No. 03-6539

In The

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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The decision of the California Supreme Court, reported at 30 Cal. 4th 1302, 1 Cal. Rptr. 3d 1, 71 P. 3d 270 (2003), is at p. 113 of the Joint Appendix (Jt. App.). The decision of the California Court of Appeal, reported at 88 Cal. App. 4th 318, 105 Cal. Rptr. 2d 717 (1st App. Dist. 2001), is at Jt. App. 58. The decisions of the trial court, contained in oral remarks from the bench, are at Jt. App. 3-10.

JURISDICTION

Jurisdiction arises under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment states in pertinent part, "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Nature of the Alleged Offense

Petitioner Jay Shawn Johnson was convicted in 1998 of second degree murder, California Penal Code §187, and assault on child, resulting in death, Calif. Penal Code § 273ab. Petitioner, an African-American (black) man, caused the death of Janika Price, the 18-month old daughter of his white girlfriend and another man. The issue at trial was whether the homicide was accidental or malicious.

The prosecution theory was that Petitioner maliciously punched or kicked the child while she was in the bedroom of their home. As part of his circumstantial evidence case, the prosecutor relied upon a quantity of bad character evidence, some of which the Court of Appeal

found inadmissible. (Jt. App. 87-96) The defense theory was that the death was accidental. Petitioner admitted causing the child's death. He bumped her with his foot while he and his two young sons were moving about the bedroom. The child started wheezing and had trouble breathing. The child's mother took the child into the next room. Petitioner gave the child some water. She drank it. When she gasped for breath, Petitioner attempted to perform cardio-pulmonary resuscitation (CPR) by striking the child hard on the chest, but he struck too hard. Petitioner defended on the ground that his negligent administration of CPR was the cause of death.[1]

Litigation of The *Batson* Issues In The Courts Below

California impanels a jury in the following manner: From among a pool of prospective jurors in the courtroom, 12 are seated in the jury box. The prosecution and defense are provided with copies of written questionnaires completed by the jurors. After the prospective jurors have been questioned, the trial judge hears and decides any challenges for cause. If jurors are disqualified for cause, their

[1] This conviction was after a third trial. The first trial terminated in a mistrial. The second trial resulted in a conviction, but it was reversed by the California Court of Appeal in case #A076360, unpublished opinion filed July 27, 1998, for instructional errors regarding concurring cause.

At the second trial the prosecutor relied on a punching theory. He introduced police and forensic evidence that the child was killed by a punch, rather than a kick, because there were no boot marks on her shirt or chest, and because the impacting surface was broader than the toe of a boot. However, at the third (most recent) trial, the prosecutor carefully omitted this police and expert testimony. Then, the prosecutor argued in the third trial, directly contrary to his own evidence at the second trial, that Petitioner killed the child with a kick, rather than a punch. (Jt. App. 87)

seats are refilled, and the replacements are similarly questioned and challenged for cause. The prosecution or defense may then exercise peremptory challenges. If less than 12 prospective jurors remain, additional jurors are called to bring the total to 12. After questioning and challenges for cause, either side may exercise peremptory challenges against the newly called prospective jurors or those who were called earlier. This process continues until both sides accept 12 jurors and a sufficient number of alternates (here, three).

In the instant case, 43 jurors were passed for cause. Three (3) were African-American (black). The prosecution peremptorily challenged all three of the black jurors, and nine of the 40 non-black jurors, for a total of 12. The defense peremptorily challenged 16 prospective jurors. (Jt. App. 12) The resulting jury, including alternates, was all white (with one Spanish-surnamed person).

The prosecutor exercised his 4th peremptory challenge against Clodette Turner and his 8th peremptory against Sara Edwards, who were both black. He challenged Ms. Edwards immediately after the trial court voir dired her. Defense counsel then objected[2] on the ground that these peremptory challenges had been made on the basis of race.[3] The prosecutor did not respond to this objection or volunteer any explanation of these challenges.

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[2] Defense counsel cited *People v. Wheeler* (1979) 22 Cal. 3d 258 [148 Cal.Rptr. 890, 583 P.2d 748], the California equivalent of *Batson*. This was sufficient to raise a *Batson* claim. *Ford v. Georgia*, 498 U.S. 411, 418-19, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991).

[3] There was confusion as to whether a third juror, Bernice Lafall, was African-American. The parties agreed she was Indian. She was dropped from the *Wheeler*/*Batson* motion.

The trial court rejected this first challenge on the ground that there had not "been shown a strong likelihood that the exercise of the peremptory challenges" had been based on race. The trial court, however, expressly admonished the prosecutor "that we are very close." (Jt. App. 5)

Notwithstanding that admonition, the prosecutor later that day exercised his 12th and final peremptory challenge to remove the third and last black prospective juror, Ruby Lanere, immediately after her voir dire concluded. The defense renewed its objection, noting that the prosecutor had now removed all three black jurors who had been passed for cause. The defense contended that "the exercise of the peremptory challenges in this way showed or reflected a systematic attempt by the prosecution to exclude African-Americans from this jury panel." (Jt. App. 6-7) Again, the prosecutor did not respond or offer explanations.

The trial court declined to "make a prima facie finding." (Jt. App. 7-10) Its ruling focused on whether the peremptory challenges were "justified." Although the prosecutor had not offered any explanation for its peremptory challenge to Ms. Lanere, the trial court commented on Ms. Lanere's written questionnaire and verbal responses, and concluded that those responses "would have justified a peremptory challenge." (Jt. App. 8).[4] Similarly, although the prosecutor had not offered any explanation for his challenge to Ms. Edwards, the trial court commented on

[4] The trial court articulated two possible justifications for the exercise of a peremptory challenge against Ms. Lanere: (1) she had a sister who had been arrested on drug charges, and (2) her answers indicated that she had difficulty understanding some of the questions. (Jt. App. 7-8).

Ms. Edwards' questionnaire and statements in court.[5] It concluded, "[w]ith regard to Ms. Edwards, the Court felt there was sufficient reason . . . to justify the exercise of the peremptory challenge." (Jt. App. 9)

Neither the prosecutor nor the trial court said anything about the third black juror, Ms. Turner. The trial court then asked the prosecutor if he "wish[ed] to make a further record." He declined. (Jt. App. 10)

Although the trial prosecutor conspicuously avoided explanations for his challenges, at the California Court of Appeal the state's appellate counsel was quite effusive, albeit in a carefully framed manner. The state's brief circumspectly did not offer any assertions about what the prosecutor's actual motives were two years earlier. Rather, the state's brief identified "grounds upon which the prosecutor *might reasonably* have challenged" the jurors in question.[6]

The state's appellate brief identified two different supposed "permissible reason[s]" or "race-neutral justifications" for objecting to prospective juror Clodette Turner,[7]

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[5] The trial judge noted two possible justifications for a peremptory challenge to Ms. Edwards: (1) her questionnaire had failed to mention that thirty years earlier "a parent had a robbery or arrest," and (2) she expressed concern about whether she could be fair in a child abuse case, indicating an inclination to favor the prosecution. (Jt. App. 9).

[6] Respondent's Brief, *People v. Johnson*, California Court of Appeal, No. A085450, 1st Dist., Div. 2, p. 40 (emphasis added).

[7] (1) Clodette Turner "neglected to answer questions 57 and 58 on the questionnaire, which inquired as to her views on prosecutors and defense attorneys. . . . The mistaken failure to complete the questionnaire betrays an 'inattention to detail' that justifies the exercise of a peremptory challenge." (2) "The district attorney reasonably could have feared that she would be insufficiently sympathetic to the victim – a nineteen-month-old child. This, too, supplied non-discriminatory grounds for the challenge." (*Id*. at 40).

five supposed permissible reasons for challenging Sara Edwards,[8] and eight supposed permissible reasons for challenging Ruby Lanere.[9] The state did not, however, actually assert (or deny) that any of the 15 recited "permissible reasons" constituted the prosecutor's actual motive at trial. Moreover, several "permissible reasons," if

[8] (1) Sara Edwards was "uncertain whether she could be 'fair and impartial,' given the nature of the charges . . . [T]he juror confessed that she had 'no feelings one way or the other about sitting as a juror until I found out who the victim was. I am *deeply* saddened that it was an eighteen month old child." (emphasis in original) (2) "[Edwards] was evasive. She did not answer question 30 on the questionnaire. . . . " (3) "[T]he juror's parent had been arrested for robbery over 35 years ago. . . . The arrest of a close relative is an acceptable race-neutral justification for a peremptory challenge." (4) "Race-neutral justifications for excusing [Edwards] are apparent from her questionnaire and her voir dire. She . . . was childless." (5) "She . . . had had 'legal training' or had taken a law course. . . . Legal training is a legitimate, race-neutral ground." (*Id*. at 41-42).

