No. 18-6309

In the Supreme Court of the United States

WARREN JUSTIN HARDY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
JONATHAN J. KLINE*
Deputy Attorney General
GEOFFREY H. WRIGHT
Associate Deputy Solicitor General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6029
Jonathan.Kline@doj.ca.gov
Counsel for Record

CAPITAL CASE
QUESTIONS PRESENTED

Whether the California Supreme Court erred in sustaining the trial court's rejection of petitioner's claim that the prosecutor in this case exercised a peremptory strike on the basis of race.

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STATEMENT

1. Petitioner Hardy was convicted and sentenced to death for the murder of Penny Sigler. Pet. App. A 1-2. In 1998, Hardy and two cohorts killed Sigler during a robbery and sexual assault. *Id.* at A 2. Sigler's nude body was found on a freeway embankment the morning after she left her home to buy soda and candy. *Id.* She suffered 114 separate injuries to various parts of her body. DNA from a bite mark on Sigler's breast was scientifically matched to Hardy. *Id.* at 3-4. In one of his statements to police, Hardy claimed that Sigler provoked a confrontation with him and his companions by yelling, "Fuck you, niggers." *Id.* Sigler was white; Hardy is African-American. *Id.* at 22.

2. During jury selection, the prosecutor exercised five peremptory challenges in selecting the main panel. One was against Frank G., the only African-American available during that part of jury selection. Pet. App. A 17-18.

In his jury questionnaire, Frank G. wrote, "I believe prosecutors are not always truthful and tend to exaggerate." Pet. App. A 24. He noted that he spoke to lawyers on a daily basis regarding civil litigation and that he knew 50 to 60 civil and criminal defense attorneys. *Id.* at 24-25. He further stated that he "would not like to sit on this jury due to the nature of the alleged crimes." *Id.* at 27. He also described how, 10 years earlier, he had been falsely accused of stealing a rental car and arrested. *Id.* at 28. Although he indicated that he had been treated fairly by police and that justice had been served when the

charge was eventually dismissed, he remained "ambivalent" about the experience. *Id.* He indicated a belief that "wrongful accusations" are a major problem in the criminal justice system. *Id.* Finally, Frank G. wrote that he believed life without the possibility of parole was a worse punishment than death. *Id.*

The prosecutor questioned Frank G. about some of these answers during voir dire. Frank G. explained that, although he was not an attorney, he supervised civil litigation for a corporation. Pet. App. A 25, 30. When asked why he did not want to serve as a juror, he said that it was a "big decision" and he was concerned about the length of the trial. *Id.* at p. 27. He was particularly concerned that serving as a juror might interfere with a civil case he was supervising for work. *Id.*

In selecting the alternate panel of four jurors, each side was allotted four peremptory challenges. Pet. App. A 18. The prosecutor used all four, two to excuse Darin B. and Marion. H, both African-American. *Id.* at 18; 8 RT 1869-1870. The prosecutor twice passed with Marion H. as an alternate, then challenged her after the defense exercised two additional peremptory challenges. Pet. App. A 18; *id.* at 21 (Liu, J., dissenting). The final alternate panel included an African-American in the fourth and final spot. *Id.*

At that point, Hardy objected that the prosecutor had excused all African-American prospective jurors for reasons of group bias. Pet. App. A 18. The prosecutor argued that Hardy had not established a prima facie case of racial

discrimination, but before the trial court ruled on that question she also gave her reasons for exercising peremptory challenges against Frank G., Darin B., and Marion H. *Id.*

Hardy's petition focuses on the prosecutor's reasons for removing Frank G.[1] The prosecutor stated that six factors, in combination, led her to exercise a peremptory challenge against Frank G.: (1) on his questionnaire, he wrote that "police are not always truthful and tend to exaggerate"; (2) he spoke to attorneys daily and knew 50 to 60 civil or criminal lawyers; (3) he did not want to be a juror in this case; (4) he had been arrested by the Los Angeles County Sheriff's Department in 1992; (5) he did not smile at the prosecutor during voir dire but had smiled at defense counsel; and (6) he had indicated that life without parole was a worse punishment than death. Pet. App. A 23-24.[2]

