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

No._______

In the Supreme Court of the United States

DON'TE LAMONT MCDANIEL,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MARY K. McCOMB
State Public Defender
*ELIAS BATCHELDER
Supervising Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
(510) 267-3300
elias.batchelder@ospd.ca.gov

**Counsel of Record*

QUESTION PRESENTED

This case presents an important question over which lower courts are openly and intractably divided regarding the proper method for assessing mixed motive in *Batson* cases. In the trial below—of a Black capital defendant—the trial judge found that the prosecutor violated *Batson v. Kentucky,* 476 U.S. 79 (1986) (*Batson*) after striking five Black jurors. Concluding that the last stricken juror was eliminated based on race, the trial court ordered that juror reseated. This appeal concerns a prior strike against another Black juror, Herman Taniehill.

The prosecutor, caught violating *Batson*, was unrepentant. In the co-defendant's capital trial a few months later, a different judge found the same prosecutor *again* violated *Batson* in striking numerous Black jurors. The meaning of these multiple findings of discrimination is relatively straightforward: *this* prosecutor, believing based on racial stereotypes that Black jurors were unfavorable in *this* case, repeatedly eliminated them based upon race and misled two respective trial courts by providing pretextual justifications to shield his true motivations.

If, as here, a prosecutor enters jury selection with negative stereotypes of Black jurors in mind, and then acts upon them by striking a juror based on race, what meaning ought this finding have for analysis of strikes against other Black jurors in that same trial? The courts below afforded little, if any, weight to an explicit act of discrimination. Petitioner, however, submits that where a prosecutor both harbors discriminatory views of Black jurors and allows this racial bias to influence their choices in a specific trial, the act of decisionmaking as to *all* Black jurors in that trial is infected with some degree of racial bias. Though a prosecutor who strikes a Black juror based on race necessarily assumes Black jurors are unfavorable as a general matter, racial animosity or negative stereotypes may not be the *only* motivation in the exercise of peremptories against Black jurors. Nonetheless, biased views regarding Black jurors are surely *one* influence on their thinking. Accepting this premise—that decisionmaking by a prosecutor caught violating *Batson* is necessarily influenced by racial stereotypes and racial bias—leads to the inexorable conclusion that the prosecutor below acted, at best, with mixed motives. This, in turn, leads to the following question:

1. Should this Court resolve the intractable three-way split of authority regarding the proper method for assessing cases of mixed motive in Batson cases?

STATEMENT OF RELATED PROCEEDINGS

People v. Don’te Lamont McDaniel, Case No. TA074274
Superior Court of Los Angeles County (California)
(Trial judgment entered March 20, 2009)

People v. Don’te Lamont McDaniel, Case No. S171393
Supreme Court of California
(Direct appeal, decision issued August 21, 2021)

People v. Don’te Lamont McDaniel, Case No. S171393
Supreme Court of California
(Petition for rehearing denied and opinion modified October 20, 2021)

In re Don’te Lamont McDaniel, Case No. S270324
Supreme Court of California
(Habeas corpus petition, filed August 11, 2021)

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

STATEMENT OF RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vi

PARTIES TO THE PROCEEDINGS 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

I. THE *BATSON* MOTION BELOW: THE TRIAL COURT FINDS THE PROSECUTOR VIOLATED *BATSON* AS TO ONE JUROR, BUT WITHOUT EXPLICITLY CONSIDERING ITS FINDING OF DISCRIMINATION IN ITS ANALYSIS, IMPLICITLY FINDS NO VIOLATION AS TO ANOTHER JUROR 3

II. THE PROSECUTOR FILES A FAILED MOTION FOR RECONSIDERATION AND THEN VIOLATES *BATSON* AGAIN IN THE CO-DEFENDANT'S CASE 12

III. THE CALIFORNIA SUPREME COURT ISSUES, AND THEN MODIFIES, ITS OPINION 13

REASONS FOR GRANTING THE WRIT 16

I. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE THE LONG-STANDING SPLIT OF AUTHORITY ON HOW TO TREAT MIXED MOTIVES IN *BATSON* CASES 18

CONCLUSION 24

TABLE OF CONTENTS

Page

APPENDICIES 25

A. *People v. McDaniel*, No. S171393, California Supreme Court Slip Opinion, August 26, 2021 25

B. *People v. McDaniel*, No. S171393, California Supreme Court Petition for Rehearing, September 10, 2021 26

C. *People v. McDaniel*, No. S171393, California Supreme Court Order Modifying Opinion And Denying Petition For Rehearing, October 20, 2021. 27

D. *McDaniel v. California*, Application No. 21A316, United States Supreme Court, Order Granting Extension of Time to File Petition for Writ of Certiorari, January 12, 2022 28