[9] (1) Ruby Lanere "ha[d] a sister who had been arrested." (2) "[S]he . . . [had] a son close in age to [Johnson]." (3) "She stated that she could not follow the instructions." (4) "Like [Edwards], she did not know whether she could be fair, given the nature of the charges and the circumstances of the case." (Edwards indicated she was biased in favor of the prosecution because the victim was an eighteen month old child.) (5) "Her ability was also compromised . . . by her knowledge that she or a family member or close friend had been the victim of a crime where the suspect was African-American." (6) "Evidence of domestic abuse, she continued, also would affect her impartiality." (Johnson had been convicted of abusing the girlfriend who was the mother of the victim.) (7) Her ability to be fair, she admitted, was affected by "the issue of interracial relationships – 'interracial relations is different. . . . ' What affected her ability to be impartial, in other words, was that 'he is Black and she is not.' Opinions on racial issues, too, are race-neutral justifications for a challenge." (8) "[T]he juror's poor command of the language and potential difficulty understanding the proceedings supplied yet another permissible reason for the exercise of a peremptory challenge." (*Id*. at 42-43).

anything, suggested possible bias in favor of the state. A prosecution challenge on such basis is rather unlikely.

A divided panel of the state Court of Appeal concluded by a vote of 2-1 that Johnson had established a *prima facie* case under *Batson*, and reversed his conviction[10] relying on a combination of factors: (i) The prosecutor peremptorily challenged all three black potential jurors. (ii) The trial court erred when it stated that the standard for a *prima facie* case was a "strong likelihood" of discrimination. Instead, the correct test is the less stringent standard of an "inference" of discrimination under *Batson*. Because the trial court applied an incorrect legal standard, its ruling was not entitled to deference, and the Court of Appeal could review the issue *de novo*. (iii) There was no race-neutral reason on the record why two of the three black jurors, Clodette Turner and Sara Edwards, would not be suitable. (iv) The supposed reasons why the prosecutor challenged them were pretextual, because those same reasons applied to several white jurors whom the prosecutor accepted.[11] (Jt. App. 58-87)

The California Supreme Court, by a vote of 5-2, reversed the Court of Appeal, and affirmed the trial court decision that Johnson had not established a *prima facie*

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[10] In California, when a trial court erroneously fails to find a *prima facie* case under *Batson*, the remedy is reversal. *People v. Fuentes* (1991) 54 Cal.3d 707, 721 [286 Cal.Rptr. 792, 812 P.2d 75]; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [242 Cal.Rptr. 477, 746 P.2d 452].

[11] The Court of Appeal also concluded that the trial court had erred in admitting certain highly prejudicial prosecution evidence. The Court of Appeal did not overturn the conviction on that basis, because it left unresolved issues about whether defense objections to that evidence had been adequately raised and preserved, and whether any actionable error arose from the prosecutor's switch in theories between the second and third trials as to the instrumentality of death. (Jt. App. 87-96)

case under *Batson*. The majority held: (i) To establish a *prima facie* case under *Batson*, a party must demonstrate "that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *People v. Johnson*, 30 Cal.4th at 1306. (Jt. App. 115). (ii) Where a trial judge, relying on such a standard, has concluded that there was no *prima facie* case, affirmance on appeal is required "if the record *suggests* grounds on which the prosecutor *might reasonably have* challenged the jurors." *People v. Johnson*, 30 Cal.4th at 1325. (Jt. App. 196, emphasis added). (iii) A defendant is barred from arguing on appeal that the grounds claimed to have been relied upon by the prosecutor were pretextual, or from arguing that those claimed grounds equally apply to white jurors who were accepted. *People v. Johnson*, 30 Cal.4th at 1318-1324 (Jt. App. 115, 134)

Two of the seven California Supreme Court justices dissented. They maintained that to establish a *prima facie* case an objector need only identify evidence which would *permit* an inference of discrimination. Such a *prima facie* case was established here, because the prosecutor peremptied all three black jurors, and because, as to at least two of those jurors, there is nothing on the record showing why they would not be acceptable. *People v. Johnson*, 30 Cal.4th at 1333, 1340, 1341. (Jt. App. 151-152, 158, 170-171).

SUMMARY OF ARGUMENT

(1) California's test for a *prima facie* case of racial discrimination in jury selection under *Batson v. Kentucky*, 476 U. S. 79 (1986), requires a much higher level of proof of discrimination at the *prima facie* stage than does *Batson*. California requires proof at the *prima facie* stage that discrimination was "more likely than not," meaning

proof by a preponderance of the evidence that discrimination actually occurred. *Batson* merely requires that an objector "raise an inference" of discrimination. 476 U. S. at 96. California's test is inconsistent with *Batson* for many reasons:

(a) The California requirement that an objector prove discriminatory motive by a preponderance of the evidence at the *prima facie* stage requires the objector to prove his case on the merits in order to establish a *prima facie* case. That undermines the whole meaning of *prima facie* case, which is to make a preliminary showing, and to impose a burden less demanding than actually proving the merits of the case.

(b) The California test confuses the *prima facie* stage and the merits stage of a *Batson* analysis when it requires the objector, at what should be the *prima facie* stage, to prove that discrimination was "more likely than not." This requirement of merits-level proof at the preliminary stage is premature and improper, because, at that stage, the objector does not have the critical evidence which he needs to prove his case on the merits, namely, the prosecutor's proffered reasons for the disputed challenges. This is like requiring a civil plaintiff to prove his case without discovery.

(c) The conflation of the first and third steps of the *Batson* analysis violates the rule of *Purkett v. Elem*, 515 U. S. 765 (1995), that the *Batson* steps must be considered separately.

(d) The court below claimed that its *prima facie* test is consistent with this Court's test for a *prima facie* case in Title VII employment discrimination cases. The court is incorrect. (i) A Title VII plaintiff need not show that discrimination is more likely than not in order to create a *prima facie* case. (ii) The threshold for a *prima facie*

Batson violation should be lower than that for a *prima facie* Title VII violation.

(2) The correct test for a *prima facie* case of discrimination under *Batson* is that the objector should identify sufficient evidence in the record to permit a finding that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. This evidentiary standard is generally referred to as a permissive inference.

The purpose of a *prima facie* case under *Batson* is to help courts and parties answer, not unnecessarily evade, the ultimate question of discrimination. That purpose will only be satisfied if the objector and the trial court can learn the reasons behind the challenges to the minority jurors whenever there is sufficient evidence to permit an inference of discrimination. *Batson*'s traditional permissive inference standard assures such an inquiry.

The federal and state courts utilize a permissive inference threshold in interpreting and enforcing *Batson*. Under this standard, the federal courts regularly find a *prima facie* case whenever (a) a party peremptorily challenges all of two or more members of a protected group, or (b) whenever a party challenges two or more members of a protected group, and thereby challenges a majority of the members of that group.

(3) On appeal, in litigating the denial of a *prima facie* case, the California court improperly allows the state to speculate as to "possible" reasons for the prosecutor's challenges, even though he never stated his actual reasons. That court compounds this error by one-sidedly prohibiting the defense from rebutting such hypothesized reasons by pointing to evidence regarding comparable jurors of another race who were not challenged.

(4) The Court should find a *prima facie Batson* violation here. The prosecutor challenged all three

African-American jurors, and caused a black defendant, charged with killing his white girlfriend's child, to be tried by an all-white jury. The prosecutor did not articulate his actual reasons for these challenges. The reasons hypothesized for the challenges to two of the black jurors were manifestly pretextual, because they equally applied to several accepted white jurors.

I. THE CORRECT TEST FOR A *PRIMA FACIE* CASE OF DISCRIMINATION IN JURY SELECTION IS WHETHER THE EVIDENCE WOULD PERMIT AN INFERENCE OF DISCRIMINATION, NOT CALIFORNIA'S REQUIREMENT THAT THE OBJECTOR MUST PROVE THAT THE EXISTENCE OF A DISCRIMINATORY MOTIVE WAS "MORE LIKELY THAN NOT"

A. *Batson* Has Established a Method for Identifying and Prohibiting Racial Discrimination in Jury Selection

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), the Court held that a party may prevent racial discrimination in jury selection based on proof that discrimination was occurring in his own trial.

Batson review was designed to serve multiple ends. (i) One purpose is "to protect individual defendants from discrimination in the selection of jurors." *Powers v. Ohio*, 489 U. S. 400, 406, 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991) (*Batson* applies to a white defendant). (ii) A second purpose is to enforce the equal protection rights of the jurors themselves. Denial of participation in jury service on account of race discriminates against the juror personally. While "[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race."

Georgia v. McCollum, 505 U. S. 42, 49, 120 L.Ed.2d 33, 112 S.Ct. 2348 (1992) (*Batson* applies to challenges by criminal defendants); *Powers*, 499 U. S. at 409. The harm from such exclusion is manifest. The juror is subjected to open and public racial discrimination. (iii) A third purpose for barring discriminatory challenges is because they undermine public confidence in the fairness of the jury trial system – as well they should. *Georgia v. McCollum*, *supra*, 505 U. S. at 49.

Batson and its progeny established a three-step test for evaluating a charge of racial discrimination in jury selection. (1) First, the objector must present a *prima facie* case of discrimination. An objector may present such a *prima facie* case by showing that the circumstances "raise an inference" of discrimination. *Id*., 479 U. S. at 93-96.[12] In *Miller-El v. Cockrell*, 537 U. S. 322, 123 S.Ct. 1029 (2003) the Court explained that the "inference" of discrimination needed to establish a *prima facie* case could be shown by statistics, such as where the prosecutor challenged a disproportionate number of minority jurors. (2) Second, if

[12] *Batson* illustrated how such an "inference" could be shown, 476 U. S. at 97:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising the challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning a prosecutor's use of peremptory challenges create a prima facie case of discrimination against black jurors.

a *prima facie* case is established, the prosecutor must state the reason for his challenge, and the court must determine if the reason is race-neutral on its face. (3) Third, the trial court determines whether or not the challenge is based on impermissible group bias. *Purkett v. Elem*, 514 U. S. 765, 767, 131 L.Ed.2d 834, 115 S.Ct. 1769 (1995).

