No. 18-9648

In the Supreme Court of the United States

JAMELLE EDWARD ARMSTRONG,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED*

Whether the California Supreme Court correctly sustained the trial court's finding that the prosecutor's race-neutral justifications for the peremptory challenges of four jurors were genuine.

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* Respondent omits the notation "capital case" because, as discussed more fully below, the California Supreme Court reversed petitioner's death sentence on grounds not at issue here, and California has filed no cross-petition. Pet. App. A 10-34, 91-92. Petitioner is thus not under any "death sentence that may be affected by the disposition of the petition." S. Ct. Rule 14.1(a).

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Armstrong, No. S126560, judgment entered Feb. 4, 2019 (this case below).

California Superior Court, Los Angeles County:

People v. Armstrong, No. NA051938-01, judgment entered July 16, 2004 (this case below).

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STATEMENT

1. Petitioner Jamelle Armstrong was convicted and sentenced to death for the murder of Penny Sigler. Pet. App. A 2. In 1998, Armstrong and two other men killed Sigler during a robbery and sexual assault in Long Beach. *Id*. She had left her home on foot to buy cereal and milk; her body was found on a freeway embankment the following morning. *Id.* at 2-3. She had died from asphyxiation and suffered 11 broken bones and other serious injuries, including lacerations and bruising of the genitalia consistent with forcible penetration. *Id.* at 3. Sigler was white; Armstrong and his two accomplices are black. *Id*. at 34.

2. Armstrong was charged with murder (with special circumstances), kidnapping, robbery, rape, and torture. Pet. App. A 7. His principal defense at trial was that while "there was ample evidence of [his] guilt on charges of robbery, rape, rape in concert and kidnapping," his accomplices bore primary responsibility for Sigler's murder. *Id.* at 86. The jury rejected this defense, convicting him and recommending a sentence of death, which the trial court imposed. *Id.* at 7-9.

a. During jury selection, four of the peremptory challenges exercised by the prosecutor involved black male prospective jurors: S.L., R.C., E.W., and R.P. Pet. App. A 39. Armstrong objected to each of these challenges as racially discriminatory in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and *People v. Wheeler*, 22 Cal. 3d 258 (1978).

With respect to prospective jurors S.L. and R.C., the trial court denied Armstrong's motion at the first step of the *Batson* inquiry, finding no prima facie case of discrimination. Pet. App. A 34. After the third peremptory challenge at issue, of prospective juror E.W., the court found a prima facie case, but concluded that the challenge had been exercised for race-neutral reasons in light of the prosecutor's explanation. *Id.* The court also asked the prosecutor to justify the two earlier challenges of S.L. and R.C., but likewise credited the prosecutor's explanation for those challenges. *Id.* at 35. The trial court initially granted Armstrong's *Batson*/*Wheeler* motion challenging a fourth prospective juror, R.P., but the court later reversed course and denied the motion after the prosecutor pointed out that the court had wrongly applied the legal standard governing for-cause challenges. *Id.*; *see id.* at 64.

Because the sole claim raised in this petition is that the trial court erred in denying Armstrong's *Batson*/*Wheeler* motions, the circumstances surrounding each peremptory challenge are set forth in some detail below.

Prospective juror S.L.: The prosecutor had moved to excuse prospective juror S.L. for cause on the ground that his answers to voir dire left it unclear whether he would be willing to impose the death penalty. Pet. App. A 40-41. The trial court denied that motion, but later (in the course of denying Armstrong's *Batson*/*Wheeler* motion with respect to S.L.), referred to that decision as having been "very close." *Id.* at 41. The trial court explained that it could "understand why [the prosecutor] would want to excuse that juror,"

because "even though this court did not grant the challenge for cause," S.L. had expressed "some reservations about imposing the penalty of death" and had "waffled on whether [he] could impose death or not." *Id.* The prosecutor later highlighted these statements in explaining her decision to challenge S.L., and the trial court credited this explanation, "again noting that in its view S.L. nearly could have been excuse for cause based on his death penalty views." *Id.* at 41-42.

