No. 21-8248

In the Supreme Court of the United States

LORENZO NEWBORN, KARL DARNELL HOLMES, AND HERBERT MCCLAIN,

Petitioners,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the California Supreme Court correctly held that the record in this case did not establish a prima facie case of race discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986).

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Holmes, McClain & Newborn, No. S058734 (judgment entered January 21, 2022; petition for rehearing denied March 30, 2022).

In re Newborn on Habeas Corpus, No. S272088 (state collateral review) (pending).

In re Holmes on Habeas Corpus, No. S271960 (state collateral review) (pending).

In re McClain on Habeas Corpus, No. S272026 (state collateral review) (pending).

Los Angeles County Superior Court:

People v. Holmes, McClain & Newborn, No. BA092268 (judgment entered January 21, 1997).

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STATEMENT

1. Petitioners Karl Holmes, Herbert McClain, and Lorenzo Newborn were convicted and sentenced to death for a 1993 shooting that left three young victims dead and five others seriously wounded. Pet. App. 23. The trial evidence showed that in October 1993, McClain shot a rival gang member several times outside of an apartment complex. *Id.* Three nights later, the rival gang retaliated by shooting and killing a member of petitioners' gang. *Id.* at 25. Later that same evening, petitioners ambushed and fired upon eight young teenagers walking home from a birthday party after mistaking them for rival gang members. *Id.* at 25-28. Three of the victims died and the other five were seriously wounded. *Id.*

A jury convicted petitioners of three counts of first degree murder, five counts of attempted murder, and conspiracy to commit murder. Pet. App. 23. The jury found true special circumstance allegations for lying in wait and multiple murder, making petitioners eligible for the death penalty. *Id.* The jury initially deadlocked on the question of punishment, but a separate jury returned verdicts of death after a penalty-phase retrial. *Id.*

2. Petitioners' guilt-phase jury was composed of four Black females, one Black male, three White females, two White males, one Hispanic female, and one Hispanic male. Pet. App. 71. During the jury selection process, petitioners challenged six of the prosecution's peremptory challenges of Black female prospective jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its state-court analog, *People v. Wheeler*, 22 Cal. 3d 258 (1978). *Id.* at 61-62. This

petition for a writ of certiorari seeks review respecting the denial of relief for those six challenges. Pet. 10-14.

Petitioners raised their *Batson* challenge after the prosecutor used his twelfth peremptory challenge to excuse Prospective Juror 94, a Black female. Pet. App. 61; 13 Reporter's Transcript (RT) 908. At the time of that challenge, the prosecutor had used challenges against five other Black female prospective jurors (Prospective Jurors 37, 53, 48, 8, and 88); three Black female jurors remained seated in the jury box and ultimately served as jurors, along with a fourth Black female juror who replaced Prospective Juror 94 in the jury box. Pet. App. 46, 49, 62, 68. In support of their *Batson* challenge, petitioners pointed to the fact that the prosecutor had struck six Black females. 13 RT 907.

The trial court denied the *Batson* challenge, concluding that petitioners failed to make a prima facie showing of purposeful discrimination. Pet App. 64. The court reasoned that three of the struck jurors had been the subject of sidebar discussion and noted that there were "some very difficult issues with them." 13 RT 908. The court further explained that it did not see anything in the record to suggest bias or prejudice in any of the challenged strikes and denied the motion without requiring the prosecutor to explain the bases for the strikes. Pet. App. 40.

The record reveals the following about the six prospective jurors at issue: Prospective Juror 37 expressed reservations about the death penalty and her

ability to impose it and the prosecutor moved to excuse her for cause. *See* 15 Supplemental I Clerk's Transcript (SCT-I) 429-4296; 11 RT 678. Prospective Juror 53 indicated in her questionnaire and during voir dire that she believed in jury nullification. *See* 18 SCT-I 4929-4932; 12 RT 722-724. The prosecutor moved to excuse her for cause as well. 12 RT 724. Prospective Juror 48 left much of her questionnaire blank, including several questions concerning her views on the death penalty. *See* 17 SCT-I 4713-4753. Prospective Juror 9 gave responses indicating that she would have difficulty weighing conflicting testimony from witnesses and in imposing the death penalty. *See* 11 SCT-I 3139, 3152. Prospective Juror 88 had previously served on two juries that were unable to reach a verdict and volunteered that she was one of the jurors who caused a mistrial in one of those cases. *See* 23 SCT-I 6358, 6366, 6368-6370; 12 RT 833, 835, 838-842. Prospective Juror 94 had been a victim of domestic abuse and disclosed that she remained with her abuser, a circumstance that would be implicated during the penalty phase of the trial when the prosecution expected to present evidence of one petitioner's domestic violence as an aggravating factor. *See* 24 SCT-I 6614-6615; 12 RT 861-862; Pet. App. 36-37.