B. When California Requires the Objector at the *Prima Facie* Stage to Prove by a Preponderance of the Evidence That a Challenge Was Made for a Discriminatory Purpose, It Improperly Applies a Merits Test at the *Prima Facie* Stage

The court below ruled that a *prima facie* case of discrimination under *Batson* can only be established by persuading the trial court to find that the record at the *prima facie* stage actually establishes discrimination on the merits. It held:

> to state a *prima facie* case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based upon impermissible group bias.

People v. Johnson, 30 Cal.4th at 1306. (Jt. App. 115) This test undermines the whole meaning of a *prima facie* case, which is to make a preliminary showing, not a merits showing. See, e.g., *Ulster County Court v. Allen*, 442 U. S. 140, 156, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979).

When the California court held that the objector must show, at the *prima facie* stage, that discrimination is "more likely than not," it meant: prove that discrimination occurred. The court below explicitly said that its "more

likely than not" test meant that the objector must show discrimination by the "preponderance of the evidence." *People v. Johnson*, 30 Cal.4th at 1317 (Jt. App. 132-133)[13] That is, of course, the traditional standard of proof on the merits. Thus, under the California test, what must be proved at the *prima facie* stage is the existence of discrimination in jury selection – on the merits. Further, under the California test, the objector must make such a merits-like showing without being told, and thus without any opportunity to attack as pretextual, whatever reasons might be offered for the challenges. The reference to the challenges then being "unexplained" does not lessen the burden on the objector; it merely describes the state of the record at the point when California requires the objector to prove the existence of a discriminatory motive.[14]

Under the California standard, an objector must twice persuade the trial court, by a preponderance of the evidence, to make findings of discrimination. First, he must do so at step one, the supposed *prima facie* stage, *before* any reasons have been given for the peremptory challenges, and when the record is thus incomplete. Second, if the court makes a *prima facie* finding, and after reasons are given, the objector must again persuade the court to

[13] Petitioner acknowledges that the underlying historical facts asserted by the objector – e.g., that a particular juror was in fact black – would have to be proved by a preponderance of the evidence.

[14] California similarly requires the objector at the *prima facie* stage to establish a "legally mandatory [but] rebuttable presumption" of group bias. *Id*., 30 Cal.4th at 1315. (Jt. App. 129) This suggests the objector's evidence must be so overwhelming as to compel a finding of discrimination as a matter of law if no contrary evidence is presented. This rule is directly contrary to this Court's rule in *Purkett v. Elem*, *supra*.

make the same finding, namely, that discrimination occurred.

Thus, the California test undermines the meaning of a *prima facie Batson* case, when it requires the objector to satisfy the same burden of proof at the *prima facie* stage (step one), before he has heard the challenger's reasons, as he must satisfy at the merits stage (step three), after he has heard the challenger's reasons.

In *Purkett v. Elem*, 514 U.S. at 767, the Court clarified *Batson*'s three-step test for determining when peremptory challenges violate the equal protection clause:

> [O]nce the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion); *id*., at 375 (O'Connor, J., concurring in judgment); *Batson, supra,* at 96-98.

This test requires separate analysis at each step. In *Purkett v. Elem* the Court reversed because the circuit court improperly conflated steps two and three. It conflated those steps when it required that the "justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., 'plausible.'" *Id*., 514 U. S. at 768. That conflation was defective, because it improperly required the prosecutor to show at step two not only that his reason was race-neutral (the step two requirement) but also that it was plausible and persuasive (the step three issue). Thus, the Court reversed in *Purkett v. Elem* because the circuit court required too much at step two.

An equivalent, or worse, problem arises under the California test for a *prima facie* case, because that court requires the objector to prove at the first step that it was "more likely than not" that the prosecutor acted with discriminatory intent in order to present a *prima facie* case. That violates the *Purkett v. Elem* test in several ways.

(i) As shown, the California requirement to prove discriminatory motive by a preponderance of the evidence at the *prima facie* stage requires the objector to prove his case on the merits in order to establish a *prima facie* case. That undermines the whole meaning of *prima facie* case, which is to make a preliminary showing, and to impose a burden less demanding than actually proving the merits of the underlying case. *Ulster County Court v. Allen*, *supra*.

(ii) Under *Purkett v. Elem*, the objector does not need to reach the level of proof of discrimination of "more likely than not" until step three. At that step the "trial court *then* will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U. S. at 98 (emphasis added). The California test is defective, because it improperly conflates steps one and three.

(iii) Worse, when the California *prima facie* test requires the objector, at the time of step one, to make the step three demonstration – namely, prove that discrimination is "more likely than not" – it does so without allowing the objector to have access to the most important piece of information which the objector would ordinarily use at step three, namely, the prosecutor's purported reason. See *Purkett v. Elem*, *supra*. At step one, the *prima facie* case step, it would be rather difficult for an objector to prove that the reason for the prosecutor's challenge is "more likely than not" racially-based, if the objector has not yet been allowed to learn the prosecutor's claimed reason. Requiring an objector to prove at the first step that discrimination is

"more likely than not," without knowing the prosecutor's reason, is like requiring a civil plaintiff to prove his case without the critical discovery.[15]

In the large majority of federal *Batson* cases which have concluded that impermissible discrimination had occurred in jury selection, the pivotal evidence was almost invariably a demonstration that the articulated reason was pretextual: (a) that the articulated reasons rested on an inaccurate description of the excluded juror, (b) that the reasons were inconsistent with the action of the prosecutor in not challenging other similar jurors of a different race, (c) that the reason was inherently implausible, (d) that the reason given was a proxy for race, or (e) that the prosecutor had articulated several different explanations, and the falsity of one account called into question the credibility of the others.[16] See also *Miller-El v. Cockrell*, *supra*, 537 U. S.

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[15] As Justice Kennard correctly noted in her dissenting opinion:

> "The threshold for establishing a prima facie case should be relatively low, so that close cases are not decided at the first stage of the inquiry, but only after the trial judge has heard the prosecutor's explanations and is in a better position to determine the propriety of the challenges . . . [T]he prosecutor's explanation is often critical to the decision whether the challenge was proper.

– 30 Cal.4th at 1339 (Jt. App. 169)

[16] See, e.g., *Ford v. Norris*, 67 F.3d 162, 168-169 (8th Cir. 1995) (prosecutor's answer that he struck a juror because he supposedly was "illiterate" was held pretextual, because the juror's answer that he does not "read the paper," but watches television instead, did not support the claim of illiteracy); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (prosecutor claimed he challenged black juror because juror said she mistrusted the system, but record did not contain any such statement); *Johnson v. Vasquez*, 3 F.3d 1327, 1330 (9th Cir. 2003) (prosecutor claimed that he challenged juror because she worked for defense attorney, but there was no evidence in the record of any such employment); *Davidson v. Harris*, 30 F.3d 963 (8th Cir. 1994) (state

(Continued on following page)

322, 123 S.Ct. at 1043, where the Court critically noted that "three of the state's proffered race-neutral rationales for striking African-Americans pertained just as well to some white jurors who were not challenged."

None of this potentially probative evidence is available to a defendant when he is seeking to establish a *prima facie* case. Thus, a requirement that a party prove the existence of intentional discrimination *before* obtaining access to what might be the critical evidence, namely, the challenger's reasons, would raise serious problems under the due process clause.

Accordingly, the California test improperly short-circuits the required three-step process under *Batson* and *Purkett v. Elem*. Just as the Court reversed in *Purkett v. Elem* because the lower court improperly combined steps

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struck several black jurors on the ground that they had children the same age as the defendant, but two white jurors who had children the same age were not struck); *Jones v. Ryan*, 987 F.2d 960, 973 (3d Cir. 1993) (*ibid.*); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000) (prosecutor claimed he challenged black juror because he was young and had no supervisory experience, but accepted white juror who was similarly young and inexperienced); *Riley v. Taylor*, 277 F.3d 261, 283 (3d Cir. 2001) (prosecutor claimed he challenged black juror because of attitude toward death penalty, but accepted white juror with same attitude); *United States v. Bishop*, 959 F.2d 820, 826 (9th Cir. 1992) (prosecutor claimed he challenged juror because she lived in a certain neighborhood, but because the population of that neighborhood is overwhelmingly black, that reason was deemed a proxy for race); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) ("the relative plausibility or implausibility of each explanation for a particular challenge . . . may strengthen or weaken the assessment of the prosecution's explanation as to other challenges. . . . "); *Collins v. Rice*, 348 F.3d 1082, 1095 (9th Cir. 2003) (fact that some of prosecutor's reasons were unconvincing undermined his credibility).

two and three of this procedure, the Court should reverse here because the California test improperly conflates steps one and three.[17]

C. Under *Batson* and its Progeny a *Prima Facie* Case Is Established When There Is Sufficient Evidence to Permit an Inference of Discrimination

The Question Presented is "whether to establish a *prima facie* case under *Batson* . . . the objector must show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias?" The answer is "no." As shown above, that test, used by California, is incorrect, because it requires the objector to prove his case on the merits at the *prima facie* stage, without even knowing the challenger's asserted reasons which the objector may be able to show are pretextual. Instead, the correct threshold for a *prima facie* case is that stated by the dissenting opinion in the court below: The objector should adduce evidence sufficient to permit an inference of discrimination. 30 Cal.4th at 1334-1339 (Jt. App. 166-170). Such standard is consistent with the rule in virtually every jurisdiction in the nation except California. (See pp. 23-26 *infra*.)

