IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ARTHUR LOURDES LENIX, Defendant and Petitioner.	)	No. S148029 Court of Appeal No. F048115

BRIEF OF AMICI CURIAE,
THE CALIFORNIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., ON BEHALF OF DEFENDANT/PETITIONER

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INTRODUCTION

In September of 2002, the Kern County district attorney began criminal proceedings against Arthur Lenix, the defendant in this case. Arthur Lenix is African-American. Eventually these proceedings resulted in a criminal jury trial which began in April of 2005.

Among the citizens called to serve as jurors in this case was prospective juror "C.A." Like Mr. Lenix, C.A. is African-American. C.A. responded to her subpoena for jury service as would any responsible citizen, dutifully arriving at the courthouse on April 5, 2005 for questioning.

C.A. took an oath to answer truthfully. She filled out a jury questionnaire. When jury voir dire continued to the next day, she returned to the courthouse on April 6. In short, C.A. did all she was asked to do as a citizen.

In all, the prosecutor would exercise five peremptory challenges during the voir dire process. He used his final challenge to discharge prospective juror C.A. At the time, C.A. was the lone remaining African-American prospective juror in the venire. After defense counsel made a motion pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79, the

trial court asked the prosecutor to explain his reasons for striking C.A.

The prosecutor did so, explaining that he struck C.A. because (1) she once received a traffic ticket she did not feel she deserved and (2) her brother had been murdered 11 years earlier in a gang related incident. (2 RT 125.) The trial court then denied defense counsel's *Batson* motion. As a result, as the state here concedes, "the record in this case shows that no African-American served as jurors or alternatives" in the Kern County trial of Arthur Lenix. (Respondent's Brief on the Merits at p. 8, n.3.)

On appeal, defendant argued that the prosecutor's stated reasons for excusing C.A. were a pretext for discrimination. Such a result would have violated not only the rights of the defendant, but also of the prospective juror, C.A. (*J.E.B. v. Alabama* (1994) 511 U.S. 127, 128 [recognizing that "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."].) To prove the constitutional violation, defendant sought to compare the voir dire answers given by juror C.A. with answers given by white jurors whom the prosecutor did not strike, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322 (*Miller-El I*) and *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El II*).

The appellate court ruled that defense counsel had not preserved the comparative juror analysis ("CJA") for appeal by raising it first in the trial court. (*People v. Lenix* (2006) 2006 WL 2925354 at * 8.) Accordingly, the appellate court refused to compare the voir dire answers of prospective juror C.A. (whom the prosecutor struck) with any of the white jurors whom the prosecutor did not strike. (*Ibid*.)

This Court granted review to determine whether defense counsel must perform CJA at trial in order to preserve that analysis for appeal. More recently, the Court asked the parties for supplemental briefing in light of the United States Supreme Court's recent decision in *Snyder v. Louisiana* (2008) ___ U.S. ___, 128 S.Ct 1203, where the Court relied on a CJA never presented at trial.

The parties have now filed briefs on the merits and supplemental briefs regarding *Snyder*. Not surprisingly, the parties propose starkly different answers to the question presented for review and the relevance of *Snyder*. The state argues that where defense counsel does not perform a CJA at trial, reviewing courts should refuse to perform such an analysis on appeal. Defendant argues that the *Batson* objection itself is sufficient, and trial counsel need not specifically perform a CJA at the trial level to preserve the analysis for appeal.

As discussed more fully in Argument I, below, amici do not believe that federal law supports either of the extreme positions the parties offer. Rather, *Snyder v. Louisiana* requires an intermediate position based on the type of justification the prosecutor offers in support of a challenged strike. Where the prosecutor's justification is based on a stricken juror's demeanor, the defense must proffer a comparison in the trial court to preserve the analysis for appeal, since considerations of demeanor are traditionally reserved for trial courts and cannot be done on a cold appellate record. But where the prosecutor's justification is not based on demeanor, but on substantive answers to voir dire questions, CJA may be made in the trial court or on appeal, and may be made for the first time on appeal whenever the trial record is sufficiently developed to permit a reasoned comparison.

As discussed more fully in Argument II below, if the Court adopts a rule that trial counsel's failure to present CJA waives the analysis for appeal, that rule should be applied prospectively only. This rule is consistent with the Court's longstanding approach to questions of retroactivity.

To ensure the Court is fully informed on both these issues, neither of which is discussed in the party briefing, amici have moved to file this brief.

ARGUMENT

I. IN LIGHT OF *SNYDER V. LOUISIANA* (2008) ___ U.S. ___, 128 S.CT. 1203, LONGSTANDING STATE APPELLATE PROCEDURE, SOUND PRACTICAL CONSIDERATIONS AND THE WEIGHT OF AUTHORITY FROM OTHER JURISDICTIONS, WHERE A PROSECUTOR'S STATED REASONS FOR DISCHARGING MINORITY JURORS DO NOT RELY ON DEMEANOR, DEFENSE COUNSEL NEED NOT PRESENT CJA AT TRIAL IN ORDER TO PRESERVE THAT ANALYSIS FOR APPEAL

It is fair to say that over the last 30 years, the Court's rulings on CJA have been the product of an ongoing dialogue between this Court and the United States Supreme Court. Each time the United States Supreme Court has issued a decision directly or indirectly involving CJA, this Court has quite appropriately responded.

Fairly read, however, this Court has not been entirely consistent in its responsive CJA jurisprudence. Initially, this Court performed CJA *regardless* of whether trial counsel presented it at trial. In 1989 -- and seeking to effectuate the latest Supreme Court ruling -- the Court took a different approach and refused to perform CJA *whether or not* trial counsel presented it at trial. In 2003 the Court responded to another new Supreme Court ruling and took a more nuanced approach, performing CJA *only* when trial counsel presented it at trial. Finally, in August of 2005, after yet another ruling from the Supreme Court, this Court returned to its pre-1989 position and once again began performing CJA

regardless of whether trial counsel presented the analysis at trial.

The grant of review here was undoubtedly intended to resolve this issue and bring both clarity and predictability to this area of the law. As discussed below, practical considerations, the decisions of other courts and sound policy all favor adopting in California the same position the Supreme Court took in *Snyder v. Louisiana*.

In Argument I-A, below, amicus will briefly detail the history of adjustments this Court has made to its CJA jurisprudence in response to Supreme Court decisions. In Argument I-B, amicus will explain that the Supreme Court's most recent CJA decisions in *Miller-El II* and *Snyder v. Louisiana, supra*, 128 S.Ct.1203, require yet another adjustment. As discussed more fully there, three basic principles emerge from these cases: (1) CJA yields evidence which is constitutionally relevant to a *Batson* motion; (2) because CJA is simply an argument based on facts which are already in the record, there are distinct circumstances where CJA may be reliably done for the first time by a reviewing court; and (3) a state reviewing court's failure to consider CJA evidence may render the ensuing decision vulnerable both on direct review and on collateral attack. In Arguments I-C and I-D, amicus will explain that, in fact, the result in *Snyder* and *Miller-El II* is consistent not only with longstanding California appellate procedure which permits new arguments on appeal when based on "facts appearing in the record," (*Ward v.*

Taggart (1959) 51 Cal.2d 736, 742), but with sound practical considerations and the decisions of other states as well.

