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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION

13  
 14 **CURTIS LEE ERVIN,**

Petitioner,

CAPITAL CASE

3:00-cv-1228

15  
 16 v.

17 **GENA JONES, Warden of the California**  
 18 **Health Care Facility,<sup>1</sup>**

Respondent.

**RESPONDENT’S NOTICE OF  
 CONCESSION OF ERROR ON CLAIM V**

Judge: The Honorable Vince Chhabria

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 21 On September 10, 2021, the United States Court of Appeal for the Ninth Circuit remanded  
 22 this case to allow this court to conduct a review of Ervin’s *Batson*<sup>2</sup> claim in light of the Supreme  
 23 Court’s opinion in *Flowers v. Mississippi*, 588 U.S. 284 (2019). *Ervin v. Davis*, 12 F.4th 1102  
 24 (9th Cir. 2021). On remand, the case was initially stayed to allow Ervin to return to state court to  
 25 exhaust some additional facts supporting this claim. That stay was then lifted and the matter was  
 26

27 <sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Gena Jones is substituted  
 28 as the respondent due to Ervin’s transfer to the California Health Care Facility.

<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

1 referred for settlement. As set forth below, respondent now concedes that a *Batson* violation  
2 occurred in this case.

### 3 **PROCEDURAL HISTORY**

4 In state court Ervin raised a *Batson* claim regarding the excusal of nine African American  
5 prospective jurors. That claim was denied on direct appeal. *People v. Ervin*, 22 Cal.4th 48, 74-77  
6 (2000). The California Supreme Court noted its existing precedent held that a reviewing court  
7 would not, for the first time on appeal, engage in a comparative juror analysis and denied relief.  
8 *Id.* at p. 76. On federal habeas review this court initially noted that Ervin failed to advance  
9 specific arguments as to six of the nine challenged jurors holding that he had thus failed to meet  
10 his burden as to the six. *Ervin v. Davis*, 150 F.Supp.3d 1108, 1136 (N.D. Cal. 2015). Regarding  
11 the remaining three jurors, this court noted that Ervin failed to identify non-African American  
12 jurors that were sufficiently similar to the challenged prospective jurors to render the state court's  
13 finding unreasonable. *Id.* at pp. 1136-40. On appeal, the Ninth Circuit Court of Appeals found  
14 that this court erred in failing to conduct a comparative analysis for six of the nine jurors or to  
15 consider other factors, and remanded the case for reconsideration in light of *Flowers v.*  
16 *Mississippi, supra*. Because Ervin sought to augment the record beyond what was before the state  
17 court, this court initially stayed the case to allow for a state exhaustion petition to be filed.  
18 Following disclosure of jury selection notes in Ervin and other Alameda County capital cases, this  
19 court lifted the stay and referred the case for settlement.

### 21 **RESPONDENT CONCEDES THAT A *BATSON* VIOLATION HAS BEEN** 22 **ESTABLISHED ON THE RECORD OF THIS CASE AND THE WRIT SHOULD** 23 **ACCORDINGLY BE GRANTED.**

24 As previously noted, the California Supreme Court determined that, under its then existing  
25 precedent, a comparative jury analysis was not required in the first instance on direct review  
26 where no such comparison was made in the trial court. Although at the time of that decision,  
27 nothing in the holding of *Batson* appeared to clearly require such an analysis, the United States  
28 Supreme Court's subsequent holdings in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Flowers v.*

1 *Mississippi, supra*, have stated that a comparative analysis “can be an important step in  
2 determining whether a *Batson* violation occurred.” *Miller-El v. Dretke*, 545 U.S. 231, 241  
3 (2005), and *Flowers v. Mississippi*, 588 U.S. at 311. Significantly, although *Flowers* came to the  
4 Court from a direct appeal, *Miller-El*, like this case, was before the Court on federal habeas.

5 Having now conducted a thorough re-examination of the record in light of *Flowers* and  
6 *Miller-El*, to include a detailed comparative juror analysis with all of the seated and challenged  
7 jurors, respondent concedes that *Batson* was violated in this case. Ervin is entitled to a new trial.

8 In light of the above, respondent respectfully requests this Court vacate the original  
9 judgment and grant a conditional writ requiring the state to either release Ervin or commence a  
10 new trial within 60 days.

11 Dated: July 30, 2024

Respectfully submitted,

12 ROB BONTA  
13 Attorney General of California  
14 LANCE E. WINTERS  
15 Chief Assistant Attorney General  
16 JAMES WILLIAM BILDERBACK, II  
17 Senior Assistant Attorney General

18 **/s/ Alice B. Lustre**  
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20 Supervising Deputy Attorney General  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**CURTIS LEE ERVIN,**  
  
Petitioner,  
  
v.  
  
**GENA JONES, Warden of the California  
Health Care Facility,**  
  
Respondent.

Case No. 3:00-cv-1228

**[PROPOSED] ORDER**

Respondent having filed a notice of concession as to the *Batson* claim set forth in the petition, the writ of habeas corpus is granted. Respondent must release petitioner or commence proceedings to retry him within 60 days.

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Vince Chhabria

## CERTIFICATE OF SERVICE

Case Name: **Curtis Lee Ervin v. Kevin Chappelle, Acting Warden of San Quentin State Prison** No. **3:00-cv-1228**

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I hereby certify that on July 30, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

### **RESPONDENT'S NOTICE OF CONCESSION OF ERROR ON CLAIM V**

#### **[PROPOSED] ORDER**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 30, 2024, at San Francisco, California.

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Nam Bui  
Declarant

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/s/ Nam Bui  
Signature