E. *People v. McDaniel*, No. S171393, California Supreme Court, Motion for Judicial Notice, August 6, 2015 29

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Akins v. Easterling,
648 F.3d 380 (6th Cir. 2011) 21

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

Berquist v. Washington Mut. Bank,
500 F.3d 344 (5th Cir. 2007) 17

Cook v. LaMarque,
593 F.3d 810 (9th Cir. 2010) 19, 21

Flowers v. Mississippi,
139 S.Ct. 2228 (2019) 17, 22

Gattis v. Snyder,
278 F.3d 222 (3d Cir. 2002) 19

Hein v. All America Plywood Co., Inc.,
232 F.3d 482 (6th Cir. 2000) 17

Howard v. Senkowski,
986 F.2d 24 (2d Cir. 1993) 19

Jones v. Plaster,
57 F.3d 417 (4th Cir. 1995) 19

Kesser v. Cambra,
465 F.3d 351 (9th Cir. 2006) 21

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 17

Shuttlesworth v. Birmingham,
394 U.S. 147 (1969) 13

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

TABLE OF AUTHORITIES

Page(s)

United States v. Darden,
70 F.3d 1507 (8th Cir. 1995) 19

Wallace v. Morrison,
87 F.3d 1271 (11th Cir. 1996) 19

Washington v. Roberts,
846 F.3d 1283 (10th Cir. 2017) 21

Whole Woman's Health v. Hellerstedt,
579 U.S. 582 (2016) 13

Wilkerson v. Texas,
493 U.S. 924 (1989) 18

STATE CASES

Ex parte Sockwell,
675 So.2d 38 (Ala. 1995) 20

McCormick v. State,
803 N.E.2d 1108 (Ind. 2004) 20

Payton v. Kearse,
329 S.C. 51 (1998) 20

People v. Douglas,
22 Cal. App. 5th 1162 (Cal. Ct. App. 2018) 20

People v. Hardy,
5 Cal. 5th 56 (2018) 5, 6, 22

People v. Lewis,
43 Cal. 4th 415 (2008) 23

People v. McDaniel,
12 Cal. 5th 97 (2021) .... passim

Rector v. State,
213 Ga. App. 450 (1994) 20

TABLE OF AUTHORITIES

Page(s)

Riley v. Commonwealth,
21 Va. App. 330 (1995) 20

Robinson v. United States,
890 A.2d 674 (D.C. App. 2006) 19

State v. King,
572 N.W.2d 530 (Wisc. App. 1997) 20

State v. Lucas,
199 Ariz. 366 (Ariz. App. 2001) 20

Strozier v. Clark,
206 Ga. App. 85 (1992) 20

FEDERAL STATUTES

28 U.S.C.
§ 1257(a) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. 14th 2

OTHER AUTHORITIES

Appellant's Opening Brief, *People v. McDaniel*,
No. S171393 (filed August 6, 2015) 5, 22

Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*,
66 MD. L. REV. 279 (2006) 18, 19, 20

Cox, *The "Tainted Decision-Making Approach": A Solution for the Mixed Messages* Batson *Gets from Employment Discrimination*
56 CASE W. RES. LAW REV. 769 (2006) 18

McDaniel et al., *The Black Gender Gap in Educational Attainment: Historical Trends and Racial Comparisons*, 48 DEMOGRAPHY
889 (2011) 9

TABLE OF AUTHORITIES

Page(s)

Tolnay, *Educational Selection in the Migration of Southern Blacks, 1880-1990*, 77 SOCIAL FORCES 487 (1998).. 9

Transcript of Oral Argument, *Flowers v. Mississippi,* 139 S.Ct. 2228 (2019) 16

Petitioner, Don’te Lamont McDaniel, respectfully petitions for a Writ of Certiorari to review the judgment 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, Don’te Lamont McDaniel, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on August 26, 2021, reported as *People v. McDaniel*, 12 Cal. 5th 97 (2021). A copy of that opinion is attached. Appendix A. A petition for rehearing, Appendix B, and a request to modify the opinion were filed on September 10, 2021. On October 20, 2021, the court issued an order denying the petition for rehearing and modifying the opinion, a copy of which is attached as Appendix C.

JURISDICTION

The California Supreme Court entered its judgment on August 26, 2021 and denied rehearing on October 20, 2021. On January 12, 2022, Justice Kagan granted petitioner’s application for extension of time within which to file a petition for certiorari in this case to March 19, 2022. Appendix D. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

///

///

STATEMENT OF THE CASE

In 2008, petitioner Don'te Lamont McDaniel, a Black man, was tried for a gang-related murder. Mr. McDaniel and his codefendant, Kai Harris, were charged with entering an apartment in the Nickerson Gardens housing project in South Central Los Angeles and killing two occupants, Annette Anderson and George Brooks. Two others inside the apartment were wounded. The prosecution theory was that McDaniel and Harris, both members of the Bounty Hunter Bloods gang, retaliated against Mr. Brooks—a member of the same gang—for taking drugs without payment from a high-level dealer. *See People v. McDaniel*, 12 Cal. 5th 97, 108-113 (2021) (*McDaniel*) (summarizing prosecution case). Mr. McDaniel was convicted of capital murder with a special circumstance of multiple murder and sentenced to death. *Id.* at 108. Mr. Harris, whose appeal remains pending, was tried separately, convicted and sentenced to death. In both cases, there were successful *Batson* motions raised against the trial prosecutor, Halim Dhanidina.