A. The Evolution Of This Court's CJA Jurisprudence From *People v. Wheeler* (1978) 22 Cal.3d 258 Through *Miller-El II*.

The Supreme Court decided *Batson* in 1986. Eight years earlier, however, this Court had already taken the lead in attempting to eradicate racism from the jury system in *People v. Wheeler* (1978) 22 Cal.3d 258.

In *Wheeler*, this Court set up a framework to ensure that prosecutors did not discriminate on the basis of race or ethnicity in the selection of a jury in violation of state law. In applying *Wheeler,* the Court made quite clear that CJA analysis was an indispensable part of assessing a prosecutor's stated reasons, and would be performed on appeal whether or not it had been performed at trial. (*See People v. Trevino* (1985) 39 Cal.3d 667; *People v. Hall* (1983) 35 Cal.3d 329, 161, 168; *see generally People v. Johnson* (2003) 30 Cal.4th 1302, 1318, *overruled on other grounds in Johnson v. California* (2005) 545 U.S. 162 [noting that prior to 1989 the Court "engaged in comparative juror analysis for the first time on appeal."].)

In 1986, the United States Supreme Court decided *Batson* and set forth the now

familiar three-step framework for resolving federal constitutional claims of discrimination in the selection of a criminal jury. In reaching this decision, the Court noted that "a reviewing court ordinarily should give [trial court] findings great deference." (476 U.S. at 98, n.21.)

Not long after *Batson*, this Court noted this "great deference" language from *Batson* and -- in a specific attempt to comply with this mandate -- the Court abandoned its prior practice of performing CJA on appeal. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1221 ["*Johnson I*"].) *Johnson I* reasoned that where a trial judge found a prosecutor's stated reasons sufficient to rebut a prima facie case of discrimination, CJA by the reviewing court would constitute "second-guess[ing] [the trial judge's] factual determination" in violation of the "great deference" language from *Batson*. (*Ibid*.) In accord with its understanding of *Batson*, *Johnson I* held reviewing courts would no longer perform CJA.[1]

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[1] *Johnson I* also articulated three criticisms of CJA by a reviewing court: (1) "it ignores the characteristics of the other 26 jurors against whom the prosecutor also exercised peremptory challenges," (2) it did not "properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar" and (3) "the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*Id.* at pp. 1220-1221.)

This approach to CJA lasted until the United States Supreme Court decided *Miller-El I* in 2003. In *Miller-El I* the High Court undercut the central premise of *Johnson I* by explicitly relying on CJA on appeal in resolving a *Batson* motion. There, at petitioner's murder trial, the prosecutor peremptorily challenged 10 of 11 potential black jurors. When required to justify the discharges, the prosecutor gave several seemingly race-neutral reasons. After petitioner's conviction was affirmed on appeal, he sought federal habeas relief under *Batson*. The district court denied relief and both the district and appellate courts refused to grant a certificate of appealability. The Supreme Court granted certiorari and reversed; the seven-justice majority performed CJA to determine if the prosecutor's stated reasons which -- on their face -- "appear[ed] race neutral" were actually based on "racial considerations." (*Id*. at p. 343.) Indeed, even the concurring and dissenting justices performed CJA. (*Id*. at pp. 351-352 [Scalia, J. concurring], 361-362 [Thomas, J., dissenting].)

The fact that the Supreme Court performed CJA on appeal in *Miller-El I* established that, at the very least, appellate CJA was *not* inconsistent with the "great deference" language of *Batson*. In other words, *Miller-El I* undercut the initial animating principle behind *Johnson I* -- the idea that CJA on appeal was inconsistent with *Batson.*

This Court acted expeditiously to bring its CJA jurisprudence back into line with

Miller-El I. In a decision issued only four months after *Miller-El I*, the Court quite properly repudiated the idea of an outright ban of CJA on appeal. Instead, the Court ruled it would not consider CJA on appeal where trial counsel failed to present that same analysis to the trial judge. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1321-1323 ["*Johnson II*"].) *Johnson II* explained an appellate court could not competently perform CJA on a "cold record" and "[a] trial court, but not a reviewing court, is able to place the answers into context and draw meaning from *all* the circumstances, including matters not discernable from the record." (*Id.* at p. 1320.) According to *Johnson II*, the decision to bar CJA on appeal unless it was first performed at trial was entirely consistent with *Miller-El I* which was "another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court." (*Id.* at p. 1321.)

This approach to CJA lasted until the United States Supreme Court decided *Miller-El II* in 2005. *Miller-El II* undercut the central premises of *Johnson II*. There, the Supreme Court reiterated that CJA was an important tool that reviewing courts should utilize in assessing *Batson* claims: "[m]ore powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." (*Miller-El v. Dretke, supra*, 545 U.S. at p. 241.) The dissent criticized the majority's use of CJA because the juror comparisons "had not been put before the Texas

courts," and comprised "theories that Miller-El never argued to the state courts." (*Miller-El II*, *supra*, 545 U.S. at p. 278-279.) The majority rejected this argument because it "conflate[d] the difference between evidence that must be presented to the state courts . . . and theories about that evidence." (*Id*. at p. 241.) The Court explained that evidence of the discriminatory intent, i.e., "the transcript of the voir dire, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts . . . ." (*Id.*, fn. 2.) And although CJA had never been presented to the state courts, the Supreme Court considered it on a "cold record" and granted relief.

Miller-El II undercut two distinct premises on which *Johnson II* was based. First, it undercut *Johnson II*'s factual understanding that *Miller-El I* was "another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court." (*Johnson II*, *supra*, 30 Cal.4th at p. 1321.) In fact, the CJA had never been presented to the state trial court at all. Second, it undercut *Johnson II*'s assumption that a reviewing court could not reliably perform CJA on a "cold record" where it had not been performed at trial. In fact, that is exactly what *Miller-El II* did.

Once again this Court acted promptly to bring its CJA case law in line with *Miller-El II*. Beginning in August of 2005 -- only two months after *Miller-El II* -- this Court followed the practice of *Miller-El II* and performed CJA on appeal, even where the CJA

had not been done at trial. (*People v. Schmeck* (2005) 37 Cal.4th 240, 270-273.) Following *Schmeck,* in a series of eight additional cases, the Court returned to its pre-1989 practice of performing comparative juror analysis on appeal even where it had not been done at trial. (*See*, *e.g.*, *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109; *People v. Stevens* (2007) 41 Cal.4th 182, 196; *People v. Williams* (2006) 40 Cal.4th 287, 289; *People v. Lewis* (2006) 39 Cal.4th 970, 1017-1024; *People v. Ledesma* (2006) 39 Cal.4th 641, 688; *People v. Avila* (2006) 38 Cal.4th 491, 547-548; *People v. Huggins* (2006) 38 Cal.4th 175, 232; *People v. Jurado* (2006) 38 Cal.4th 72, 105-106.) As in *Miller-El II*, the performance of CJA in these cases showed that conducting CJA on appeal was far from impossible.

That is the current state of this Court's CJA case law. But as discussed in Argument I-B, below, this case law too now needs to be adjusted. This is because the Supreme Court has even more recently mapped the contours of CJA in *Snyder v. Louisiana*, *supra*, 128 S.Ct. 1203.

As discussed below, *Snyder* is just like *Miller-El I* and *Miller-El II* in that the Court once again reliably engaged in CJA on a cold record, even where the CJA had never been performed at trial. But *Snyder* also suggests a specific limit to CJA analysis on appeal, where a prosecutor's stated reasons lie "peculiarly with the trial judge's

province." In light of *Snyder*, it is altogether appropriate for this Court to refine its CJA practice. It is to that refinement amicus now turns.