After the *Batson* motion was denied, jury selection resumed and several more panelists were excused by both the defense and the prosecution. Pet. App. 70-71. Later, during an in-chambers discussion on a separate topic, the trial court remarked that it was "sensitive" to the issue of bias in jury selection. The court cautioned that, although both parties' peremptory strikes had been

proper, both the defense and prosecution needed to "be careful" and aware of the appearance of bias. *Id.* at 64-65, 70-71.[1] The prosecutor subsequently exercised an additional four peremptory challenges against a Hispanic male, two Black females, and a Hispanic female. *Id.* at 70-71. Petitioners did not object to those challenges or to the final composition of the jury. *Id.* at 71.

The jury reached verdicts at the guilt phase, but hung during penalty-phase deliberations. Pet. App. 32; 7 Clerk's Transcript (CT) 1863, 1888. A new jury was empaneled for the penalty-phase retrial and that jury returned death verdicts against all petitioners. Pet. App. 23-24.

3. The California Supreme Court affirmed petitioners' convictions and death sentences on direct appeal. Pet. App. 23. As relevant here, the state supreme court concluded after conducting an independent review of the record that there was no prima facie showing that the prosecutor excused any juror on a discriminatory basis. *Id.* at 61; *see also id.* at 61-72.

In reaching that conclusion, the California Supreme Court recognized that when the jury was selected in 1995, "there was some confusion" in California courts about the standard for establishing a prima facie showing of discrimination, with some courts requiring objectors to show that it was "more likely than not" that a challenge was based on impermissible bias. Pet. App.

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[1] By the time the panel was ultimately sworn in as jurors, the defense had excused nine White prospective jurors, two Black prospective jurors, three Asian prospective jurors, and one Hispanic prospective juror. Pet. App. 65 n.18.

63. This Court disapproved of that "more likely than not standard" in *Johnson v. California*, 545 U.S. 162, 170 (2005), and held that a defendant satisfies the requirements of *Batson's* first step by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* Following that decision, the California Supreme Court adopted a "mode of analysis" for cases tried before *Johnson* in which it reviewed "the record independently to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis." *Id.* As part of that independent review, the California Supreme Court considered "all relevant circumstances," including "whether a party has struck most or all of the members of the identified group from the venire; has used a disproportionate number of strikes against the group; or has only engaged the panelists in desultory voir dire." *Id.* at 64.

Conducting that independent review in this case, the California Supreme Court concluded that the trial court had not erred in denying petitioners' *Batson* motion. Pet. App. 64, 72. Turning to the "pertinent 'especially relevant'" factors, the court acknowledged that there was an "obvious disparity" between the percentage of Black women comprising the venire (19% of 83 venire), the portion of the venire pool that had been questioned (26% of 34 panelists), and the percentage of peremptory strikes the prosecutor

exercised against Black females (50% of 12 peremptory strikes). *Id.* at 65.[2] While those numbers were "important," the court concluded that, when "considered in context, [they] do[] not give rise to an inference [that] the excusals were motivated by racial bias." *Id.* at 67. For example, while at the time of the *Batson* motion Black females made up 26% of the 34 panelists that had been questioned, Black females comprised 33% of the jurors ultimately seated, exceeding their representation among the panel at the time of the motion. *Id.* "While acceptance of one or more Black jurors by the prosecution does not necessarily settle all questions about how the prosecution used its peremptory challenges," the court observed that "these facts nonetheless help lessen the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply." *Id.*

The California Supreme Court also noted that a juror who had been excused right before petitioners raised their *Batson* challenge was replaced in the jury box by another Black female who ultimately served as a juror. Pet. App. 68. Moreover, two Black females had been present on the panel from an early point in the selection process. *Id.* But the prosecutor never exercised strikes against them and they ultimately served as jurors. *Id.* And the prosecutor eventually accepted the jury with four Black females seated, leaving

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[2] The court observed that a factor considering whether the defendant is a member of the identified group and whether the victim is a member of the majority of remaining jurors was not implicated in this case. Pet. App. 64.

19 strikes unused. *Id.* at 68-69. Those facts tended to show that the "prosecutor did not harbor bias against" Black females. *Id.* at 69.

