No. 04-10500

In The Supreme Court of the United States

STANLEY WILLIAMS,

Petitioner,

v.

JILL BROWN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PROGRESSIVE JEWISH ALLIANCE, MUSLIM PUBLIC AFFAIRS COUNCIL, CHINESE FOR AFFIRMATIVE ACTION, AMERICAN FRIENDS SERVICE COMMITTEE, FRIENDS COMMITTEE ON LEGISLATION OF CALIFORNIA, INTERFAITH COMMUNITIES UNITED FOR JUSTICE AND PEACE, OFFICE OF RESTORATIVE JUSTICE FOR THE ARCHDIOCESE OF LOS ANGELES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS, ELLA BAKER CENTER FOR HUMAN RIGHTS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND DEATH PENALTY FOCUS IN SUPPORT OF PETITIONER'S WRIT OF CERTIORARI

STEPHEN F. ROHDE, ESQ.
(*Counsel of Record*)
ROHDE & VICTOROFF
1880 Century Park East,
Suite 411
Los Angeles, CA 90067
(310) 277-1482

ANDREW LOVE, ESQ.
P.O. Box 194401
San Francisco, CA 94119
(415) 904-5617

CHARLES PATTERSON, ESQ.
MORRISON & FOERSTER LLP
555 W. 5th Street, No. 3500
Los Angeles, CA 90013
(213) 892-5553

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S WRIT OF CERTIORARI

National Association for the Advancement of Colored People, Progressive Jewish Alliance, Muslim Public Affairs Council, Chinese for Affirmative Action, American Friends Service Committee, Friends Committee on Legislation of California, Interfaith Communities United for Justice and Peace, Office of Restorative Justice for the Archdiocese of Los Angeles, Lawyers' Committee for Civil Rights, Ella Baker Center For Human Rights, National Association of Criminal Defense Lawyers, and Death Penalty Focus submit this *amici curiae* brief in support of the Petitioner, Stanley Williams.[1]

STATEMENT OF INTEREST

Each *amici* organization has a particular interest in the constitutional command that bias in the jury selection process be eliminated, particularly in death penalty cases. *Amici* are dedicated to making a reality of "the promise of equality under the law – that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy." *J.E.B. v. Alabama*, 511 U.S. 127, 145-46 (1994).

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of prejudice; the

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. Letters from both parties signifying consent to the filing of this brief are submitted with this brief and on file with the Court.

publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious and ethnic bias.

Progressive Jewish Alliance (PJA) is a statewide nonprofit organization dedicated to the Jewish tradition of pursuing peace, promoting equality and diversity, and working for social and economic justice. A central commitment of the Jewish tradition is that all laws be applied equally to all members of the community, whatever their race, ethnicity, or religion. PJA is deeply concerned that juries which are the product of racial discrimination – and racial bias in the criminal justice system more broadly – violate the principle of equal protection of the law, and thereby compromise the quality of justice.

The Muslim Public Affairs Council (MPAC) is a public service agency working for the civil rights of American Muslims and for the integration of Islam into American pluralism. Since 1988, MPAC has worked diligently to promote a vibrant American Muslim community and enrich American society through exemplifying the Islamic values of mercy, justice, peace, human dignity, freedom, and equality for all. MPAC is deeply concerned that racial bias in jury selection continues to deny equal protection of the laws to defendants in criminal cases.

Chinese for Affirmative Action (CAA) is a 36-year-old, membership-based nonprofit organization whose mission is to defend and promote the civil rights of Asian Americans within the context of advancing a multiracial democracy in the United States. Throughout its history, CAA has engaged in policy advocacy and litigation to eliminate racial bias from government at local, state, and federal levels. One of the areas central to CAA's goals is to advocate for equal access to government, including the judicial system.

The American Friends Service Committee (AFSC), since its founding in 1917, has been involved in programs to overcome discrimination and oppression, for peace and reconciliation, and humanitarian assistance. The AFSC

has a vital interest in this litigation because of Friends' historic and continued opposition to racial inequality and discrimination and to the taking of human life by the State. This opposition to capital punishment and inequality is based on Friends' belief in the infinite worth of each human being and the equality of all human beings in the sight of God.