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[17] In holding that the threshold for a *prima facie* case of discrimination in jury selection was proof that discrimination was "more likely than not," the California Supreme Court purported to rely upon the *prima facie* test in Title VII employment discrimination cases. *People v. Johnson*, 30 Cal.4th at 1314 (Jt. App. 128). That reliance is mistaken. Title VII does not require a plaintiff at the *prima facie* stage to prove the existence of discrimination. Further, the *prima facie* threshold for a *Batson* case is clearly lower than that in a Title VII case. (Petitioner discusses the Title VII contention in detail at pp. 30-37, *infra*.

This rule should be stated as follows: To establish a *prima facie* case, the objector should identify sufficient evidence in the record to allow a finding that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. This type of inference is referred to as a permissive inference. See, e.g., *Ulster County v. Allen*, *supra*.

The reasons why the standard for a *prima facie* case is, and should be, a permissive inference of discrimination are three-fold: First, only *Batson's* traditional permissive inference standard, and not California's unduly-elevated standard, can assure inquiry into the challenger's reasons whenever peremptory challenges may be the result of improper discrimination. Second, it has been the practice in virtually every jurisdiction, other than California, that a *prima facie* case may be established by evidence which would support an inference of discrimination. Third, the purpose of *Batson* was to reduce the burden of proof for requiring inquiry as to possible discrimination. However, raising the *prima facie* threshold from a permissive inference standard to proof that discrimination "more likely than not" actually occurred, as the California court does, would increase that burden of proof, not lower it.

The test, or threshold, for establishing a *prima facie* case of a *Batson* violation plays a crucial role in eliminating racial discrimination in jury selection. Until a *prima facie* case is established, no inquiry need be made into a party's reasons for a challenge. Until then, the objector does not have access to the information needed to show whether a challenge is discriminatory, namely, the claimed reason for a challenge. If the barrier for establishing a *prima facie* case is set too high, the necessary evidence for evaluating possible discrimination will be absent, and judicial scrutiny of possible discrimination will be unduly reduced. The threshold for establishing a *prima facie* case

should be set relatively low, so that close cases are not decided at the first stage of the inquiry, but only after reasons are given and evaluated.

The purpose of a *prima facie* case under *Batson* "'is to help courts and parties answer, not unnecessarily evade, the ultimate question of discrimination, *vel non*.'" *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995), quoting from *United States Postal Service Bd. of Governors v. Aikens*, 460 U. S. 711, 714, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). That purpose will only be satisfied if the objector and the trial court can learn the reasons behind the challenges to the minority jurors whenever there is sufficient evidence to permit an inference of discrimination.

If a party is not discriminating, a simple explanation will suffice, and the case will proceed. The cost of adding a few minutes to a trial to obtain the reasons for a questioned challenge is far lower than the cost of allowing a trial to proceed which has been contaminated by racial discrimination.

D. "Inference," as Used in Other Areas of the Law, and as Understood by the Federal Courts in Interpreting *Batson*, Refers to a Permissive Inference

1. Inference ordinarily means permissive inference

Batson holds that an objector may establish a *prima facie* case by adducing evidence sufficient to "raise an inference" of discrimination. The inference established by a *Batson prima facie* case is merely a permissive inference, not a mandatory inference. That is so, because *Batson* cannot possibly mean that in order to *permit* an inference of discrimination, an objector must adduce evidence that *compels* a finding of discrimination.

1. Wigmore explains that the most common method of establishing a *prima facie* case is by a permissive inference. "[T]he more common meaning of *prima facie* case applies 'where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case." 9 Wigmore, *Evidence* (Chadbourn rev.ed. 1981) §2494, p. 379.

2. *Weinstein's Federal Evidence* (2d ed.) similarly makes clear in §301.02[1] that the standard meaning of "inference" is a "permissive" inference, not a "mandatory" presumption, and that an inference, unlike a presumption, "allows but does not require the trier of fact to infer the elemental fact from proof of the basic one. . . . "

3. In *Ulster County Court v. Allen*, *supra*, 442 U. S. at 156, the Court distinguished between a permissive inference and a presumption. *Ulster County* explained, 442 U. S. at 157, that, when facts are sufficient to establish a permissive inference, they are sufficient to establish a *prima facie* case.

> The most common evidentiary device is the entirely permissive inference or presumption, which allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant. [citation omitted] In that situation the basic fact may constitute *prima facie* evidence of the elemental fact.

4. In *United States v. Armstrong*, 517 U. S. 456, 470, 134 L.Ed.2d 687, 116 S.Ct. 1480 (1996), a selective prosecution case, the question was the quantum of evidence needed by a criminal defendant to obtain discovery from the government. The Court held that the threshold was "*some evidence* of differential treatment of similarly

situated members of other races," or "a credible showing of different treatment of similarly situated persons." (*Id*., emphasis added) When an objector initially makes a *Batson* motion, he similarly seeks discovery, namely, the purported reason for the peremptory challenge. If the *Armstrong* standard of "some evidence," or a "credible showing" is good enough to obtain discovery in a selective prosecution case, then the *Batson* standard of permissive inference," should be good enough to obtain what is often critical discovery in a juror discrimination case.

2. The lower courts have understood *Batson's* "inference" standard merely to require evidence which would permit an inference of discrimination

Because, as shown, the ordinary meaning of the "inference" needed to establish a *prima facie* case is a permissive inference, the lower courts have regularly applied such a standard in evaluating a *prima facie* case under *Batson*: See, e.g., *Johnson v. Love*, 40 F.3d 658, 665 (3d Cir. 1994) ("whether a *prima facie* case was present, i.e., whether there is reason to believe that discrimination may have been at work in this case"). In *Central Alabama Fair Housing Center v. Lowder Realty*, 236 F.3d 629, 636-637 (11th Cir. 2000), the court held that the objector:

> bears the burden of establishing facts sufficient to support an inference of racial discrimination. . . . an inference of discrimination based on the number of jurors of a particular race may arise when there is a substantial disparity between the percentage of jurors of one race struck and the percentage of their representation on the jury. . . . Thus, the number of jurors of one race struck by the challenged party may be sufficient

> by itself to establish a *prima facie* case where a party strikes all or nearly all of the members of one race on a venire.

C.f., *United States v. Allen-Brown*, 243 F.3d 1293, 1298 (11th Cir. 2001) (where the government opposed defendant's peremptories of white jurors, the court held that *Batson* "compels the trial court to act if it has a reasonable suspicion that constitutional rights are being violated . . . ").[18]

The Ninth Circuit has unanimously held in four opinions, decided by eleven different judges, appointed by four different presidents, that California's *prima facie* standard presents an unduly-elevated and improperly-stringent threshold, which conflicts with this Court's permissive inference test under *Batson*. *Wade v. Terhune*, 202 F.2d 1190, 1195 (9th Cir. 2000); *Cooperwood v. Cambra*, 245 F.3d 1042, 1046 (9th Cir. 2001); *Fernandez v. Roe*, 286 F.3d 1073, 1076 (9th Cir. 2002); *Lewis v. Lewis*, 321 F.3d 824, 827 (9th Cir. 2003). For example, it held in *Wade v. Terhune*, *supra*, 212 F.2d at 1197:

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[18] And see also *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) ("[W]here there are only a few members of a racial group on the venire panel and one party strikes each one of them, the *inference* of discrimination may arise" (emphasis added)); *Overton v. Newton*, 295 F.3d 270, 279, n. 10 (2d Cir. 2002) (*Batson* imposes only a "minimal burden . . . on a defendant to make a *prima facie* showing . . . "); *Mahaffey v. Page*, 162 F.3d 481, 485 (7th Cir. 1998) ("The Supreme Court in *Batson* emphasized that an *inference* of discrimination may arise where the prosecutor makes a pattern of strikes against African-American jurors. *Id.* at 97. Such a pattern plainly is evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire. . . . "); *U. S. Xpress Enterprises v. J. B. Hunt Transport Co.*, 320 F.2d 809 (8th Cir. 2003) (*prima facie* case is established when the party shows that the relevant circumstances of the voir dire support an inference of discriminatory purpose).

> In our view, the *Wheeler* "strong likelihood" test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* "inference" test. Indeed, when the California Court of Appeal resolved the direct appeal in the case now before us, it followed the literal language of *Wheeler* and characterized its test for a *prima facie* case as "not easy." . . . We therefore conclude that California courts in following the "strong likelihood" language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*.