Prospective juror R.C.: The trial court also found no prima facie case of discrimination with respect to the prosecutor's challenge of prospective juror R.C. Pet. App. A 48. The court noted that R.C. had refused to give direct answers to voir dire questions, and that it appeared that "friction" had developed between R.C. and the prosecutor during the course of questioning. *Id.* Later, when the trial court retroactively asked the prosecutor to explain her peremptory challenge of R.C., the prosecutor explained that she had challenged him because he had repeatedly given non-answers to voir dire questions, had expressed no views about the death penalty, and had clashed with the prosecutor during voir dire. *Id.* at 48; *see id.* at 49-50 n.12 (sample voir dire exchanges between prosecutor and R.C.). The trial court credited this explanation, which aligned with the court's own earlier assessment. *Id.* at 49.

Prospective juror E.W.: After the prosecutor exercised a peremptory challenge against prospective juror E.W., Armstrong again argued that the challenge was racially discriminatory, and the trial court found a prima facie

case and asked the prosecutor for an explanation. Pet. App. A 52. The prosecutor discussed several of E.W.'s voir dire responses, and explained that "[t]he two things that really bother me" are that E.W. had expressed the view that life without the possibility of parole was a more severe sentence than death, and also had suggested that the death penalty may be inadvisable because it generates so much additional litigation. *Id.* The prosecutor reasoned, "To me, that is indicative of what his verdict is going to be." *Id.* The trial court credited this explanation and denied Armstrong's motion. *Id.*

Prospective juror R.P.: The prosecutor also challenged prospective juror R.P. Pet. App. A 64. The prosecutor noted that, like E.W., R.P. had expressed the view that life in prison was a more severe sentence than death. *Id.* He had also said that the death penalty was overused, especially against African-Americans, and that African-Americans were over-incarcerated in general. *Id.* He had sat on two prior murder cases and had said that service troubled him. *Id.* And one of his sons "had had a negative experience with the Long Beach Police Department," while another had recently been robbed at gunpoint—experiences the prosecutor feared could affect R.P.'s impartiality. *Id.*

The court concluded that the prosecutor's peremptory challenge was based on her belief that R.P. would be unlikely to vote to impose the death penalty, and that that reason was race-neutral. Pet. App. A 64. It nonetheless initially granted Armstrong's *Batson*/*Wheeler* motion, reasoning that R.P. *could* impose a verdict of death, rendering the prosecutor's race-neutral reason

"mistaken." *Id.* The prosecutor then pointed out that while that consideration would be relevant to a motion to dismiss a prospective juror for cause, it was irrelevant in the context of a peremptory challenge, where the question is whether the prosecutor is genuinely exercising the challenge for a race-neutral reason. *Id.* The trial court recognized its error and reversed itself, denying Armstrong's motion. *Id.* at 64-65. The court specifically credited three of the prosecutor's rationales and found them to be race-neutral: R.P. "found judging others disturbing"; he thought the death penalty was overused, especially against African-Americans; and he was concerned about the overincarceration of African-Americans in general. *Id.* at 65.

b. After the trial court had denied each of Armstrong's *Batson*/*Wheeler* motions, Armstrong moved for a mistrial on the ground that the prosecutor had struck every African-American male from the jury pool. Pet. App. A 35. The court denied that motion as well, noting that it had credited the prosecution's reasons for striking each of the four jurors, and that the seated jury had both one African-American woman and five Caucasian men. *Id.* The jury later convicted Armstrong, and the trial court (following the jury's recommendation) imposed a sentence of death. *Id.* at 9.

3. On automatic appeal, the California Supreme Court affirmed Armstrong's conviction, but reversed his death sentence after concluding that four prospective jurors were erroneously excused for cause under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985).

