CAPITAL CASE

No. _____

In the Supreme Court of the United States

JAIME HOYOS, Petitioner

vs.

RONALD DAVIS, Warden, San Quentin State Prison, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

MARK F. ADAMS
325 W. Washington St., Suite 2341
San Diego, CA 92103
619-846-5125
Email: markadamsesq@gmail.com

ERIC S. MULTHAUP
35 Miller Avenue, Suite 229
Mill Valley, CA 94941
415-381-9311
Email: mullew@comcast.net

Counsel for Petitioner Jaime Hoyos

QUESTION PRESENTED

DID THE NINTH CIRCUIT COURT OF APPEALS VIOLATE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT BY ITS FAILURE TO APPLY THIS COURT'S STANDARD SET FORTH IN *JOHNSON V. CALIFORNIA* (2005) 545 U.S. 162 REGARDING THE SUFFICIENCY OF A PRIMA FACIE SHOWING OF DISCRIMINATORY USE OF PEREMPTORY STRIKES BY THE PROSECUTION WHERE THE RECORD ESTABLISHES:

1. The prosecution struck all three Hispanic female jurors who were seated as prospective jurors during voir dire;

2. Petitioner is Hispanic and the victims were white;

3. The prosecutor left three white jurors seated whose concerns about the death penalty were virtually identical to those expressed by two of the struck Hispanic jurors Yolanda M. and Lisa H.; and

4. The three Hispanic women struck by the prosecutor were all excellent candidates for jury service as indicated by their shared status as respectable and gainfully employed members of the community.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

In the Supreme Court of the United States

Petitioner Jaime Hoyos respectfully petitions a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals affirming his convictions and sentence of death.

OPINION BELOW

The opinion below was initially filed on September 2, 2022 as *Hoyos v. Davis*, 47 F.4th 1016 (9th Cir. 2022). Petitioner filed a timely petition for rehearing and for rehearing *en banc* on September 15, 2022. On October 17, 2022, the Ninth Circuit in a written order denied the petition for rehearing and for rehearing *en banc* and issued an amended opinion on the *Batson* issue only, Appendix A. A Memorandum Decision of the Ninth Circuit affirmed the denial of Petitioner's many remaining claims, Appendix B.

JURISDICTION

The Ninth Circuit issued its amended Opinion and Memorandum Decision on October 17, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's rights were violated under the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides

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

INTRODUCTION

On May 26, 1992 Mary and Dan Magoon where shot to death in their home in east San Diego County near the international border with Mexico. For years they had trafficked in illegal narcotics, working with various narcotics brokers in Mexico unaffiliated with either of the major international cartels controlling the border area. At the time of their deaths, the border territory in the state of Baja California between Tijuana to the west and Mexicali to the east was the subject of a deadly turf war that continues today. The Magoons had recently lost a significant drug load, had a reported $250,000 in cash at their home, were both armed and under the influence of drugs, each had significant amounts of cocaine in their blood system at death.

Petitioner, Hoyos, and his brother-in-law and co-defendant, Alvarado, were arrested and convicted in a joint trial of killing the Magoons. Petitioner was sentenced to death for killing Mary Magoon and life in prison without the possibility of parole for killing Dan Magoon. After the guilt phase, a mistrial was declared in Alvarado's case when a *Brady* violation was revealed. Alvarado later plead guilty to both killings and was sentenced to life in prison. A comprehensive post-conviction

forensic analysis of all physical evidence demonstrated conclusively that Petitioner could not have killed either of the Magoons.

At trial, Petitioner's defense counsel advanced a ridiculous theory that the killings were the result of a "drug deal gone bad". This theory did not account for the killing of Mary Magoon, belied the evidence that Petitioner was a friend to the Magoon family and ignored the many cartel figures with motive and opportunity to kill the Magoons. This defense theory also ignored Petitioner's stated desire to testify in his own defense that he did not harm the Magoons and that when he and his brother-in-law arrived at the Magoon home the Magoons had already been killed.

In addition to the *Batson* issue, Petitioner raised numerous issues relative to the failure of his counsel to effectively investigate the facts of the case, understand Petitioner's testimony in his defense and otherwise adequately represent his interests, the failure of the prosecution to discharge their constitutional responsibilities under *Brady v. Maryland*, the trial court's refusal to sever Petitioner's trial from his co-defendant in order to safeguard Petitioner's right to testify in his defense and Petitioner's manifest disability pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002). The Ninth Circuit declined to address Petitioner's uncertified claims including that he was denied due process by the trial court's failure to allow evidence of Mary Magoon's propensity for violence, his counsel's

failure to move to exclude custodial statements and the unconstitutional delay in presenting Petitioner for arraignment. This petition for Writ of Certiorari follows.

