No. 21-7455

In the Supreme Court of the United States

DON'TE LAMONT MCDANIEL,

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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CAPITAL CASE

QUESTION PRESENTED

Whether the California Supreme Court properly held that the prosecutor's use of a peremptory strike to excuse Prospective Juror 28 did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986).

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. McDaniel, No. S171393, judgment entered August 26, 2021, opinion modified October 20, 2021 (this case below).

In re McDaniel on Habeas Corpus, No. S270324 (state collateral review) (pending).

Los Angeles County Superior Court:

People v. McDaniel, No. TA074274, judgment entered March 20, 2009 (this case below).

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STATEMENT

1. Petitioner Don'te Lamont McDaniel was convicted and sentenced to death for a 2004 shooting that left two victims dead and two others seriously wounded. Pet. App. A 1. The trial evidence showed that McDaniel and an associate entered an apartment and shot four occupants in retaliation for a gang-related drug theft. *Id.* at 1-8. Two of the occupants died from multiple gunshot wounds, with forensic gunpowder evidence indicating that they had been shot in the face at close range. *Id.* at 2. The two other occupants survived multiple gunshot wounds, including to their faces, and they were able to identify McDaniel as the shooter in preliminary court proceedings and at trial. *Id.* at 2-4. A jury convicted McDaniel of two counts of first degree murder, two counts of attempted murder, and possession of a firearm by a felon. *Id.* at 1. The jury also found true the special circumstance allegation that McDaniel committed multiple murders, making him eligible for the death penalty. *Id.* The jury initially deadlocked on the question of punishment, but a separate jury returned a verdict of death in a penalty-phase retrial. *Id.*

2. McDaniel's guilt-phase jury was composed of four Black, three Hispanic, three White, and two Asian members. Pet. App. A 20. During the jury selection process, McDaniel challenged five of the prosecutor's peremptory strikes of Black prospective jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its state-court analog, *People v. Wheeler*, 22 Cal. 3d 258 (1978). Pet App. A 16-17. The petition seeks review respecting the denial of relief for the strike of Prospective Juror 28. Pet. 16.

McDaniel raised his first *Batson* challenge after the prosecutor used his eighth peremptory strike to excuse Prospective Juror 28. Pet. App. A 16. At the time of that strike, the prosecutor had used strikes against two other Black prospective jurors (Prospective Jurors 7 and 13), though four Black jurors remained seated in the jury box. *Id.* In support of his *Batson* challenge, McDaniel argued that Prospective Juror 28 appeared "fairly strong on the death penalty" and that "[t]here was nothing obvious" in that juror's questionnaire responses supporting the strike. *Id.* at 17. The trial court denied the motion without further argument, concluding that McDaniel had failed to make a prima facie case of purposeful discrimination. *Id.* The court noted that the venire included "a lot" of prospective Black jurors; observed that there were "a number" of Black jurors "seated in the box as we speak"; but assured McDaniel that it would remain "mindful" of *Batson* even though a prima facie case of racial discrimination had not been made "at this time." *Id.*

The prosecutor subsequently used his eleventh and twelfth peremptory strikes to excuse two more Black jurors—Prospective Jurors 40 and 46. Pet. App. A 17. At the time of those strikes, three other Black jurors remained seated in the jury box. *Id.* McDaniel raised another *Batson* challenge. *Id.* Based on the prosecutor's prior strikes of three Black prospective jurors (7, 13 and 28), and the two additional strikes of Prospective Jurors 40 and 46, the trial court concluded that McDaniel had met his burden to show "a prima facie

case of excusals based on race," and directed the prosecutor to state his reasons for the strikes of all five Black prospective jurors. *Id.*

With respect to Prospective Juror 7, the prosecutor explained that he had considered requesting dismissal for cause based on her response that "she would always vote against death." Pet. App. A 17.[1] As to Prospective Juror 13, the prosecutor pointed to the juror's apparent anti-police bias, her stated concerns about the effectiveness of the death penalty, and her husband's work as a criminal defense attorney. *Id.* at 17-18. And with respect to Prospective Juror 40, the prosecutor explained that he struck her because she said she did not "want the responsibility of deciding anyone's guilt or innocence and possibly being wrong." *Id.* at 19. McDaniel has never objected to the denial of relief with respect to those prospective jurors.