I. THE *BATSON* MOTION BELOW: THE TRIAL COURT FINDS THE PROSECUTOR VIOLATED *BATSON* AS TO ONE JUROR, BUT WITHOUT EXPLICITLY CONSIDERING ITS FINDING OF DISCRIMINATION IN ITS ANALYSIS, IMPLICITLY FINDS NO VIOLATION AS TO ANOTHER JUROR

The prosecutor quickly eliminated three Black jurors during jury selection in his first eight strikes. When the third juror, Herman Taniehill, was stricken, counsel objected, noting that he "seemed fairly strong on the death penalty" and

had no obvious problems in his questionnaire. *McDaniel*, 12 Cal. 5th at 118. This juror indeed had several seemingly favorable prosecution characteristics: Mr. Taniehill "had served in the military," *id.* 126, thought that the death penalty was applied "too seldom," (5 CT 1216), and had written that he would not consider mental health testimony or background and upbringing as mitigation in a capital case. (5 CT 1215). The trial court nevertheless denied the objection, finding no prima facie pattern of discrimination sufficient to require a response from the prosecution. *Ibid*.

In the following four peremptory challenges, however, the prosecutor struck two additional Black prospective jurors, for a total of five Black jurors eliminated in the first twelve peremptory challenges. When the fifth Black juror, Prospective Juror No. 46,[1] was stricken, defense counsel again objected. Expressing concern regarding the disproportionate strikes against Black prospective jurors, the trial court found a prima facie case of discrimination and demanded a justification for all five strikes. *McDaniel*, 12 Cal. 5th at 118-19.

For Mr. Taniehill, the juror at issue here, the prosecutor provided three bases for his excusal.

First, the prosecutor alleged that his "primary problem" with this juror "was that he*, along with many others, in fact* – but he indicated that life without

[1] Because Prospective Juror No. 46 was ultimately seated and the names of the seated jurors sealed by the trial court, he is referred to only by his juror number.

parole is a more severe sentence, which I don't think is a good instinct to have on a death penalty jury." (5 RT 1078-1079) (emphasis added.)

As the prosecutor's italicized admission suggested, he based this alleged "primary concern" on a wide-spread questionnaire response of questionable relevance. See Appellant's Opening Brief, *People v. McDaniel*, No. S171393 (filed August 6, 2015) (AOB) at 75 ("no less than 33 prospective jurors explicitly state that they felt LWOP was more severe. An additional eight prospective jurors stated or suggested that the two were equivalent"); *People v. Hardy*, 5 Cal. 5th 56, 83 (2018) (*Hardy*) (recognizing that a prospective jurors' unconsidered questionnaire response that a life sentence is more severe than a death sentence is a "weak reason" for their excusal). Indeed, the prosecutor and the trial court had explicitly noted earlier during voir dire that this questionnaire response was quite prevalent. (4 RT 857) (trial court: "many of you in your responses said . . . I think life without parole is worse"), (4 RT 942) (prosecutor: "I noticed on the questionnaires . . . a lot of people felt that a life sentence or a life without parole is more severe than the death penalty"). The belief was so prevalent, in fact, that the trial court decided to admonish the entire jury pool that the law dictated that death was the more severe punishment. (4 RT 857). Of the 18 jurors and alternates, the prosecution accepted four who stated that a life sentence was more severe than death. AOB at 76-77. No one asked Mr. Taniehill any

questions about his belief that a life sentence was more severe than a death sentence—the purportedly "primary" driver of the strike against him.

Second, the prosecutor noted that Mr. Taniehill indicated on his questionnaire that "he did not want to serve on the jury because he felt like the trial would be too long." (5 RT 1079). The prosecutor explained that he tried "not to have jurors on death penalty cases that don't want to be here and don't want to take the time in particular to be here" and a "juror that is in a rush is not a juror I want to have." (5 RT 1079).