As shown above, California is not just out of step with its own Ninth Circuit. It is out of step with other federal circuits, and with state courts as well.[19] For example, in

[19] The California Supreme Court asserted in its *Johnson* opinion that two other state courts agreed that the necessary "inference" must reach the level of "more likely than not." *People v. Johnson*, *supra*, 30 Cal.4th at 1316. (Jt. App. 131) Presumably, it failed to find support from the other 48 states. In any event, the dissent in *Johnson* dispelled reliance on either of those states. *People v. Johnson*, *supra*, 30 Cal.4th at 1335-1336 (Jt. App. 162) (Kennard, J. dissenting). For example, Connecticut first adopted and then rejected a preponderance standard. Its current rule is that a *prima facie* case is established when the defendant is a member of a racially cognizable group, and when the defendant objects to the prosecutor's challenges to members of defendant's race. *State v. Halloway*, 209 Conn. 636, [553 A.2d 166, 171-172] (1989). This threshold is distinctly lower than that which Petitioner proposes here.

Decisions from other state courts support Petitioner including, e.g., *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998) ("the defendant is not required to prove by a preponderance of the evidence that discrimination occurred. Rather the defendant must present evidence sufficient to raise an inference that discrimination occurred."); *Conerly v. State*, 544 So.2d 1370, 1372 (Miss. 1989) ("inference" of discrimination arises under *Batson* when prosecutor strikes five of six black jurors); *State v. Henderson*, 764 P.2d 602, 604 (Or. App. 1988) ("inference" sufficient to

(Continued on following page)

King v. Moore, 196 F.3d 1327 (11th Cir. 1999) the Florida state trial court had found no *prima facie* case under a test which, like an earlier version of California's test, required the opponent of a peremptory strike to show a "strong likelihood" of discrimination. The Eleventh Circuit held that this "strong likelihood" threshold was improper, because it was higher than *Batson*'s threshold, which merely requires the objector to raise an inference of improper motive." *Id*., at 1334.[20]

3. The federal courts regularly find a *prima facie* case when the challenger perempts all two or more members of a protected group, or when he perempts the majority of a protected group

The lower courts, following *Batson*'s permissive inference standard, regularly find that a *prima facie* case of group bias is presented when the prosecutor strikes all of two or more members of the defendant's racial group from the jury, leaving no jurors remaining from that group. The federal courts similarly and regularly hold that a *prima facie* case is presented when a party challenges the majority of the members of a protected group.[21]

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establish a *prima facie* case arises when prosecutor strikes the only black juror in case with a black defendant).

[20] In *State v. Slappy* (Fla. 1988) 522 So.2d 18, 20-21, the Florida Supreme Court substantially relaxed its definition of the *prima facie* standard to bring it in line with *Batson*. It held, 522 So.2d at 22: "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination."

[21] *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) (strikes of all three blacks); *United States v. Alvarado*, 923 F.2d 253, 255 (2nd Cir. 1991) (strikes of four of seven minority jurors): *Simmons v. Beyer*, 44

(Continued on following page)

Thus the threshold in the federal courts for a *prima facie* case is crossed whenever a party peremptes two or more members of a protected group, and thereby peremptes more than half the members of a protected group.

E. A Review of How California Applies its *Prima Facie* Test Establishes That the California Standard Presents a Substantially Higher Threshold for a *Prima Facie* Case than the *Batson* Inference Standard

A review of California's cases establishes that the way the California court employs its current "more likely than not" standard, or its predecessor, the "strong likelihood" standard, which was in effect at the time of Petitioner's

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F.3d 1160, 1167 (3d Cir. 1995) (strikes of all three blacks); *Allen v. Lee*, 319 F.3d 645, 649 (4th Cir. 2003) (strikes of 10 of 17 blacks); *Splunge v. Clark*, 960 F.2d 705, 707 (7th Cir. 1992) (strikes of both blacks); *Mahaffey v. Page*, 162 F.3d 481, 485 (7th Cir. 1998); *U. S. v. Pherigo*, 327 F.3d 690, 695 (8th Cir. 2003) (district court found *prima facie* case where prosecutor struck only two black jurors); *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000) (strikes of all three black jurors); *Stubbs v. Gomez*, 189 F.3d 1099 (9th Cir. 1999) (California state court violated *Batson* in failing to determine that strikes of all three black jurors established a *prima facie* case); *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989) (strikes of both Hispanics); *United States v. Chalan*, 812 F.2d 1302, 1312 (10th Cir. 1989) *(prima facie* case where government struck three of four native Americans for cause, and then struck last native American peremptorily; "If all the jurors of a defendant's race are excluded from the jury, we believe that there is a substantial risk that the government excluded the jurors because of their race."); *Central Ala. Fair Housing Center v. Lowder Realty*, *supra*, 236 F.3d at 637 ("the number of jurors of one race struck by the challenged party may be sufficient by itself to establish a *prima facie* case where a party strikes all or nearly all of the members of one race on a venire").

trial in 1998,[22] results in setting of the *prima facie* bar much higher than the federal or state courts set their *prima facie* bar. As a result, the California court fails to inquire as to the prosecutor's reasons for challenges to minority jurors under circumstances when virtually every other court in the country would make such inquiry. This failure to inquire allows parties the opportunity to get away with discrimination in California, when they would not have that opportunity anywhere else.

In *People v. Sanders* (1990) 51 Cal.3d 471, 500-501 [273 Cal.Rptr. 537, 797 P.2d 561] the prosecutor peremptorily challenged all *four* prospective Hispanic jurors. The California Supreme Court refused to find a *prima facie* case: "Although removal of all members of a certain group may give rise to an inference of impropriety (*Wheeler*, *supra*, 22 Cal.3d at 280), we cannot say this factor was dispositive on the record . . . ." Even though the defendant had established an "inference" of discrimination, he had

[22] As shown in this subsection, earlier California cases appeared to distinguish between the more stringent "strong likelihood" threshold and the less-stringent "inference" threshold, and chose to apply the former, rather than the latter. See *People v. Box* (2000) 23 Cal.3d 1153, 1188, n. 7 [99 Cal.Rptr.2d 69, 5 P.3d 130]. Subsequent to Petitioner's trial, the California court modified its position on this point, and perhaps rewrote history a bit, and now deems all these formulations of this test – "inference," "strong likelihood," "more likely than not," "preponderance of the evidence," "dispositive" inference, "conclusive" inference, and "mandatory [but] rebuttable presumption" – to be equivalent. *People v. Johnson*, *supra*, 30 Cal.4th at 1312-1318 (Jt. App. 125-127, 132-133) That court claims that all these formulations satisfy *Batson*. It makes no claim that any independent state law applies here. Because the California court now asserts that all these formulations are identical, Petitioner assumes, for the purposes of this argument, that the earlier strong likelihood standard is the same as the standard stated in this case.

not established the necessary "strong likelihood" or "dispositive" inference of discrimination.

In *People v. Howard* (1992) 1 Cal.4th 1132, 1154-1156 [5 Cal.Rptr.2d 268, 824 P.2d 1315], the prosecutor peremptied the only two prospective black jurors. No *prima facie* case was found. In affirming, the California court held "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." *Id*. Thus, although the elimination of all the black jurors created an "inference" of racial discrimination, it did not rise to the required level of a "strong likelihood" or a "conclusive" inference needed for a *prima facie* case. Accord: *People v. Crittenden* (1994) 9 Cal.4th 83, 117-119 [36 Cal.Rptr.2d 474, 885 P.2d 887]: "the prosecutor's excusal of all members of a particular group may give rise to an inference of impropriety, especially if the defendant belongs to the same group. [T]hat inference, as we have observed, is not dispositive."

In the same way, the California Supreme Court held here that its "strong likelihood" standard required proof that discrimination was "more likely than not," in order to establish a *prima facie* case. 30 Cal.4th at 1306 (Jt. App. 115, 134) It defines that standard as requiring proof of discrimination by a preponderance of the evidence, 30 Cal.4th at 1317 (Jt. App. 132-133), and as requiring proof of a "legally mandatory [but] rebuttable presumption." 30 Cal.4th at 1315. (Jt. App. 129) It held that its "more likely than not" standard was not satisfied even when the prosecutor perempted all three black jurors in a case where a black defendant was charged with killing his white girlfriend's child.

These cases show how California's *prima facie* threshold is improperly elevated far above that established by *Batson* and its progeny. Contrary to established practice in

essentially all other jurisdictions, California refuses to find a *prima facie* case, or to make inquiry of the prosecutor, even when he peremptes all two, all three, or even all four members of a protected group. Accordingly, California's "more likely than not" *prima facie* standard should be deemed to violate the rule of *Batson*.

F. Title VII Standards Do Not Support the Decision of the Court below

The California court held here that the threshold for a *prima facie* case of racial discrimination in jury selection is proof that discrimination is "more likely than not," based upon the following syllogism: *Batson* adopts the procedural requirement in Title VII employment cases of initially requiring a *prima facie* case of discrimination. Title VII cases supposedly require a finding of discrimination in order to establish a *prima facie* case. Ergo, *Batson* cases require proof of discrimination by a preponderance of the evidence ("more likely than not") to present a *prima facie* case. *People v. Johnson*, 30 Cal.4th at 1311, 1314 (Jt. App. 122, 128)

The syllogism is inaccurate for two reasons. First, Title VII cases do not require proving the existence of discrimination in order to create a *prima facie* case. Second, and in any event, less evidence should be required to establish a *prima facie* case under *Batson* than under Title VII.

1. Title VII cases do not require a plaintiff to show that discrimination was more likely than not in order to create a *prima facie* case

The holding of the California Supreme Court is based on a fundamental misunderstanding of this Court's Title

VII decisions. In a Title VII case a plaintiff emphatically is not required, in order to create a *prima facie* case, to show by a preponderance of the evidence that the employer engaged in discrimination.