The prosecutor offered three reasons for excusing Prospective Juror 28. Pet. App. A 18. In the prosecutor's view, the "primary problem with this juror was the fact that he, along with many others, . . . indicated that life without parole is a more severe sentence, which I don't think is a good instinct to have on a death penalty jury." *Id.* The prosecutor also explained that he "tr[ied] not to have jurors on death penalty cases that don't want to" serve and pointed to Prospective Juror 28's questionnaire response indicating that he did not want to be empaneled because of the expected length of trial. *Id.* Finally, the

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[1] The trial court agreed: its notes reflected that the juror would "[a]lways vote for life" and considered life without parole to be "more severe" than death. Pet. App. A 17.

prosecutor described his preference for jurors "with as much formal education as possible" and noted that Prospective Juror 28 had "just completed 12th grade." *Id.* The trial court turned to Prospective Juror 28's questionnaire responses and inquired whether the juror had answered "no" to a question asking whether he could impose the death penalty if he thought it were appropriate. *Id.* at 19; *see also* 5 Clerk's Transcript (CT) 1215-1216. McDaniel's attorney confirmed that the written response indicated that the juror could not impose the death penalty, but asserted that the juror said that the written response was a mistake. Pet. App. A 19.[2] The trial court did not remember "one way or the other," and asked the prosecutor to address the strike of Prospective Juror 46. *Id.*

As to Prospective Juror 46, the prosecutor pointed to the juror's stated belief that the death penalty was not an effective deterrent. *Id.* The prosecutor also expressed concern that the juror listened to a "very liberal political radio station" that frequently featured anti-death penalty guest speakers and that was run by employees who were "actively trying to abolish the death penalty." *Id.*; 5 RT 1081-82. In the prosecutor's opinion, Prospective Juror 46's views

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[2] Nothing in the record reflects that Prospective Juror 28 said he made a "mistake" when he answered "no" to the question about whether he could impose the death penalty. Pet. App. A 19. During voir dire, Prospective Juror 28 did indicate that he was a "category four" on the trial judge's rating system, meaning that he could be comfortable voting either for death or life without the possibility of parole depending on the evidence. *Id.* at 15-16; 4 Reporter's Transcript (RT) 863.

about the efficacy of the death penalty reflected the attitude of the radio station. *Id.* at 1082-83.

The trial court granted *Batson* relief with respect to the strike of Prospective Juror 46, but denied the motion with respect to the four other strikes, explaining that it was "accepting" the prosecutor's "articulated reasons that have been advanced here" for exercising strikes against those jurors. Pet. App. A 19, 20. In granting relief as to Prospective Juror 46, the trial court first asked McDaniel's attorney to clarify the relief he was requesting. *Id.* McDaniel's attorney answered that he did not seek a mistrial: He was "not asking that the panel be dismissed and start all over. [He was] just asking that Juror Number 46 not be excused." *Id*. at 20. The trial court granted that requested relief, reasoning that "the radio station that somebody listens to is not a valid reason" for a peremptory strike. *Id*. The prosecutor countered that the radio station was "the third of three reasons" he proffered, and added that he exercised the strike on the additional bases that Prospective Juror 46 volunteered for a nonprofit organization and submitted several questionnaire responses that raised "a number of race-neutral reasons" for the strike. *Id*.; 5 RT 1085. The court maintained that Prospective Juror 46 "looked like an acceptable juror" and seated him in the jury box. Pet. App. 20. McDaniel's attorney did not raise any additional objections with respect to the other prospective jurors. 5 RT 1086.