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[1] Hardy challenged the removal of Darin B. and Marion H. in his appeal to the California Supreme Court (Pet. App. 32-33), but the court held that Hardy was not harmed by the removal of these jurors because they would not have been called to the main panel regardless of how the prosecutor exercised her peremptory challenges. *Id.* at 21-22. It accordingly addressed the removal of these jurors only to the extent it provided a "reason to be skeptical of the genuineness of [the prosecutor's] reasons for excusing Frank G." *Id.* at 33. Hardy takes a similar approach in his petition, arguing that the timing of the prosecutor's challenge to Marion H. supports an inference of racial bias in the selection process as a whole. Pet. 12-15, 23-25.

[2] Frank G. wrote in his jury questionnaire that he believed "*prosecutors* are not always truthful and tend to exaggerate." Pet. App. A 24 (emphasis added). As noted, the prosecutor gave as one of her reasons that Frank G. had indicated that "*police* are not always truthful and tend to exaggerate." *Id.* at 23. The California Supreme Court observed that there was no reason "to doubt the prosecutor's sincerity or suspect she simply made it up." *Id.* at 24. She

The trial court offered Hardy an opportunity to respond. Pet. App. A 18. Hardy's counsel declined. *Id.* The trial court denied the motion, finding that Hardy had not established a prima facie case of racial discrimination. *Id.* Even if Hardy had made such a showing, the court continued, the prosecutor had offered "race-neutral reasons for excusing the jurors." *Id.*

3. On direct appeal to the California Supreme Court, Hardy argued that the prosecutor had improperly excused African-Americans jurors because of their race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and California's similar state-law precedent, *People* v. *Wheeler*, 22 Cal. 3d 258 (1978). Pet. App. A 17. Because the prosecutor stated her reasons for excusing the prospective jurors before the trial court made a finding on whether Hardy established a prima facie case of racial discrimination, the court inferred a prima facie finding and proceeded directly to review the ultimate question of purposeful discrimination. *Id.* at 19.

The court applied "close scrutiny" to "the prosecutor's use of peremptory challenges because (1) the prosecutor "excused every African-American prospective juror that she could have excused" and (2) the "case had definite racial overtones." Pet. App. A 22. Nonetheless, it rejected Hardy's *Batson* claim. It considered three of the prosecutor's reasons for striking Frank G.

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accurately quoted the remainder of Frank G.'s answer, and the court considered it a permissible reason for excusing him whether the prosecutor simply misspoke or actually misremembered and thought Frank G. had said 'police." *Id.*

"especially strong: the juror's distrust of police (if the prosecutor misremembered) or prosecutors (if the prosecutor misspoke), the juror's close and daily professional relationship with lawyers and the court system, and the juror's false arrest." *Id.* at 29. The court concluded that the prosecutor's other three reasons—Frank G.'s reluctance to serve on a jury, his demeanor, and his belief that life imprisonment was a worse punishment than death—were less persuasive, but still legitimate. *Id.* at 27-29. The court concluded that all the prosecutor's reasons were "inherently plausible and reasonable and have a basis in accepted trial strategy. Considered in combination, they provide ample race-neutral grounds for the challenge." *Id.* at 24.

Hardy's argument to the California Supreme Court relied on "comparative juror analysis," in which a challenged juror's voir dire and questionnaire responses are compared with those of similar jurors whom the prosecutor did not challenge, to see whether some of the prosecutor's stated reasons for challenging minority jurors could also have applied to seated jurors. *See* Pet. App. A 21, 29-30; *see also Miller-El v. Dretke* 545 U.S. 231, 241 (2005). In responding to Hardy's analysis, the court observed that when reviewing comparative juror arguments for the first time on appeal, appellate courts "must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable." Pet. App. A 21; *see also Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (When comparing jurors on a "cold record," appellate courts "must be mindful that an exploration of the

alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.").

