No. 17-6923

In the Supreme Court of the United States

GERALD PARKER,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether petitioner was denied his right to equal protection in contravention of *Batson v. Kentucky* and its progeny when the California Supreme Court found that the totality of the circumstances did not support an inference of racial discrimination requiring the prosecutor to state reasons for exercising peremptory challenges to two African-American prospective jurors.

2. Whether a state reviewing court is required to conduct a "comparative juror analysis," requested by a party for the first time on appeal, in order to determine whether the trial court erred in failing to draw an inference of discrimination from the exercise of a peremptory challenge.

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STATEMENT

1. In 1978 and 1979 petitioner, while a Staff Sergeant in the United States Marine Corps stationed in Orange County, California, brutally beat and sexually assaulted six women—Sandra Fry, Kimberly Rawlins, Marolyn Carleton, D. Green, Debora Kennedy, and Debra Senior—in their apartments. Pet. App. A 1-2, 8. Five of the women died from massive injuries to their heads, and, while one pregnant victim survived, her fetus died as a result of the attack. *Id.* at 2. Petitioner's crimes went unsolved until 1996, when DNA tests connected the homicides to each other and to petitioner. *Id.* While serving a prison term on an unrelated parole violation, petitioner was confronted with DNA and fingerprint evidence and admitted to burglarizing all six apartments. *Id.*

2. Petitioner was charged with six counts of capital murder. Pet. App. A 1. One-hundred-thirty-six prospective jurors were available for petitioner's trial. *Id.* at 28. After 71 potential jurors were questioned, and 17 of them were excused for cause or hardship by stipulation or without objection, 54 prospective jurors remained subject to peremptory challenges by the parties. *Id.*

The prosecutor challenged 19 prospective jurors, including two African-Americans (Prospective Jurors Nos. 719 and 213), and exercised three peremptory challenges in selecting alternate jurors. Pet. App. A 28, 31. Prospective Juror No. 719, an African-American woman, had asked to be

excused for hardship on the first day of voir dire due to lower back pain caused by sitting, but the trial judge had denied her request. *Id.* at 28-29.

Prospective Juror No. 719 also had indicated on her written questionnaire, in response to general feelings regarding the death penalty, "I don't like it!" *Id.* at 28. In addition, she had responded affirmatively to the question whether she had "religious beliefs" that would "impair her ability to serve as a juror on this type of case"; her explanation accompanying that question was, "Death." *Id.* at 28-29. She had left blank the spaces for answering questions about whether she would automatically vote for either death or life imprisonment without the possibility of parole without considering any aggravating and mitigation factors, and whether the death penalty was used too often, too seldom, or randomly. *Id.* at 29.

After the defense had passed on its challenges for cause, the prosecutor questioned Prospective Juror No. 719 about her death penalty views. Pet. App. A 29. She confirmed that she had a problem with the death penalty based on her religious beliefs. *Id.* She stated that, if she were choosing between life without possibility of parole and death, she would probably always select life over death. *Id.* The prosecutor challenged Prospective Juror No. 719 for cause. *Id.* She was then questioned further by the trial judge and counsel in chambers. *Id.*

When the judge asked whether she could ever vote for the death penalty, Prospective Juror No. 719 replied, "I just don't believe in it. I'm

being honest." Pet. App. A 30. When the judge asked if she would never vote for the death penalty under any circumstances, she did not agree and said she would take the evidence into consideration. *Id.* But she reiterated that, because of her religious beliefs, she did not believe in taking a life. *Id.* The judge asked her if she could vote for the death penalty if the other jurors convinced her it was the appropriate penalty; and she responded, "I can't give you that answer." *Id.* In response to further questions by the judge, Prospective Juror No. 719 indicated her willingness to listen to the evidence before making a decision; but she reiterated that she had a lower-back problem that made it painful to sit for a long period of time. *Id.*