STATEMENT OF THE CASE

A. The Circumstances of the Offense.

Petitioner Hoyos and his brother-in-law and co-defendant Jorge Emilio Alvarado were found guilty of murdering Daniel and Mary Magoon in their San Diego County home in 1992; assaulting their three-year-old son, who was struck by a stray bullet; convicted of conspiracy to commit robbery, first-degree robbery; burglary; grand theft of a firearm; and transporting over 28.5 grams of marijuana. The prosecution's theory was that petitioner and Alvarado knew that Magoon was a drug distributor and robbed him of his drugs.

B. The *Batson* Proceedings.

During voir dire proceedings in 1994, the defense interposed an objection under the authority of *Batson v. Kentucky*, 476 US. 79 (1986) and *People v. Wheeler*, 22 Cal.3d 258 (1978) after the prosecution exercised peremptory challenges against all three female Hispanic prospective jurors called to the jury box. The trial court overruled the objection on the basis that there was no prima facie demonstration of discrimination given that the record contained colorable reasons for the strikes.

In 2007, the California Supreme Court affirmed the judgment and rejected the *Batson* claim on the basis that "the record discloses race-neutral grounds for the prosecutor's peremptory challenges", *People v. Hoyos*, 41 Cal.4th 872, 901.

The district court denied the *Batson* claim as raised in the federal habeas corpus petition on the ground that the California Supreme Court's rejection of the claim was not unreasonable.

The Ninth Circuit correctly found that the California Supreme Court's rejection of the claim was an unreasonable application of the controlling law as set forth in *Johnson v. California*, 545 U.S. 162 (2005):

> The California Supreme Court's decision in Hoyos's appeal conflicts with clearly established federal law articulated by the United States Supreme Court. By citing *Johnson*, the state supreme court correctly identified the relevant and controlling Supreme Court authority, but the court applied that authority unreasonably by doing exactly what we have explained *Johnson* forbids: the court scanned the record, articulated its own race-neutral reasons why the prosecutor may have exercised his peremptory strikes, and denied Hoyos's *Batson* claim on those grounds at Step One. *Hoyos v. Davis*, 51 Cal.4th at 307.

The Ninth Circuit then erred in concluding that "did not meet his burden of showing of an inference of discrimination", *id.* at 315.

REASONS FOR GRANTING THE PETITION

PETITIONER WAS DEPRIVED OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE NINTH CIRCUIT'S ERRONEOUS CONCLUSION THAT PETITIONER DID NOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATORY USE OF PEREMPTORY CHALLENGES.

The Ninth Circuit also correctly recognized that "the percentage of Hispanic prospective jurors struck in this case is akin to the cases cited in *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015), and we assume without deciding that striking two out of four prospective jurors or three out of five venire members could support a prima facie showing of discrimination", 51 F.4th at 311. However, the Court then erred in concluding that other aspects of the record rebutted an inference of discriminatory use of the peremptory challenges.

First, the court erred in concluding that "the exclusion of Margaret A. does not give rise to an inference of bias." 51 F.4th at 210. The opinion fails to acknowledge that the trial court repeatedly characterized Margaret A. as "articulate" in English. The court first inquired about her English language skills, considered her answers, and immediately stated that "you seem from your responses just now in court to be quite articulate, frankly." The court then confirmed that Margaret A. was "able to follow and understand the questionnaire." After denying the challenges for cause, the

Court commented again that "she seems to be relatively articulate in response to questions." In sum, Margaret A.'s language skills were certainly adequate to serve on the jury in the trial court's view. Her lack of complete fluency is not a self-evident reason why any prosecutor would necessarily strike her.

The court also incorrectly discounted the *Batson* claim on the basis that "Hoyos' statistical analysis begins by including a juror he attempted to remove himself." 51 F.4th at 311. This is faulty reasoning in a number of ways. First, counsel for petitioner moved to excuse Margaret A. for cause during voir dire before any *Batson* motions had been made. At that point, counsel could have reasonably been concerned that her command of English was merely "fairly good," rather than perfect. However, at the time the *Batson* motion was argued after jury selection had been completed, counsel could have reasonably decided that in the face of the prosecutor's multiple strikes of Hispanic female jurors, Margaret A.'s adequate-but-less-than-perfect command of English was a small price to pay for having Hispanics fairly represented on the jury.

Next, at the time of the *Batson-Wheeler* argument, counsel for petitioner joined the motion in its entirety, and the motion clearly included the striking of Margaret A. It is illogical to view appellant's prima facie case as somehow compromised because counsel for appellant initially

moved to exclude Margaret A. for cause at a time during an early phase of the voir dire process, but then later objected to the prosecutor striking her in response to the prosecutor's multiple strikes of Hispanic jurors.