This was a complex capital case in which the court had estimated a roughly four week trial. (3A RT 452). Over 50 prospective jurors expressed concern stemming from the length of the trial and/or related conflicts in schedule. See AOB at 80-81 & n.22. Nowhere in his questionnaire did Mr. Taniehill indicate he was "in a rush." In fact, unlike scores of other jurors concerned with the duration of the trial, Mr. Taniehill did not request to seek excusal from the jury based on its length, nor did he otherwise exhibit hostility to sober deliberation. To the contrary, during voir dire the trial court actually *commended* Mr. Taniehill specifically for showing up to serve on this lengthy case notwithstanding his reservations about its duration. (4 RT 878); see also *Hardy*, 5 Cal. 5th at 82 (a prospective jurors' desire not to sit on a lengthy capital trial is "also a rather weak reason" because "[m]any prospective jurors do not want to sit on a jury in a death penalty case"); see also *Snyder v. Louisiana,* 552

U.S. 472, 482 (2008) (discounting claim that juror was stricken due to concern that he would return verdict quickly to avoid scheduling conflict; even if a true concern, juror's hypothesized impatience "might have led him to agree [with verdict favoring prosecution] in order to speed the deliberations").

A comparison to Seated Juror No. 5 is particularly striking. Seated Juror No. 5 wrote on his questionnaire that he did not wish to serve on the jury because he was a manager at a store and "need[ed] to work to make house payment." (4 CT 784.) He separately noted at the end of his questionnaire that he "need[ed] to be at work" because he was the "leader there at my store" and that, because he was buying his first house and needed to move, "I can't be here." (4 CT 787.) Although Seated Juror No. 5 requested excusal during the hardship period of voir dire, the trial court denied his request. (3A RT 495.) The prosecutor later asked Seated Juror No. 5 about his concerns during attorney-led voir dire. (4 RT 964.) Seated Juror No. 5 reaffirmed that he did not want to serve on the jury due to financial issues. (4 RT 964.) When asked whether this issue would impact how he looked at the evidence, he stated, "I believe so." (4 RT 964.) When asked how so, he responded, "there's lots of things going on in my personal life financial-wise that I need to take care of the family." (4 RT 964.) When asked if he could set aside those feelings if instructed to do so, the juror stated, "I guess I have to." (4 RT 964.) When the prosecutor responded, "you have to?" the juror responded, "it is the law." (4 RT 964-965.)

Notwithstanding his purported concern for seating jurors who did "want to be here," the prosecutor accepted Seated Juror No. 5. In contrast, the prosecutor did not even ask Mr. Taniehill a single question about the alleged flaw that he did not wish to serve on a lengthy capital trial.

Third, the prosecutor indicated that he was trying "to have a jury with as much formal education as possible. And this juror I think just completed the twelfth grade." (5 RT 1079.) Despite this alleged desire for formally educated jurors, the seated jury accepted by the prosecution had seven members who did not have college degrees, three of whom did not even graduate high school.[2] Nor had any of the six alternate jurors accepted by the prosecution completed four years of college.[3] The prosecutor did not explain why jurors without a college education would be less favorable to the prosecution in this case. However, as noted by the California Supreme Court, "[e]ducational disparities" among jurors "fell across racial lines," with Black jurors far less likely to have college experience. *McDaniel*, 12 Cal. 5th at 125.

---

[2] 4 CT 777 (Seated Juror No. 5: "11th grade"); 4 CT 861 (Seated Juror No. 12 "14"); 4 CT 801 (Seated Juror 7 "some high school"); 4 CT 753 (Seated Juror 3: "high school"); 4 CT 813 (Seated Juror 12: "12th grade and trade school"); 4 CT 4 CT 766 (Seated Juror No. 4: "some college courses");

[3] 4 CT 873 (Alternate Juror No. 1, 2 years of college); 4 CT 885 (Alternate Juror No. 2, AA degree); 4 CT 897 (Alternate Juror No. 3, some college); 4 CT 909 (Alternate Juror No. 4, high school graduate and 1 year of junior college); 4 CT 921 (Alternate Juror No. 5, some college); 4 CT 933 (Alternate Juror No. 6, college student with approximately 80 units).

Mr. Taniehill, for his part, was an older Black man who was born in the 1930s—an era when it was extremely rare for Black men to receive college degrees.[4] Mr. Taniehill was also born in the Jim Crow South. 5 CT 1209. Because of the forced racial hierarchy of the South at this time, it was even more uncommon for Black men of Mr. Tanniehill's generation from the South to attend college. *See* Tolnay, *Educational Selection in the Migration of Southern Blacks*, *1880-1990*, 77 SOCIAL FORCES 487, & n.18 (1998) (noting "large regional differences in educational attainment" among Black population because of "the slow development of educational opportunities for blacks in the South": average years of schooling for Black men in the South who were over 25 of years of age in the 1950s was only 5.5 years).

Notwithstanding these substantial social disadvantages, Mr. Taniehill graduated high school, joined the military, and became an electrician working for an aircraft company. *McDaniel*, 12 Cal. 5th at 126. The prosecutor asked Mr. Taniehill no questions about his education or what it might signify about his ability to deliberate.