The prosecutor then asked Prospective Juror No. 719 if "it would be very difficult for you to vote to put someone to death" given her religious beliefs against the death penalty. Pet. App. A 30. She answered, "Oh, yes, definitely." *Id.* When asked if she would be biased against the death penalty based on her religious beliefs, she said that she would "have to look at the evidence" and that it would "[d]epend on the evidence." *Id.* But she agreed with the prosecutor that her feelings against the death penalty would make it "very difficult" for her to impose death. *Id.*

The trial court advised counsel that he was denying the prosecutor's challenge of Prospective Juror No. 719 for cause and asked petitioner's counsel if there was going to be a "*Wheeler* situation" if the prosecutor

exercised a peremptory challenge of the juror. Pet. App. A 30.[1] Initially, defense counsel indicated to the contrary, noting that Prospective Juror No. 719's answers "probably give reason" for use of a peremptory challenge in a "non-racial manner." *Id.* at 31. After the prosecutor argued the standard for a challenge for cause further, however, defense counsel reconsidered and said "we may well be getting into a *Wheeler* situation"; he asserted that, because of the limited pool of African-American jurors, challenging any prospective African-American juror created a *Wheeler* situation. *Id.* The trial court said that, if the prosecutor exercised a peremptory challenge of Prospective Juror No. 719, it would not find a prima facie case of discrimination; the court expressly noted defense counsel's acknowledgement of the likelihood that a good prosecutor would challenge Prospective Juror No. 719 based on her responses. *Id.* The prosecutor subsequently exercised his fourth peremptory challenge to excuse Prospective Juror No. 719. *Id.* at 31.

Prospective Juror No. 213, the other African-American challenged by the prosecutor, had asked to be excused based on hardship from conflicts with doctors' appointments, an important school departmental meeting, out of

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[1] *People v. Wheeler*, 22 Cal. 3d 258 (1978), is the state-law counterpart to *Batson v. Kentucky*, 476 U.S. 79 (1986). As the California Supreme Court explained in this case, "[a]lthough defendant relied solely upon *Wheeler* at trial and did not invoke *Batson*, we have recognized that an objection on the basis of *Wheeler* also preserves claims that may be made under *Batson*." Pet. App. A 35 n.10 (citing, e.g., *People v. Lewis & Oliver*, 39 Cal. 4th 970, 1008, n.9 (2006)).

town travel, and practice and game commitments as a head basketball coach. Pet. App. A 31. While the prosecutor was willing to stipulate to excuse Prospective Juror No. 213 for hardship, defense counsel had told the court "[w]e want him." *Id.* at 32.

In subsequent voir dire in open court, the prosecutor asked Prospective Juror No. 213 about being the foreman in a murder trial in 1995, testifying as a character witness for a friend accused of the murder of his father, and receiving psychological counseling in high school relating to a girlfriend. Pet. App. A 32. When asked about difficulty serving on the jury while being head coach of the freshman boys' basketball team, Prospective Juror No. 213 confirmed that practices would have to be in the evening and agreed with the prosecutor that he was "torn" between his responsibilities as a coach and those of a juror. *Id.* The prosecutor then asked about Juror No. 213's death penalty views. *Id.* The prospective juror responded that he had voted for the death penalty and believed it was necessary to deter "very, very violent" crimes. *Id.* He also said that, while he felt it was appropriate in some instances and could impose it if warranted, he had "mixed feelings" about the death penalty. *Id.* The prosecutor passed on his challenges for cause. *Id.* at 33. But he then exercised his next, and seventeenth, peremptory challenge to excuse Prospective Juror No. 213. *Id.*

Defense counsel objected to the peremptory challenge of Prospective Juror No. 213. Pet. App. A 33. He stated that there were only two or three

African-American jurors "in the whole room, and two of them have been excused" by the People's fourth and seventeenth peremptory challenges and explained, "I'm just making my record in that regard.... So, we're contending that that establishes a systematic exclusion of the African-American potential jurors." *Id.* at 33. The trial court disagreed with defense counsel's representation regarding the racial composition of the jury pool, noting that it did not know if there were only three prospective African-American jurors in the jury pool; and that there might have been more. *Id.*