The opinion further states that "the trial-court transcript leaves no doubt about the basis for the prosecutor's objection." 51 F.4th at 310. The opinion further states that "the prosecutor's joinder in Hoyos' unsuccessful attempt to have Margaret A. excused for cause due to her difficulty with English significantly undercuts Hoyos' argument that the prosecutor's use of a peremptory challenge raised an inference of racial bias at Step One." *Ibid*. To the contrary, the fact that the prosecutor joined the defense motion to exclude for cause is entirely consistent with a discriminatory purpose because it offered an opportunity to eliminate a Hispanic juror without having to expend a peremptory challenge. It is a well-known prosecutorial tactic to move to exclude minority jurors for cause in the hopes that (1) the court might grant the motion and obviate the need for a peremptory challenge; or (2) the prosecutor's credibility would be somewhat enhanced if subsequently asked to provide a race-neutral reason for a peremptory strike. The conclusion that "[o]n *de novo* review, we agree with the California Supreme Court that the exclusion of Margaret A. did not give rise to an inference of bias" is untenable. *Ibid*.

The opinion then segued into a consideration of struck versus seated juror comparisons, but then incorrectly asserts that "Hoyos makes no argument that the prosecutor disparately questioned prospective Hispanic jurors compared to non-Hispanic jurors, and our *de novo* review does not reveal any such discrepancy in questioning." 51 F.4th at 312. To the contrary, appellant expressly pointed out that as to the seated white jurors whose voir dire raised a red flag regarding opposition to the death penalty, the prosecutor's voir dire was either non-existent or cursory. The fact that the prosecutor asked the seated white jurors, conspicuously few, if any, questions about their red flag feelings about capital punishment strongly supports an inference of discrimination as to the three struck Hispanic jurors. As set forth in *Miller-El v. Dretke*, 545 U.S. 231 (2005), the failure of a prosecutor to voir dire a prospective juror on a matter of potential concern provides circumstantial evidence that the prosecutor was not actually motivated by concern for the matter in question.

There were three seated white jurors who expressed concerns about the imposition of the death penalty that were objectively as much of a red flag to a prosecutor as anything that Lisa H. or Yolanda M. said. The opinion fails to acknowledge that fact and further fails to consider the prosecutor's absence of voir dire in response.

Whit juror Jimmy C.'s answer to question #63 on the questionnaire would have raised a red flag for any reasonable prosecutor:

> I believe that the death penalty is justified only in the case where there is no other choice[.] If the crime is so bad such as the Charles Manson crime of murder or in a crime against the United States where national interests are involved such as spy cases. I would not give the death penalty for any trivial crime. But if the crime was justified then I would not hesitate as a juror to use it. (emphasis supplied)

The Charles Manson murders are universally considered to be among the most egregious and heinous in the history of California criminal justice, and spy cases are similarly viewed as extremely aggravated. Thus, Jimmy C. drew an implicit line that the death penalty was not justified for crimes not involving serial murders or treason. The prosecutor's questions to him about his very restrictive view as to what types of cases that were appropriate for the death penalty were cursory and superficial:

> Q: Mr. [C], in your questionnaire you were talking about certain circumstances where you believe the death penalty is appropriate, such as the crimes you were talking about, treason, killing a president, and you also said but not a trivial crime. By that did you mean there are some murders that are trivial?
>
> A: No.
>
> Q: What did you mean by that?
>
> A: I don't really remember. Can you give me the exact answer I put down there? [Jimmy C. was asked to read his answer to the question to refresh his memory, he then answered:]

> What I meant was I would weigh the evidence and give the death penalty only in the case of a very serious crime. In other words, I wouldn't do it if some man just robbed a bank; I wouldn't give him the death penalty unless he might have killed someone in the process. Then I would weigh the evidence and decide what I felt would be – you know, what I think right for the crime.
>
> Q: And consider all the factors that His Honor is going to give you to consider?
>
> A: Right.
>
> Mr. Greenberg: Okay. I have no further questions, Your Honor.

Jimmy C. clearly conveyed that the crimes for which he would consider the death penalty justified did not include crimes such as the ones charged against appellant. The prosecutor asked him to explain his answer, and Jimmy C. responded that he would "weigh the evidence and decide what [he] felt would be – you know, what I think right for the crime." That was it for the prosecutor's voir dire.