B. Pursuant To *Snyder,* Where The Prosecutor's Stated Reasons For Discharging A Minority Juror Involve Demeanor, Trial Counsel Must Present CJA At Trial To Preserve The Analysis For Appeal, But Where The Prosecutor Relies On A Stricken Juror's Substantive Answers To Voir Dire Questions, A Reviewing Court May Consider CJA For The First Time.

In *Snyder*, the High Court once again considered CJA on appeal, even where that analysis had never been performed at trial. Because the facts of *Snyder* suggest a limiting principle to appellate CJA, however, it is necessary to understand *Snyder* in some detail.

The defendant in *Snyder* was charged with murder. At trial, the prosecutor used peremptory challenges to remove every black prospective juror, five in all. Defendant objected under *Batson*. The trial court asked the prosecutor to state race-neutral reasons for the strikes. (*See State v. Snyder* (1999) 750 So.2d 832, 841.) As to prospective juror Brooks, the prosecutor offered two very different reasons: one related to demeanor and one related to specific voir dire answers. Thus, the prosecutor explained that he discharged Mr. Brooks because he (1) "looked very nervous" and (2) expressed an interest in getting home quickly which convinced the prosecutor that he might "come back with guilty of a lesser verdict so there wouldn't be a penalty phase." (*Snyder v.*

Louisiana, *supra*, 128 S.Ct. at p. 1208.)

Louisiana law (like that in California) contains a general rule that a defense lawyer's failure to raise an issue at trial waives the issue for appeal. (*See* La. Code Crim.P. at art. 841.) Nevertheless, the trial lawyer in *Snyder* presented no CJA as to either of the prosecutor's explanations and the trial court denied the *Batson* motion. When defendant raised the *Batson* claim as to prospective juror Brooks again on appeal, the Louisiana Supreme Court upheld the trial court's ruling without performing any CJA analysis. (*State v. Snyder*, *supra*, 750 So.2d at pp. 841-842.)

Defendant in *Snyder* sought certiorari, contending that the state reviewing court "fail[ed] to consider all the evidence supporting an inference of discrimination . . . ." (*Snyder v. Louisiana*, No. 04-6830, Petition for Writ of Certiorari at p. 12.) The Supreme Court granted certiorari, vacated the judgment and remanded for further consideration in light of *Miller-El II.* (*Snyder v. Louisiana* (2005) 545 U.S. 1137.)

On remand, the Louisiana Supreme Court reconsidered the *Batson* challenge to prospective juror Brooks, and compared the answers Mr. Brooks gave with the answers of two seated jurors. (*Snyder v. State* (2006) 942 So.2d 484, 496.) The state court found no *Batson* violation, and again affirmed the judgment.

Defendant sought certiorari again, arguing that the state court had still "fail[ed] to consider highly probative evidence of discriminatory intent." (*Snyder v. Louisiana*, No. 06-10119, Petition for Writ of Certiorari at p. ii.) The Supreme Court again granted certiorari and, after briefing and argument, reversed. The Court rejected the prosecutor's explanation that Mr. Brooks was discharged because he said he wanted to get home quickly, noting that "[t]he implausibility of this explanation is reinforced by the prosecutor's acceptance of [two] white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'." (128 S.Ct. at p. 1211.) Significantly, however, the two white jurors who were the subject of the High Court's CJA were *not* the same two seated jurors that had been the subject of the state supreme court's CJA on remand. (*See Snyder*, *supra*, 128 S.Ct. at p. 1214 [Thomas, J., dissenting].) In other words, and like *Miller-El I* and *Miller-El II*, the *Snyder* court performed a CJA that had never been done either at trial or on appeal in state court. All three cases establish that CJA can, in fact, be reliably performed by a reviewing court even based on a "cold record" and when the CJA has not been presented at trial.

But *Snyder* does more. As noted above, the prosecutor provided two distinct justifications for his challenge of Mr. Brooks. One justification related directly to demeanor (he "looked very nervous") while the other related directly to substantive answers during the voir dire process (he wanted to get home quickly). *Snyder* made a

crucial distinction between these justifications.

As to the justification based on demeanor, the Supreme Court agreed with the state court that "nervousness cannot be shown from a cold transcript . . . ." (128 S.Ct. at p. 1209.) As to assessments of demeanor, "[w]e have recognized that these determinations of credibility and demeanor lie 'peculiarly within a trial judge's province,' and we have stated that 'in the absence of exceptional circumstances, we would defer to [the trial court].'" (*Snyder*, *supra*, 128 S.Ct. at p. 1208.) Accordingly, the Court did not attempt CJA in connection with this stated reason.[2]

But the Court's approach was very different in connection with the prosecutor's non-demeanor based justification. As noted, the prosecutor in *Snyder* cited Juror Brooks' statement that he was worried about missing school and that the prosecutor therefore feared he would return a verdict that obviated the need for a penalty phase. The trial

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[2] The distinction in *Snyder* was presaged by the Supreme Court's decision in *Rice v. Collins* (2006) 546 U.S. 333. There, in reviewing a state court's *Batson* ruling, the Court did not perform CJA where the prosecutor's justification was based on demeanor.

Significantly, in a concurring opinion in *Rice v. Collins,* Justices Breyer and Souter agreed that great deference must be given the trial court on questions of demeanor, and that "appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*." (*Id.* at pp. 343.) Their cautionary note is just that: it is not a reason to abandon CJA on appeal. This much is clear from the fact that both Justices Breyer and Souter were part of the majority that employed CJA in *Miller-El II*, which preceded *Rice v. Collins*, and in *Snyder v. Louisiana*, which followed it.

court record fully explored the factual predicate of this justification. That is, the voir dire contained not only Mr. Brooks' detailed answers on this point, but also the detailed answers of the seated jurors on the same question. (*See Snyder v. Louisiana*, *supra*, 128 S.Ct. at pp. 1209-1212.) Because this justification was "thoroughly explored" by the trial court, the Supreme Court had no trouble performing CJA even though it had not been performed at trial. (128 S.Ct. at p. 1211.)

The rule applied in *Snyder* is plain. Where the prosecutor justifies a peremptory challenge on the basis of the prospective juror's demeanor or credibility, the reviewing court should not perform CJA for the first time on appeal. But where the prosecutor justifies the challenge based on specific answers appearing in a well-developed record, the reviewing court is not only perfectly capable of performing CJA, but the CJA evidence is constitutionally relevant to the *Batson* inquiry.[3]

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[3] The distinction applied in *Snyder* was also applied in *Miller-El II*. There, the Supreme Court's CJA was premised not on the demeanor of any juror, but solely on side-by-side comparisons of their substantive answers to voir dire questions on the subject of their support for the death penalty, their views on rehabilitation, and their opinions on whether the death penalty inflicts more or less suffering than life in prison. (*Miller-El II*, *supra*, 545 U.S. at pp. 241-249.) The record on each substantive area was sufficiently detailed to permit the side-by-side comparisons. In contrast, and as noted above, the Supreme Court did not perform CJA in *Rice v. Collins*, *supra*, 546 U.S. 333, where the prosecutor's stated reason directly involved a juror's demeanor (purportedly rolling her eyes at a question from the trial judge), and the prosecutor's credibility on this point, since the trial judge stated that he had not personally observed the purported eyeball roll. The record in *Rice* was thus particularly unsuited to CJA on appeal.

