]hat matters is the real reason they

were stricken." *Id.*

Currie v. McDowell, 825 F.3d 603, 609-610 (9th Cir. 2016).

The pertinent question is whether "other relevant circumstances" erode the premises of a defendant's allegations of discrimination. *Williams v Runnels*, 432 F.3rd 1102, 1109 (9th Cir. 2006). The trial court addressed a different issue, whether the record could support race-neutral grounds for the prosecutor's peremptory challenges.

This . . . does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson*, 125 S.Ct. at 2418; *see also Miller-El*, 125 S.Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

Williams v Runnels, *supra*, 432 F.3rd at 1109.

Moreover, as a practical matter "mixed motive" cases -- where the proponent of the strike offers one explanation that is found to be discriminatory and one or more that are found to be non-discriminatory, or where the proponent of the strike is found to have engaged in prohibited discrimination with respect to one but not all struck jurors -- present special *Batson* problems because a peremptory strike can be sustained only if the prosecution shows, at the least, that discriminatory intent was not a substantial or motivating factor for the challenge. *Snyder v. Louisiana*, *supra*, 552 U.S. at 484-485. If a reviewing court chooses to speculate about reasons for a peremptory challenge, it must determine how many reasons the prosecutor had for exercising the challenge. Unless it can say that there was only one reason, the court

must then determine how big a part each of the reasons played in the decision to strike the prospective juror and whether discriminatory intent was a substantial or motivating factor for the challenge. Appellant respectfully submits that this is an impossible task, even for the most prescient courts. In these circumstances, “needless and imperfect speculation” is simply unlikely to “produce actual answers to suspicions and inferences.”

It would be particularly inappropriate in this case to rely on speculation that the prosecutor might have excused Juror No. 213 because of his commitment to his basketball team. One of the alleged reasons for the challenge of a prospective black juror in *Snyder v. Louisiana* was the time pressure created by his student-teaching obligation.⁷ The prosecutor claimed to be apprehensive that the prospective juror, in order to minimize the student-teaching hours missed during jury service, might have been motivated to vote for guilt, not of first-degree murder, but of a lesser included offense because this would obviate the need for a penalty phase proceeding. This Court found the scenario to be “highly speculative.” In light of the anticipated brevity of the trial, serving on the jury would not have seriously

⁷ The prospective juror was a student in his last semester. He was required to student teach in order to graduate, and he was teaching five days a week, 8:30 a.m. through 3:00 p.m. The court contacted the prospective juror’s dean who indicated that “as long as it’s just this week, he doesn’t see that it would cause a problem with Mr. Brooks completing his observation time within this semester.” Thereafter, the prospective juror did not express any further concern about serving on the jury, and the prosecution did not choose to question him more deeply about this matter. *Snyder v. Louisiana*, *supra*, 128 S.Ct. at 479-481.

interfered with the prospective juror's ability to complete his required student teaching. "When all of these considerations are taken into account, the prosecutor's second proffered justification for striking Mr. Brooks is suspicious." *Snyder v. Louisiana*, *supra*, 552 U.S. at 481.

In the case at bar, as noted above, the judge himself acknowledged that Juror No. 213 concluded he could fulfill his commitment to both the team and the jury. It is unlikely that his decision was capricious because the prospective juror had previously served as a jury foreman in a murder trial and he knew exactly what he was getting into. Juror No. 213 explained on the record how serving on the jury would not seriously interfere with his ability to fulfill his obligations to his team. Like *Snyder*, excusing him for time pressure related to his basketball commitment would be suspicious.

Nor does Prospective Juror No. 213's demeanor provide a basis for determining that appellant did not make a *prima facie* case of discrimination. The trial court observed:

Yesterday when we broke in the evening one of the first prospective jurors to come up to the bailiff to get a hardship form was (juror 213). As you know, I emptied the courtroom so nobody could return anything at that time, so we got (juror 213's) request today. And then I had (juror 213) step out into the courtroom waiting whether there was going to be a stipulation or not. So, when I came back out and advised him what, that he needed to go take the jury seat, there was an audible groan and facial expression consistent with that as he moved from the clerk's area over to the chair. And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult.