During the balance of the jury selection process, the prosecutor exercised an additional five peremptory strikes. Pet. App. A 20. McDaniel did not object to any of those strikes. *Id.* Thereafter, the parties accepted the jury. *Id.* The final composition of the jury included four Black jurors (including Prospective Juror 46), three Hispanic jurors, three White jurors, and two Asian jurors. *Id.* After reaching verdicts at the guilt phase, the jury hung during penalty-phase deliberations and the trial court declared a mistrial as to punishment. *Id.*

The prosecutor later filed a motion for reconsideration of the *Batson* ruling as to Prospective Juror 46. Pet. App. A 20-21. The prosecutor argued that the trial court improperly applied a "for-cause standard" for dismissal when it rejected the radio-station justification as "not a valid reason" for the strike, and also argued that the trial court failed to shift the burden to McDaniel to prove discrimination after the court accepted the prosecutor's stated reasons. *Id.*[3] The trial court denied the reconsideration motion, explaining that "I just felt that in an abundance of caution and since this was a capital case that I had to do what I did." *Id.* at 21; 16 RT 3061. McDaniel's attorney did not raise any objections or arguments with respect to Prospective Juror 28 during that reconsideration hearing.

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[3] At the hearing, the trial court asked McDaniel's attorney for his views on whether it had erred in granting the *Batson* motion. Pet. App. A 21. McDaniel's attorney explained that "at the time [of the ruling] I thought the court was ruling correctly. However, I have talked to [the prosecutor] and I have seen how the jury came out racial-wise and in terms of how many African Americans there were on the jury at the end of it. And I told [the prosecutor] that I would submit it to the court." 16 RT 3055-56; Pet. App. A 21.

3. On direct appeal, the California Supreme Court affirmed McDaniel's convictions and death sentence in a unanimous opinion authored by Justice Liu. Pet. App. A 1, 77. As relevant here, the state supreme court concluded that substantial evidence supported the trial court's determination that McDaniel failed to prove purposeful discrimination at the third stage of *Batson* with respect to the strike of Prospective Juror 28. *Id.* at 22; *see also id.* at 15-32. In support of his *Batson* claim, McDaniel argued that the trial court's ruling was not entitled to deference (Opening Br. 56-60; Reply Br. 8-22); that the trial court improperly failed to conduct a comparative juror analysis (Opening Br. 60-66; Reply Br. 22-27); and that the trial court failed to give adequate weight to substantial evidence of pretext, including its own determination that the prosecutor had improperly excused Prospective Juror 46 (Opening Br. 66-82; Reply Br. 2, 27-51). McDaniel did not raise any arguments about how courts should address "mixed motivation" cases in "which race—at least in part—played a role in the prosecution's decision to strike a juror." Pet. 18. Instead, McDaniel faulted the trial court for concluding that the prosecutor's strike of Prospective Juror 28 was not race-based at all. *See generally* Opening Br. 41-83; Reply Br. 2-52.[4]

After reviewing this Court's *Batson* precedents as well as its own jurisprudence, the California Supreme Court concluded that substantial

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[4] McDaniel's attorney filed several supplemental opening and reply briefs. None of them raised the issue of how courts should address "mixed motivation" cases.

evidence supported the trial court's determination that the prosecution's strike of Prospective Juror 28 did not violate *Batson*. Pet. App. A 15-32 (citing, e.g., *Batson*, 476 U.S. at 97; *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Snyder v. Louisiana*, 552 U.S. 472 (2008)). The state supreme court began its analysis by declining to reach the State's argument that McDaniel forfeited any right to a mistrial with respect to Prospective Juror 28 when he refused the mistrial remedy and instead accepted reseating Prospective Juror 46. Pet. App. A 21-22. Turning to the merits, the court explained that the trial court's ruling regarding Prospective Juror 28 was entitled to deference because the trial court "made a sincere and reasoned attempt to evaluate the prosecutor's justifications based on the court's observations regarding the circumstances of the strike and its active participation in voir dire." *Id.* at 23-25. The trial court also had "test[ed] the applicability of the prosecutor's justifications against other jurors," and "made clear" throughout the jury selection process "that it was cognizant of the prosecutor's rate of strikes and the current composition of the jury, which show[ed] that the court considered the circumstances of the strikes." *Id*. at 24.