C. Performance Of CJA For The First Time On Appeal, If Based On Substantive Answers Appearing In The Record, Is Fully Consistent With California's Longstanding Appellate Procedure.

The contours of CJA mapped by the Supreme Court in *Snyder* should be familiar territory to this Court. For at least 50 years, California courts have routinely permitted litigants to advance arguments on appeal that were not made in the trial court, provided that the arguments were *based on evidence contained in the record*. Historically, the courts of this state have not imposed a bar to advancing -- for the first time on appeal -- arguments of the sort that were the centerpiece in *Miller-El II* and *Snyder v. Louisiana*.

This Court's decision in *Ward v. Taggart*, *supra*, 51 Cal.2d 736, authored by Justice Roger Traynor, is the leading decision on this aspect of appellate procedure. Plaintiffs sued their real estate brokers for fraud. On appeal the defendant's raised a technical defense to the fraud claim. Accordingly plaintiffs switched theories, advancing -- for the first time on appeal -- a new theory of recovery based on constructive trust. This Court held there was no bar to considering this new theory on appeal because it was based "on the facts appearing in the record.'" (*Id.* at p.742.) The principal is limited by the concern that "opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of

which are open to controversy and were not put in issue or presented at the trial.'" (*Id.*)[4]

Consideration of CJA for the first time on appeal -- as in *Snyder*, *Miller-El I* and *Miller-El II* -- fits well within the rule of *Ward*. That is, these three Supreme Court decisions establish that CJA may produce constitutionally relevant evidence on appeal if it is based on facts developed in the voir dire transcripts. In the lexicon of *Ward*, CJA for the first time on appeal is perfectly appropriate if it is presented on the basis of "facts appearing in the record." That is precisely how the Supreme Court conducted its side-by-side analysis in *Miller-El II* and in *Snyder*. The facts in the voir dire, i.e., the potential and seated jurors' answers to specific questions, were developed and undisputed, and it

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[4] This rule of appellate procedure has been routinely followed in numerous decisions and divergent contexts. (E.g., *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 23 [permitting insurance defendant to rely on theory that certain economic losses are not covered by duty to defend, even though not presented at trial]; *Xiloj-Itzep v. City of Agoura Hills* (1994) 24 Cal.App.4th 620, 633 [permitting plaintiff seeking injunction against city traffic ordinance to rely on theory of preemption, even though not raised in trial court]; *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 239 [plaintiff in real estate litigation seeking constructive trust permitted to rely on theory of resulting trust, even though not raised in trial court]; *Warren v. State Personnel Bd.* (1979) 94 Cal.App.3d 95, 111 [permitting defendant state employment board, in wage and hour dispute brought by discharged police officer to raise new argument on appeal regarding proper calculation of benefits, even though not raised in trial court]; *California Sch. Employees Assn. v. Sunnyvale* (1973) 36 Cal.App.3d 46, 56 [permitting plaintiff teachers' union in contract action to rely on new argument for voiding school district's contract with private party, even though not raised in the trial court]; *People v. Vallejos* (1967) 251 Cal.App.2d 414, 417 [permitting homeowners in eminent domain action to raise new theory of loss, even though not raised in the trial court since the theory was base entirely on documentary evidence in the record].)

was only left to the reviewing court to compare the answers of the seated jurors with the answers of the stricken jurors. Application of CJA is not subject to the limiting principle expressed in *Ward*, that the State should not be compelled to address new issues requiring factual development. The jurors' voir dire answers are fixed in the record of the proceedings, as is the prosecutor's step-two justification for his peremptory strikes. As *Miller-El II* pointed out, CJA does not require any new evidence, but only argument or "theories about that evidence." (*Miller-El II*, *supra*, 545 U.S. at p. 241, fn. 2.)

A rule that litigants on appeal are confined to parroting the exact arguments they made at trial -- even when a new argument is based entirely on facts in a fully-developed record -- would signal a breathtaking revision of appellate practice in this state. Where a litigant does nothing more than support his preserved objection or claim with a new argument based on facts already in the record -- as is the case with CJA -- the longstanding rule of *Ward* should be observed. (*See Miller-El II*, *supra*, 545 U.S. at p. 241, n. 2 [addressing CJA argument raised for the first time on appeal to avoid "conflat[ing] the difference between evidence that must be presented . . . and theories about that evidence."].) In short, the type of CJA employed in *Miller-El II* and *Snyder* are precisely the sort of analysis this Court has historically permitted to be made in our state

courts for the first time on appeal.[5]

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[5] In dissenting in *Johnson II*, Justice Kennard cited *Ward v. Taggart*, *supra*, 51 Cal.2d at p. 742 and suggested an appellant's effort to conduct CJA for the first time on appeal should be barred by the procedural rule that "ordinarily an appellate court will not consider a theory not raised at trial." (*Johnson II*, *supra*, 30 Cal.4th at p. 1330 (dis. opn. of Kennard, J.) Justice Kennard suggested the exception to the rule articulated in *Ward v. Taggart* -- where the new argument is based solely on the facts in the record -- did not apply to CJA because it would "deprive[] the prosecution of the opportunity to explain the pattern of its preemptive challenges to the trial court . . . ." (*Id.*)

Of course, at the time, there was confusion over whether CJA had been performed at trial in *Miller-El I* -- the majority in *Johnson II* believed that CJA *had* been performed at trial in *Miller-El I*. (30 Cal.4th at p. 1321.) However, developments after *Johnson II* showed this understanding was flawed. In fact, the Supreme Court in *Miller El I* (and later *Snyder*) considered CJA which had *never* been presented to the state courts.

The Supreme Court's use of CJA in *Miller-El II* and *Snyder v. Louisiana* undercuts the concerns expressed in Justice Kennard's *Johnson II* dissent. In neither case had CJA been performed in the trial court, and thus in neither case did the prosecutors have an "opportunity to explain the pattern of its preemptive challenges to the trial court . . . ." (30 Cal.4th at p. 1330.) Yet in neither cases did this pose an obstacle to the reliable use of CJA on appeal or, ultimately, to a grant of relief.

The reason is simple. The facts on which the prosecutor is permitted to justify his choices, i.e., the transcript of the voir dire, and the prosecutor's explanation for his choices, are fixed permanently in the record. The prosecutor cannot change his step-two justification, for that would "reek[] of afterthought." (*Miller-El II*, *supra*, 545 U.S. at p. 246.) The record of the juror's answers and the record of the prosecutor's step-two justification remain the same whether it is before the trial court or the appellate court. *Snyder* and *Miller-El II* recognize that whatever arguments the prosecutor may make to the trial court -- based on the immutable record -- to explain why seemingly comparable jurors are not really comparable, may be made with equal reliability to the appellate court.

D. Sound Practical Considerations Militate In Favor Of Permitting CJA For The First Time On Appeal, As Do The Courts Of Many States.

In addition to the longstanding practice of permitting arguments akin to CJA to be made for the first time on appeal, there are two sound practical reasons for doing so. First, as explained below, if trial counsel are required to perform CJA in order to preserve a defendant's right to argue CJA evidence on appeal, the procedures currently used in most trial courts for adjudication of *Batson* motions will have to be entirely revamped. And second, if this Court employs a "chain of reasoning" default, the parameters of that default will be litigated for many years, and will feature extensively in this Court's capital caseload. This may explain the common practice of reviewing courts throughout the country to perform CJA on appeal even where it has not been done at trial.