Pet. App. A 2; *see id.* at 10-34.[1] The court held that the trial court had wrongly concluded, based on those jurors' responses to voir dire questions, that they "could not fairly and impartially consider whether death was the appropriate punishment." *Id.* at 10. That holding is not at issue here.

a. Applying the "now familiar three-step process" this Court has set forth for adjudicating *Batson* claims, Pet. App. A 36 (citing *Johnson v. California*, 545 U.S. 162, 168 (2005)), the California Supreme Court rejected Armstrong's claim that the prosecution violated the constitution when exercising peremptory challenges to excuse the four black male prospective jurors. *Id*. at 35; *see id.* at 34-67. The court held that African-American men are a "[c]ognizable [c]lass" for *Batson* purposes, *id.* at 39-40, and proceeded to review the trial court's determination that the "race-neutral explanations" the prosecutor offered were "credible," *id.* at 38; *see id.* at 40-67. In keeping with established legal standards, the court afforded deference to the trial court's assessments of the credibility of the prosecutor's explanations, reviewing the trial court's findings for clear error. *Id.* at 39.

Prospective juror S.L.: The court determined that the "record supports the prosecutor's and trial court's assessments" that S.L. would be hesitant to return a verdict of death. Pet. App. A 42. S.L. "gave conflicting answers" as to

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[1] "In a capital case, the erroneous excusal of even one prospective juror for cause" based on the juror's views regarding the death penalty "requires automatic reversal of the death sentence, although not the preceding guilt determinations." Pet. App. A 33 (citing *Witherspoon*, 391 U.S. at 516-518).

whether he would follow jury instructions, "thought life in prison was a more severe punishment than death," and "was unsure whether California should abolish the death penalty." *Id.* at 42-43. The court explained that "[a] juror's reservations about imposing the death penalty are an acceptable race-neutral basis for exercising a peremptory," and that a juror's view that life in prison is a more severe punishment than death is "an obvious race-neutral ground for challenging a prospective juror." *Id.* at 43 (internal quotation marks and alteration omitted).

The court rejected Armstrong's contention that the prosecutor's conduct was similar to the discriminatory practices discussed in *Miller-El v. Dretke*, 545 U.S. 231 (2005). Pet. App. A 43. It reasoned that "[t]wo factors" this Court had found significant there, a Texas procedure called "jury shuffling" and Dallas County's historic policy of systematically excluding blacks from juries, were absent in this case. *Id.* The court also held that the record did not support Armstrong's claims that the prosecutor engaged in "disparate questioning" of S.L. and declined to challenge prospective white jurors who gave answers similar to S.L. *Id.* The prosecutor had "employed the same general line of questioning with numerous prospective jurors who were not African-American men," had "routinely questioned White jurors of both genders about the respective severity of death and life without parole," and had "challenged for cause or used peremptories against many White jurors who did not clearly view death as more severe." *Id.* at 47, 44.

Prospective juror R.C.: The court likewise held that the record "supports the [trial] court's determination" that prospective juror R.C. had failed to give direct answers to the prosecutor's voir dire questions and that "friction" had developed between R.C. and the prosecutor. Pet. App. A 48-49. R.C.'s "questionnaire revealed little to nothing about his death penalty views," and the prosecutor "had an equally difficult time discovering his feelings on the subject during voir dire," due to R.C.'s repeated refusal to elaborate on his questionnaire answers. *Id.* at 49; *see id.* at 49-50 n.12. And "review of the voir dire transcript confirms that exchanges between the prosecutor and R.C. became so combative" that counsel requested a sidebar with the court to discuss R.C.'s refusal to answer her questions. *Id.* at 49; *see id.* at 49-50 n.12. (sample voir dire exchanges).

The court agreed with the trial court's assessment that these rationales constituted a credible race-neutral explanation for the prosecutor's peremptory challenge of R.C. The voir dire transcript supported the trial court's conclusion that R.C. had been "belligerent and hostile … toward the prosecutor during her questioning." Pet. App. A 51. The court also rejected Armstrong's argument that the prosecutor had declined to challenge other jurors similar to R.C., explaining that "no other juror's combination of questionnaire and voir dire responses is comparable to R.C.'s." *Id.* at 51-52.

Prospective juror E.W.: The court concluded that the "record substantiates" the prosecutor's assessment that E.W. believed life

imprisonment was a more severe sentence than death and that the death penalty may be inadvisable because of the additional litigation it entails. Pet. App. A 52. E.W. had written that "the death penalty in its current form is so slow that it's really useless," and that "maybe the state should just let it go." *Id.* at 52-53 (internal quotation marks and alteration omitted). The court agreed with the trial court that these reasons "could well make a juror less desirable for a prosecution seeking the death penalty." *Id.* at 54.