The Friends Committee on Legislation of California (FCL) is a legislative action group founded by Quakers in 1952. FCL advocates for California state laws that are just, compassionate, and respectful of the inherent worth of every person. FCL believes that the accused are entitled to full due process regardless of a defendant's economic status, racial or ethnic background, national origin, immigration status, social class, gender, or sexual orientation and that racial bias in jury selection is a violation of due process.

Interfaith Communities United for Justice & Peace (ICUJP) is an organization of Buddhists, Christians, Jews, Muslims, and followers of other faith traditions dedicated to peace and justice and opposed to war and violence. ICUJP is deeply concerned about racial discrimination in general and in the selection of juries in particular.

The Office of Restorative Justice of the Archdiocese of Los Angeles and its staff provide pastoral care for the incarcerated, their families, and victims while seeking to affect changes in public policy regarding incarceration. They employ education and outreach as they advocate for a transformation in our current criminal justice system and those human beings impacted by it. They are especially concerned with how racism undermines the fairness of the criminal justice system.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee is affiliated with the

Lawyers' Committee for Civil Rights Under Law in Washington, D.C. that was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco. Throughout its history, the Lawyers' Committee has dedicated itself to ensuring that our legal processes are carried out without the taint of racial bias. To allow such bias to influence the selection of a jury thwarts the fulfillment of this important goal.

The Ella Baker Center for Human Rights ("the Center") documents, exposes and challenges human rights abuses in the United States criminal justice system. Included in the Center's struggle against the criminal justice system's devastating inequities and shortcomings is racial bias in juror selection.

The National Association of Criminal Defense Lawyers (NACDL) works domestically and internationally to ensure justice and due process for persons accused of crime, foster the integrity, independence and expertise of the criminal defense profession and promote the proper and fair administration of criminal justice. NACDL has appeared as *amicus curiae* numerous times before this Court.

Death Penalty Focus ("DPF") is a membership-based nonprofit organization whose mission is to educate the public on the unfair and arbitrary nature of the death penalty and seeks its abolition. DPF is particularly concerned about the effect of racism in the application and administration of the death penalty in California.

STATEMENT OF THE CASE

A single jury drawn from a narrow segment of Los Angeles County convicted Stanley Williams of four counts of robbery-murder arising from two separate incidents. In one, Williams, who is African American, was convicted of killing a Caucasian convenience store clerk in Whittier, California. In the other, Williams was convicted of killing three Asian Americans, members of a family that owned a

motel in South Central Los Angeles. Nearly all of the evidence against Williams consisted of testimony from jailhouse informants and immunized accomplices, exactly the type of evidence that is the leading cause of wrongful convictions in death penalty cases. Center for Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, available at http://www.law.northwestern.edu/wrongfulconvictions (viewed June 29, 2005). Williams has always asserted that he is innocent of these crimes. Despite the weak nature of the evidence against him, the jury sentenced Williams to death.

The record shows that, during voir dire in Williams' trial, the prosecutor deliberately used his peremptory challenges to remove all of the potential jurors who were identified on the record as African-American. The prosecutor used two of 19 strikes to exclude the only two African-American women called as potential jurors. He then used one of three strikes to exclude the only African-American man called as a potential alternate juror. As a result, the prosecutor effectively precluded every person identified on the record as African American from serving as a juror or alternate juror in Williams' trial.

This was not the first time this prosecutor had engaged in overt, race-based jury selection. Indeed, after the Williams trial, the California Supreme Court would reverse two death sentences precisely because this same prosecutor engaged in racially biased jury selection. *People v. Turner*, 42 Cal.3d 711, 714, 726 P.2d 102, 103, 230 Cal.Rptr. 656, 657 (1986); *People v. Fuentes*, 54 Cal.3d 707, 721, 818 P.2d 75, 83, 286 Cal.Rptr. 792, 800 (1991). In one of these cases, the Court reversed the conviction on the grounds that the trial court failed to use the correct standard in evaluating the prosecutor's proffered reasons for the challenges. In a concurring opinion, Justice Stanley Mosk stated:

> I believe we must place the ultimate blame on its real source – the prosecutor. It was he who

> unconstitutionally struck Black prospective jurors. The record compels this conclusion and permits none other. . . . This prosecutor knew that such conduct was altogether improper. The trial court told him as much. And so did we. Only a few months earlier, in *People v. Turner* (1986) 42 Cal.3d 711 . . . this court attempted to teach the same prosecutor that invidious discrimination was unacceptable when we reversed a judgment of death because of similar improper conduct on his part. He failed – or refused – to learn his lesson.