In any event, the court concluded that comparative juror analysis did not help make out a claim in Hardy's case. Pet. App. A 29. It acknowledged that "some unexcused jurors shared some of the traits the prosecutor cited regarding Frank G," but it noted that "[t]here will always be some similarities between excused and nonexcused jurors." *Id.* The court reasoned that Hardy had cited "no unexcused juror who exhibited the cynicism about prosecutors that this juror showed, or who had been mistakenly arrested for a crime and remained ambivalent about it, or who had such close and continual professional contacts with attorneys and the court system [as] this juror had." *Id.* at 29-30. It concluded that "all of these circumstances sharply distinguish this juror from others . . . cite[d] as supposedly similar." *Id.* at 30.[3]

The court addressed Hardy's argument that the prosecution should have viewed Frank G. as a "fine juror." Pet. App. A 30. Although it considered that

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[3] The court further held that the prosecutor's exercise of peremptory challenges while selecting the alternates provided no reason for skepticism about her dismissal of Frank G. Pet. App. A 33. With respect to Darin B., "[t]he record support[ed] each of [the prosecutor's] reasons, they [we]re plausible, and, collectively at least, [we]re strong." Pet. App. A 31. The court was unpersuaded by Hardy's comparative analysis as to Darin B., observing that Hardy "identifie[d] no unexcused juror who was currently on probation, a point the prosecutor stressed, or was a lawyer." *Id.* The court likewise found the prosecutor's reasons for excusing Marion H. to be plausible and found Hardy's comparative analysis unconvincing, noting that he had "fail[ed] to identify any nonexcused juror who was at all similar." *Id.* at 32.

true "in some respects," the court explained that, under *Batson*, "the question is not whether a prosecutor should or should not have excused a prospective juror," but rather "whether this prosecutor excused [Frank G.] for an improper reason." *Id.* It concluded that "[t]he record provides no sufficient reason to so conclude or for this court to overturn the trial court's ruling regarding Frank G." *Id.*

Justice Liu dissented from the court's *Batson* holding. In his view, it was more likely than not that the prosecutor's removal of Frank G. was impermissibly motivated by race. Pet. App. A 2 (Liu, J., dissenting). He reasoned that each of the prosecutor's reasons for striking Frank G. was questionable because some unexcused jurors shared some of those characteristics, and he expressed concern that the prosecutor had failed to question Frank G. about some of her reasons for striking him. *Id.* at 5, 6-15. He was also troubled by the timing of the prosecutor's use of a peremptory challenge against Marion H., which placed an African-American in the fourth and final alternate position, the least likely position to be called to serve. *Id.* at 19-22.

ARGUMENT

1. Hardy's primary contention is that the California Supreme Court "misapplied this Court's precedents" (Pet. 18) by "fail[ing] to conduct a meaningful comparative analysis" (Pet. 15). He maintains that the court required "near identical similarity" between jurors before it would engage in a

"meaningful" comparative juror analysis, and that its decision therefore conflicts with *Miller-El v. Dretke*, 545 U.S. at 247 & n.6.

The California Supreme Court recognized that comparing excused and unexcused jurors is one form of circumstantial evidence that can cast doubt on a prosecutor's stated reasons for removing a juror. Pet. App. A 21. And citing *Miller-El*, the court acknowledged that "[t]he individuals compared need not be identical in every respect aside from ethnicity." *Id.* at 21; *see also Miller-El*, 545 U.S. at 247 n.6. The court next compared Frank G. to unexcused jurors. Pet. App. A 29-30. On the record before it, the court concluded that no seated juror was similarly situated to Frank G. because none shared many of the race-neutral characteristics that led the prosecutor to strike Frank G. *Id.* The court rejected Hardy's *Batson* claim on that basis. *Id.*

Hardy appears to fault the court for examining both similarities and differences between Frank G. and unexcused jurors. Pet. 23; *see also id.* at 15-22 (discussing only similarities). But the court's method is consistent with *Miller-El*, which itself engaged in such an examination. *See* 545 U.S. at 247 ("[W]hen we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences." (footnote omitted)). Indeed, courts must examine material differences among jurors in order to comply with this Court's repeated instruction that *Batson* inquiries should consider all relevant circumstances. *See, e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1748 (2016) ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a

ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'"). In applying *Batson*, courts will frequently have to draw inferences from circumstantial evidence. *See Foster*, 136 S. Ct. at 1748 ("As we have said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.'" (quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). When an excused minority juror differs in material respects from an unexcused juror, that circumstance cuts against an inference of racial discrimination, even if the jurors are similar in other respects. The California Supreme Court properly applied these principles in rejecting Hardy's *Batson* claim.