The court denied petitioner's objection, noting the absence of any basis for "finding that the district attorney is engaging in misconduct, that he systematically is excluding all [African]-Americans from serving as jurors on this case, or that he is systematically excluding any other minority group from serving on this particular case." Pet. App. A 33. The court explained: "[Prospective Juror No. 213] did submit a request to be excused for hardship, and ... [i]n our discussion in chambers he indicated his reticence about serving, although he did opine that if actually selected, he will find a way to make his job work consistent with the nature of the jury duty. [¶] But, just watching his expression, and I have to put two things on the record: Yesterday when we broke in the evening one of the first prospective jurors to come up to the bailiff to get a hardship form was [Prospective Juror No. 213].... [¶] So, when I came back out and advised him ... that he needed to go take the jury seat, there was an audible groan and facial expression

consistent with that as he moved from the clerk's area over to the chair. [¶] And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult. Plus some of the other information that was disclosed to the deputy district attorney upon further inquiry. [¶] So, I think we have to be careful, when you make a challenge of this nature, that the court give a legitimate consideration. And I don't mean to make less of the challenge. If I thought that it was even close, I would make the deputy district attorney state on the record his feeling as to why he was excusing [Prospective Juror No. 213], but, there was ample reason to excuse both [Prospective Jurors Nos. 719 and 213], other than dealing with race. [¶] And based on your offer of proof, I'm just denying the challenge." *Id.* at 33-34.

At the trial, Parker did not present any evidence during the guilt phase. Relying on Parker's statements to police, defense counsel argued that Parker was guilty of only second degree murder as to each victim based on diminished mental capacity due to intoxication. 8 RT 1709, 1778, 1873-1886; 9 CT 2876; Pet. App. A 2. The jury convicted petitioner of the six charged first degree murders. Pet. App. A 1. The jury also found true the "special circumstances" allegations of multiple murder and murder during the attempted commission or commission of the crimes of rape and burglary. Following the penalty phase of the trial, the jury returned a verdict of death. *Id.*

3. On direct appeal to the California Supreme Court, petitioner argued, among other contentions, that the trial court had erred in denying his objections to the prosecution's peremptory challenges to Prospective Jurors Nos. 719 and 213. Pet. App. A 28. Because petitioner's trial had pre-dated this Court's decision in *Johnson v. California*, 545 U.S. 162 (2005), clarifying the proper standard for determining a prima facie case of discrimination, the California Supreme Court "independently" considered the record in resolving the legal question of "whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis." *Id.* at 35. For purposes of its analysis, the state court assumed that Prospective Jurors Nos. 719 and 213 were the only African-Americans in the 136-person jury pool, a proposition that had not been conceded or confirmed as factually accurate. *Id.* at 36. It also observed that the prosecutor engaged in more than a cursory or desultory voir dire of the two prospective African-American jurors. *Id.* at 37. While noting that petitioner is the same race as the challenged jurors, the state court concluded that such a fact alone could not establish a prima facie case of discrimination. *Id.*

The court also found that the record showed race-neutral reasons for the challenges. Pet. App. A 38. As the defense initially had conceded, Prospective Juror No. 719's views on the death penalty provided non-racial reasons for the prosecutor to excuse the juror. *Id.* Similarly, Prospective Juror No. 213's reluctance to serve on the jury was evident from his answers

on voir dire as well as his demeanor. *Id.* The California Supreme Court concluded that petitioner had not demonstrated that "the totality of relevant circumstances gives rise to an inference of discriminatory purpose in the prosecutor's exercise of peremptory challenges against these two prospective jurors." *Id.*

The California Supreme Court rejected petitioner's other claims and affirmed the judgment of the trial court. Pet. App. A 38-66.