54 Cal.3d at 722, 818 P.2d at 83-84, 286 Cal.Rptr. at 800-801.

Moreover, after unconstitutionally removing African Americans from the jury in Williams' trial, the prosecutor argued in closing that the defendant was a wild animal, an argument that many would find to be racially coded. He told the jurors they saw the defendant in a "very civilized proceeding" in the courtroom which was akin to seeing a "Bengal Tiger in captivity in a zoo," but that if the jurors saw the "defendant in his environment," it would be like "going into the back country, into the hinterlands" and encountering the Bengal Tiger in its natural "habitat." The prosecutor used this argument to inflame the fears and passions of the jurors. As with the prosecutor's race-based jury selection, this was not an isolated incident; he later used this same metaphor in other cases, including another capital case involving an African-American defendant and a Caucasian victim. *People v. Duncan*, 53 Cal.3d 955, 976, 810 P.2d 131, 142, 281 Cal.Rptr. 273, 284 (1991), *cert. denied*, 503 U.S. 908 (1992).

SUMMARY OF ARGUMENT

Racial bias in California's criminal justice system has long been recognized as a prevalent but intolerable problem. In Petitioner's trial, the prosecutor's racially biased conduct distorted the fact finding and sentencing process from beginning to end. By failing to issue a certificate of appealability on the issue of racial bias in jury selection,

the Court of Appeals has turned its back on this blatant violation of fundamental civil rights, in direct contravention of controlling and recently reaffirmed Supreme Court precedent. By failing to enforce the Constitution and rulings of this Court, the Court of Appeals has sent a message to California prosecutors that it will turn a blind eye to racial bias in jury selection. This Court should grant certiorari, vacate the opinion, and remand the case for reconsideration in light of controlling Supreme Court precedent ignored by the Court of Appeals.

ARGUMENT

I. COURTS AND COMMENTATORS HAVE LONG RECOGNIZED THAT RACIAL BIAS IS A SIGNIFICANT AND CONTINUING PROBLEM IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM.

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of the judicial system is jeopardized.

J.E.B. v. Alabama, 511 U.S. 127, 145-46 (1994).

The California Supreme Court was the first to recognize that racial bias in jury selection is unconstitutional. *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978). Yet, 27 years later, the problem persists. Sadly, courts and commentators continue to document the failure of California's criminal justice system to deliver on the promise of equal treatment and equal participation in the jury system.

The Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, released in 1997 ("Judicial Council Report"), identified many of the causes of racial disparities in jury

selection in California (available at http://www.courtinfo.ca.gov/reference/documents/rebias.pdf (viewed June 29, 2005)). In some counties, the problem begins with the selection of a venue and how jurors are summoned to court. *Id.* at 192-194. The Judicial Council Report states:

> Several speakers at the public hearings claimed that changes of venue, or intracounty transfers between court districts, frequently result in a different jury composition than would be drawn at the original venue. The implication is that case transfers may be intended to affect case outcomes.

Id. at 193.

In Los Angeles County in particular, the Judicial Council Report documents repeated complaints that trials are regularly moved from courthouses in downtown Los Angeles, where the jury pool is relatively diverse, to more suburban parts of the county, where the jury pool is predominantly white. *Id.* at 193-194. Because Los Angeles County summons jurors from only a 20-mile radius around the courthouse, moving a case from downtown to an outlying courthouse effectively excludes minorities from jury service in that case. *Id.* at 194.