The state supreme court also disagreed with McDaniel's suggestion that the trial court "overlook[ed] 'powerful evidence of pretext'" by granting relief with respect to Prospective Juror 46 but declining to grant relief with respect to Prospective Juror 28. Pet. App. A 24. Assuming without deciding that the trial court applied the correct standard in reseating Prospective Juror 46, the

reviewing court explained that while a "prior *Batson* violation is a relevant circumstance" when considering a challenge to a separate strike, the record established that the trial court did not disregard that information and "was well aware of the violation when it ruled on all five strikes at the same time." *Id.* The state supreme court concluded that the trial court "considered the totality of the circumstances, including the fact that the judge found a *Batson*/*Wheeler* violation for Prospective Juror No. 46" and held that the trial court's ruling as to Prospective Juror 28 was supported by substantial evidence. *Id.* at 25, 31.[5] The considerations supporting that holding included that a "[c]ompari[son of] the final racial composition of the jury to the overall pool, while not in itself decisive, reveal[ed] that Black jurors were overrepresented on the jury," Pet. App. C 2; "the prosecution [had] accepted a panel with three Black jurors when it had enough remaining peremptory challenges to strike them, suggest[ing] that the prosecutor did not harbor bias against Black jurors," Pet. App. A 26; a comparative juror analysis with "similarly situated non-Black panelists whom the prosecutor did not strike"

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[5] The state supreme court declined to take judicial notice of the fact that a *Batson* motion was granted against the same prosecutor in a co-defendant's trial that took place months after McDaniel's trial. Pet. 12-13; Pet. App. A 32. The court did so without prejudice to McDaniel presenting "such information on a fuller record in connection with a petition for habeas corpus." Pet. App. A 32. Those habeas proceedings are pending. *In re McDaniel on Habeas Corpus*, No. S270324 (petition filed Aug. 11, 2021).

did not establish pretext, *id.* at 28, 31; and "[a]ll of the prosecutor's stated reasons [for his strike] were supported by the record," *id.* at 31.

McDaniel filed a rehearing petition. Pet. App. B.[6] The California Supreme Court denied rehearing, but modified the opinion in two minor respects that did not affect the judgment. Pet. App. C 1-2.

ARGUMENT

McDaniel asserts that the lower courts are divided on the issue of how to address *Batson* claims in which "race—at least in part—played a role in the prosecution's decision to strike a juror (so-called 'mixed motivation' *Batson* cases)." Pet. 18. He urges the Court to grant review to settle "the proper method of assessing" such mixed-motive cases. *Id.* at ii. But this case does not present that issue and McDaniel never asked the lower courts to evaluate his case under any mixed-motive approach. The trial court determined that the prosecutor struck Prospective Juror 28 on race-neutral grounds—not a combination of race-based and race-neutral ones—and the California Supreme Court concluded that the trial court's ruling was supported by substantial evidence. The state supreme court's analysis of the particular facts surrounding the strike of Prospective Juror 28 does not conflict with this

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[6] Like McDaniel's briefing on the merits before the California Supreme Court, his rehearing petition did not make any arguments about how to address "mixed motivation" cases. In his rehearing petition, McDaniel faulted the state supreme court for concluding that the strike was not motivated at all by a discriminatory purpose. Pet. App. B. 1-21.

Court's *Batson* precedents. And McDaniel fails to identify any other basis for further review.

1. The Equal Protection Clause forbids a prosecutor from exercising peremptory strikes to excuse potential jurors on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Under the three-step process for adjudicating *Batson* challenges, once a defendant makes a prima facie showing that a peremptory strike has been exercised on the basis of race, the prosecution must offer a race-neutral explanation for the strike, and the trial court must then decide whether the defendant has sustained his burden to prove purposeful racial discrimination with respect to that strike. *See Snyder v. Louisiana*, 552 U.S. 472, 476-477 (2008). Beyond that three-step framework, the Court has declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99. Instead, "[i]t remains for the trial courts to develop rules" to assess the particular circumstances presented in the exercise of a peremptory strike. *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

This Court has not expressly decided what standard governs in mixed-motive cases where a strike is supported by both race-based and race-neutral grounds. *Snyder*, 552 U.S. at 485. As McDaniel notes (Pet. 18-19), this Court in *Snyder* acknowledged that in other equal protection contexts it has held "that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the

party defending the action to show that this factor was not determinative." *Id.* (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)). But the Court has "not previously applied [that] rule in a *Batson* case," and it has declined to "decide . . . whether that standard governs in [the *Batson*] context." *Id.* at 485.