ARGUMENT

1. The Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); see *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*). Under this Court's jurisprudence, a trial court is required to undertake a three-step analysis in evaluating an equal-protection objection to the prosecutor's use of peremptory challenges. *Batson*, 476 U.S. at 96-98; see *Johnson v. California*, 545 U.S. 162, 168 (2005). "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson*, 545 U.S. at 168; see *Miller-El II*, 545 U.S. at 239. Once the defendant has made such a showing, the burden shifts to the prosecutor to explain his challenges by providing race-neutral explanations. *Id.* If a race-neutral explanation is given, the trial court "'must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.'" *Id.*

Beyond those basic rules, *Batson* "decline[d] ... to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99. Instead, "[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

First, petitioner criticizes the California Supreme Court for concluding that the "'bare circumstance that *all* African-American prospective jurors were struck from the pool would be insufficient in this case to support an inference that the two were challenged because of their race.'" Pet. 22, quoting Pet. App. A 36. He contends that the court ignored the cross-racial nature of the case, i.e., that petitioner is an African-American charged with raping and killing young white women. Pet. 22. But the state court is well aware that a relevant consideration on the prima facie case question is whether a defendant is a member of the excluded group, "especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong." *People v. Kelly*, 42 Cal. 4th 763, 779-780 (2007), cited at Pet. App. A 37; see also *People v. Taylor*, 48 Cal. 4th 574, 615 (2010).

Next, petitioner contends that the California Supreme Court, in reasoning that the challenge of only one or two prospective jurors rarely

suggests a pattern of impermissible exclusion, misapprehended this Court's precedents as requiring him to demonstrate a pattern of discriminatory strikes. Pet. 24-25, citing Pet. App. A 36. But, as the state court painstakingly made clear in its opinion, it labored under no such confusion: "'As we have previously explained, "'the ultimate issue to be addressed ... 'is not whether there is a pattern of systemic exclusion; rather the issue is whether a particular prospective juror has been challenged because of group bias.'"'" Pet. App. A 36 n.11. The state court simply and correctly recognized that, whenever an inference of discrimination is asserted solely "'from the fact one party has excused "most or all" members of a cognizable group,'" any court finding a prima facie case on that basis would necessarily rely on "'"an apparent pattern in the party's challenges"'" and discerning such a pattern is difficult "'when the number of challenges is extremely small.'" *Id.*

Petitioner notes that even the strike of a single juror for discriminatory purposes is improper. Pet. 25. The California Supreme Court expressly acknowledged that point in denying petitioner relief. Pet. App. A 36 ("'[E]ven the exclusion of a single prospective juror may be the product of an improper group bias.'").

Nor does this Court's decision in *Johnson* undermine the state court rejection of petitioner's *Batson* claim. This Court observed in *Johnson* that "the inference of discrimination was sufficient to invoke a comment by the trial judge 'that "we are very close,"'" and that, on review, the California

Supreme Court acknowledged that "'it certainly looks suspicious that all three African-American prospective jurors were removed from the jury.'" *Johnson*, 545 U.S. at 173, citing *People v. Johnson*, 30 Cal. 4th 1302, 1307, 1326 (2003). Here, the trial court's observation was the polar opposite of the trial court's impression in *Johnson*. Instead of suggesting it was a close case, the trial judge observed: "If I thought it was even close, I would make the deputy district attorney" state the reasons on the record. Pet. App. A 34.

Petitioner contends that the state court ignored Ninth Circuit cases where excusal of the only minority jurors established racial discrimination. Pet. 25, citing *Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010); *United States v. Collins*, 551 F.3d 914, 918 (9th Cir. 2009); *Ali v. Hickman*, 584 F.3d 1174, 1176 (9th Cir. 2009); *Johnson*, 545 U.S. at 173; *Johnson v. Finn*, 665 F.3d 1063, 1070 (9th Cir. 2011).[2] In *Crittenden*, however, the Ninth Circuit relied on both "comparative analysis," which included considering the prosecutor's juror-rating system (known only because the prosecutor provided that information in an evidentiary hearing during federal habeas proceedings) and on the fact that the challenge for cause against the juror had been predicated on nothing more than her general objections to the death