After the prosecutor completed providing his reasons for eliminating Mr. Taniehill, defense counsel interjected that:

---

[4] 5 CT 1209; see McDaniel et al., *The Black Gender Gap in Educational Attainment: Historical Trends and Racial Comparisons,* 48 DEMOGRAPHY 889 (2011), Appendix, figure 1 (between 1950 and 1960, only approximately 2-3% of African American men between 22 and 28 years old had completed college).

> There were many jurors – those particular reasons – the education, LWOP[5] is more severe, the uncomfortable – you know, the time issue with regard to the jury, there are a lot of people on this panel that have reflected – and you corrected them in your opening remarks, and they all backed off of any problem in that regard. ¶ As far as education goes, I haven't gone through it particularly, but there are lots of jurors –

(5 RT 1079-1080.)

The court then interrupted to note that Mr. Taniehill had given a potentially problematic questionnaire response relating to the death penalty. (5 RT 1080.) Defense counsel explained that Mr. Taniehill had clarified during court-led voir dire that this answer was simply a mistake. (5 RT 1080); *McDaniel*, 12 Cal. 5th at 119 ["Defense counsel confirmed that [Mr. Taniehill] . . . said he had made a mistake"]; see also 4 RT 878 [voir dire].) The prosecutor did not adopt Mr. Taniehill's mistaken response as a basis for excusal or reference Mr. Taniehill's response related to the death penalty in any way during the hearing.

As the hearing continued, the prosecutor subsequently gave three reasons for his strike of the fifth Black juror, Prospective Juror No. 46 (later Seated Juror No. 3). The first reason, relating to the relative severity of LWOP and the death penalty, was strikingly similar to the "primary" reason given for the strike of Mr. Taniehill: the "prosecutor noted that Prospective Juror No. 46 believed that life without parole and the death penalty 'are essentially the same because

[5] Life without the possibility of parole.

life in prison is not a life.'" *McDaniel*, 12 Cal. 5th at 120. The prosecutor also noted that Prospective Juror No. 46 had stated that he did not believe the death penalty was a deterrent, which he claimed "'is not an attitude that I considered to be a fair attitude.'" *Ibid*. Finally, the prosecutor noted that the juror listed to an allegedly "liberal" public radio station—which the prosecutor himself also listed to—that had at some point invited "guest speakers and interviews [sic] that are anti-death penalty advocates." *Ibid.*; (5 RT 1082). Defense counsel countered that, in addition to the prosecutor, he and many other "conservative jurors" listened to this and other public radio stations. (5 RT 1082).

Initially, the trial court denied the *Batson* motion as to all jurors stating that he was "accepting of the articulated reasons that have been advanced here." *McDaniel*, 12 Cal. 5th at 120. However, immediately thereafter, the trial court reversed course, finding that the reasons provided for striking Prospective Juror No. 46, in particular his choice of a particular radio station, was "not a valid reason." *Ibid.*; (5 RT 1085). At the election of trial counsel, the trial court ordered that Prospective Juror No. 46 be reseated. *Ibid*.

The prosecutor, seeking to change the trial court's mind, then attempted to proffer additional justifications—noting the fact that the juror volunteered at a non-profit called "urban possibilities." *McDaniel*, 12 Cal. 5th at 120. He then asked for a recess to consult his supervisors about the court's "highly unusual" decision. *Ibid*. Both efforts failed.

However, the trial court made no further findings concerning the *other* four jurors (including Mr. Taniehill), implicitly leaving in place its prior statement—made *before* the finding of the *Batson* violation—that he was "accepting of the articulated reasons that have been advanced here." *McDaniel*, 12 Cal. 5th at 120. The trial court made no mention of weighing the *Batson* violation as to Prospective Juror No. 46 when assessing the *Batson* violation as to the other jurors.

II. THE PROSECUTOR FILES A FAILED MOTION FOR RECONSIDERATION AND THEN VIOLATES *BATSON* AGAIN IN THE CO-DEFENDANT'S CASE

The prosecutor later filed a motion for reconsideration, arguing that he had not violated *Batson* because the trial court had applied an erroneous "for cause" standard to his peremptory challenge when he had ruled that one of the prosecutor's reasons for excusing Prospective Juror No. 46 was "not valid." *McDaniel*, 12 Cal. 5th at 121. The trial court denied the motion, explaining that he "st[oo]d by his ruling" and still did not believe "they [the prosecutor's reasons for striking Prospective Juror No. 46] were valid under the circumstances because I think there were other jurors who said similar statements as this juror." *Ibid.* (brackets in original).