McDaniel is correct that the lower courts do not follow a uniform approach to analyzing mixed-motive *Batson* cases. As McDaniel observes (Pet. 19), some courts have held that a prosecutor may avoid a *Batson* violation in a mixed-motive case by proving that the same strike would have been made absent the impermissible ground for the strike. *See* LaFave, 6 Crim. Proc. § 22.3(d) n.268 (4th ed. 2021) (collecting cases). Other courts have rejected that "but-for-causation" approach, holding that a strike motivated in "substantial part" by race is adequate to establish a *Batson* violation. *Id.* at n.269 (collecting cases); Pet. 19. And some other courts have adopted a "per se rule," requiring reversal whenever a prosecutor relies in any part on race. LaFave, *supra*, at n.269.50; Pet. 20. The California Supreme Court has not taken a position on the approach that should govern in California state courts.[7]

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[7] *See, e.g.*, *People v. Smith*, 4 Cal. 5th 1134, 1162 n. 7 (2018) (court had "no occasion to consider what result would obtain if the prosecutor's challenges were based in part on race-neutral reasons and based in part on group bias"); *People v. Hamilton*, 45 Cal. 4th 863, 909 n. 14 (2009) ("it is unnecessary to consider here whether the trial court erred in failing to apply a mixed motive analysis to any of the challenged peremptories"); *People v. Schmeck*, 37 Cal. 4th 240, 276-277 (2005) (same); *see also People v. Douglas*, 22 Cal. App. 5th 1162, 1172 (Ct. App. 2018) (noting the California Supreme Court has never "considered whether to apply a per se, mixed-motive, or substantial motivating factor approach" where a challenge was based in part on group bias).

As the label "mixed-motive" reflects, each of those approaches requires the existence of an impermissible motive in deciding a *Batson* objection—that is, they require a finding or admission that the prosecutor's strike was motivated "at least in part" by racial (or other illegitimate) bias before a court may apply the analysis. Pet. 18. Indeed, every case cited in McDaniel's petition adopting the "but-for-causation" approach to mixed-motive cases (*see id.* at 19) involved proof (or an admission) that race or gender motivated a strike.[8] The cited cases embracing the "substantial factor" approach to mixed-motive cases (*see id.* at 19-20) also required proof of an illegitimate motive.[9] So, too, did the cited cases for the "per se" approach to mixed-motive *Batson* challenges. *See id.* at 20.[10]

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[8] *Howard v. Senkowski*, 986 F.2d 24, 25 (2d Cir. 1993) (prosecutor's "acknowledgment of some reliance on race was explicit"); *Gattis v. Snyder*, 278 F.3d 222, 232 (3d Cir. 2002) (state admitted that "one of the prosecutor's reasons for the challenge was based on gender"); *Wallace v. Morrison*, 87 F.3d 1271, 1274 (11th Cir. 1996) ("The State concedes that race was a factor in the prosecutor's use of peremptory strikes."); *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (mixed-motive analysis is relevant only "[i]f the court concludes, or the party admits, that the strike has been exercised in part for a discriminatory purpose"); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995) (prosecutor justified strike based in part on "one reason that was not race or gender neutral").

[9] *Cook v. LaMarque*, 593 F.3d 810, 813-814 (9th Cir. 2010) ("The district court concluded the prosecutor was motivated by both legitimate and illegitimate reasons."); *Robinson v. United States*, 890 A.2d 674, 681 (D.C. 2006) ("We now *hold* that even where the exclusion of a potential juror is motivated in substantial part by constitutionally permissible factors (such as the juror's age), the exclusion is a denial of equal protection and a *Batson* violation if it is partially motivated as well by the juror's race or gender.").