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[2] *Hickman* is particularly inapposite since that case involved a federal habeas court's review of a state court stage-three *Batson* analysis with benefit of the prosecutor's actual reasons. *Ali v. Hickman*, 584 F.3d at 1177. The fact that the trial court proceeded to stage two of the *Batson* framework in *Hickman* does not serve to undermine the California Supreme Court's analysis and rejection of petitioner's *Batson* claim.

penalty. *Crittenden*, 624 F.3d at 956-957. Here, the basis for the challenge for cause of Prospective Juror No. 719 by the prosecutor extended far beyond her general objections to the death penalty. While Prospective Juror No. 719 declined to state that she would never under any circumstances vote for the death penalty, she made it very clear that it would be "very difficult" for her to vote for the death penalty because of her religious beliefs and that she would "probably always select life without possibility of parole over death." Pet. App. A 29-30.

Petitioner's reliance on *Collins* is equally misplaced. While the Ninth Circuit relied on comparative analysis as revealing little distinction among those who served and the challenged juror that would account for the prosecutor's strike, it also cited the absence of questioning by the prosecutor of the challenged juror combined with "having very little hard information" on which to base a finding of no prima facie case. *Collins*, 551 F.3d at 922-923. Conversely, the California Supreme Court expressly found that the voir dire of the two African-American prospective jurors in this case was "by no means desultory or cursory." Pet. App. A 37. Moreover, the record in this case contains the hard information lacking in *Collins*. The California Supreme Court pointed out, "as defense counsel initially conceded," that Prospective Juror No. 719's answers regarding her views on the death penalty gave the prosecutor "reason to use his peremptory in a nonracial manner." *Id.* at 38. The reluctance of Prospective Juror No. 213 to serve on

the jury also is apparent from the record; further, "the prosecutor specifically referenced this reluctance—'I take from it some things you said and the way you walked to the jury box, you're not thrilled'—and the trial court made express factual findings in this regard." *Id.* Precluding a court from taking into account this relevant information would be inconsistent with this Court's directive to consider "all relevant circumstances" in deciding whether a defendant has made a prima facie showing of purposeful discrimination. *Batson*, 476 U.S. at 96.

Moreover, unlike the prosecutor in *Johnson*, who exercised two of his first three peremptory challenges against African-American prospective jurors and his twelfth and final peremptory challenge against the third (and only remaining) African-American prospective juror, in petitioner's case the prosecutor exercised his fourth and seventeenth peremptory challenges. Pet. App. A 37. Petitioner's case also contrasts with *Williams v. Runnels*, 432 F.3d 1102 (9th Cir. 2006), on which petitioner relied on appeal (Pet. App. A 37) as well as in his petition to this Court (Pet. 28), because the prosecutor in that case exercised three of his first four peremptory challenges to dismiss African-American prospective jurors. *Williams v. Runnels*, 432 F.3d at 1107-1109. Unlike cases involving the exercise of multiple challenges against African-American prospective jurors early in the voir dire process, here the prosecutor's use of his fourth and seventeenth peremptory challenges to excuse African-American prospective jurors did not support an inference that

the race of the prospective jurors was of greater concern to the prosecutor than the possible reasons for challenging prospective jurors that had not been apparent from their questionnaires but that might become evident later in the voir dire process.

Petitioner's reliance on *Johnson v. Finn*, 665 F.3d at 1070 (Pet. 25-26), and the cases cited therein, is likewise misplaced. Those cases only serve to illustrate the absence of a comparable pattern in petitioner's case to support an inference of discrimination. Opinions finding *Batson* violations on different sets of unique facts—e.g., a prosecutor striking five out of six African-American prospective jurors (*Paulino v. Castro*, 371 F.3d 1083, 1091 (9th Cir. 2004)), or four out of seven Hispanic prospective jurors along with the only two African-American prospective jurors (*Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002)), or five out of nine prospective African-American jurors (*Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir. 1995)), or 10 of 11 prospective African-American jurors (*Miller-El v. Cockrell*, 537 U.S. 322 (2003))—do not suggest a conflict on a legal question requiring this Court's review.