Under current practice, defendants are required to make a *Batson* motion "at the earliest opportunity during the voir dire process." (*People v. Ortega* (1984) 156 Cal.App.3d 63, 69.) As *Ortega* explained, encouraging an objection at the earliest time benefits (1) defense counsel in "making the best possible prima facie case," (2) the prosecution in "prepar[ing] to make the best explanation feasible" (3) the trial court in permitting an "intelligent[] rul[ing] on the questions of prima facie case and, if one is found, explanations . . . . The longer a party waits to make a *Wheeler* motion the less feasible it will be for the court to recall specific questions and answers and the demeanor

of the jurors" and (4) "the efficient and economic administration of justice by permitting the court, if it finds discrimination in the use of peremptory challenges, to dismiss the existing jury panel and obtain a new panel without having to wait until the selection process has been completed." (*Id.* at pp. 69-70. *Accord People v. Thompson* (1990) 50 Cal.3d 134, 179 [adopting *Ortega*'s timeliness rule].) When a prima facie case is found, the trial court will ask the prosecutor for an explanation of the strikes and then make a ruling on the *Batson* motion. (*See*, *e.g.*, *People v. Lewis* (2006) 39 Cal.4th 940, 1009; *People v. Silva* (2001) 25 Cal.4th 345, 381-382.)

All this will have to change if the Court adopts a waiver rule. By definition CJA involves comparing minority "panelists who were struck and white panelists allowed to serve." (*Miller-El II*, 541 U.S. at p. 241.) A side-by-side comparison of stricken jurors with seated jurors cannot be made until the jury panel has actually been selected. At that point, just before the jurors are sworn, the defense will, for the first time, be in a position to make a CJA analysis in support of the *Batson* motion.[6]

For all the sound reasons on which *Ortega* was based -- including ensuring that the prosecutor is able to give an explanation when the strike is fresh in his or her mind --

[6] The state recognizes this logical point, noting that CJA is "meaningless" when performed with jurors not actually seated. (Respondent's Brief on the Merits at p. 41.)

defense counsel will want to make the *Batson* motion at the time the prosecutor makes the potentially unlawful strike. But since CJA cannot be done until the trial jurors are seated, the trial court will have to hold the *Batson* motion in abeyance until that time, lest it deprive the defendant of the opportunity to marshal constitutionally relevant evidence of the *Batson* violation.

At this point, several additional difficulties arise. First, as explained in *Johnson I* CJA is an extremely detailed process: "we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial. Here, with a two-month voir dire it is unrealistic to expect the trial judge to make a detailed review of the reasons [for a particular strike]." (*Johnson I*, *supra*, 47 Cal.3d at p. 1220.)

The Court was entirely correct. But just as a trial judge cannot reasonably be expected to make "detailed comparisons" mid-trial, neither can the litigants. As *Miller-El II* and *Snyder* show, such comparisons require careful review of jury selection transcripts. Thus, if defense counsel is required to perform CJA at trial, after the jurors are selected but before they are sworn, defense counsel will have to request (1) a transcript of the voir dire and, most probably (2) a brief continuance to review, and marshal the relevant evidence from, the voir dire transcripts. Only at that point can counsel effectively argue the constitutionally relevant evidence that *Miller-El II* and *Snyder* contemplate.

There is, of course, a reasonable alternative, to this cumbersome, time-consuming and expensive procedure in the trial court. That alternative is the procedure employed in *Miller-El II* and *Snyder* -- performing the CJA on appeal. That procedure not only permits an uninterrupted trial, it saves counties significant costs of producing daily voir dire transcripts prior to an appeal, and it permits the sort of detailed, searching comparison that -- as this Court recognized in *Johnson I* -- simply cannot be done by the judge or the parties in the midst of a criminal trial. Given that both *Miller-El II* and *Snyder* show that CJA can be performed by an appellate court on a cold record where questions of demeanor are not involved, the practical problems created by imposing a CJA requirement in California's already busy trial courts strongly counsels in favor of following the Supreme Court's recent examples of performing CJA on appeal.

But that is not the only practical reason counseling against imposition of a default rule in this context. The Supreme Court has long noted that "[i]n determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." (*Douglas v. Alabama* (1965) 380 U.S. 415, 422.) State law is similar; the basic rule governing the preservation of claims for appellate review in all litigation -- civil and criminal -- is that

the claimant must, in the trial court: (I) object to some specific action of the court or of his or her opponent, (ii) state the ground of the objection (the legal rule that he or she relies on, and its constitutional, statutory, or common-law source), and (iii) put into the record any factual information necessary for consideration of the objection. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-436.)

Once an issue is preserved in this way, the United States Supreme Court has certainly not limited litigants to advancing the same chain of reasoning in the appellate court that they presented to the trial court. (*Compare Vasquez v. Hillery* (1986) 474 U.S. 254, 257-260 [in state court defendant argues that blacks were improperly excluded from his grand jury and he introduces raw data showing the numbers of blacks that served, in federal habeas proceedings defendant introduces for the first time a statistician's analysis of the raw data before the state court; held, because the raw numbers evidence itself had been presented below, defendant was entitled to present the new statistical analysis in federal court].)

Indeed, this was the exact reasoning of *Miller-El II*, where the majority performed CJA even though it had not been done at trial precisely because a proper objection had been made and the necessary evidence was in the record. (*Miller El II*, *supra*, 545 U.S. at p. 241, n.2.) This Court has taken a similar approach. (*People v. DePriest* (2007) 42

Cal.4th 1, 19, fn. 6; *People v. Partida*, *supra*, 37 Cal.4th at pp. 433-439; *People v. Boyer* (2006) 38 Cal.4th 412, 446, fn. 17.)

If the Court now embraces the state's "chain of reasoning" objection at trial, there will be significant litigation ahead to determine how this principle will be applied in practice. For example, is there a principled distinction between *Batson* objections and other legal objections, or will the "chain of reasoning" default apply to other objections as well? Putting aside litigation on that question, how much of the chain of reasoning will a defense lawyer have to present at trial? And when that is finally established, and a trial lawyer defaults CJA on appeal because he has failed to sufficiently present it at trial, how will the reviewing courts assess the parade of ineffective assistance of counsel claims that will follow?[7]

Once again, given that both *Miller-El II* and *Snyder* establish that CJA can be

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[7] This latter question has particular relevance for this Court. In the context of its significant capital caseload, where a trial lawyer has defaulted a claim for failing to properly object, the Court often considers the merits of the claim in order to preclude a claim of ineffective assistance of counsel. (*See*, *e.g.*, *People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Mickey* (1991) 54 Cal.3d 612, 665; *People v. Ashmus* (1991) 54 Cal.3d 932, 976; *People v. Morris* (1991) 53 Cal.3d 152, 196; *People v. Sully* (1991) 53 Cal.3d 1195, 1218.) Of course, if reviewing courts do not take this approach, they will certainly be faced with ineffective assistance of counsel claims. And if reviewing courts do take this approach, a default with significant practical concerns will have been adopted that is -- as a practical matter -- not conserving judicial resources at all.

performed on appeal even where not done at trial, there is little reason to walk down the path of creating a "chain of reasoning" default in California. This is especially true here, where other states have reached precisely this conclusion.