[10] *McCormick v. State*, 803 N.E.2d 1108, 1112 (Ind. 2004) ("the State gave

Here, in contrast, neither the trial court nor the California Supreme Court concluded that the prosecutor excused Prospective Juror 28 in any part because of race. During voir dire, the prosecutor offered three race-neutral reasons for his strike: The juror indicated that life without the possibility of parole was a harsher penalty than death; the juror was reluctant to serve on a lengthy trial; and the juror had graduated only from high school. Pet. App. A 18. The trial court credited the prosecutor's justifications. *Id.* at 19 ("I am accepting of the articulated reasons that have been advanced here."). The California Supreme Court upheld that ruling, concluding "that substantial evidence support[ed] the race-neutral reasons given by the prosecutor for his

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multiple reasons for its strike, some of which were permissible and one of which was not"); *State v. Lucas*, 199 Ariz. 366, 369 (Ct. App. 2001) (State struck juror on "assumption that they hold particular views simply because of their gender"); *Payton v. Kearse*, 329 S.C. 51, 59 (1998) (attorney admitted striking juror in part on account of the prospective juror's race); *Riley v. Commonwealth*, 21 Va. App. 330, 336 (1995) ("The Commonwealth exercised its strikes based on the assumption that the women would hold particular views because of their gender."); *Rector v. State*, 213 Ga. App. 450, 454 (1994) (trial court found that one justification for strike was a "racially motivated explanation"); *Ex parte Sockwell*, 675 So. 2d 38, 41 (Ala. 1995) (explaining "mixed-motive" analysis not proper when race did not motivate strike but was in a separate case where the prosecutor "admitted that race was a 'reason' and a 'factor' that was considered along with race-neutral reasons for the strike"); *Strozier v. Clark*, 206 Ga. App. 85, 87 (1992) (prosecutor assumed "the prospective juror in the instant case would likewise act 'along racial lines' and engage in 'misconduct'" which constituted "an impermissible assumption ultimately arising solely from the juror's race"); *State v. King*, 215 Wis. 2d 295, 303 (Ct. App. 1997) ("the reasons offered by the prosecutor to rebut the claim of racial discrimination included an affirmative and unequivocal statement that she struck two of the four jurors because they were older females"); *People v. Douglas*, 22 Cal. App. 5th at 1167-1168 (Ct. App. 2018) (prosecutor admitted that he struck jurors in part based on sexual orientation).

strike of Prospective Juror No. 28." *Id.* at 25. Because none of the reasons proffered by the prosecutor with respect to Prospective Juror 28 was found to be racially motivated and because the lower courts instead concluded that the prosecutor struck the juror on the basis of race-neutral considerations, this case does not implicate the mixed-motive issue McDaniel identifies in his petition.

McDaniel does not (and cannot) identify any portion of the record where the prosecutor admitted—or the lower courts found—that the strike of Prospective Juror 28 was motivated in any part by race. *See generally* Pet. i-24. Instead, he asks this Court to accept his "premise" that the trial court's *Batson* ruling with respect to a *different* prospective juror—Prospective Juror 46—"leads to the inexorable conclusion" that the prosecutor acted based on "racial stereotypes and racial bias" in striking Prospective Juror 28. *Id.* at ii. According to McDaniel, the "*Batson* violation" for Prospective Juror 46 reflects that "race was a *factor* in the prosecutor's mind, if not the *only* factor," in striking Prospective Juror 28. *Id.* at 16.