Nor would those cases compel an inference of racial discrimination from challenging two African-American prospective jurors in the circumstances of this case. Apart from the lack of an inference of discrimination from the exercise of such a small number of peremptory challenges, the California Supreme Court also pointed out that the prosecutor's use of those two of 22

peremptory challenges did not constitute a disproportionate use of challenges against members of cognizable minority groups. A record showing 9.1 percent of challenges relating to African-American prospective jurors from a jury pool comprising 3.7 percent African-Americans provides little information, given such a small sample size. Pet. App. A 37, n.12.

Petitioner complains that the California Supreme Court found that he failed to make a prima facie showing "largely because the 'information elicited in voir dire showed race-neutral reasons for excusing both prospective jurors.'" Pet. 27, quoting Pet. App. A 38. He contends that the state court incorrectly focused on whether the record supported race-neutral grounds for the peremptory challenge, instead of whether "other relevant circumstances" erode the premises underlying the defendant's assertion of the discriminatory exercise of peremptory challenges. Pet. 28, citing *Williams v. Runnels*, 432 F.3d at 1109. Petitioner argues that the presence of race-neutral reasons in the record is irrelevant to a stage-one *Batson* analysis, reasoning that only the prosecutor's actual reasons matter. Pet. 28, citing *Currie v. McDowell*, 825 F.3d 603, 609-610 (9th Cir. 2016); *Williams v. Runnels*, 432 F.3d at 1109 (question is not whether prosecutor might have had a good reason but instead the real reasons), citing *Johnson*, 545 U.S. at 172; *Miller-El II*, 545 U.S. at 252. But petitioner's insistence on ignoring the presence of obvious race-neutral reasons in the record contradicts this Court's precedent endorsing consideration of all relevant circumstances in a stage-one *Batson* analysis.

In *Batson*, this Court explained that, "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." 476 U.S. at 96. And, in identifying some of these circumstances, the Court noted that "the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Id.* at 97. That is, circumstantial evidence of what the prosecutor likely was thinking may be considered. *Batson* affirmed this Court's "confidence" that "trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges create a prima facie case of discrimination against black jurors." *Id.* It would be inconsistent with this Court's stated confidence in trial courts, and illogical and unrealistic as well, to demand that trial courts blind themselves to convincing reasons, tending to negate any inference of racial discrimination, that are evident from the course of the proceedings that have taken place before them.

Conversely, it would be untenable to require that the determination of a prima facie case must be based only upon circumstances that support the *Batson* objector. Under that view, a single challenge of a minority juror seemingly would trump all other circumstances and require a finding of a prima facie case. To the contrary, as indicated in *Batson*, relevant

circumstances either supporting or refuting a prima facie case should be considered.

Notwithstanding petitioner's suggestion (Pet. 26-27), this Court's decision in *Johnson v. California* did not signal any departure by this Court from the "all relevant circumstances" scope of the prima face case inquiry recognized in *Batson*. It is true that the trial judge in *Johnson*, in declining to find a prima facie case, had noted some reasons that could have supported the strikes. But this Court did not rule on the propriety of that particular approach by the judge. Instead, this Court held that the state courts had applied an entirely incorrect standard for determining a prima facie case—a preponderance-of-evidence standard rather than a lesser one of "inference." *Johnson*, 545 U.S. at 170-171. Certainly, the Court noted the benefits of the three-step *Batson* approach in ultimately getting to a "direct answer" in prima facie instances of discrimination in *Johnson*; but it never suggested that an obvious explanation for a challenge may not be considered in evaluating a claimed prima facie case.