The court rejected Armstrong's arguments for reversal. Armstrong noted that E.W. had said "his views would not affect his verdict," but E.W. had been the subject of a peremptory challenge, not a for-cause challenge. Pet. App. A 53. In the peremptory context, the question is whether the prosecutor's "reasons [are] sincere and nondiscriminatory," not whether they "might have been unfounded." *Id.* Armstrong argued that the prosecutor had not challenged other jurors who had expressed similar views about the death penalty, but the court noted that the prosecutor had been successful in limiting jurors who thought life in prison was a more severe punishment than death to "meager representation on the panel, notwithstanding that nearly half the prospective jurors held such views." *Id.* at 55.[2] This "was the product of weeks

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[2] Two questions on the juror questionnaire probed prospective jurors' views regarding whether life in prison was a more severe punishment than death (one asking the question in the abstract, and one asking the question from the standpoint of a defendant). Pet. App. A 43-44 & n.7. "More than 30 percent of the jury pool indicated that life was the harsher penalty in response to both questions, and nearly half indicated as much on at least one of the two

the prosecutor spent pressing, challenging for cause, and striking jurors who did not consider death more severe than life in prison without parole." *Id.* While "the prosecutor may have succeeded in eliminating only nearly all, rather than all, the jurors" who expressed views on the death penalty comparable to E.W., that "does not call into question the sincerity of her concern." *Id.* at 56-57.

Armstrong also took issue with the prosecutor's reference to E.W.'s profession as an engineer and her expressed "fear[] that he might put her to a higher standard of proof," a fear Armstrong argued was not genuine. Pet. App. A 58. But the court observed that the prosecutor had not described E.W.'s profession as one of the "two things that really bother me" about him, an indication that it was only E.W.'s profession in combination with his views about the death penalty that led the prosecutor to challenge him. *Id.* And no other juror shared that combination. *Id.* at 59.

Prospective juror R.P.: Finally, the court determined that "[t]he record supports the [trial] court's determination" that the prosecutor's reasons for challenging R.P. were "genuine and race-neutral." Pet. App. A 65. R.P. had "found judging others disturbing" and struggled with the "aftermath" of serving as a juror in two noncapital murder trials. *Id.* He also expressed concern that the death penalty was overused, especially against African-

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questions." *Id.* at 44. Yet "the prosecutor's focus on this issue produced a jury that contained *no one* in the first category, and only four jurors in the second." *Id.* at 44-45.

Americans, suggesting that "something was 'fundamentally wrong' with the criminal justice system." *Id.* at 66. The court observed that these "concerns are held by many," but "they also provide a legitimate reason why a prosecutor … might view R.P. as a problematic juror." *Id.* The concerns "are not unique to African-Americans: A prospective juror of any ethnicity might equally share them." *Id.* And "given R.P.'s responses about jury service in noncapital cases"—responses that "[n]o other juror" had given—the "prosecutor might be legitimately concerned that he might lean toward a verdict that would be emotionally less taxing." *Id.*

b. Justice Liu, joined by Justice Cuéllar and Justice Perluss, dissented.[3] Pet. App. A 93-116. He agreed with the majority as to the strike of prospective juror R.C., but concluded that "as to the other three strikes," Armstrong had "raise[d] more substantial objections." *Id*. at 93-94. Justice Liu considered the prosecutor's decision to strike prospective juror E.W. "[e]specially troublesome." *Id.* at 94. He acknowledged that the prosecutor's concern about E.W.'s belief that life was the more severe sentence was "an important reason for the strike." *Id*. at 98. In Justice Liu's view, however, the majority had minimized and failed to examine the other explanations proffered by the prosecutor, particularly E.W.'s training as an engineer. *Id*. at 95-100. Justice Liu thought the record cast doubt on the sincerity of that explanation, given