In fact, in 1973, the California Supreme Court found this practice unconstitutional. *People v. Jones*, 9 Cal.3d 546, 556, 510 P.2d 705, 712, 108 Cal.Rptr. 345, 352 (1973). [*Jones* was the controlling law at the time of Williams' trial, although this holding was subsequently overruled in *Hernandez v. Municipal Court*, 49 Cal.3d 713, 717, 781 P.2d 547, 549, 263 Cal.Rptr. 513, 515 (1990)]. In *Jones*, the defendant was charged with a crime that had occurred in downtown Los Angeles, within the Central Judicial District of the county. The trial, however, was held in Torrance, within the Southwest Judicial District. *Id.* at 548, 707, 347. At the time of the trial, African Americans constituted 31% of the population of the Central District and 73% of the population of the police precinct where the crime occurred, but only 7% of the population of the

Southwest District, where the trial was held. *Ibid.* Noting this disparity in population, the Court found that a jury pool that excluded all of the residents of the area where the crime occurred violated the Sixth Amendment's vicinage requirement. *Id.* at 556, 712, 352.

In Petitioner's case, the charged crimes occurred in South Central Los Angeles and in Whittier, California, in the eastern part of the county. The trial, however, was held in Torrance, where the jury pool included very few African Americans. Although *Jones* was still controlling at the time of his trial, Petitioner's attorney failed to object on these grounds. Thus, even before the trial started, African Americans were effectively excluded from Petitioner's jury pool.

Racial discrimination in California's jury system begins with the location where the trial is held, but it does not end there. As documented in the Judicial Council Report, attorneys systematically exclude people of color during voir dire, resulting in all white or overwhelmingly white juries throughout California. Judicial Council Report, at 192-193. Legal experts in the state agree that lawyers continue to "make race-based decisions in jury selection . . . even though such selections are illegal." K. Corcoran, "*Jury Trials: The Subtext May Often be Race*," San Jose Mercury News, Apr. 24, 2005; see also M. Stannard, "*Minority Jurors Noticeably Absent*," San Francisco Chronicle, Oct. 3, 2003. A recent survey of 197 criminal trial attorneys in San Diego found that none of them believed that *Batson v. Kentucky*, 476 U.S. 79 (1986) ("*Batson*") was always effective at preventing racial bias in jury selection. J. Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire Questionnaire and the "Blind" Peremptory*, 29 U. Mich.J.L.Reform 981, Appendix, Table 7 (1996). Rather, more than a quarter of the California criminal trial lawyers surveyed concluded that *Batson* was never effective at preventing illegal discrimination. *Ibid.*

Indeed, one commentator concludes that more has been done to prevent systemic exclusion from jury pools than to prevent intentional racial bias in jury selection. P. Haddon, *Does Grutter Offer Courts an Opportunity to Consider Race in Jury Selection and Decisions Related to Promoting Fairness in the Deliberation Process?* 13 Temp. Pol. & Civ. Rts. L. Rev. 547, 549-550 (2004). Professor Haddon states:

> Although most jurisdictions have moved in the direction of increasing the racial and ethnic diversity of the venire, less has been done to curtail the racial and ethnic bias that can erode diversity during the juror selection process. The practice of using peremptory challenges to remove racial and other cognizable groups continues (despite Batson and its progeny), in part because many judges have been reluctant to exercise their discretion to intervene or treat skeptically the race-neutral justifications offered by attorneys in response to Batson challenges.

Ibid.

In fact, recent examples of prosecutors' attempts to defend preemptory strikes against *Batson* challenges only serve to prove that racial bias in jury selection is a continuing problem in California. In one case, after excluding two African Americans from the jury, a prosecutor proffered as "race-neutral" reasons that one was "a former affirmative action officer who was reading 'The Autobiography of Malcolm X,'" and the other was unlikely to sympathize with the victim because she was white. See R. Egelko, "*Court Overturns Murder Conviction*," Contra Costa Times, Aug. 3, 1999 [discussing *Ricardo v. Rardin,* 189 F.3d 474 (9th Cir. 1999)]. Consistent with Professor Haddon's observations, the state court accepted these justifications as "race neutral." *Ibid.* In another recent case, the prosecutor excluded all three Native Americans called as potential jurors. *Kesser v. Cambra,* 392 F.3d 327, 330-331 (9th Cir. 2004) [petition for rehearing pending]. In

response to a *Batson* challenge, the prosecutor offered the following:

> My experience is that Native Americans who are employed by the tribe are a little more prone to associate themselves with the culture and beliefs of the tribe than they are with the mainstream system, and my experience is that they are sometimes resistive of the criminal justice system generally and somewhat suspicious of the system.