Justice Liu dissented. Pet. App. 183-202. In his view, the record was "more than 'sufficient to permit [the court] to draw an inference that discrimination *may* have occurred.'" *Id.* at 196 (quoting *People v. Battle*, 11 Cal. 5th 749, 773 (2021)). Justice Liu would have concluded that the strike rate and the elimination rate were sufficient to draw an inference of discrimination. *Id.* at 186-189. He would have put no weight on the ultimate composition of the jury, given the trial court's warnings to counsel in chambers to "be careful" with the balance of jury selection. *Id.* at 194-195. He would have reversed the judgment in this case, given that the "passage of time makes remand to explore the prosecutor's actual reasons for the contested strikes impractical." *Id.* at 197.[3]

ARGUMENT

Petitioners contend that the California Supreme Court erred in concluding that the record does not reflect a prima facie case of discrimination at step one of the *Batson* analysis. But the state court properly applied this Court's *Batson* precedents to the circumstances presented in this case and correctly concluded that the record does not support an inference of purposeful

[3] At the same time, Justice Liu expressed "no view on whether" petitioners "would have ultimately shown by a preponderance of the evidence that the prosecutor improperly dismissed one or more Black female jurors." Pet. App. 196. He acknowledged that the "prosecutor may well have had race-neutral reasons for each strike." *Id.*

discrimination. That decision does not warrant further review. And petitioners do not identify any other basis for this Court's intervention.

1. To make out a prima facie case of purposeful discrimination, a defendant raising a *Batson* challenge must "show[] that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. at 168.[4] To make that showing, a defendant may rely on a "wide variety of evidence, so long as the proffered facts gives 'rise to an inference of discriminatory purpose.'" *Id.* at 169. And while a court considering a *Batson* claim must consider all "relevant circumstances," they maintain "flexibility in formulating appropriate procedures to comply with *Batson*." *Id.* at 168, 169.

Petitioners argue that this Court's review is necessary because the California Supreme Court failed to "accept [those] responsibilities under *Johnson*." Pet. 6. That is incorrect. The state high court adhered to *Johnson* and this Court's other *Batson* precedents. Citing *Johnson*, the court acknowledged its obligation to consider "all relevant circumstances" to determine whether the "objector produced sufficient evidence to support an inference that discrimination occurred." Pet. App. 63 (quoting *Batson*, 476 U.S. at 96-97 and *Johnson*, 545 U.S. at 170). Turning to the record, the court

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[4] *See Johnson*, 545 U.S. at 170 ("[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.").

carefully examined the circumstances, noting that among 83 potential venirepersons, 16 of the prospective jurors (or 19%) were Black females. *Id.* at 65. And at the time of the *Batson* motion, 26% of the 34-person venire who had been questioned were Black females. *Id.* The court acknowledged that the prosecutor's six of twelve peremptory challenges against Black females reflected an "obvious disparity" with the percentage of Black females comprising the venire. *Id.* at 65.[5] But the court also properly observed that "[e]ven a high exclusion rate does not invariably" raise the inference that excusals "were motivated by discriminatory animus; other factors may also be relevant." Pet. App. 65; *see also id.* ("context remains informative").

In this case, that context included the fact that the prosecution "ultimately accepted a jury with four" Black women, a "statistically higher figure than [their] representation in the box." Pet. App. 67. And while a prosecutor's "acceptance of a panel including multiple" Black female prospective jurors is not "conclusive," the court reasoned that it "lessen[ed] the strength of any inference of discrimination that the pattern of . . . strikes might otherwise imply" and offered "an indication of the prosecutor's good faith in exercising . . . peremptories." *Id.* Moreover, the court observed that in accepting the jury, the prosecutor left 19 strikes unused. *Id.* at 68. The court explained that the "fact that the prosecution accepted a panel with [four Black

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[5] *See also* Pet. App. 65 (acknowledging that prosecutor had excused Black females "at a rate higher than their representation among those called to the box," a fact that was both "important" and "noteworthy").

female] jurors when it had enough remaining peremptory challenges to strike them suggests that the prosecutor did not harbor bias against" Black females. *Id.* at 69.

In addition, the state high court noted that the "prosecutor's decision to strike one [B]lack juror while accepting another who replaced her suggests that nonrace related differences between the jurors, rather than race, explain the prosecutor's actions." Pet. App. 68. Moreover, two of the Black females ultimately seated on the jury had been members of the panel from an early point in the jury selection process, but "were never the subject of a strike." *Id.* at 69. The court reasoned that "[w]hen advocates pass a challenge, they evidence a willingness to accept the panel as constituted." *Id.* And in this case, the "prosecutor . . . passed the challenge when the group of 40 panelists seated or excused contained several" Black females. *Id.* The state high court acknowledged that the issue was "close," but ultimately "conclude[d]"—consistent with *Johnson* and other *Batson* precedents—that the record did not support a prima facie showing of purposeful discrimination. *Id.* at 61.