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[3] The Chief Justice of the California Supreme Court assigned Justice Perluss, of the California Court of Appeal, to join the Supreme Court for this case due to the vacancy that existed on the court at the time. *See* Pet. App. A 1 n.*.

that another engineer (Juror No. 11) served on the panel and that the prosecutor had not asked her the type of probing questions she had asked E.W. *Id.* at 100-106. In addition, while the prosecutor "did remove many jurors with views similar to E.W.'s" regarding the death penalty, she had not challenged three jurors and one alternate who, like E.W., had expressed the view that a sentence of life without the possibility of parole is "worse for a defendant" than a death sentence. *Id.* at 108; *see id.* at 107-112.

ARGUMENT

Armstrong concedes that "[t]he California Supreme Court did not use the wrong law," and specifies that he is not contending that "the California Supreme Court came to a conclusion at odds with that which may have been reached by this Court." Pet. 13. Nor does he assert that the opinion below conflicts with other lower court opinions or departs from this Court's well-established *Batson* framework. Rather, Armstrong takes issue with the California Supreme Court's review of the trial court's factual findings, accusing the court below of "ignor[ing] large parts of the record." *Id.* That is incorrect: The state court carefully reviewed the record and the record amply supports its affirmance of the factual determinations made by the trial judge. In any event, certiorari is not warranted to review the fact-intensive arguments Armstrong advances.

1. Armstrong first contends that the California Supreme Court failed to consider the fact that the prosecutor struck all members of a cognizable group, namely African-American men. Pet. 16-18. But the court specifically

recognized that "African-American [m]en [a]re a [c]ognizable [c]lass" for *Batson* purposes, Pet. App. A 39-40, and acknowledged that the prosecutor had exercised peremptory challenges against each of the four African-American men in the jury pool, *id.* at 35. There is thus no basis for Armstrong's charge that the court below "ignored" this factor. Pet. 16. Rather, the court simply did not consider it dispositive, in light of the court's examination of the particular circumstances surrounding each peremptory challenge. *See* Pet. App. A 40-67.

Armstrong asserts (Pet. 16-17) that the opinion below departs from this Court's decision in *Miller-El*, 545 U.S. at 241. But the California Supreme Court considered at length Armstrong's effort to analogize his case to *Miller-El*, and rightly rejected it. Pet. App. A 43-45. Among other considerations, *Miller-El* emphasized the "broader patterns of practice during jury selection," which included "jury shuffling," disparate questioning, and the county's historical policy of excluding blacks from juries, 545 U.S. at 253—patterns the opinion below recognized are "absent here," Pet. App. A 43.[4]

Although it is true that the prosecutor here challenged each of the African-American men in the jury pool, there were only four such jurors,

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[4] "Jury shuffling" is a procedure in which "either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Miller-El*, 545 U.S. at 253. Texas prosecutors sometimes requested a jury shuffle "when a predominant number of African-Americans were seated in the front of the panel" in order "to manipulate the racial composition of the jury." *Id.* at 254.

compared to "20 black members of the 108-person venire panel" in *Miller-El*, 545 U.S. at 240. Moreover, in *Miller-El* this Court deemed "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" to be "[m]ore powerful" than these "bare statistics" regarding relative rates of peremptory challenges. *Id.* at 241. Here, that comparison underscores the lack of merit in Armstrong's claim. As the California Supreme Court noted, "[c]omparative juror analysis" reveals that there were no white jurors who were "substantially similar ... in all material respects" to the challenged African-American male jurors. Pet. App. A 59; *see also id.* at 51-52; 66-67.

In addition, "[t]his is not a case like *Miller-El* where the prosecutor displayed only selective concern" for her avowed rationale for challenging jurors. Pet. App. A 45. Rather, her focus on jurors' views regarding the death penalty "was a frequent part of the prosecutor's questioning of both White and African-American jurors." *Id.* Through this persistent questioning and the use of peremptory challenges, the prosecutor succeeded in limiting the number of seated jurors—regardless of race—who believed that life in prison was a more serious punishment than death to a level far below what might have been expected based on the prevalence of those views in the jury pool. *Id.* at 43-45 & nn.8-9. The court below reasonably deferred to the findings of the trial court, *see id.* at 62-63, which was in the best position to assess whether the prosecutor's emphasis on this issue was pretextual.