Id. at 331-332. Again, as Professor Haddon might predict, every court, including the Ninth Circuit, found that the prosecutor had not engaged in racially biased jury selection despite his explicitly race-based reasons for excluding the jurors.

There is also growing evidence that prosecutors intentionally removed African Americans and Jews from death penalty juries in California in the 1970s and 1980s. D. Murphy, "*Case Stirs Fight on Jews, Juries and Execution*," New York Times, Mar. 16, 2005; P. Blumberg, "*Jury Bias Hearings Casts Light on Prosecutorial Code of Silence*," Daily Journal, Mar. 29, 2005. In a recent hearing on allegations of jury bias in a death penalty case from the mid-1980s, one current Alameda County District Attorney testified that the prosecutor in the case had given a lecture in 1992 to hundreds of homicide prosecutors in the state, telling them "never, ever" allow a Jew to sit on a death penalty case. Blumberg, *Jury Bias Hearings*. Apparently 300 of California's leading prosecutors heard these comments and not one complained. *Ibid.* When asked about allegations that his office routinely excluded African Americans and Jews from death penalty cases, the former head of the Alameda County death penalty team did not deny the allegations. Murphy, *Case Stirs Fight on Jews*. Instead, he declared, "'[t]hat is not a racist thing, but just common sense. . . . It is an axiom. It is not because of prejudice. Their politics are not going to be on your side.'" *Ibid.* He continued to state that an Alameda County judge used to advise him and others, "'[i]f you have a cop case,

be careful of blacks on the jury because they don't like cops.'" *Ibid.*

In any trial, racial discrimination in qualifying jurors "offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). In a death penalty trial, it increases the likelihood that arbitrary or constitutionally impermissible factors will come into play. See *Turner v. Murray*, 476 U.S. 28, 35 (1986) (permitting voir dire on racial prejudice: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate . . . undetected."); *Riley v. Taylor*, 277 F.3d 261, 299 (3d Cir. 2001) (reversing a death sentence and conviction due to *Batson* error: "One of the principal objections to the operation of the death penalty in this country is that it is applied unevenly, particularly against poor black defendants.").

In fact, growing evidence demonstrates that racially diverse juries reach different results from those reached by predominantly white juries. Judicial Council Report, 195; Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, page 205, available at http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (viewed June 29, 2005) ("Pennsylvania Supreme Court Committee"); see also Amnesty International, "*United States of America: Death by Discrimination-The Continuing Role of Race in Capital Cases*," Apr. 24, 2003, available at http://web.amnesty.org/library/index/engamr510462003 (viewed June 29, 2005). In death penalty cases, this means the difference between life and death. The Pennsylvania Supreme Court Committee found that prosecutors struck African Americans from death penalty juries twice as often as they struck whites. *Id.* at 201. Moreover, the report found that "this jury selection strategy skews jury sentencing decisions towards increasing the frequency of death sentences." *Id.* at 205. Specifically, the Committee noted that juries that were predominantly non-African American

were twice as likely to sentence an African American defendant to death as were more racially diverse juries. *Id.* at 207.

The forgoing demonstrates that racial disparities in the jury system and intentional racial bias in jury selection are widespread and continuing problems in California. Moreover, predominately white juries reach substantively different results than do more diverse juries, sentencing African Americans to death at a higher rate. Given these facts, the Court of Appeals' failure to even entertain on the merits a viable claim of racial bias in jury selection is particularly troubling. As stated by Judge Rawlinson in dissent in Petitioner's case:

> If our judicial system is to inspire a sense of confidence among the populace, we must not, we cannot permit trials to proceed in the face of blatant, race-based jury selection practices. Failure to grant a COA in this case sends an unmistakable message that the dictates of *Batson* may be disregarded with impunity.

Williams v. Woodford, 396 F.3d 1059, 1072-1073 (9th Cir. 2005) [Rawlinson, J., dissenting].