A few months later, the same prosecutor, Mr. Dhanidina, tried the co-defendant, Kai Harris, before a different trial court. There was another *Batson* objection after Mr. Dhanidina removed numerous Black jurors and other jurors

of color during that trial. The court found that Mr. Dhanidina violated *Batson* based on discrimination against a Black juror and granted a mistrial. *See* Motion for Judicial Notice, *People v. McDaniel*, No. S171393 (filed August 6, 2015), attached Appendix E. The California Supreme Court, although acknowledging that it could have appropriately granted judicial notice of the co-defendant's proceeding, exercised its discretion and declined to do so on direct appeal, "without prejudice to McDaniel presenting such information on a fuller record in connection with a petition for habeas corpus." *McDaniel*, 12 Cal. 5th at 128; see also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (court may take notice of "litigation between the same parties who are now before us"); *Whole Woman's Health v. Hellerstedt,* 579 U.S. 582 (2016), ___ n.24 (Alito, J., dissenting) (taking judicial notice of documents filed by one of the parties in a "closely related" case).

III. THE CALIFORNIA SUPREME COURT ISSUES, AND THEN MODIFIES, ITS OPINION

On August 26, 2021, the California Supreme Court issued its opinion in this case affirming the judgment in its entirety. *McDaniel*, 12 Cal. 5th 97. The original opinion "assume[d]" that that trial court had correctly determined that the prosecutor had violated *Batson* by excusing Prospective Juror No. 46. *Id.* at

123.[6] The opinion concluded that the discriminatory strike against Prospective Juror No. 46 was a "relevant circumstance" in assessing the strike against Mr. Taniehill. *Ibid*. However, aside from acknowledging relevance, the opinion did not provide any guidance concerning what *weight* trial courts should afford such direct evidence of discrimination.

Instead, the opinion's only further reference to the finding of discrimination was its assertion that the trial court was "well aware of the [*Batson*] violation [against Prospective Juror No. 46] when it ruled on all five strikes at the same time." *Ibid*. This logic of this conclusion is dubious. The trial court ruled on "all five strikes at the same time" when there was no *Batson* violation. The meaning of the trial court's initial ruling was that it had determined that all five strikes were nondiscriminatory. The trial court then reconsidered its ruling regarding Prospective Juror No. 46.

However, even assuming the California Supreme Court was correct, there is no evidence that the trial court relied on its *subsequent* finding of discrimination in making the *prior* determination as to the first four jurors. *Cf. Snyder*, 552 U.S.at 478 ("a court *would be required* to consider the strike of [one juror] for the bearing it might have upon the strike of another]) (emphasis

---

[6] Like the prosecutor below, the Attorney General had argued on appeal that the trial court had employed an improper "for cause" standard in sustaining the *Batson* objection.

added). Mr. McDaniel filed a petition for rehearing, explaining these and other deficiencies. Appendix B.

In particular, the petition for rehearing underscored that one of the most powerful facts supporting a finding of discrimination in this case is the "troubling parallel between the challenges of [Mr. Taniehill] and Prospective Juror No. 46. They were both stricken [using] the same sham reason: their views on the comparative severity of death and life without the possibility of parole (LWOP)." Appendix B at 9. Notwithstanding the striking resemblance between the reason given for striking Prospective Juror No. 46 (which the trial court found pretextual) and the primary reason given for striking Mr. Taniehill, the original opinion not only failed to acknowledge the similarity between these justifications but obscured it altogether. In laying out the facts detailing why Prospective Juror No. 46 was pretextually excused, the opinion omitted any reference to the justification relating to the severity of LWOP. *Ibid*.

On October 20, 2021, the California Supreme Court denied the petition for rehearing. However, it revised its opinion to list the pretextual reason for excusing Prospective Juror No. 46 relating to the comparative severity of a life and death sentence it had previously omitted. Appendix C.

REASONS FOR GRANTING THE WRIT

This case has a striking feature: it contains direct evidence of discrimination by the prosecutor, who violated *Batson* in Mr. McDaniel's trial and soon after that again violated *Batson* in the co-defendant's trial, each time excusing Black jurors based on race. Given the existence of discrimination by the prosecutor below in excusing Prospective Juror No. 46, the question before this Court is how that evidence should have factored in the analysis of the challenge against the prior stricken juror, Mr. Taniehill. However, although this case's specific (and troubling) facts are uncommon, it nonetheless raises an important and frequently recurring question that hopelessly divides the state and federal courts: how should reviewing courts treat questions of mixed motives in the *Batson* context.

From the *Batson* violation against Prospective Juror No. 46 alone, any reviewing court can determine that this prosecutor 1) held negative stereotypes of Black jurors, believing that Black jurors as a general matter were unfavorable to the prosecution, and 2) holding these stereotypes in mind, allowed them to influence his selection of the jury in this case (to such an extent that he provided pretextual justifications to multiple trial courts in an effort to hide his repeated instances of unconstitutional misconduct). In other words, from the *Batson* violation alone, it can be said that race was *a factor* in the prosecutor's mind, if not the *only* factor, in selecting the jury *in this case*. *Cf.* Tr. of Oral Arg. at 18-20,

Flowers v. Mississippi 139 S.Ct. 2228 (2019)(Chief Justice Roberts's inquiry into the probative weight of a prior *Batson* violation by a prosecutor 20 or 30 years prior to the present trial).