In analyzing claims of employment discrimination under *McDonnell Douglas v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), courts use the three step methodology upon which *Batson* is modeled, namely, (1) the plaintiff must establish a *prima facie* case; (2) the defendant employer states its reason for its employment decision; (3) the trier of fact determines whether the employer treated plaintiff less favorably because of impermissible factors. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575-577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

In *Furnco* this Court reversed a lower court decision for confusing the first and third steps of the *McDonnell Douglas* analysis. The lower court, *Furnco* held, "went awry . . . in apparently equating a *prima facie* showing under *McDonnell Douglas* with an ultimate finding of fact as to the discriminatory refusal to hire under Title VII; the two are quite different. . . . " 438 U.S. at 576. This is essentially the same error which the California court committed here. Under *McDonnell Douglas* and *Furnco* a *prima facie* case arises not because the plaintiff caused the trier of fact actually to make a finding that the defendant's actions (to the extent they remain unexplained) were indeed discriminatory, but because the plaintiff adduced enough evidence to permit such an inference.

This Court has repeatedly held in Title VII cases that evidence from which the trier of fact *could* infer the existence of a discriminatory motive (a permissive inference) is sufficient to create a *prima facie* case under *McDonnell Douglas*. A plaintiff can meet his initial burden of establishing a *prima facie* case by "showing actions

taken by the employer from which *one can infer*, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." *Furnco Construction Co.*, *supra*, 438 U.S. at 576. (emphasis added) Thus, the *McDonnell Douglas* and *Furnco* test requires a permissive inference but no more. Under this standard, the burden on the plaintiff is to identify evidence which allows a court to "infer" that discrimination occurred.[23]

This *McDonnell Douglas-Furnco* Title VII *prima facie* standard is very different from the rule adopted by the court below, which required the objecting party at the *prima facie* stage to prove by a preponderance of the evidence that discrimination actually occurred. In *Teamsters v. United States*, 431 U. S. 324, 358, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977), this Court made clear that a plaintiff can create a *prima facie* case with an "initial showing [that] *justified* the inference that the minority applicant was denied employment opportunity for reasons prohibited by Title VII." (emphasis added).

In arriving at its conclusion that *Batson* requires that an objector prove the existence of discrimination in order to establish a *prima facie* case, the California Supreme Court relied largely on a single sentence in *Wigmore's Evidence*. The court below reasoned as follows: (1) Footnotes 18 and 20 in *Batson* refer to the Title VII decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981), and *Burdine* is

[23] Under *Furnco Construction* the phrase "more likely than not" does not describe the strength of the evidence needed to establish the plaintiff's inference. Instead, the phrase "more likely than not" characterizes what the trier of fact may find if it accepts plaintiff's inference, namely, that discrimination was more likely than not.

"one of the cases cited in *Batson*." (2) Footnote 7 in *Burdine*, which is not the passage quoted in *Batson*, in turn refers to section 2494 in Wigmore's Evidence. (3) Section 2494 in Wigmore's Evidence contains a sentence – not quoted in either *Batson* or *Burdine* – which purportedly states that the type of *prima facie* case created in a Title VII case must be based on "strong evidence" which compels the very conclusion mandated by the presumption. "Thus," the court below reasoned, "*Batson* permits a court to require . . . [such] 'strong evidence.'" *People v. Johnson*, 30 Cal.4th 1314-1316. (Jt. App. 128-130)

Neither the meaning of *Batson* or *Burdine*, nor that of any decision of this Court, can be divined in this extraordinarily strained manner. None of the members of the Court who joined the decision in *Batson* or *Burdine* could possibly have understood they were endorsing the contents of section 2494, as defining what needed to be shown for a *prima facie* case.[24]

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[24] Section 2494 emphatically does not require "strong evidence" to create a mandatory inference. The section in question states that a *prima facie* case creates a mandatory inference

> where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, *either by means of a presumption or by a general mass of strong evidence*, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence.

9 Wigmore, Evidence, §2494, p. 379 (1979 ed.) (emphasis added). Clearly a general mass of strong evidence is not the *only* manner of creating a mandatory inference; such a mandatory inference may also arise because of a presumption. This Court's numerous decisions regarding the *McDonnell Douglas prima facie* case contain no reference to any "strong evidence" requirement.

The court below mischaracterized footnote 7 in *Burdine* as stating that a Title VII plaintiff seeking to create a *prima facie* case must adduce evidence so overwhelming that a trier of fact would be obligated to make a finding of discrimination. *People v. Johnson*, 30 Cal.4th 1314-1316. (Jt. App. 128-130) That footnote in *Burdine* 450 U.S. at 254, n. 7, actually reads:

> The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by the courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

However, this footnote only concerns the *consequence* of creating a Title VII *prima facie* case, not the type or quantity of evidence needed to do so. A Title VII plaintiff can establish a *prima facie* case with evidence sufficient to permit a finding of discrimination (a permissive inference). *Furnco Construction*, *supra*; *McDonnell Douglas*, *supra*. Once a plaintiff has established a *prima facie* case, then he is entitled to a rebuttable presumption of discrimination. *Id*., The sole purpose of that presumption is to compel the employer to articulate a reason for the disputed action; once the employer has done so, the presumption disappears. *St. Mary's Honor Center v. Hicks*, 509 U. S. 502, 507, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Thus, because a showing of "strong evidence," within the meaning of Wigmore §2494, is not needed to get a Title VII case to a jury, it would be nonsensical to require proof at that

elevated level merely to establish the preliminary step of a *prima facie* case.[25]

2. Less evidence is required to establish a *prima facie* case under *Batson* than under Title VII

Title VII cases cannot be used against Petitioner, because less evidence is required to establish a *prima facie* case under *Batson* than under Title VII for several reasons.

(a) **No presumption**: Under Title VII, proof of a *prima facie* case creates a rebuttable presumption of discrimination. *Furnco Construction Corp. v. Waters*, *supra*. Under *Batson*, to the contrary, proof of a *prima facie* case merely requires the challenger to give reasons for his peremptory challenges. It does not create any presumption at all. *Purkett v. Elem*, *supra*, 514 U. S. at 768. For this reason, among others, the *prima facie* threshold and *prima facie* burden under *Batson* should be lower than that under Title VII because the latter need to be strong enough to establish a presumption of discrimination, while the former do not.

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[25] *McDonnell Douglas* established a four-part formula deemed sufficient per se to create a *prima facie* case:

> This may be done by showing (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. Obviously this evidence is not so overwhelming that it would compel a trier of fact to conclude that discrimination had occurred.

(b) **No discovery**: In *Swierkiewicz v. Sorema*, 534 U.S. 506, 152 L.Ed.2d 1, 122 S.Ct. 992 (2002), the Court held that the district court complaint in a Title VII case need not allege enough facts to establish all four elements of a *prima facie* case under *McDonnell Douglas*. The Court held in *Swierkiewicz*, 534 U. S. at 511-512, that the imposition of such a heightened requirement at the pleading stage would be incongruous and premature, because the plaintiff would not yet have been able to use discovery to obtain the necessary evidence:

> It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. . . . Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case. Given that the *prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Swierkiewicz should apply here. The objector to a peremptory challenge, just like the Title VII pleader under *Swierkiewicz*, should not be required to state every possible evidentiary fact, or to show that discrimination is "more likely than not," at the initial stage of his case to present a *prima facie* claim, because, until obtaining discovery, he may be largely unable to state those facts.

(c) **No investigation**: When a Title VII plaintiff's *prima facie* case is tested (such as on summary judgment), he will have his knowledge of his own job situation. He will have conducted investigation as well as discovery. He will have amassed files, if not boxes, full of information before being required to prove that his *prima facie* case is "more likely than not." By contrast, all a *Batson* objector

will know is the identity of the challenged jurors. He will not know the proffered reason why they were challenged, or why other jurors were retained. Because the quantities of proof available in these two categories of cases are so different, it would be incongruous and illogical to require *Batson* objectors to prove their respective *prima facie* cases by the same quantum of evidence as required of Title VII plaintiffs.

II. THE LOWER COURTS' RELIANCE UPON CONJECTURAL JUSTIFICATIONS AT THE *PRIMA FACIE* STAGE VIOLATES THE RULE OF *PURKETT V. ELEM* THAT A *PRIMA FACIE* CASE IS TO BE EVALUATED WITH THE CHALLENGES "UNEXPLAINED"

A. No Conjectured Explanations Should Be Relied upon at the *Prima Facie* Stage

The Question Presented is whether, to establish a *prima facie* case, the objector must show "that it is more likely than not that the other party's peremptory challenges, *if unexplained*, were based upon impermissible group bias" (emphasis added) (Respondent's position), or whether the objector merely must adduce evidence sufficient to permit an inference that "the other party's peremptory challenges, *if unexplained*, were based upon impermissible group bias." (Petitioner's position) Either way, a *prima facie* case is to be established before the challenges are "explained."

California's Supreme Court disregards this principle. It allows the trial judge at trial and the prosecution on appeal to postulate hypothetical justifications for challenges in order to disprove a *prima facie* case, although, by definition, the *prima facie* case is to be evaluated before explanations are given.