As articulated below, Petitioner has made a more than sufficient showing to warrant a certificate of appealability on this issue.

II. THE COURT OF APPEALS' LEGAL AND FACTUAL ERRORS AND DISMISSAL OF RELEVANT EVIDENCE FOSTER RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS.

Compelling circumstances in the record of Petitioner's case demonstrate that his conviction and death sentence were handed down by a jury "chosen by unlawful means." *Powers v. Ohio,* 499 U.S. 400, 413 (1991). The Ninth Circuit panel reached the opposite conclusion because it made a series of legal and factual errors, and then refused

to consider as relevant the best evidence of the prosecutor's racial motivation.

The Court of Appeals agreed that "a pattern of strikes against African-Americans provides support for an inference of discrimination," but held that Petitioner was required "to point to more facts than the number of African-Americans struck" to establish a *prima facie* case of an equal protection violation. *Williams v. Woodford*, 384 F.3d 567, 584 (9th Cir. 2004). A reasonable inference of a discriminatory purpose is all that is required, however, to make out a *prima facie* case. See *California v. Johnson*, 545 U.S. ___, 2005 WL 1383731, slip op. at p. 5 (2005). The panel rejected Petitioner's claim by erroneously imposing a higher burden to establish a *prima facie* case, and then compounded its mistake by refusing to consider the additional evidence of discriminatory purpose presented by Petitioner.

As stated by Judge Rawlinson in dissent, the panel was simply inaccurate when it observed that Petitioner failed to allege any facts other than that the prosecutor peremptorily removed two African-American female prospective jurors and one African-American male prospective alternate. Once the panel's errors are corrected, the existence of a *prima facie Batson* violation is strikingly evident. *Williams v. Woodford*, 396 F.3d at 1061-1062 [Rawlinson, J., dissenting].

First, Petitioner established that he is African-American and the victims were not. Second, the record demonstrates that the prosecutor removed, via peremptory challenges, all of the citizens called into the jury box who were identified as African American.[2] This Court has just

[2] The Warden did not challenge these facts in the district court or in the Court of Appeals. *Amici* understand that the record may not reflect the race of one individual who served on the jury in this case. This does nothing to undermine the claim that the prosecutor's intentional elimination of three African Americans from the jury based on their race establishes a *prima facie* violation of *Batson* and warrants

(Continued on following page)

held that the prosecutor's use of peremptory challenges to remove three black prospective jurors in the trial of a black defendant, establishes a *prima facie* case of discrimination. *California v. Johnson*, 545 U.S. ___, 2005 WL 1383731 (2005), slip op. at pp. 2-5. The prosecutor's strikes of the three African American prospective jurors in Petitioner's case are equally suspect.

Not only did the Court of Appeals ignore these salient – indeed dispositive – facts for establishing a *prima facie* case, it refused to consider the most probative circumstantial evidence of the prosecutor's motives: Petitioner's prosecutor was censured judicially twice in published capital cases for the same practice. *People v. Turner*, 42 Cal.3d 711, 714, 726 P.2d 102, 103, 230 Cal.Rptr. 656, 657 (1986); *People v. Fuentes*, 54 Cal.3d at 721, 818 P.2d at 83, 286 Cal.Rptr. at 800. In *Turner*, which occurred prior to the trial in Petitioner's case, the prosecutor was found to have used peremptory challenges to strike three African American prospective jurors "in a racially discriminatory manner for the apparent purpose of obtaining an all-White jury to try this Black defendant for crimes against White victims." *People v. Turner*, 42 Cal.3d at 714, 726 P.2d at