Justice Liu's dissent reached a different conclusion, focusing in particular on the prosecutor's challenge of prospective juror E.W. Pet. App. A 93-116. The dissent acknowledged that there was "no question" that "E.W.'s belief that [life without parole] is a more severe sentence than death was, according to the prosecutor, an important reason for the strike." *Id.* at 98. Justice Liu was concerned that the prosecutor's other stated reasons—especially her emphasis on E.W.'s work as an engineer—suggested that the prosecutor's ostensible focus on the death penalty was pretextual, in light of the presence of other jurors with comparable views on the death penalty. *Id.* at 100-115. As the majority explained, however, "[t]hat the prosecutor may have succeeded in eliminating only nearly all, rather than all, the jurors the dissent deems comparable" to E.W. "does not call into question the sincerity of her concern." *Id.* at 56-57. And the majority reasoned that the seated jurors mentioned by the dissent were "not comparable" to E.W. in all material respects. *Id.* at 57. Even if reasonable minds might differ on that point, the trial court's factual findings are entitled to deference, and this Court's review of that narrow, record-dependent question is unwarranted.

Armstrong's reliance (Pet. 17-18) on *Johnson v. California*, 545 U.S. 162, is also misplaced. In *Johnson*, this Court clarified the standard for making out a prima facie case of discrimination under *Batson*'s step one inquiry. *Id.* at 168. But this case involves the third step of the *Batson* inquiry, regarding whether the explanation offered by the prosecutor is genuine. *See supra* at 2.

Johnson did not address, much less adopt, Armstrong's theory that the inquiry differs as a matter of law if the prosecutor has challenged multiple members of a relatively small set of prospective jurors of a cognizable class.[5]

2. Armstrong next faults the California Supreme Court for "completely ignor[ing]" the trial court's initial decision to grant his fourth *Batson* motion with respect to prospective juror R.P. Pet. 25. That is incorrect. The court below noted that the trial court had initially granted the motion on the ground that "it believed R.P. could impose a death verdict" notwithstanding his general skepticism about the death penalty. Pet. App. A 64. But "[t]he prosecutor pointed out that the court was applying the wrong standard. Whether R.P. was unable to vote for death was a consideration in a for-cause challenge." *Id.* In the *Batson* context, the question is "whether the prosecutor genuinely believes a juror will be resistant to her side of the case and is striking him for that race-neutral reason." *Id.* Once the trial court recognized this mistake, it "ask[ed] the prosecutor to restate her reasons" for challenging R.P., and then denied Armstrong's motion on the ground that it found those reasons (focusing on R.P.'s views about the death penalty and criminal law more broadly) to be "genuine and race-neutral." *Id.* at 64-65; *see supra* at 4-5.

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[5] Armstrong also misquotes *Johnson*. Pet. 18. It was not this Court, but the California Supreme Court, that commented that the excusal of three African-American prospective jurors in that case "certainly look[ed] suspicious." 545 U.S. at 167.

The record thus refutes Armstrong's unsupported assertion that the trial court reversed itself because of "an emotional rant by the prosecutor" that the court had "branded her a racist." Pet. 25. Instead, the trial court's decision to initially grant Armstrong's *Batson* motion with respect to R.P. was plainly premised on a mistaken view of the law, and the California Supreme Court correctly declined to reverse Armstrong's conviction on that ground.

3. Armstrong contends that the California Supreme Court should have resolved his *Batson* claim differently in light of two other errors that occurred at trial. That argument is meritless.