Here, for example, when the trial court stated its ruling, denying a *prima facie* case, it expressly based that decision on speculation that possible race-neutral justifications for the challenge to Sara Edwards were that her father had been arrested for robbery 30 or 35 years earlier, and that she had an emotional reaction to the charges of child abuse. (Jt. App. 9) That court attached conclusive importance to its views that such circumstances "would have justified a peremptory challenge." (Jt. App. 8) Similarly, on appeal, the state attorney general and a dissenting judge on the intermediate appellate court speculated that possible justifications for Ms. Edwards' challenge were her omission to answer one out of 62 questions on her juror questionnaire, and that she was childless (supposedly making her less sympathetic to a child's death).[26] (Jt. App. 109-111) Overall, the prosecution on appeal hypothesized 15 such possible "permissible reasons" for the challenges to the black jurors. (See pp. 5-6, *supra*)

The California Supreme Court deemed this type of speculation proper – indeed, dispositive – when it held that, where a trial judge finds no *prima facie* case, affirmance on appeal is required "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors." *Johnson*, 30 Cal.4th at 1325. (Jt. App. 146) Petitioner disagrees. Such speculation is premature and improper at the *prima facie* case stage of *Batson* analysis for several reasons.

(1) Consideration at the *prima facie* stage as to possible reasons for challenges wrongly conflates *Batson*'s step one analysis (*prima facie* case) with step three (evaluation

[26] Petitioner shows at pp. 44-45, *infra*, that each such speculative reason equally applied to multiple white jurors who were seated, which indicates that reliance upon any such reason would be pretextual.

of the prosecutor's explanations and decision on the merits). This improper conflation, like that discussed at pp. 15-17, *supra*, violates the rule of *Purkett v. Elem*. It disobeys the rule that there must be separate analysis at each of the three *Batson* steps. At step one the court is to decide whether the evidence relied upon by the objector is sufficient "if unexplained" to create a *prima facie* case. At step one the court is not to consider possible explanations offered by the prosecutor, hypothesized by appellate counsel, or conjured up by the court itself. "Unexplained" means just that – unexplained.

(2) *Batson* only provides for consideration of the prosecutor's actual reason, and not for consideration of conjectured or "permissible" reasons. When there is no proof that the conjectured reasons reflect the prosecutor's real motivation, they should not be relied upon, because they "cannot be mistaken for the actual reasons for a [peremptory] challenge." *Mahaffey v. Page*, *supra*, 162 F.3d at 483-484, n. 1. Accord: *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 1999) (en banc) ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"); *Bui v. Haley*, 321 F.3d 1304, 1313-1314 (11th Cir. 2003) (reasons given by assistant prosecutor at post-trial hearing as to why she would have challenged minority jurors fail to satisfy *Batson*, because there is no showing that chief prosecutor actually relied upon those specific reasons when he made the challenges); *Turner v. Marshall* (II) 121 F.3d 1248, 1253 (9th Cir. 1997) ("The arguments that the State has made since the evidentiary hearing do not form part of the prosecution's explanation.") To say that certain facts known about a juror *could* have supported a nondiscriminatory challenge cannot establish that those facts were *actually* relied upon by the challenger, or that nondiscriminatory reasons were employed.

(3) Written speculation, after the fact, on appeal, as to possible justifications is not proper. Under *Batson*, once a *prima facie* case has been established, "*the prosecutor* must articulate a neutral explanation." *Batson*, 476 U. S. at 98 (emphasis added). The prosecutor must do so personally by a statement in open court. This Court has emphasized the importance of demeanor evidence in resolving *Batson* claims. *Hernandez v. New York*, 500 U. S. 352, 365, 114 L.Ed.2d 395, 111 S.Ct. 1859 (1991). That demeanor evidence would be unavailable if a prosecutor were permitted at step two to respond after the fact with a written explanation of his actions. Thus, the state's burden may not be satisfied through written arguments by an appellate attorney[27] with or without personal knowledge of the reason for the peremptory challenge.[28] *A fortiori* a court cannot itself assume the prosecution's burden and hypothesize possible explanatory motivations.

(4) When the trial court and the prosecution on appeal conjectured here at the *prima facie* stage as to possible reasons, that required Petitioner not simply to establish an inference of discrimination, but also to prove that there were no possible nondiscriminatory motives for the strikes. By obligating Petitioner to defend at the *prima facie* stage against an almost infinite number of known and unknown possible reasons, the court below imposed upon Petitioner a far greater burden at the *prima facie* stage than he would have had at the merits stage. For, at the merits stage, he would only need to address the

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[27] See *Burdine*, 450 U. S. at 255, n. 9 (defendant's burden in a Title VII case cannot be met "merely through an answer or by an argument of counsel.")

[28] See *Bui v. Haley*, *supra*, 321 at 1314-16 (rejecting explanation by co-counsel who had not made the decision to exercise the challenge.)

limited number of reasons actually stated by the prosecution, not the entire universe of imaginable reasons.

Reliance upon such conjectured reasons or explanations at the *prima facie* stage should be deemed improper. *Batson* did not intend that the objector's *prima facie* burden at step one be more onerous than his merits burden at step three. *Batson* did not intend that an objector lose a motion at the step one *prima facie* stage, simply because he cannot guess the reason upon which the prosecutor will later claim reliance, when the objector might win on the merits at step three, once he knows the prosecutor's claimed reasons.

(5) The California Supreme Court barred Petitioner on appeal from rebutting such conjectured reasons by pointing to evidence in the record that similar white jurors had not been challenged. *People v. Johnson*, 30 Cal.4th 1318 (Jt. App. 134) Such a ruling presents a double standard, and offends the Fifth Amendment's due process clause, because the bar to new arguments on appeal does not apply to the prosecution. Under current California procedure, (a) the state is regularly allowed, for the first time on appeal, to advance possible reasons for challenges (which were not presented at trial), but (b) the defense is not allowed to rebut those speculations, when it hears about them, years later, for the first time on appeal. This double standard allowing one side, but not the other, to raise new arguments on appeal, and not allowing the other side even to respond to these new arguments, offends "the old adage about sauce and geese, which need not be given a citation." *Midstate Co. v. Penna R. Co.*, 320 U. S. 356, 367, 64 S.Ct. 128 (1943).

It was manifestly impossible for defense counsel at trial to adduce comparative juror evidence to rebut the hypothetical reasons first advanced by the state's lawyer on appeal two years later.

Under proper *Batson* procedure, once the prosecutor articulates a reason for a disputed peremptory (step two), the defendant at step three may try to establish pretext by showing that comparable white jurors had not been challenged. If so, that may constitute persuasive evidence that the claimed reason for the challenge to the minority juror is pretextual. Such comparative juror analysis is the law of the land. *Miller-El v. Cockrell*, *supra*, 123 S.Ct. at 1043-1044. Comparative juror analysis has been uniformly applied in all 12 federal circuits.[29]

Every equal protection claim asks whether similarly-situated individuals have been treated differently on the basis of a constitutionally protected classification. As the Court held in *Texas Dep't of Community Affairs v. Burdine*, *supra*, 450 U.S. at 258, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." This elementary principle applies in juror selection cases, too. *Miller-El v. Cockrell*, 123 S.Ct. at 1042-1044. The court below improperly denied Petitioner the right to make such an argument.

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[29] *Caldwell v. Maloney*, 159 F.3d 639, 653 (1st Cir. 1998); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *United States v. Alvarado*, 923 F.2d 253, 256 (2nd Cir. 1991); *Jones v. Ryan*, 987 F.2d 960, 963 (3rd Cir. 1993); *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997); *Hicks v. Johnson*, 186 F.3d 634, 637 (5th Cir. 1999); *United States v. Hatchett*, 918 F.2d 631, 636 (6th Cir. 1990); *Henderson v. Walls*, 296 F.3d 541, 548 (7th Cir. 2002); *Mahaffey v. Page*, *supra*; *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998); *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995); *Devose v. Norris*, 53 F.3d 201 (8th Cir. 1995); *McClain v. Prunty*, 217 F.3d 1209, 1215, 1222 (9th Cir. 2000); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987); *Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994); *United States v. Wynn*, 20 F.Supp.2d 7, 13-15 (D.D.C. 1997).