Petitioner's reliance on the discussion regarding "mixed motive" cases in *Snyder v. Louisiana*, 552 U.S. 472 (2008) (Pet. 29-30), is similarly misplaced. In *Snyder*, the prosecutor gave two reasons for dismissing a juror: the juror's nervous demeanor and the juror's concern that the trial would prevent him from meeting his student-teaching obligations. 552 U.S. at 478. The trial court overruled the *Batson* motion without comment. *Id.* at 479. Because the

trial court had not made an express finding on the juror's demeanor, and because demeanor cannot be shown from a cold record, this Court refused to presume that the trial court had credited the prosecutor's demeanor-based reason for striking the juror. *Id.* This Court then rejected the teaching-obligation reason as pretextual as well. *Id.* at 479-484.

Petitioner argues that "[i]t would be particularly inappropriate in his case to rely on speculation that the prosecutor might have excused Prospective Juror No. 213 because of his commitment to his basketball team," drawing an analogy to the teaching commitment found to be pretextual in *Snyder*. Pet. 29. Prospective Juror No. 213 offered several scheduling conflicts pertaining to medical appointments, school-related meetings, out of town travel in addition to basketball practices conflicting with jury service. Pet. App. A 31. There was never any indication that any conflict with basketball practice schedules had been resolved such that it would render the situation analogous to the pretext identified in *Snyder*. Additionally, the comparison petitioner makes is particularly inapt, given the trial court's express findings regarding Prospective Juror No. 213's demeanor (Pet. App. A 33-34) and the trial prosecutor's reference to that demeanor in his questioning of him (*id.* at A 38).

Petitioner contends that the demeanor of Prospective Juror No. 213 could not inform the trial court's decision declining to find a prima facie case of discrimination, because the prospective juror had explained his conduct, at

least to petitioner's satisfaction. Pet. 30-31. Nothing in the Prospective Juror's response, that he was "torn" between his responsibilities as a coach and as a juror (see *id.* at 19, quoting 6 RT 1092-1093), compelled the California Supreme Court to ignore the import of the trial court's express findings regarding demeanor, or the significance of that demeanor to a prosecutor's proper exercise of peremptory challenges.

2. Petitioner also argues that certiorari is warranted to address whether a state reviewing court, in considering a stage-one *Batson* question, must conduct a "comparative analysis"— that is, "a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group." *People v. Gutierrez*, 2 Cal. 5th 1150, 1173 (2017), citing *Miller-El II*, 545 U.S. at 241; Pet. 32-38.[3] Petitioner contends that this Court's precedent requires that a comparative juror analysis be undertaken for the first time on appeal, even when a trial court finds that the defendant has failed to make a prima facie case of discrimination. Pet. 32, citing *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006). As explained below, this

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[3] While the "Question Presented" in the Petition literally refers to whether a *trial* court must conduct comparative analysis upon request (see Pet. i), petitioner apparently recognizes that his case does not present that question. His argument, instead, discusses whether a reviewing court is required to undertake comparative analysis when requested in determining whether an inference of discrimination can be drawn from the exercise of a peremptory challenge. See Pet. iii, 36 (heading).

Court's precedent does not require a reviewing court to undertake comparative analysis on a first-stage *Batson* question. And requiring comparative analysis for the first time on appeal, even where none was requested at trial, would reduce the incentive for trial counsel to bring purportedly relevant comparisons to the trial court's attention.

Petitioner relies on *Boyd v. Newland* (Pet. 32), where the Ninth Circuit concluded that clearly established federal law as determined by this Court (see 28 U.S.C. § 2254(d)) required granting a criminal defendant's request for a free transcript of the entire voir dire for use on appeal. *Boyd*, 467 F.3d at 1142. The Ninth Circuit observed, "[l]ike the various California courts to address the issue, we do not hold that comparative juror analysis *always* is compelled at the appellate level." *Id.* at 1149, emphasis in original. Instead, the Ninth Circuit opined that comparative analysis is "an important tool that courts *should* use on appeal." *Id.*, emphasis in original. While petitioner is correct that the Ninth Circuit went on to conclude that this Court's precedent requires comparative analysis "even when the trial court has concluded that the defendant failed to make a prima facie case" (Pet. 36, citing *Boyd*, 467 F.3d at 1149), this Court's precedent reveals no such requirement. Moreover, the Ninth Circuit's decision in *Boyd* is not in conflict with the California Supreme Court's decision in petitioner's case.