A time-honored prosecutorial tactic for ferreting out anti-death penalty jurors is to give them a hypothetical based on the facts of the charged case and ask whether they would consider the death penalty in that case. The prosecutor never did that, indicating that he was willing to accept Jimmy C. without clarifying that appellant's case was one in which he would consider the death penalty, compared to the killing of a president or treason. The prosecutor's failure to conduct more than a cursory voir

dire supports an inference of a double standard regarding Hispanic versus white jurors.

Juror Delores R. stated in voir dire that the death penalty should be reserved for the "worst of the worst" under questioning by defense counsel, and the prosecutor conducted no voir dire of her at all.

Juror Kristen T. wrote in her questionnaire that an answer to question #63 in the questionnaire that "I think the death penalty is warranted in certain instances, but is a frightening and irrevocable decision on the part of the jury." Moreover, in her answer to jury question #65, she stated that "I used to believe that the death penalty was unwarranted in every instance." Her response to the final question #78 was similarly a red flag for any prosecutor:

> A murder case with the possibility of a death sentence is ominous in its very existence. Someone was murdered and someone else could die as punishment. To be involved in the reality of a murder, let alone involved in making a decision regarding sentencing and the guilt or innocence of somebody accused of murder is not something that I would seek out or look forward to with gleeful excitement. However, a serious crime was committed and someone has been accused of it. The consequences to the accused, the victims, the community as a whole are enormous. I'm fair, not stupid and conscientious. Unfortunately for me, I'd be a good juror, I think, but the idea fills me with trepidation.

Notwithstanding that statement, the prosecutor's voir dire of Kristen T. was manifestly cursory:

Q: Ms. [T], you indicated in your questionnaire that the death penalty decision is an enormous one which causes you trepidation??

A: Yep.

Q: Is that a decision that you feel you would be able to make?

A: Yes.

Q: That you could decide someone's fate?

A: Someone's fate, yes.

Q: You could live with that?

A: I could live with that.

Mr. Greenberg: I have no further questions, Your Honor.

The opinion addresses each of these white jurors in a manner that is entirely inconsistent with *Miller-El v. Dretke, supra*. The court states that "Jimmy C. never hesitated about his willingness to apply the death penalty." That is an unfair characterization of the record, because it ignores the fact that Jimmy C. believed that the death penalty should be restricted to Charles Manson type serial murder or presidential assassinations. Those statements convey that he would <u>not</u> feel that the death penalty was justified in cases such as this one where there was no serial killing involved nor any threat to the larger political process. In short, Jimmy C. was clear that he would be <u>un</u>willing to apply the death

penalty to less serious types of murder, and the prosecutor was okay with that.

Regarding Delores R., the opinion acknowledges that she stated that the death penalty "should be reserved for the very worst of the worst," but then comments that "Hoyos overlooks that Delores R. also explained her view that the death penalty is 'there to be used if the situation warrants the use of the death penalty' and 'that's what makes our system work'." 51 F.4th at 314. The fact that Delores R. also made equivocating statements regarding her attitude toward the death penalty does not distinguish her from jurors Yolanda M. and Lisa H.

The panel's effort at comparative juror analysis is tainted by its determination to differentiate the seated white jurors from the struck Hispanic jurors on the basis of minor variations in their responses that are insignificant in light of the jurors' more important similarities. The white jurors are sufficiently similar to the Hispanic jurors to strongly support an inference of discrimination against the Hispanic jurors under the standard of *Miller-El v. Dretke*, *supra*, 545 U.S. 257 at fn. 6:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white

juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

The opinion cherry-picks the voir dire of the seated white jurors to find comments that purport to palliate their serious reservations about imposing the death penalty in a case like this one, fails to acknowledge that similar palliative comments were made by jurors Lisa H. and Yolanda M. In short, two of the three struck Hispanic jurors and three of the white seated jurors under discussion are functionally indistinguishable from each other in terms of their restrictive attitudes about imposing the death penalty. At Step One of *Batson* review, the disparate treatment of minority jurors versus white jurors supports an inference of discrimination. Taken as a whole, petitioner met and exceeded the minimal showing under *Johnson v. California*, 545 U.S. 162 (2005) to establish a prima facie case of discrimination.

CONCLUSION

This case calls out for the Court to grant certiorari and fulfill the pledge of *Flowers v. Mississippi*, 588 U.S. __, 139 S.Ct. 2228 (2019) to "simply enforce[] and reinforce[] *Batson* by applying it to the extraordinary facts of this case," 139 S.Ct. at 2231. Petitioner urges this Court to grant certiorari to remedy this unfortunate situation.

Dated: January 10, 2023

/s/ Mark F. Adams
MARK F. ADAMS

/s/ Eric S. Multhaup
ERIC S. MULTHAUP
Attorneys for Petitioner
JAIME HOYOS