In this regard, the United States Supreme Court is not alone in conducting CJA for the first time on appeal where the prosecutor's stated reasons for a strike are not demeanor based, but are based on answers to specific voir dire questions. In this situation, Texas -- which has the heaviest appellate caseload in the nation after California and Florida[8] -- conducts CJA for the first time on appeal. (*Watkins v. State* (Tex. 2008) 245 S.W.3d 444 [refusing to default CJA not performed at trial where prosecutor's stated reasons were not demeanor-based, but involved substantive answers to voir dire questions on rehabilitation and burden of proof.) The Texas courts have been explicit on this point:

> "In assaying the record for clear error, vel non, the reviewing court should consider the entire record of voir dire; it need not limit itself to arguments or considerations that the parties specifically called to the trial court's attention so long as those arguments are manifestly grounded in the appellate record." (*Id.* at p. 448.)

In adopting this procedural rule, the Texas court relied on *Miller-El v. Dretke,*

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[8] *See* Nat. Center for State Courts, http://www.ncsconline.org/D_Research/CSP/2006_files/Appellate.pdf.

which the court characterized as "mak[ing] comparative juror analysis in determining the plausibility of [the] prosecutor's race-neutral explanations, though [the] state court was apparently never specifically asked to make comparative-juror analysis during the *Batson* hearing." (*Ibid*.)

While Texas has explicitly held that trial counsel need not present CJA in order to preserve defendant's right to argue it on appeal, a number of other states have implicitly taken the same approach. Thus, the courts of Florida, Louisiana, Georgia, Illinois and Wisconsin all perform CJA on appeal as to stricken jurors, even where it was not performed in the trial court, so long as the prosecutor's reasons for striking the juror are not based on demeanor. (*See*, *e.g.*, *Roundtree v. State* (Fla. 1989) 546 So.2d 1042; *State v. Collier* (La. 1989) 553 So.2d 815; *Ford v. State* (Ga. 1992) 423 S.E.2d 245; *People v. Coulter* (Ill. 1992) 594 N.E.2d 1163; *People v. Morales* (Ill.App. 1999) 719 N.E.2d 261; *State v. Walker* (Wis. 1990) 453 N.W.2d 127.) Federal circuit courts of appeal have reached the same result. (*See*, *e.g.*, *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.)[9]

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[9] In 2000, some five years before *Miller-El I*, three years before *Miller-El* II and eight years before *Snyder*, the State of Connecticut adopted a contrary rule requiring CJA to be raised in the trial court. (*State v. Mukhtaar* (2000) 750 A.2d 1059.) Unlike the Texas courts, the Connecticut Supreme Court has not yet determined whether the Supreme Court's recent case law endorsing CJA for the first time on appeal requires a different result.

It is not surprising that the practice of a large number of jurisdictions coincides with the Supreme Court's practice of considering CJA for the first time on appeal, provided the CJA arguments "are manifestly grounded in the appellate record." (*Watkins v. State*, supra, 245 S.W.3d at p. 448.) As discussed above, not only do sound practical considerations counsel just such a result, but California appellate procedure recognizes the same principle, permitting additional arguments on appeal provided they are based on a clear factual record. And perhaps even more importantly, as these cases from around the country suggest, the promise (and hope) of both *Wheeler* and *Batson* -- to eradicate racism in the jury system -- also counsel against withdrawing CJA as a tool in the limited circumstances of *Miller-El I*, *Miller-El II*, and *Snyder*.

In sum, amici propose a rule that permits appellate courts to perform CJA on appeal, provided that it does not require reviewing a prosecutor's justification based on demeanor, and further provided the record on the stricken juror's substantive answers is

sufficiently developed. Both *Miller-El II* and *Snyder* involved such a scenario, as do the many out-of-state cases cited above.[10]

[10] Applying this test to the case at bar is not difficult. The prosecutor said he challenged prospective juror C.A., not based on her demeanor, but based on (1) her responses to a question about "run-ins" with law enforcement (she had received a traffic ticket), and (2) her brother having been a victim of a gang-related homicide, which suggested to the prosecutor the prospective juror's brother might have a gang-affiliation. (2 RT 125.)

Because the prosecutor's justification was based solely on C.A.'s substantive answers to voir dire questions rather than on her demeanor, the prosecutor's justification is suited to CJA on appeal (provided the record is sufficiently developed on these justifications with respect to both C.A. and the seated jurors). While amici take no position on whether the CJA discloses that the prosecutor's conduct was in fact pretextual, amici do note that the record was sufficiently developed to permit both parties to effectively argue that CJA fails to show pretext. (See Resp. Answer Brief on the Merits, at pp. 39-42.) The state has never contended the record was inadequate for it to respond to defendant's CJA.

II. ASSUMING DEFENSE COUNSEL MUST PRESENT CJA AT TRIAL IN ORDER TO ARGUE THE EVIDENCE ON APPEAL, SUCH A RULE MAY NOT BE APPLIED RETROACTIVELY.

As noted, the parties offer starkly different answers to what trial counsel must do to preserve CJA for appeal. The state argues defense counsel must present CJA at trial to argue the evidence on appeal. (*People v. Lenix*, S148029, Respondent's Brief ("RB") 12-32.) Defendant argues the *Batson* motion is sufficient to argue CJA on appeal. (*People v. Lenix*, S148029, Appellant's Brief on the Merits ("ABOM") 12-45.) And amici propose an intermediate position consistent with the Supreme Court's recent case law, practical concerns and the actual practice throughout the country.

Assuming this Court adopts either this intermediate position or the more extreme position advocated by the state, and announces a procedure trial counsel must now follow in order raise CJA on appeal, the question becomes whether such a rule may be applied retroactively. As more fully discussed below, in accord with both fundamental fairness and this Court's longstanding jurisprudence, the answer is no.

A. The General Rule: When The Court Changes The Rules Governing How A Trial Lawyer Must Preserve An Issue For Appeal, That Change May Not Be Retroactivity Applied To Cases Tried Before The Rule Is Changed.

For thirty years this Court has taken a consistent and entirely fair approach to this issue. Where the Court changes, or resolves a conflict in, the rules for preserving an issue on appeal, federal and state principles of due process and fundamental fairness prevent retroactive application of the new rule. (*See e.g.*, *People v. Collins* (1986) 42 Cal.3d 378, 388.) "To deny defendants their right to appeal on [an] issue because [they followed existing law] . . . would be to change the rules after the contest was over." (*Ibid*.)

As Judge Alarcon explained in this very context, "we refuse to impose subsequently-created requirements for preserving a claim on appeal on a defendant who did all that was necessary to comply with the law applicable at the time of his trial. By doing so, we avoid the brutal absurdity of commanding a man today to do something yesterday." (*United States v. Givens* (9th Cir. 1985) 767 F.2d 574, 579.) Thus, a decision changing the rules for preserving an issue on appeal will only be applied to "trials beginning after [the new] decision is final." (*People v. Collins*, *supra*, 42 Cal.3d at p. 388. *Accord People v. Riel* (2000) 22 Cal.4th 1153, 1220 [court refuses to retroactively apply holding that trial lawyers must challenge certain rulings to preserve claim for appeal]; *People v. Scott* (1994) 9 Cal.4th 331, 358 [court holds defense lawyers must

object to sentence to preserve issue for appeal but makes ruling prospective]; *People v. Welch* (1993) 5 Cal.4th 228, 238 [court holds defense lawyers must challenge probation conditions in trial court to preserve the issue for appeal, but makes ruling prospective]; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 716 [court holds challenges to juvenile court's fitness finding must be raised in a pretrial writ, but makes ruling prospective because "the reported cases provide conflicting directions as to the proper manner in which and time at which a challenge to a certification order should be asserted."].)[11]

The straightforward approach to this issue which the Court has consistently charted since *Chi Ko Wong* requires an analysis of what obligations the published case law imposed on trial counsel to ensure that CJA was properly preserved for appeal. It is to that analysis amicus now turns.