That premise is unsound for several reasons. It contradicts the conclusion—reached by two lower courts—that the prosecutor exercised the strike of Prospective Juror 28 on race-neutral grounds, not on the basis of any race-based considerations. Pet. App. A 19, 25.[11] It assumes that the trial

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[11] *See generally Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949), *adhered to on reh'g*, 339 U.S. 605 (1950) ("A court of law, such as

court's *Batson* ruling with respect to Prospective Juror 46 was correct, when the California Supreme Court explained that it merely "assume[d], without deciding, that" the trial court applied the correct standard in its ruling as to that juror. *Id.* at 24.[12] And it is in substantial tension with this Court's precedents: while the Court has recognized that a "prior *Batson* violation is a *relevant circumstance* for a court to consider in determining whether there was purposeful discrimination," *id.* (citing *Snyder*, 552 U.S. at 478) (emphasis added), the Court has never adopted a per se rule that would require a prior *Batson* violation with respect to one strike to automatically establish purposeful discrimination with respect to other, distinct strikes. *See, e.g.*, *Snyder*, 552 U.S. at 478 ("a court would be required to consider [an impermissible] strike of [one juror] for the bearing it might have upon the strike of" another).

In any event, this would not be a suitable case for considering the mixed-motive issue advanced by the petition for the additional reason that McDaniel did not properly raise the issue in the lower courts. In the trial court, McDaniel argued that each of the prosecutor's reasons for striking Prospective Juror 26 was pretextual and that the prosecutor exercised the strike on the basis of race

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this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

[12] Indeed, the trial court noted that it had issued its ruling with respect to Prospective Juror 46 "in an abundance of caution," "since this was a capital case" and because "I had to do what I did." Pet. App. A 21; 16 RT 3061.

alone. Pet. App. A 18. On direct appeal, McDaniel did not urge the California Supreme Court to apply a mixed-motive analysis or otherwise fault the trial court for failing to doing so. Instead, he disputed the trial court's credibility findings and then (in his petition for rehearing) faulted the state supreme court for accepting the trial court's conclusion that the strike of Prospective Juror 26 was race-neutral. *See* Opening Br. 41-83; Reply Br. 2-52; Pet. App. B. The term "mixed-motive" does not appear in any of the briefs filed in the court below. *See generally Illinois v. Gates*, 462 U.S. 213, 218 (1983) ("it is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below").[13]

Moreover, the California Supreme Court has never yet decided what analytical approach should apply to mixed-motive *Batson* cases in California state courts. *See supra* p. 12 & n.7; *Smith*, 4 Cal. 5th at 1162 n.7; *Hamilton*, 45 Cal. 4th at 909 n.14; *Schmeck*, 37 Cal. 4th at 276-277. There is no good reason for this Court to consider that issue in the first instance in the context of a case that does not present it.

2. To the extent McDaniel raises a challenge to the state court's application of *Batson*'s three-step framework, that record-specific dispute does not warrant review. *See* Pet. 14, 22-23.

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[13] Nor do the terms "mixed motive", "mixed-motivation", "mixed motivation", "dual-motive", "dual motive", "dual-motivation", or "dual motivation" appear in the briefs below.

The California Supreme Court correctly identified the relevant *Batson* standards, Pet. App. A 22-23; evaluated whether the trial court's ruling was entitled to deference, *id.* at 23-25; *see also Snyder*, 552 U.S. at 477 ("in the absence of exceptional circumstances," the Court "defer[s]" to the trial court); analyzed whether the trial court accounted for the totality of circumstances surrounding the strike, including its ruling with respect to Prospective Juror 46, Pet. App. A 24; and properly concluded that "the trial court's ruling was supported by substantial evidence," *id.* at 31. In reaching that conclusion, the court thoroughly examined the prosecutor's rate of strikes, *id.* at 25; compared the "final composition of the jury to the overall pool," *id.* at 26; considered the fact that the "prosecution accepted a panel with three Black jurors when it had enough remaining peremptory challenges to strike them[,] suggest[ing] that the prosecutor did not harbor bias against Black jurors, *id.*; accounted for the *Batson* violation with respect to Prospective Juror 46, *id.* at 27; reflected on how the trial court's "limitations on voir dire" bore on McDaniel's argument that the prosecutor did not ask more than one question of Prospective Juror 28, *id.*; and compared Prospective Juror 28 with "similarly situated non-Black panelists whom the prosecutor did not strike," *id.* at 28-31. The state court's analysis of those particular factors is correct and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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