---

the issuance of a certificate of appealability in this case. See *California v. Johnson*, 545 U.S. ___, 2005 WL 1383731 (2005); *Miller-El v. Dretke*, 545 U.S. ___, 2005 WL 1383365, slip op. at pp. 7-8 (2005) ("*Miller-El II*"); *United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir. 1994), *cert. denied,* 513 U.S. 891 (1994) [exclusion of even one juror may be sufficient to establish *prima facie* violation of *Batson*]; see also *People v. Motton* (1985) 39 Cal.3d 596, 603, fn *, 704 P.2d 176, 179, fn *, 217 Cal.Rptr. 416, 419 fn * [record did not reflect race of one juror; *prima facie Wheeler* violation found even though Court later informed that one African American served on the jury]. In *California v. Johnson*, 545 U.S. ___, 2005 WL 1383731, slip op. at pp. 2-5 (2005), for example, the Court found sufficient evidence of a *prima facie Batson* violation based on the prosecutor's use of preemptory strikes to remove three African American jurors. In *Miller-El II*, the Court found a *Batson* violation and reversed the conviction, even though one African American served on the jury. *Miller-El v. Dretke*, 545 U.S. ___, 2005 WL 1383365, slip op. at p. 8 (2005).

103, 230 Cal.Rptr. at 657. In *Fuentes*, which occurred after Petitioner's trial, the very same prosecutor used ten of thirteen peremptory challenges to excuse African Americans from the jury, and gave "unreasonable" and "spurious" explanations for the exercise of many of the challenges. *People v. Fuentes*, 54 Cal.3d at 712-713, 818 P.2d at 76-77, 286 Cal.Rptr. at 793-794.

As demonstrated in the next section, the panel's determination that these circumstances "are irrelevant because they are not 'circumstances concerning the prosecutor's use of peremptory challenges' " is in direct contravention of this Courts decisions in *Miller-El v. Dretke*, 545 U.S. ___, 2005 WL 1383365, slip op. at pp. 7-8 (2005) ("*Miller-El II*"), *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*") and prior case law. Indeed, the three judge panel originally wrote their opinion in Petitioner's case before *Miller-El I* was decided. The panel then reissued its opinion, without making any changes in its discussion of the prosecutor's racial bias in jury selection and without even citing *Miller-El I*. A more concrete example of a circuit court ignoring the rulings of this Court is difficult to imagine.

III. THE PANEL MISAPPLIED CONTROLLING PRECEDENT IN HOLDING THAT PETITIONER FAILED TO RAISE AN INFERENCE OF DISCRIMINATION IN JURY SELECTION.

The Court of Appeals' opinion is inconsistent with *Miller-El II, Miller-El I* and other controlling decisions. The panel concluded that Petitioner failed to present the district court with sufficient factual allegations to establish a *prima facie* case under *Batson* because he failed to allege supporting "statistical facts," such as a "statistical disparity" between the number of African-Americans in the venire and the number who sat on the jury, which would in turn show a "pattern of strikes."

This conclusion was based on the assumption that such a pattern must be shown to establish an inference of discrimination. As this Court recently reaffirmed, however, "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. ___, ___, slip op. at p. 1 (quoting *Batson v. Kentucky*, 476 U.S. at 94). Accordingly, "[t]o establish a prima facie case, [defendant does] not need to show that the prosecution had engaged in a pattern of discriminatory strikes against more than one prospective juror. We have held that the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994), *cert. denied*, 513 U.S. 891 (1994); *Batson v. Kentucky*, 476 U.S. at 97 (discussing pattern of strikes as one method of raising an inference of discrimination, but noting "these examples are merely illustrative"); *United States v. Hughes*, 880 F.2d 101, 102 (8th Cir. 1989) ("we have never held that the Supreme Court contemplated" a "purely numerical formula" in determining the existence of a *prima facie* case under *Batson*); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988), (*prima facie* case established "even though we are here concerned with only a single juror").

By focusing almost exclusively on statistics, the Ninth Circuit panel ignored the comprehensive analysis required by existing case law. *Vasquez-Lopez*, 22 F.3d at 902 (reviewing court "must consider the relevant circumstances surrounding a peremptory challenge" in evaluating existence of *prima facie* case); *United States v. Omoruyi*, 7 F.3d 880, 882 (9th Cir. 1993) (pattern of discrimination not necessary where evidence revealing discriminatory motive in challenging jurors exists); *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989) ("no magic number" of challenges establishes a *prima facie* case; rather, "the combination of circumstances taken as a whole must be considered.") The defect in the Ninth Circuit's methodology, which relies

on percentages, ratios, and patterns of strikes, is that it allows "those to discriminate who are of a mind to discriminate," *Avery v. Georgia*, 345 U.S. 559, 562 (1953), by providing them with a blueprint for hiding race-based challenges behind an acceptable pattern or percentage of strikes, and by assuring such discrimination will be irremediable in a case in which very few members of the racial or ethnic group at issue are in the initial jury pool.