Hardy argues that "[c]ertiorari is needed so this Court can define more precisely, and in keeping with *Batson* precedent, the degree of similarity between challenged jurors and seated jurors that triggers the requirement of a side-by-side comparison." Pet. 7; see also *id.* at 9. But this Court's precedents already teach that trivial differences between excused and unexcused jurors do not defeat an inference of discrimination, while meaningful differences should not be ignored. *See Miller-El*, 545 U.S. at 247. It is unlikely that any formula could better define the precise "degree of similarity" required before a comparison will give rise to an inference of discrimination on particular facts. In any event, as discussed further below, in this case the California Supreme

Court explained why Frank G. was materially dissimilar from the seated jurors. There is no reason for further review.

2. Hardy's additional arguments likewise do not warrant review.

First, Hardy challenges the California Supreme Court's application of *Batson* to the facts of his case. Pet. 16-21. He points out that one juror also expressed a low opinion of police; several had regular contact with attorneys; and several shared Frank G.'s reluctance to serve as a juror and his belief that life imprisonment without parole was a worse punishment than death. *Id.*

The California Supreme Court considered these arguments and found them unpersuasive. Pet. App. A 29. As the court observed, "[t]here will always be some similarities between excused jurors and unexcused jurors," and "parties with limited peremptory challenges generally cannot excuse every potential juror who has any trait that is at all problematic." *Id.* The court explained that Hardy cited "no unexcused juror who exhibited the cynicism about prosecutors that [Frank G.] showed, or who had been mistakenly arrested for a crime and remained ambivalent about it, or who had such close and continual professional contacts with attorneys and the court system [as] this juror had." *Id.* at 29-30. These characteristics reasonably distinguished Frank G. from every other seated juror. The court thus correctly held that the prosecutor's reasons for striking Frank G., "considered in combination," provide "ample race-neutral grounds for the challenge." *Id.* at 24.

Second, Hardy argues that *Snyder v. Louisiana*, 552 U.S. 472 (2008) precluded the California Supreme Court from considering the prosecutor's demeanor-based justification for excusing Frank G. (*i.e.*, that he did not smile at the prosecutor, but did smile at the defense), because demeanor is not reflected in the record and the trial court did not expressly endorse or credit the prosecutor's observation. Pet. 19. Hardy misreads *Snyder*. In *Snyder*, the prosecutor had offered two reasons for striking a juror—one of which was demeanor-based—and the trial judge overruled a *Batson* challenge without explanation. 552 U.S. at 478-479. This Court, after finding the non-demeanor explanation refuted by the record, concluded that the peremptory challenge could not be sustained on the demeanor-based ground alone, because that ground might have played no role in the trial judge's unexplained ruling. *Id.* at 485-486. As this Court stated in *Thaler v. Haynes*, 559 U.S. 43 (2010), *Snyder* did not establish a rule "that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id.* at 48. Indeed, *Thaler* permits judges to accept demeanor-based rationales even "in the absence of a personal recollection of the juror's demeanor." *Id.* at 49. Here, the prosecutor's demeanor-based rationale was only one of six reasons given for removing Frank G., all of which Hardy's counsel expressly declined to refute. Pet. App. A 18, 23-24. It was not error for the California Supreme Court to credit that rationale as one of several race-neutral explanations rebutting Hardy's *Batson* claim. *Id.* at 28.