6 RT 1118. The court did not inquire about this demeanor, 6 RT 1082-1086, and there is no evidence that the prosecutor observed it. "This . . . does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson*, 125 S.Ct. at 2418; *see also Miller-El*, 125 S.Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.") *Williams v Runnels*, *supra*, 432 F.3^d at 1109. This "judicial speculation" is too imprecise to rely on to resolve plausible claims of discrimination. *Johnson v. California*, *supra*, 545 U.S. at p. 173. Moreover, even if the speculation is accurate, reluctance to serve is not a basis for excluding the prospective juror.

The prosecutor asked only one question about Prospective Juror No. 213's demeanor: "I take from it some things you said and the way you walked to the jury box, you're not thrilled; is that a bad way to state it?" Prospective Juror No. 213 responded, "That's a bad way to state it," and indicated that he knew he would be a good juror but was torn between his responsibilities as a juror and to the high school basketball team he coached. He explained, "If we can work out, if I can get it so they're both on different keels, it's fine with me. Because I don't have to worry about anything. I don't have to worry until I get to the game." 6 RT 1092-1093. The trial court acknowledged, "he did opine that if actually selected, he will find a way to make his job work consistent with the nature of the jury duty." 6 RT 1118. Given Prospective Juror No. 213's explanation of his demeanor, an audible groan and consistent facial expression is neither an indication that he was unwilling to serve

as a juror on the case nor a valid race-neutral ground for the exercise of a peremptory challenge. Even if it were, as previously noted, the existence of race-neutral grounds upon which to base a peremptory challenge does not negate the existence of a prima facie case of discrimination.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A REVIEWING COURT IS REQUIRED TO CONDUCT A COMPARATIVE JUROR ANALYSIS, WHEN REQUESTED, IN DETERMINING AT STEP ONE OF THE *BATSON* ANALYSIS WHETHER AN INFERENCE OF DISCRIMINATION IN THE EXERCISE OF A PEREMPTORY CHALLENGE CAN BE DRAWN

“Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.” *Boyd v. Newland*, 467 F.3rd 1139, 1149 (9th Cir. 2006). “An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the prosecutor has challenged only the minority juror.” *United States v. Collins*, *supra*, 551 F.3^d at 922. Comparative juror analysis may therefore be employed at step one to determine whether a defendant has established a prima facie case of discrimination. *Crittenden v. Ayers*, *supra*, 624 F.3^d at 956. Such an analysis does not deprive a prosecutor of the opportunity to explain any differences he perceived in jurors. Since it is only used at step one of the inquiry to raise an inference of discriminatory purpose, the prosecutor remains free to explain any differences he perceived among the prospective jurors at step two.

The *Boyd* court noted that his Court did not merely review the reasons the prosecutor gave for peremptorily striking the black jurors in *Miller-El v. Dretke*

(2005) 545 U.S. 231. Instead it also considered the voir dire questions the prosecutor had posed to the various jurors. *Boyd v. Newland, supra*, 467 F.3^d at 1149. Indeed, “[i]n some circumstances, a court may have to review the questions that the prosecution asked of jurors at step one of the *Batson* analysis to determine whether a defendant has made a prima facie showing of unlawful discrimination. There is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson*.” *Ibid.* The court also observed that both *Johnson* and *Miller-El II* suggest that courts should engage in a rigorous review of a prosecution’s use of peremptory strikes. “If a trial court’s conclusion that a defendant failed to make a prima facie case could insulate from review a prosecution’s use of peremptory strikes, the holdings of those Supreme Court opinions would be undermined.” *Id.* at 1149-1150.

Comparative juror analyses is instructive in this case. For example, prospective juror No. 719 had religious objections to the death penalty because of her religious beliefs and favored life without possibility of parole over a sentence of death, but she did not lean strongly against it. Although she would have a difficult time imposing a death sentence, she would consider the evidence and apply the law in an evenhanded manner. When the prosecutor suggested she would “certainly be leaning against the death penalty strongly because of your religious beliefs,” she said, “I won’t say that’s a true statement because I have to look at the evidence. Depend on the evidence.” 5 RT 929-934. The prosecutor did not explore the depth of her religious convictions or how they might affect her ability to consider and impose

a sentence of death. His challenge for cause on these grounds was denied. 5 RT 923-934.