Petitioners disagree with the court's conclusion, focusing on the elimination, strike, and exclusion rates to argue that those statistics "converge to support" an inference of purposeful discrimination. Pet. 8-9. They identify other cases in which comparable statistics satisfied a defendant's burden at step one of the *Batson* analysis. *Id.* But the state high court in this case did not dispute that "high exclusion rates" may, in appropriate circumstances,

support an inference of discrimination. Pet. App. 44. Indeed, "[t]he fact that a prosecutor peremptorily strikes all or most veniremembers of the defendant's race" may be "sufficient on its own to make a prima facie case at Step One" in certain cases. *Shirley v. Yates*, 807 F.3d 1090, 1101 (9th Cir. 2015). The state high court instead concluded on the basis of the record presented in this case that all the "other factors" dispelled any inference of purposeful discrimination arising from the fact that six of twelve Black females had been stricken. Pet. App. 66. None of the cases cited in support of petitioners' statistical argument involved similar facts. *See* Pet. 8-9.[6] And the petition does not address the factors the California Supreme Court found significant in dispelling an inference of purposeful discrimination.

Petitioners also point to the profiles of the six Black female jurors who were stricken and conduct a "comparative juror analysis" to support their argument for a prima facie case of purposeful discrimination. Pet. 10-19. In petitioners' view, the "strength of the jurors' qualifications is an additional circumstance that supports an inference of discriminatory intent." *Id.* at 14.

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[6] *See Shirley*, 807 F.3d at 1101 (prosecutor struck two of only three Black potential jurors and allowed one to be seated on the jury only after the judge indicated that if he struck the remaining black veniremember, he would be required to give reasons for all three strikes); *Currie v. McDowell*, 825 F.3d 603 (9th Cir. 2016) (prosecutor had documented history of committing *Batson* violations and offered pretextual justifications found inadequate at step three of the *Batson* inquiry); *Abu-Jamal v. Horn*, 520 F.3d 272, 290 (3d Cir. 2008), vacated on other grounds sub nom, *Beard v. Abu-Jamal*, 558 U.S. 1143 (2010) (concluding that it was not unreasonable for Pennsylvania Supreme Court to hold that defendant failed to sustain burden at step one based on strike rate alone).

The California Supreme Court concluded that it did not need to "examin[e] the record for obvious race-neutral reasons for the prosecutor's peremptory strikes" because the final jury composition and other facts were adequate to conclude that the strikes did not raise an inference of discrimination. Pet. App. 72. In any event, an examination of the record refutes petitioners' characterization of the prospective jurors and dispels any inference of bias. *See People v. Scott*, 61 Cal.4th 363, 384 (2015) (courts may consider non-discriminatory reasons that are "apparent from and clearly established" in the record to dispel any inference of bias).

For example, petitioners argue that Prospective Juror 37 was "well qualified for jury service." Pet. 11. But Prospective Juror 37 was challenged for cause on the basis of her responses, including an admission that she might nullify special circumstance allegations to avoid imposing the death penalty. 15 SCT-I 4300.[7] Petitioners assert that Prospective Juror 53 was "overtly pro-death penalty." Pet. 11. But Prospective Juror 53, too, was challenged for cause on the basis of her responses during voir dire, including the fact that she

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[7] In addition, Prospective Juror 37 reported that her son had been arrested for or charged with numerous crimes and involved in an altercation with the police in which his "skull was split," 15 SCT-I 4276A-4277; she believed the death penalty was used randomly and disproportionately on minorities, the poor, and the uneducated, 15 SCT-I 4294-4295; there were some circumstances where it would be impossible for her to vote for the death penalty, 15 SCT-I 4296; and she believed that life in prison was a worse punishment than death for some, 15 SCT-I 4297.

might in some circumstances vote her conscience, rather than follow the law.[8] Petitioners state that Prospective Juror 48 believed that the death penalty was imposed "too seldom," Pet. 12, but the record reflects that she also stated that life without the possibility of parole was a worse punishment than the death penalty and ignored 21 questions on the juror questionnaire, many of which involved the death penalty. *See* 17 SCT-I 4713-4753.[9]