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[11] The United States Supreme Court takes a similar approach, refusing to honor state court procedural defaults which were not both clearly announced and consistently applied prior to trial. (*See*, *e.g.*, *Ford v. Georgia* (1991) 498 U.S. 411, 424-425; *Barr v. City of Columbia* (1964) 378 U.S. 146, 149-150 [where state supreme court does not employ procedural default in four cases, but relies on it in a fifth case, the default will not bar review on appeal].)

B. Prior To 2003, And From 2005 To The Present, Whether CJA Was Performed At Trial Had Nothing To Do With Whether A Reviewing Court Would Perform CJA On Appeal.

In Argument I-A, amicus has discussed the history of this Court's CJA case law. There is no need to repeat that discussion in any detail. Suffice it to say that for California trials prior to 1989, this Court was clear it would "engage[] in comparative juror analysis for the first time on appeal." (*Johnson II*, *supra*, 30 Cal.4th at p. 1318.) In other words, prior to 1989, there was no need for defense counsel to raise CJA at trial in order to argue this evidence on appeal.

As discussed above, the rules changed in 1989. Seeking to effectuate *Batson*, this Court held that CJA would not be performed on appeal in assessing the third stage of the *Batson* inquiry. (*Johnson I*, *supra*, 47 Cal.3d at 1221.) Significantly, *Johnson I* did not purport to announce a limited new rule as to actions a trial lawyer must take to present CJA evidence on appeal. Thus, the court drew no distinction between cases in which CJA had been done at trial, and cases in which it had not. (47 Cal.3d at pp. 1220-1222.)

Equally important, the Court applied its ban on CJA directly to the defendant in *Johnson I*. This is important because, as discussed above, prior to *Johnson I* defense counsel did *not* have to present CJA at trial in order to argue this evidence on appeal.

(*Johnson II*, *supra*, 30 Cal.4th at p. 1318.) Thus, this Court could not have changed the rule of appellate review in *Johnson I* and retroactively applied that new rule to defendants (such as the one in *Johnson I*) whose trial lawyer could not have known of the new rule. (*See*, *e.g.*, *People v. Collins*, *supra*, 42 Cal.3d at p. 388 ["To deny defendants their right to appeal on [an] issue because [they followed existing law] . . . would be to change the rules after the contest was over."]; *Accord People v. Chi Ko Wong*, *supra*, 18 Cal.3d at p. 716.) In short, and in light of *Collins* and *Chi Ko Wong* the logical reading of *Johnson I* was that it did not matter if defense counsel performed CJA at trial; in the interests of giving "great deference" to the trial court and avoiding "second guessing," appellate courts would no longer perform CJA.

The case law following *Johnson I* certainly supported this interpretation. These cases show that presentation of CJA at trial had nothing at all to do with whether the evidence could be argued on appeal. Thus, on some occasions this Court refused to conduct CJA even where it *was* performed at trial. (*See*, *e.g*. *People v. Montiel* (1993) 5 Cal.4th 877, 907-09.) On other occasions, the Court performed CJA even though it was not done at trial. (*See*, *e,.g.*, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1091, n.27.) And on yet other occasions, the Court refused to perform CJA without any mention of whether it was done at trial. (*See*, *e.g.*, *People v. Catlin* (2001) 26 Cal.4th 81, 119, fn. 5; *People v. Ayala* (2000) 24 Cal.4th 243, 270; *People v. Jackson* (1996) 13 Cal.4th 1164, 1195-1198;

People v. Turner (1994) 8 Cal.4th 137, 164.)[12]

From this case law, defense lawyers could not have known that unless they performed CJA at trial, the argument would be waived on appeal. And the intermediate appellate courts' understanding of *Johnson I* certainly confirmed this view; these courts too understood *Johnson I* as a straightforward ban on CJA on appeal. (*See*, *e.g.*, *People v. Landry* (1996) 49 Cal.App.4th 785, 791 ["[U]nder authority of the California Supreme Court, an appellate court is not allowed to compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered."]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1329 [rejecting CJA on appeal by citing *Johnson I* and concluding "while such comparative analysis of various jurors' responses to evaluate the bona fides of the prosecutor's stated reasons once may have been allowed, it is now disapproved."].) So too did the federal courts. (*See*, *e.g.*, *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360 n.3; *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427 and 1428, n.2.)

In short, from 1989 through 2003, there was no requirement for defense counsel to

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[12] Ironically, several of these cases were ones in which defense counsel *had* presented CJA to the trial court. (*See*, *e.g.*, *People v. Ayala*, S013188, Reporter's Transcript at 6347 [CJA performed at trial]; *People v. Jackson*, S010723, Reporter's Transcript at 8135-37 [CJA performed at trial].) Obviously, the Court's refusal to perform CJA even where it had been done at trial directly supports the view that a trial lawyer's decision to engage in CJA was irrelevant to preserving this issue for appeal.

raise CJA at trial in order to preserve a defendant's right to argue that evidence on appeal. Regardless of whether defense counsel took that step at trial, defendants were simply unable to pursue the issue on appeal.

This changed in 2003 when this Court decided *Johnson II*. *Johnson II* involved a trial court's refusal to find a prima facie case at stage one of the *Batson* inquiry. (30 Cal.4th at pp. 1307-1308.) In dicta -- because *Johnson II* did not involve a third-stage *Batson* inquiry at all -- the Court sought to comply with *Miller-El I* and suggested that in connection with a third-stage *Batson* inquiry, defense counsel had to present CJA at trial in order to preserve a defendant's right to pursue the analysis on appeal. (30 Cal.4th at pp. 1318-1324.) According to *Johnson II*, this rule complied with *Miller-El I* because *Miller-El I* was just "another example of a reviewing court considering evidence of comparative juror analysis *after it had been presented to the trial court*." (30 Cal.4th at p.

1321, emphasis added.)[13]

The 2003 rule of *Johnson II* changed in 2005. Less than two years after *Johnson II*, the Supreme Court decided *Miller-El II* and made clear that -- contrary to the assumption made in *Johnson II* -- the CJA on which the Supreme Court relied in both *Miller-El I* and *Miller-El II* had *not* been "presented to the trial court." (*Miller-El II*, *supra*, 545 U.S. at p. 241, n.2.) Following the Supreme Court's lead in *Miller-El II*, this Court returned to performing CJA even where trial counsel had not presented the

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[13] Amicus recognizes that although *Johnson II* did not involve a stage-three *Batson* inquiry, the Court nevertheless discussed its 1989 decision in *Johnson I* (which *did* involve a stage three inquiry) in light of *Miller-El I.* Because all nine justices in *Miller-El I* employed CJA on appeal, a reading of *Johnson I* as an outright ban on appellate CJA was inconsistent with *Miller-El I.* (*See Johnson*, *supra*, 30 Cal.4th at pp. 1331-1332 [Kennard, J., dissenting].) In light of *Miller-El I*, *Johnson II* reexamined *Johnson I* and concluded it never intended an outright ban on appellate CJA, just a ban on appellate CJA where trial counsel failed to present CJA. (30 Cal.4th at p. 1318.)