First, Armstrong argues that the court below erroneously failed to consider its separate conclusion that the prosecutor committed misconduct in closing argument (a claim the court ultimately rejected on harmless error grounds). Pet. 18-24; *see* Pet. App. A 83-88.[6] But the misconduct the court identified has no relationship to the *Batson* inquiry. The court faulted the prosecutor for telling the jury during her closing argument that, before the murder, "in response to Armstrong's loud comments about the coming new year, Sigler called back, 'Happy New Year.'" Pet. App. A 85. Because the trial record contained no evidence of that factual assertion, under longstanding

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[6] The court explained that Armstrong himself had effectively conceded his guilt on the non-murder charges, so the prosecutor's conduct would not have changed the jury's verdict on these offenses. Pet. App. A 87. And while "the calculus of prejudice might be different at the penalty phase[,] … [b]ecause the death verdict is being set aside for error in jury selection," the court held that it "need not discuss this question further." *Id.* at 87-88; *see supra* at 5-6.

California precedent, it was misconduct for the prosecutor to relate it to the jury during closing argument. *Id.* at 85-86. That episode, however, is irrelevant to Armstrong's *Batson* claim, which required the trial court to determine whether the prosecutor's proffered race-neutral explanations were genuine or were instead a pretext for "purposeful racial discrimination." *Johnson*, 545 U.S. at 168.

Second, Armstrong argues that the court below erroneously failed to consider its separate reversal of his death sentence based on the trial court's improper excusal of prospective jurors for cause. Pet. 26-27. But the court rightly explained that "the questions involve different principles." Pet. App. A 34. The fact that the prosecutor successfully (but erroneously) sought to excuse certain jurors for cause based on their views regarding the death penalty does not suggest that the prosecutor's race-neutral reasons for exercising peremptory challenges were not genuine. If anything, it suggests the opposite: that the prosecutor consistently sought to use all tools at her disposal, including both for-cause removal and peremptory challenges, to exclude jurors with reservations about capital punishment. *See id.* at 45-46.[7]

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[7] Relatedly, Armstrong asserts that the California Supreme Court failed to consider the prosecutor's "general voir dire conduct" that in Armstrong's view exhibited hostility and bias toward prospective jurors S.L., R.C., E.W., and R.P. Pet. 27-29. The trial court was best positioned to assess that claim and rejected it. The California Supreme Court reviewed the voir dire transcripts in detail and reasonably determined that the trial court's findings were supported by the record and warranted deference. *See* Pet. App. A 42-47, 49, 52-53, 65-66.

4. Finally, Armstrong argues that this Court's recent decision in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), bolsters his *Batson* claim. Supp. Br. 1-4, 8-15. But *Flowers* by its own terms "br[oke] no new legal ground," and the "extraordinary facts" requiring reversal in *Flowers* are absent here. *Flowers*, 139 S. Ct. at 2251; *see also id*. at 2251 (Alito, J., concurring) ("As the Court takes pains to note, this is a highly unusual case. Indeed, it is likely one of a kind.").

In *Flowers*, this Court identified four "critical facts, taken together," that required reversal: (1) in Flowers's six murder trials, the prosecutor used peremptory challenges to strike 41 of 42 possible black jurors; (2) in the sixth trial, the prosecutor struck five of the six black prospective jurors; (3) in the sixth trial, the prosecutor engaged in "dramatically disparate questioning of black and white prospective jurors"; and (4) in the sixth trial, similarly situated white jurors were permitted to serve. 139 S. Ct. at 2235, 2244.

Here, in contrast, as this was Armstrong's first and only murder trial, the prosecutor had not engaged in a history of discriminatory strikes in earlier prosecutions. The record supported the trial court's finding that the prosecutor did not engage in disparate questioning of black and white prospective jurors. *See* Pet. App. A 43-44, 61-62 & n.8. And no similarly situated white juror was permitted to serve. *See id*. at 46-47, 51-52. Thus, the "relevant facts and

circumstances taken together" that made *Flowers* an "extraordinary" case, 139 S. Ct. at 2251, are not present here.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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Dated: October 10, 2019

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[8] Armstrong faults the California Supreme Court for having not granted relief on a *Batson* claim in a capital case since 2001. Pet. 3. But it has granted relief on *Batson* claims in non-capital cases, *see, e.g.*, *People v. Gutierrez*, 2 Cal. 5th 1150, 1172 (2017), and this Court has not reversed (or even granted certiorari to review) any of the denials of *Batson* relief in the capital cases Armstrong mentions.