Prospective Juror No. 719 is no different than the only African-American prospective juror in *Crittenden v. Ayers*, Ms. Casey, who noted on her jury questionnaire “I don’t like to see anyone put to death.” During voir dire she said she was “against death—being put to death” and “against killing people.” Her feelings concerning the death penalty would not cause her to vote against a first degree murder conviction or special circumstances, if proven, but she did not know if they might impair her ability to fairly evaluate all of the evidence and make a decision regarding the death penalty. *Crittenden v. Ayers, supra*, 624 F.3^d at 950. The prosecutor’s challenge for cause was denied. Thereafter, he used a peremptory challenge to excuse Ms. Casey. The white juror who took her place was demographically similar apart from race and also expressed general opposition to the death penalty and some hesitancy about its imposition. And, although there were some differences in another white juror’s voir dire responses, she was demographically similar and shared “somewhat analogous views on the death penalty.” *Id.* at 956. Like the trial court here, the court found that the defense had not established a prima facie case of discriminatory purpose because of the “abundant . . . reasons why I would have expected a peremptory challenge on this particular matter.” *Id.* at 951. The Ninth Circuit determined, to the contrary, that excusal of the only African-American prospective juror and a comparative juror analysis were sufficient to establish a prima facie showing of discrimination. *Id.* at

Like *Crittenden v. Ayers*, several sitting non-African-American jurors in this case found the death penalty just as problematic as Prospective Juror No. 719, but they were not questioned at all about their views. Juror No. 11 believed imposing the death penalty “would be difficult, I agree with that. But, it would be based on the evidence.” 5 RT 845. Despite her misgivings, the prosecutor did not challenge her. Juror No. 2 believed, “There are cases where [the death penalty] is appropriate, and IF appropriate, I would have some reservations, but I would be willing to make such a decision.” 1 CTJQ 49. The prosecutor did not ask this juror any questions about the nature or extent of her reservations about the death penalty. 6 RT 1105-1109. Juror No. 5 believed the death penalty was imposed randomly, 1 CTJQ 120, as did Juror No. 10. 1 CTJQ 160 [“Cannot understand how one case can be judged so differently than another case when they are almost identical.”]. Neither of these jurors were questioned about how their views might impact their ability to sit as jurors in the case. 5 RT 994-997, 968-971. Given the responses of these sitting non-African-American jurors and the holding in *Crittenden v. Ayers*, the prosecutor’s challenge of Prospective Juror No. 719 raises an inference of discrimination. Her views about the death penalty do not serve to rebut that inference.

Prospective Juror No. 213 was a proponent of the death penalty. He reported a favorable experience with a psychologist in high school. He had testified as a character witness in a friend’s murder trial, and he had served as the foreman of a jury that reached a verdict in a murder trial. Finally, he was the head coach of his

high school basketball team and its practices and games presented a possible conflict with jury service, but he was confident that the game schedule did not present any problems and that practices could be moved to later in the evening. He was questioned by the prosecutor about his commitment to his basketball team, 6 RT 1082-1087; 1091-1093; about his prior experience in the criminal justice system, 6 RT 1089-1090; about his psychological and/or psychiatric treatment, 6 RT 1090-1091; and about his views concerning the death penalty. 6 RT 1093-1096.

Several sitting, non-African-American jurors reported similar experiences but went unquestioned by the prosecutor about those matters. Juror No. 1 reported in his questionnaire that he or someone close to him had been seen or treated by a psychologist or psychiatrist. 1 CTJQ 8. The prosecutor asked him no questions about his psychological and/or psychiatric treatment. 6 RT 1031-1034. Juror No. 4 reported that he had been treated by a psychologist or psychiatrist and was hospitalized in a psychiatric facility for a brief time in 1970 following his mother's death in a drunk-driving accident. 1 CTJQ 25. The prosecutor asked no questions concerning his psychological and/or psychiatric treatment, his hospitalization, or the impact it might have on his ability to consider the case. 6 RT 1133-1137.

Respondent claims that a prosecutor could be "concerned over a juror who had received psychological counseling as a young man," RB 67, but fails to address the prosecutor's lack of concern about the psychological/psychiatric experiences of these non-African-American jurors. The failure to explore the matter with these jurors raises an inference of discrimination.

Juror No. 7, like Prospective Juror No. 213, had potential scheduling problems. She had purchased non-refundable airline tickets for a vacation from November 23 to December 2, 1998. 1 CTJQ 189. Her hardship application on these grounds was denied, 1 CTHS 139; 5 RT 873, like Prospective Juror No. 213, but the prosecutor asked her no questions about how this pre-planned vacation and potential scheduling problems might affect her consideration of the case. 5 RT 797-802, 838-839, 844. In contrast Prospective Juror No. 213 was questioned at length about the potential scheduling problems coaching his basketball team might present. 6 RT 1082-1087, 1091-1093.