Indeed, in Petitioner's case, African Americans had already been systematically excluded from the jury pool as a result of the trial being set in Torrance rather than in South Central Los Angeles where one of the crimes occurred, or in the downtown courthouses, closer to the location of both crimes. It is, therefore, not an accident that so few African Americans were called into the jury box in Petitioner's case despite the fact that the neighborhood where one of the crimes occurred is predominantly African American. The fact remains that the prosecutor systematically excluded even the few people identified on the record as African Americans from serving on Petitioner's jury. To require Petitioner to prove more than the law requires in order to warrant issuance of a certificate of appealability would effectively punish Petitioner for the systemic racial disparities of the Los Angeles court system.

The other salient deficiency inherent in the Ninth Circuit panel's approach is that the best, most relevant evidence of racial motivation – the prosecutor's documented behavior in other cases – was deemed "irrelevant" because it supposedly was not part of the "circumstances concerning the prosecutor's use of peremptory challenges." Although the Ninth Circuit panel does not explain its reasoning, it appears to have employed a strict, temporal notion of "circumstances" so that only the prosecutor's words or actions during Petitioner's voir dire, but not during voir dire in other cases, are relevant circumstances. This approach directly contradicts the holdings of this Court in *Miller-El II* and *Miller-El I*. Moreover, it lacks an anchor in logic or law because a prosecutor's pattern and

practice of racial bias is necessarily relevant to support an inference of discrimination and certainly part of the "circumstances concerning the prosecutor's use of peremptory challenges." *Miller-El I*, 537 U.S. at 346-347.

Indeed, under *Swain v. Alabama*, 380 U.S. 202 (1965), such evidence was the only means by which a defendant could raise an inference of discrimination in jury selection. *Batson,* 476 U.S. at 91-92. The purpose of *Batson* was to ameliorate this "crippling burden of proof" by changing the "quantum of proof," not the "nature of the violation." *Ford v. Georgia*, 498 U.S. 411, 420 (1991). As recognized in *Miller-El II*, the "move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain's* wide net, [but] the net was not entirely consigned to history" and, thus, "a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El II*, 545 U.S. at ___, slip op. at p. 7 (quoting *Batson*, 476 U.S. at 96-97). Consequently, under the "more lenient burden of proof" of *Batson*, *id.*, although a defendant *does not have* to prove discriminatory actions in other cases, such evidence surely *is* relevant.

In Petitioner's case, racial bias distorted the fact finding and sentencing process from beginning to end. The prosecutor's intentional use of race as a basis to exclude African Americans from serving on Petitioner's jury violated the Petitioner's rights and the rights of the prospective jurors, and undermined the legitimacy of our criminal justice system. We, as a community, cannot have faith in a guilty verdict and death sentence built on a record infected with racism.

CONCLUSION

Discriminatory jury selection practices – especially in a capital case – are an affront to the defendant, to the jurors, to the administration of justice, and to society as a whole. Petitioner raised an inference of discrimination in the district court. The Ninth Circuit, however, ignored

controlling Supreme Court precedent. The guarantee of equal protection requires this Court to grant certiorari, vacate the opinion, and remand the matter to the Ninth Circuit for reconsideration in light of *Johnson v. California*, *Miller-El II* and *Miller-El I*.

Respectfully submitted,

STEPHEN F. ROHDE, ESQ.
(*Counsel of Record*)
ROHDE & VICTOROFF
1880 Century Park East, Suite 411
Los Angeles, CA 90067
(310) 277-1482

ANDREW LOVE, ESQ.
P.O. Box 194401
San Francisco, CA 94119
(415) 904-5617

CHARLES PATTERSON, ESQ.
MORRISON & FOERSTER LLP
555 W. 5th Street, No. 3500
Los Angeles, CA 90013
(213) 892-5553

July 6, 2005