To analogize to the Title VII context from which the *Batson* framework was adopted, when as here direct evidence of discrimination exists, "the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., conc.); *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007) ("If a plaintiff produces direct evidence of discrimination, no further showing is required, and the burden shifts to the employer" to establish that the discriminatory motive did not impact the hiring decision); see also *Hein v. All America Plywood Co., Inc.*, 232 F.3d 482, 488 (6th Cir. 2000) (direct evidence of discrimination requires a showing both that an "employer was predisposed to discriminate on the basis of [a protected classification], [and] also that the employer acted on that predisposition"). In other words, when as here there is direct evidence of discrimination, the next step is to assess the question of mixed motives.

However, although the trial court found—and California Supreme Court explicitly assumed—the existence of discrimination by the prosecutor in this case, the legal test for how to analyze a case of mixed motives in the *Batson*

context has created a quagmire of conflicting decisions in the lower courts. This Court should grant certiorari to resolve the confusion.

I. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE THE LONG-STANDING SPLIT OF AUTHORITY ON HOW TO TREAT MIXED MOTIVES IN *BATSON* CASES

This case presents an important question of law that has divided lower courts for decades. How should trial and reviewing courts address cases in which race—at least in part—played a role in the prosecution's decision to strike a juror (so-called "mixed motivation" *Batson* cases)? That question has resulted in a tangled morass of published, conflicting opinions in both state and federal courts. *See generally*, Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 297-301 (2006) (collecting and discussing conflicting cases); Lisa M. Cox, *The "Tainted Decision-Making Approach": A Solution for the Mixed Messages* Batson *Gets from Employment Discrimination* 56 CASE W. RES. LAW REV. 769, 782-789 (2006) (accord).

Divisions on this issue have persisted for nearly thirty years. Shortly after *Batson* was decided, two justices of this Court argued that a "mixed motive" analysis should be rejected in the *Batson* context because of the "special difficulties of proof that a court applying that standard to a prosecutor's peremptory[]challenge[.]" *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of certiorari). Yet as this Court explained

nearly twenty years after *Wilkerson* in *Snyder*, 552 U.S. 472, this Court had still not addressed the issue. *Id.* at 485 ("We have not previously applied this [mixed motives] rule in a *Batson* case, and we need not decide here whether that standard governs in this context"). As a result of this silence, lower courts have applied numerous separate tests, splitting circuits—and even single states—into divergent camps.

Many federal circuits have adopted a "mixed motives" analysis requiring a showing that discrimination was the "but for" cause of the strike. *Howard v. Senkowski,* 986 F.2d 24, 27–30 (2d Cir. 1993); *Gattis v. Snyder,* 278 F.3d 222, 232–35 (3d Cir. 2002)*; Wallace v. Morrison,* 87 F.3d 1271, 1274–75 (11th Cir. 1996) (per curiam)*; Jones v. Plaster,* 57 F.3d 417, 420–22 (4th Cir. 1995)*; United States v. Darden,* 70 F.3d 1507, 1530–32 (8th Cir. 1995). Under this test, even when a prosecutor frankly admits that "race was a factor I considered," some courts have found no constitutional violation. *Wallace*, 87 F.3d at 1273. The Ninth Circuit, however, has explicitly parted company with its sister circuits and rejected this view, holding that a constitutional violation is established so long as discrimination was a "substantial factor" motivating the juror's excusal. *Cook v. LaMarque*, 593 F.3d 810, 815 (9th Cir. 2010); see also Covey, *supra*, 66 MD. L. REV. at 330-346 (advocating for substantial factor test); *Robinson v. United States* 890 A.2d 674, 679-681 (D.C. App. 2006) (if racial bias is a "substantial part" of challenge, reversal is required despite partially unbiased reasons).

In contrast to the two federal approaches, many state courts have rejected the application of a "mixed motive" analysis altogether, adopting a per se "tainted" approach when racial bias infects strikes in any way. *See*, *e.g.*, *McCormick v. State* 803 N.E.2d 1108, 1113 (Ind. 2004) ("it is not appropriate to apply the dual motivation analysis in the *Batson* context;" one biased "challenge tainted any nondiscriminatory reasons"); *State v. Lucas*, 199 Ariz. 366, 369 (Ariz. App. 2001) ("any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process"); *Payton v. Kearse*, 329 S.C. 51, 59 (1998) ("Once a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection procedure"); *see also Riley v. Commonwealth*, 21 Va. App. 330, 336 (1995); *Rector v. State*, 213 Ga. App. 450, 454 (1994); *Ex parte Sockwell,* 675 So.2d 38, 41 (Ala. 1995); *Strozier v. Clark,* 206 Ga. App. 85, 88 (1992); *State v. King*, 572 N.W.2d 530, 535-536 (Wisc. App. 1997); *People v. Douglas*, 22 Cal. App.5th 1162 (Cal. Ct. App. 2018).