The jury foreman, Juror No. 12, 9 RT 1968, had served six years earlier on a jury that reached a verdict in a criminal trial involving possession of guns and weapons. 1 CTJQ 93; 6 RT 1027-1028. The only question the prosecutor asked him about his prior service was, "The other trial you served on, that was back in '92?" 6 RT 1028. Juror No. 4 had been a ward of the Oakland County Michigan court for a few years when he was a minor due to "status" offenses running away from home and school truancy). He spent about two weeks in the "Children's Village" juvenile detention facility. During that time he was assigned a probation/case worker and he testified in court. 1 CTJQ 21, 23. The prosecutor asked no questions of this juror about any of these experiences or how they might impact his consideration of the case. 6 RT 1133-1137. Respondent's claim that Prospective Juror No. 213's testimony for a friend who was accused of murder was a race-neutral ground for excusing him RB 67 is belied by the prosecutor's failure to explore Juror No. 4's

personal experience with the criminal justice system and his testimony.

“[P]otential jurors are not products of a set of cookie cutters.” *Miller-El v. Dretke, supra*, 545 U.S. at p. 247, fn. 6. “A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable.” *Ibid*. These non-African-American jurors were similar enough to Prospective Juror No. 213 that an inference of discrimination can and should be drawn from the fact that the prosecutor questioned Prospective Juror No. 213 in depth but did not ask them any questions about markedly similar responses.

CONCLUSION

The lack of diversity in the panel, along with the removal of each African-American prospective juror, justifies close scrutiny of the challenges. *United States v. Collins, supra*, 551 F.3^d at p. 921, citing *United States v. Chinchilla*, 874 F.2^d 695, 698 (9th Cir.1989) n.5 [although the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant’s rights to a fair and impartial jury]. Although it arguably does not by itself raise an inference of discrimination, the prosecutor’s use of peremptory strikes against both African-American prospective juror is a relevant consideration. *Crittenden v. Ayers, supra*, 624 F.3d at p. 955. The African-American prospective jurors shared only two characteristics - their race and age - and in all other respects were as heterogeneous as the community as a whole. The manner in which the prosecutor questioned them raises an inference of

discriminatory purpose. Additional evidence is provided by way of comparative juror analysis.

In well over 100 cases presenting *Batson* issues over the past 26 years, the California Supreme Court has never found first-stage error on appellate review, and it has only twice found third-stage error. See *People v. Chism* (2014) 58 Cal.4th 1266, 1352 [171 Cal. Rptr. 3d 347, 324 P.3d 183] (conc. & dis. opn. of Liu, J.); *People v. Harris* (2013) 57 Cal.4th 804, 885 [161 Cal. Rptr. 3d 364, 306 P.3d 1195] (conc. opn. of Liu, J.); *People v. Scott* (2015) 61 Cal.4th 363, 412 [188 Cal.Rptr.3d 328, 349 P.3d 1028] (conc. opn. of Liu, J.); *People v. Gutierrez* (2017) 2 Cal.5th 1150 [218 Cal.Rptr.3d 289, 395 P.3d 186].

This case presents an opportunity for this Court to clarify and reinforce its *Batson* jurisprudence. When illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. *Miller-El v Dretke*, *supra*, 545 U.S. at p. 252.

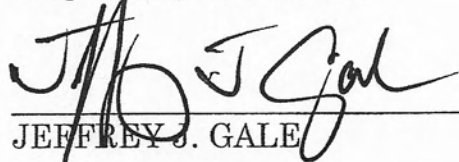
Under the totality of the circumstances, appellant met his “small” burden of proof of producing evidence sufficient to permit the trial judge to draw an inference that discrimination occurred. *Johnson v. Finn*, *supra*, 665 F.3d at p. 1068; *United*

States v. Collins, supra, 551 F.3^d at p. 920. The trial court's determination to the contrary is erroneous.

For all the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of California should be granted and the judgment of the Supreme Court of California upholding Petitioner's death sentence should be reversed.

Dated: November 20, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. J. Gale", is written over a horizontal line.

JEFFREY J. GALE

Counsel of Record for Petitioner