Petitioners also characterize Prospective Jurors 9, 88, and 94 as "prime candidates to sit on a death-qualified jury." Pet. 13. But Prospective Juror 9 indicated that differing versions of events from witnesses would automatically raise reasonable doubt (though she changed that answer during voir dire), 11 SCT-I 3139; 11 RT 602; and she stated in her questionnaire that it would be impossible to vote for death, while possible to vote against death, 11 SCT-I 3152. Prospective Juror 88 had served as a juror in two previous trials that could not reach verdicts, and identified herself as one of the jurors who had

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[8] Prospective Juror 53 stated that prior jury service led her to believe "that a juror can ignore the letter of the law and follow his/her conscience," and that she could see herself in circumstances ignoring the law and voting her conscience, 18 SCT-I 4932; 12 RT 722-724; and in a questionnaire, she identified the "criminally insane" as a class of individuals suitable for the death penalty because they were beyond reform, *see* 18 SCT-I 4951, 4952, 4955, 4957, 4958.

[9] Prospective Juror 48 also disagreed somewhat with the statements that "Anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty" and "Anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty." 17 SCT-I 4747-4748.

caused the mistrial in one of those cases. 12 RT 835.[10] And Prospective Juror 94 stated in her questionnaire that she had been the recent victim of domestic violence, but remained with her abuser, 24 SCT-I 6614-6615; 12 RT 862. That disclosure was relevant to evidence expected to be introduced at the penalty phase, involving petitioner Newborn's commission of battery on four different girlfriends. *See* Pet. App. 36-37.[11]

Those characteristics offer additional non-discriminatory reasons for dispelling any inference of bias. Of course, as the California Supreme Court has itself observed, it would have been "better practice . . . to 'offer prosecutors the opportunity to state their reasons . . . to determine whether any constitutional violation has been established.'" *People v. Reed*, 4 Cal. 5th 989, 999 n.6 (2018). But the court's record-specific conclusion that the totality of

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[10] In addition, Prospective Juror 88's eldest child's father had been incarcerated and suffered several convictions, including for armed robbery and accomplice to murder, and she also had cousins and a sister who had also been incarcerated, 23 SCT-I 6358, 6368-6370; *see also* 12 RT 833, 838-842; during voir dire, she was shaking and appeared out of breath and told the trial court that she was nervous, 12 RT 840; she initially indicated that she could not personally vote to impose the death penalty, but changed her response during voir dire, 23 SCT-I 6388; 12 RT 843; she indicated in her questionnaire that it would be impossible to vote for death under any circumstances, 23 SCT-I 6388, and that she was "against" the adage "an eye for an eye," 23 SCT-I 6389; and she stated that very few crimes warrant the death penalty, 23 SCT-I 6386.

[11] Prospective Juror 94 also stated in her questionnaire that she believed life in prison without the possibility of parole was a worse punishment than the death penalty, 24 SCT-I 6635; and although she "strongly agree[d]" with the death penalty, she acknowledged that she held a different opinion within ten years of completing the questionnaire, 24 SCT-I 6632, 6633, 6639.

circumstances dispels any inference of discrimination does not warrant further review.

2. Apart from the circumstances presented in petitioners' own case, they contend that plenary review is warranted to course correct for decades of state court denials of *Batson* relief. Pet. 5-7. But the court properly applied *Johnson* to the record in this case. Pet. App. 41. And the California Supreme Court's resolution of *Batson* issues in other cases is not before this Court. In any event, petitioners do not demonstrate that those decisions were wrong—indeed, they acknowledge that this Court denied review in many of them. Pet. 20.

Moreover, California's courts and legislature are actively addressing many of the policy concerns raised in the petition. *See* Pet. 6. For example, the California Supreme Court convened a working group to study measures to guard against discrimination in jury selection.[12] That working group recently submitted a final report.[13] And the State enacted a statute that eliminates a defendant's burden to establish a prima facie case in California trials. *See* A.B. 3070, Cal. Stats. 2020, ch. 318 (signed Sept. 30, 2020). As of January 2022, whenever a *Batson* objection is made, "the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been

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[12] *See* California Supreme Court, Statement on Jury Selection Work Group (January 29, 2020), https://tinyurl.com/2tnh6n3e.

[13] *See* Jury Selection Work Group, Final Report to the California Supreme Court (July 2022), https://tinyurl.com/yc334ecx.

exercised." *Id.* § 2 (emphasis added) (enacting Cal. Code Civ. Proc. § 231.17(c), effective Jan. 1, 2022).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: August 26, 2022

Respectfully submitted,

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