The lingering jurisprudential conflict has led to the bizarre result of one jurisdiction's two highest courts coming to opposite conclusions, resulting in different outcomes based on whether a case is criminal or civil. *Covey*, supra, at 298 & n.96 (discussing conflict between Texas Court of Criminal Appeals and Supreme Court of Texas). Moreover, California state authority now contradicts the federal circuit with jurisdiction over California cases. *Compare People v.*

Douglas, 22 Cal. App. 5th at 1174-75 (adopting per se tainted approach) *with Cook v. LaMarque*, 593 F.3d at 815 (adopting substantial factor test).

Some state courts have even applied a fourth test with no apparent doctrinal underpinning: a "sole motivation" test. However, even though published decisions have "overwhelmingly reject[ed] a sole-motivation standard in favor of some level of dual-motivation analysis" this Court's silence and the deferential prism of the AEDPA have prevented federal courts from correcting apparent errors. *Akins v. Easterling*, 648 F.3d 380, 389–92 (6th Cir. 2011) ("sole motivation" test was not an unreasonable application of clearly established federal law); *Washington v. Roberts*, 846 F.3d 1283, 1292 (10th Cir. 2017) (accord). This confusing and conflicting set of tests is itself a compelling reason for this Court to supply a definitive answer.

Yet the predicament of trial courts ruling on fast-paced *Batson* hearings presents perhaps the most compelling reason to resolve the conflict. It may be true that the most common context of *appellate* review of mixed motive questions—prosecutorial admission of at least one race-conscious justification—is relatively rare. *Kesser v. Cambra*, 465 F.3d 351, 373 (9th Cir. 2006) (en banc) (Wardlaw, J., concurring). But the reality is that for *trial* courts, mixed motivation questions likely arise *sub silentio* far more frequently. That is because every instance in which at least one of a prosecutor's list of reasons is questionable may present to a trial court the question of mixed motives. In the

heat of trial, a trial judge may not pause to articulate the split of appellate authority or even the possibility of mixed motives. However, the mere fact that a single (or multiple) justifications are suspect raises the possibility that racial stereotypes may have placed an invisible, invidious weight on the scale.

Mr. McDaniel's case is just such a case. The trial court recognized explicitly that the prosecutor *was discriminating based on race* (as did the trial court in the co-defendant's case). Nevertheless, the trial court never paused to reflect upon how a finding that the prosecutor discriminated against Black jurors should impact its analysis of the many prior Black jurors stricken by the prosecution.

Nor is that the only evidence of discrimination against Mr. Taniehill. The California Supreme Court itself noted that the prosecutor engaged in highly disproportionate strikes against Black jurors. *McDaniel*, 12 Cal. 5th at 124. Moreover, two of the three justifications given by the prosecutor for striking Mr. Taniehill have been specifically identified as "weak" by the California Supreme Court. *Hardy*, 5 Cal. 5th at 82-83. In addition, all three allegedly problematic characteristics (a belief that LWOP was the more severe punishment, lack of higher education, and a desire not to sit on a lengthy capital trial) were possessed by numerous jurors, including several jurors accepted by the prosecution. See AOB at 74-83; *Flowers v. Mississippi*, 139 S.Ct. at 2248 ("Comparing prospective jurors who were struck and not struck can be an

important step in determining whether a Batson violation occurred") As further evidence of the prosecutor's pretext, the prosecutor did not pose a *single* question to Mr. Taniehill regarding any of his purported flaws. *People v. Lewis*, 43 Cal. 4th 415, 476 (2008) (failure to explore excused juror's views at all during voir dire "troubling").

Given the fact that the prosecutor appears to have entered jury selection in this case with an intent to discriminate against Black jurors, which he effected in the strike of Prospective Juror No. 46, it is inconceivable that his decision to strike Mr. Taniehill was not also motivated, at least in some part, by race. *Snyder*, 552 U.S. at 485. The California Supreme Court should have recognized the patent evidence of discrimination and addressed the question of mixed motives. Because it did not do so, this Court should grant certiorari to clarify this pressing legal issue.

///

///

CONCLUSION

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

Dated: March 21, 2022

Respectfully submitted,

MARY K. MCCOMB
California State Public Defender

/s/ Elias Batchelder

ELIAS BATCHELDER
Supervising Deputy State Public Defender
Counsel of Record
1111 Broadway, Suite 1000
Oakland, California 94607
elias.batchelder@ospd.ca.gov
Tel: (510) 267-3300

Counsel for Petitioner