Justice Kennard disagreed with this reading of *Johnson I*, noting that "the more reasonable reading of *Johnson* [*I*] is that it barred the use of comparative juror analysis on appeal whether or not that approach was urged before the trial court." (30 Cal.4th at p. 1331.) Justice Kennard accurately observed that post-*Johnson I* decisions rejected CJA on appeal without regard to whether trial counsel had presented the analysis. (*Ibid*.) In addition, if *Johnson I* simply altered how trial counsel preserved CJA for appeal, the rule could not have applied retroactively to the defendant in *Johnson I* whose trial began before the change was announced. (*See Collins*, *supra*, 42 Cal.3d at p. 388; *Welch*, *supra*, 5 Cal.4th at p. 238; *Chi Ko Wong*, *supra*, 18 Cal.3d at p. 716.)

In any event, in *People v. Reynoso* (2003) 31 Cal.4th 903 the Court seemed to adopt Justice Kennard's view of *Johnson I*, accurately noting that defense counsel's obligation to perform CJA at trial derived from *Johnson II.* (31 Cal.4th at p. 936, n.1.)

argument. (*See*, *e.g.*, *See*, *e.g.*, *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1109; *People v. Stevens*, *supra*, 41 Cal.4th at p. 196; *People v. Williams*, *supra*, 40 Cal.4th at p. 289; *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1017-1024; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 688; *People v. Avila*, *supra*, 38 Cal.4th at pp. 547-548; *People v. Huggins*, *supra*, 38 Cal.4th at p. 232; *People v. Jurado*, *supra*, 38 Cal.4th at p. 105-106; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 270-273.)[14]

C. If The Court Does Require Trial Counsel To Present CJA In Order To Preserve The Defendant's Right To Argue The Evidence On Appeal, Except For A Window Between December 1, 2003 And August 25, 2005, This Requirement Should Be Prospective Only.

As discussed in Argument II-A, *supra*, for more than 30 years this Court's rule has been both clear and fair: a decision changing the rules for preserving an argument on appeal will only be applied to "trials beginning after [the new] decision is final." (*Collins*, *supra*, 42 Cal.3d at p. 388. *Accord Riel*, *supra*, 22 Cal.4th at p. 1220; *Scott*, *supra*, 9 Cal.4th at p. 358; *Welch*, *supra*, 5 Cal.4th at p. 238; *Chi Ko Wong*, *supra*, 18

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[14] In the *post-Miller-El* II context, the intermediate appellate courts followed this Court's lead. All have addressed the merits of comparative juror analyses on appeal *without a requirement that trial counsel preserve the issue by raising it at trial*. (*See*, *e.g.*, *People v. Carter* (2007) 2007 WL 741317; *People v. Miller* (2007) 2007 WL 4465764; *People v. Inocencio* (2007) 2007 WL 2783324; *People v. Wilson* (2007) 2007 WL 2751877; *People v. Liggion* (2007) 2007 WL 2713730; *People v. Delgado* (2007) 2007 WL 1559817; *People v. Williams* (2007) 2007 WL 1114104; *People v. Corona* (2006) 2006 WL 3028269.)

Cal.3d at p. 716.) As discussed in Argument II-B, *supra*, prior to 1989 defense lawyers in California had no obligation to present CJA at trial in order to preserve defendant's right to argue the evidence on appeal -- reviewing courts would perform the analysis even if it was not done at trial. (*Johnson II*, *supra*, 30 Cal.4th at p. 1318.) Similarly, from 1989 through 2003, trial lawyers again had no obligation to present CJA at trial in order to preserve the analysis for appeal -- reviewing courts would not perform the analysis regardless of whether it was done at trial.

Amicus recognizes that the landscape changed in 2003. For a time period after this Court's decision in *Johnson II*, trial counsel were plainly on notice that CJA had to be presented at trial in order to preserve a defendant's right to argue the evidence on appeal.

Calculating when trial lawyers knew of this requirement is relatively easy. "[A] judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*In re Pedro T.* (1995) 8 Cal.4th 1041, 1046. *Accord People v. Kemp* (1974) 10 Cal.3d 611, 614.) When certiorari is sought, a decision is not final until certiorari is denied. (*See People v. Murtishaw* (1989) 48 Cal.3d 1001, 1012.)

Here, *Johnson II* was decided on June 30, 2003. Petitioner in *Johnson II* sought certiorari. Certiorari was granted on another issue on December 1, 2003. (*Johnson v.*

California (2003) 540 U.S. 1045.) Which meant that the portion of *Johnson II* requiring defense lawyers to present CJA at trial became final that same day -- December 1, 2003.

But under the unusual facts of this case, the December 1, 2003 date is not the end of the analysis. *Miller-El II* was decided on June 13, 2005. Beginning in August 2005, this Court returned to its pre-1989 practice and performed CJA on appeal even when not raised at trial. (*See*, *e.g.*, *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 270-273 [decided August 25, 2005]. *Accord People v. Zambrano*, *supra*, 41 Cal.4th at p. 1109; *People v. Stevens*, *supra*, 41 Cal.4th at p. 196; *People v. Williams*, *supra*, 40 Cal.4th at p. 289; *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1017-1024; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 688; *People v. Avila*, *supra*, 38 Cal.4th at pp. 547-548; *People v. Huggins*, *supra*, 38 Cal.4th at p. 232; *People v. Jurado*, *supra*, 38 Cal.4th at p. 105-106.)

In sum, based on principles of fair notice, any rule the Court adopts which requires defense lawyers to present CJA at trial in order to preserve the defendant's right to raise the analysis on appeal may be applied as follows:

- It may *not* be applied to trials which began before the waiver component of *Johnson II* became final on December 1, 2003. Prior to *Johnson II*, defense counsel's decision to pursue CJA at trial had nothing to do with a defendant's ability to argue CJA on appeal.
- It may be fully applied to trials which occurred between December 1,

2003 and August 25, 2005. In that time period it was clear that if defense counsel did not present CJA at trial, the appellate court would not consider it.

- It may *not* be applied to trials which began after August 25, 2005, when the Court again routinely performed CJA even though not presented at trial.

This analysis is consistent with this Court's longstanding approach in *Collins*, *Welch* and *Chi Ko Wong*, and avoids "the brutal absurdity of commanding a man today to do something yesterday." (*United States v. Givens*, *supra*, 767 F.2d at 579.)[15]

[15] The voir dire in this case occurred in April of 2005. Thus, assuming the Court adopts a trial presentation requirement which would otherwise apply to this case, it would not be unfair to apply that rule to the defendant here. But as discussed in Argument I, *supra*, the intermediate position advocated by amicus would not have required trial counsel in this case to present the comparison below.

CONCLUSION

This Court's 1978 decision in *Wheeler* reflected a remarkable commitment to the goal of eradicating racism from the jury system. Eight years later, in *Batson v. Kentucky*, the Supreme Court followed this Court's lead.

Snyder v. Louisiana, along with *Miller-El I* and *Miller-El II*, further that laudable goal. These cases not only show that CJA is an important part of the *Wheeler/Batson* scheme, but that even where CJA is not performed at trial, reliably performing CJA on appeal can nevertheless help achieve the promise of *Wheeler* and *Batson*.

The goals of *Wheeler* are every bit as important today as they were in 1978. Not only does the weight of authority from other jurisdictions already comply with the course charted in *Snyder* and *Miller-El II*, but there are strong practical and policy reasons for this Court to take the same approach as well.

DATED: _____.

Respectfully submitted,

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_____
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