In supporting the need for an indigent defendant to receive a transcript of the entire voir dire, the Ninth Circuit noted that this Court did not confine

its review in *Miller-El II* to the prosecutor's reasons but also considered the questions posed by the prosecutor to other jurors. *Boyd*, 467 F.3d at 1149. But petitioner's reliance on *Boyd* and its analysis of this Court's precedent ignores the fact that *Miller-El II* arose in the context of a third-stage *Batson* inquiry and did not consider whether an appellate court is required to undertake comparative analysis when the party objecting to a peremptory challenge is seeking review of a ruling that he had failed to make a prima facie showing of discrimination. *Miller-El II*, 545 U.S. at 241-252; accord, *Boyd*, 467 F.3d at 1146.

The Ninth Circuit also observed in *Boyd* that this Court's decisions in both *Miller-El II* and *Johnson* "suggest that courts should engage in a rigorous review of a prosecution's use of peremptory strikes." *Boyd*, 467 F.3d 1139. The California Supreme Court did nothing less here. And, contrary to the concern expressed in *Boyd*, see 467 F.3d at 1149-1150, declining to undertake comparative analysis did not serve to insulate the prosecutor's exercise of peremptory challenges in petitioner's case from review nor undermine the holdings of this Court.

As the California Supreme Court has previously explained, comparative analysis undertaken for the first time on appeal "is neither mandated nor helpful in a first-stage case." *People v. Dement*, 53 Cal. 4th 1, 21 (2011), overruled on other grounds in *People v. Rangel*, 62 Cal. 4th 1192, 1216 (2016), cited at Pet. App. A 38. "'Whatever use comparative juror analysis might

have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales.'" *Id.*

Petitioner contends that comparative analysis is instructive in his case. Pet. 33. To the contrary, nothing in the responses of the seated jurors relied upon by Parker supports an inference of discrimination. First, petitioner suggests that other jurors—Juror Nos. 2, 5, 10, and 11—had expressed views on the death penalty comparable to those of Prospective Juror No. 719. *Id.* at 35. There is no comparison between those jurors' responses and Prospective Juror No. 719's response that she "definitely" would have difficulty imposing the death penalty based on her religious beliefs to the point where she would probably always select life without possibility of parole. See *id.* at 29-30. Merely expressing that it would be difficult to impose the death penalty (Juror No. 11), or confirming an ability to make the penalty decision despite some reservations about the death penalty generally (Juror No. 2), or expressing an opinion that the death penalty is randomly imposed (Juror Nos. 5 and 10), are not remotely the same as the views expressed by Prospective Juror No. 719.

Comparative analysis with respect to Prospective Juror No. 213 fares no better. First, petitioner points to Juror No. 7's hardship application, which indicated a scheduling concern over non-refundable tickets for a vacation. Pet. 37. But such a concern is very different from the demeanor and the

willingness to serve that is reflected in the record as to Prospective Juror No. 213. The concern over the demeanor of Prospective Juror No. 213 and his attitude toward serving on the jury is likewise absent in the other comparisons petitioner attempts to draw with seated jurors. See *id.* at 36-37. None of the seated jurors were indistinguishable from Prospective Juror Nos. 719 or 213, and comparative analysis for the first time by a reviewing court adds nothing to the stage-one *Batson* analysis in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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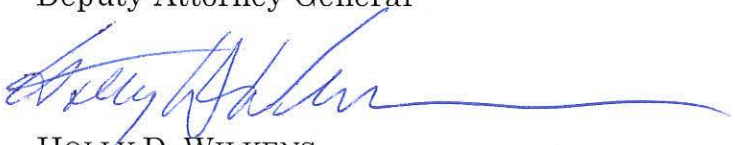

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