For all these reasons, the combination of California's reliance on the prosecution's belated explanations on appeal, and California's refusal to allow the defense to rebut those explanations with comparative juror analysis when it first hears them, violates due process and is contrary to *Miller-El*.[30]

[30] The California Supreme Court has given two alternative and somewhat inconsistent rationales for prohibiting defendants from arguing regarding comparable white jurors when the defense hears, for the first time, on appeal, the state's hypothesized reasons for the challenges to minority jurors. (1) First, in cases decided both before and after the instant case, that court has categorically refused to allow, at any stage, comparative juror analysis when evaluating whether proffered reasons are pretextual. *People v. (James) Johnson* (1989) 47 Cal.3d 1194, 1216-1221 [255 Cal.Rptr. 569, 767 P.2d 1047]; *People v. Arias* (1996) 13 Cal.4th 92, 136, n. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980]; *People v. Reynoso* (2003) 31 Cal.4th 903, 920 [3 Cal.Rptr.3d 769, 74 P.3d 852.] California stands alone in the nation in this refusal. (2) Second, the California court held in this case that because comparative juror analysis was not used at trial when this case was tried, it should not be utilized on appeal. *People v. Johnson*, 30 Cal.4th at 1319-1321. (Jt. App. 136-140)

These conclusions are wrong for several reasons: (a) They are contrary to *Miller-El*, which uses comparative juror analysis on appeal. *Miller-El* retroactively applies to the instant case. *Griffith v. Kentucky*, 479 U. S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987). (b) Under federal law, comparative juror analysis may be used for the first time on appeal. *United States v. Alanis*, 335 F.3d 965, 969, n. 5 (9th Cir. 2003). (c) The claim that comparative juror analysis could have been used at Petitioner's trial in 1998 is inaccurate. For many years, as even the dissenting justice at the state Court of Appeal acknowledged, 88 Cal.App.4th 342-344 (Jt. App. 102-105), California barred comparative juror analysis from being used at any stage, including at trial. Thus, any attempt to use it at trial here would have been futile. See, e.g., *People v. Arias*, *supra*, 13 Cal.4th at 136, n. 16, where that court held:

> Just as an appellate court will not compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. "[W]e fail to see how a

(Continued on following page)

B. The Prosecution's Conjectured Explanations Should Be Rejected as Pretextual, Because They Equally Apply to White Jurors Who Were Accepted

The California Court of Appeal found here, under comparative juror analysis, that every reason hypothesized to support the prosecutor's challenges to two of the three black jurors (e.g., unanswered questions on juror questionnaires, family members with arrest history, childlessness) equally applied to multiple white jurors whom the prosecutor accepted. Thus, if *arguendo*, the prosecutor's after-the-fact conjectured explanations may be examined, reliance on such explanations should be rejected as pretextual. *Miller-El v. Cockrell*, *supra*.

As to prospective juror Clodette Turner, the California Court of Appeal gave, as one of several examples of pretext, 88 Cal.App.4th at 333-334 (Jt. App. 79-80):

> No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never mentioned by counsel or the court during argument on either of the *Wheeler* motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by white juror number 7 (questionnaire #50) who also explained he had no opinions on the subject of

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> trial judge can reasonably be expected to make such detailed comparison mid-trial." (*People v. Johnson, supra,* 47 Cal.3d 1194, 1220.) Moreover, as we have indicated, such an analysis is largely beside the point, . . .

Thus, the instant opinion which purports to allow comparative juror analysis on appeal, if only it were used at trial, presents an impossible-to-satisfy "Catch-22."

> those questions, and by white juror number 10 (questionnaire #89).[31]

Other examples of pretextual hypothetical reasons for her challenge are noted at 88 Cal.App.4th 333-334. (Jt. App. 80)

As to prospective juror Sara Edwards, the California Court of Appeal held, 88 Cal.App.4th 333-334 (Jt. App. 82) that any reliance upon the arrest of her father 35 years ago for robbery would be pretextual,

> because the prosecutor failed to challenge several whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror number 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate juror number 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge. . . .

Other examples of pretextual reasons for her challenge are discussed at 88 Cal.App.4th 333-334. (Jt. App. 80-84)

Neither Respondent nor the California Supreme Court has ever rebutted the examples of pretext identified by the Court of Appeal. If comparative juror analysis were applied here, it would clearly establish a *prima facie* case of a *Batson* violation for these two black jurors.

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[31] The dissenting Court of Appeal justice suggested one further possible reason, namely, her childlessness. 88 Cal.App.4th at 347 (Jt. App. 111) This claim, too, fails under comparative juror analysis. The prosecution accepted four white jurors and one Hispanic juror who were similarly childless. (Juror #6, questionnaire #78; Juror #9, questionnaire 41; Juror #10, questionnaire 89; Juror #11, questionnaire 42; Juror #12, questionnaire 81).

III. A *PRIMA FACIE* CASE OF A *BATSON* VIOLATION IS SHOWN ON THIS RECORD

A. This Court Should Decide the Question of Whether There Is a *Prima Facie* Case in this Case

Petitioner requests that the Court resolve the question of whether the record establishes a *prima facie* case. It is five years since the original *Batson* motion in this case. Additional delay in determining this threshold issue will permit further deterioration of the memories of court and counsel regarding the voir dire in December, 1998. Should Johnson's *Batson* challenge ultimately be sustained, and a new trial be required, additional delay in resolving that challenge will dim the memories of the witnesses.

Resolution by this Court is also warranted to remove a misapprehension created by this Court's decision in *Miller-El v. Cockrell*, *supra*, 537 U. S. 322. In holding that no *prima facie* case existed here, the California Supreme Court stressed that the evidence in *Miller-El* was "far stronger than here." *People v. Johnson*, 30 Cal.4th at 1327. (Jt. App. 149) The particular circumstances of *Miller-El* were in several respects extraordinarily unique.[32] If the lower courts were to treat the facts of *Miller-El* as the paradigm of a *prima facie* case, *Batson* would be virtually a dead letter. The lower courts need guidance from this

[32] For example, the Texas jury shuffle procedure involved in *Miller-El* exists in few other states. The circular issued by the Dallas District Attorney's office, recommending that prosecutors avoid jurors of several ethnic groups, was withdrawn in 1976, a quarter century ago. Miller-El was tried in 1986, in a pre-*Batson* era when prosecutors openly engaged in discriminatory practices which they then believed lawful.

Court in the assessment of a *prima facie* case under less atypical circumstances.[33]

B. A *Prima Facie* Case Is Established by the Fact that the Prosecutor Perempted All Three Black Jurors in this Racially-Charged Case

The facts of this case support an inference of intentional discrimination. The prosecution exercised peremptory challenges against 100% of the black prospective jurors (3 of 3), but only against 22% of the non-blacks (9 of 40). (Jt. App. 8-10, 12) The California Supreme Court correctly characterized this pattern as "indeed troubling," noting that "it certainly looks suspicious that all three black prospective jurors were removed from the jury." *People v. Johnson*, 30 Cal.4th at 1328. (Jt. App. 148) Nonetheless, that court held that such a pattern of challenges was "perhaps more explainable by happenstance." *People v. Johnson*, 30 Cal.4th at 1327 (Jt. App. 150)

[33] The California Supreme Court asserted in the instant case that, compared to *Miller-El*, "the number of strikes is smaller, and thus perhaps more explainable by happenstance." *People v. Johnson*, 30 Cal.4th at 1327. (Jt. App. 150) In *Miller-El* the prosecution excused 3 of 31 non-African-American jurors (9.67%) and 10 of 11 African-Americans (90.9%). If the prosecution had excused all jurors at the 9.67% rate, the probability that 10 of the 11 African-American jurors would have been excused would have been less than one in a million. (.0967)[11] If that is the degree of unlikelihood needed to establish a *prima facie* case, it is unlikely that any other *Batson* challenge will ever succeed.

It was quite unlikely that this 100% exclusion occurred by happenstance. The probability of such complete exclusion occurring by chance was approximately 1 in 87.[34]

In *Miller-El v. Cockrell*, 123 S.Ct. at 1042, the Court held that a *prima facie* case may be shown by "statistical evidence alone." The issue at the *prima facie* stage is neither the credibility of a racially-neutral explanation nor the ultimate question of bias, but merely the appearance of such bias as would call for an explanation. Striking all three black jurors clearly presents the appearance of bias, warranting an explanation. These facts alone should establish a *prima facie* case.

Further, the facts of the alleged offense had considerable potential to inflame racial animus. Johnson was charged with killing his white girlfriend's child. His defense depended on his credibility. Even a prosecutor who harbored no personal animus towards black defendants might have thought that white jurors would be more likely to convict because of the race of the individuals involved. The state Supreme Court frankly acknowledged that these racial "circumstances are obviously highly relevant to whether a prima facie case existed." *People v. Johnson*, 30 Cal.4th at 1326. (Jt. App. 197)

Finally, even if the Court were to examine the personal characteristics of the challenged black jurors to look for obvious reasons for their challenges – a course of action which we contend is inappropriate at step one of the *Batson* analysis – none appear. No one at the trial court

[34] The prosecution exercised peremptory challenges against 22.5% of the non-African-American jurors. The likelihood that the three African-American jurors (or any other three specific jurors) would be removed by peremptory challenge is (.225)x(.225)x(.225)=.01139. The inverse of .01139 is 87.8.

identified any problem whatsoever as to Clodette Turner. No one ever identified any factor as to Sara Edwards which did not equally apply to several white jurors who were accepted. For these reasons the Court should determine, consistent with the majority at the state Court of Appeal and the dissent at the state Supreme Court, that there was a *prima facie Batson* case.

CONCLUSION

Unjust convictions of African-American defendants by all-white juries have played a long and tragic role in the history of the American legal system.[35] The use of peremptory challenges to create an all-white jury is assuredly not conclusive evidence of an invidious discriminatory scheme. But where an all-white jury has been created by the use of two or more peremptory challenges against black jurors (and here the prosecutor used three), the appearance of justice would be intolerably compromised if the court refused even to ask the prosecutor to explain that action.

For all the reasons stated here, Petitioner respectfully requests that the Court rule: (1) that California's standard for the inference needed to present a *prima facie* case of discrimination under *Batson* is incorrect; (2) that a *prima facie* case is presented on the record here; and (3) that the

[35] See, e.g., *Georgia v. McCollum*, *supra*, 505 U. S. at 61, n. 1 (Thomas, J. concurring), noting frequent criticism of "all white juries."

decision of the California Supreme Court should be reversed.

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