Relying on *Uttecht v. Brown*, 551 U.S. 1 (2007), Hardy asserts that the California Supreme Court could not credit the demeanor-based rationale based on Hardy's failure to question it. That is also incorrect. *Uttecht* instructs appellate courts to apply deferential review to rulings on for-cause challenges based on a juror's views on the death penalty, because only trial courts have "the opportunity to observe the demeanor" of potential jurors. *Uttecht*, 552 U.S. at 18; see also *id.* at 9. *Uttecht* concluded that this deference was appropriate in the case before it even though the transcript did not reflect demeanor, and even though the trial court had made no finding on the issue because defense counsel did not object. *Id.* at 18. Nothing in *Uttecht* foreclosed the California Supreme Court from considering Hardy's failure to question the prosecutor's demeanor-based rationale.

Third, Hardy claims that the prosecutor's reasons for excusing Frank G. are undermined by her failure to question Frank G. about some of her concerns. Pet. 22. While such a failure to question can be evidence of pretext, *Miller-El*, 545 U.S. at 246, it is not dispositive, *see McNair v. Campbell*, 416 F.3d 1291, 1311 (11th Cir. 2005) (prosecutor's "failure to question most of the stricken African-American venire members about the specific concern that prompted the use of the challenge" was not persuasive evidence of pretext where the questions were "not likely to have been productive"). Here, the California Supreme Court rightly found this factor "relevant but not particularly probative," because the prosecutor (1) did question Frank G. about some of her

concerns; (2) had a lengthy questionnaire to review; and (3) had already heard questioning during voir dire by the court and defense counsel. Pet. App. A 29.

Fourth, Hardy further argues that "the prosecutor's manipulative challenges to African-American prospective jurors who could have sat as alternates also indicates racial bias." Pet. 24. He notes that, before exercising a peremptory challenge against Marion H., the prosecutor asked how the alternates would be chosen to serve on the jury and was told that they would be called in the order they were seated. *Id.* He reasons that when the prosecutor had one peremptory challenge remaining, she knew she could not avoid having an African-American alternate juror—either Marion H. would serve as alternate number three or Juror No. S-6169 (also African American) would serve as alternate number four. *Id.* at 24-25. He then posits that the prosecutor exercised her final peremptory challenge against Marion H. to minimize the likelihood that an African-American alternate would be called to the main panel. *Id.* at 25.

Hardy's theory of racial manipulation is undercut by the fact that the prosecutor twice accepted the alternate panel with Marion H. on it while she still had peremptory challenges remaining. Pet. App. A 18; 8 RT 1869-1870. Hardy responds by asserting that "[t]he prosecutor's acceptance of Marion H. occurred *before* defense strikes moved Marion H. from the fourth alternate position to the third" (Pet. 24), but that is incorrect. Although Marion H. was in the number four position the first time the prosecutor accepted the alternate

juror panel, she was in the number three position the second time the prosecutor accepted the panel. *See* 8 RT 1869-1870; Pet. App. A 21 (Liu, J., dissenting) ("the *first time* the prosecutor passed, Marion H. was positioned as the fourth alternate" (emphasis added)). That the prosecutor initially accepted the alternate juror panel with Marion H. as the third alternate—the same position she would have been in had the prosecutor *not* ultimately exercised a peremptory challenge against her—undermines Hardy's claim that the prosecutor was racially manipulating the alternate juror panel. Moreover, even the dissent below acknowledged that it was entirely possible that the prosecutor believed Marion H. was less favorable than the other jurors who served as alternates. *See* Pet. App. A 22 (Liu, J., dissenting).

Finally, Hardy claims that Frank G. "'should have been an ideal juror in the eyes of a prosecutor seeking a death sentence.'" Pet. 25 (quoting *Miller-El*, 545 U.S. at 247). As the California Supreme Court explained, however, "the question is not whether a prosecutor should or should not have excused a prospective juror. It is whether this prosecutor excused him for an improper reason. The record provides no sufficient reason to so conclude . . . ." Pet. App. A 30. On the contrary, after careful review the court concluded that the reasons articulated by the prosecutor were "inherently plausible and reasonable and have a basis in accepted trial strategy." Pet. App. A 24. That fact-bound conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
GEOFFREY H. WRIGHT
Associate Deputy Solicitor General

JONATHAN J. KLINE
Deputy Attorney General
Counsel for Record

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