No. 20-808

In the Supreme Court of the United States

JOHNNY DUANE MILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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February 16, 2021

CAPITAL CASE
QUESTION PRESENTED

Whether the California Supreme Court properly concluded that the prosecution did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986), by striking a Black prospective juror.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Miles, No. S086234, judgment entered May 28, 2020 (this case below).

California Superior Court, San Bernardino County:

People v. Miles, No. FSB09438, judgment entered March 17, 1999 (this case below).

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STATEMENT

1. In February 1992, Nancy Willem was killed in her office by a combination of blunt force trauma and manual strangulation. Pet. App. 4. Blood and semen collected from the crime scene yielded DNA and other genetic markers that matched petitioner Johnny Duane Miles. *Id.* A few weeks later, a masked man bound a woman in her office at gunpoint, demanded money, and raped her. *Id.* at 7-8. The next day, a masked man entered another office, bound a male occupant and demanded money. *Id.* at 8. A woman walked into the office during the robbery and the masked man tied her up and raped her. *Id.* at 8-9. Although the surviving victims could not identify petitioner as the masked man, *id.* at 169 nn.2-4, genetic material in semen recovered from the second and third crime scenes matched petitioner's DNA profile as well as the DNA profile of the semen collected from the first crime scene, *id.* at 8, 9-10.[1]

2. a. Petitioner was charged in connection with all three incidents. Pet. App. 2. During the guilt-phase trial, petitioner's trial counsel contested petitioner's responsibility for the crimes, arguing that officers never recovered stolen property or bloody clothing connected to the crime scenes during searches of his house and car. *Id.* at 10. Petitioner also called a "research methodology expert" to testify about errors involving DNA analysis. *Id.* The jury convicted petitioner of

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[1] A forensic criminalist testified that the DNA profile from the first and second crime scenes would be expected to match only "one in 180 million African-Americans." Pet. App. 5, 8. The criminalist was able to form only a partial DNA profile from the sample obtained from the third crime scene, but that material matched petitioner's DNA and was expected in approximately "one in 920 African-Americans." *Id.* at 10.

first degree murder for killing Willem and found true several special circumstances making petitioner eligible for the death penalty. *Id.* at 2. The jury also returned guilty verdicts on ten counts related to the three other victims. *Id.*

During the penalty phase, petitioner testified (against the advice of his attorney) and admitted that he raped, "beat, kicked, and stomped" Willem, Pet. App. 15, and that he assaulted the two other rape victims at the behest of "ill angels" in his head, *id.* at 169 n.6. Petitioner's attorney called five psychiatrists and medical professionals to offer expert opinions about petitioner's mental health. *Id.* at 16. A prosecution expert testified on rebuttal that petitioner "was malingering mental illness." *Id.* at 18. The jury reached a verdict of death, which the trial court imposed. *Id.* at 2.

b. Because petitioner's sole claim in this Court is under *Batson v. Kentucky*, 476 U.S. 79 (1986), the voir dire proceedings prior to his trial are of particular relevance here. Those proceedings resulted in a guilt-phase jury composed of ten White jurors, one Hispanic juror, and one "American Indian/Caucasian juror." Pet. App. 21. The alternate jurors included one Black juror, who was seated and served during the penalty phase.

During jury selection, the prosecutor exercised peremptory strikes to excuse, in order, a Hispanic woman, a Black man (Kevin C.), a White woman, a Black man (Simeon G.), a White man, and a Black woman (Isabella B.). Pet. App. 21.[2] Petitioner objected that the

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[2] The jury selection transcript is available in the reporter's transcript (R.T.) at 5 R.T. 1301-6 R.T. 1773. Questionnaires filled out

prosecutor had used three of his six initial preemptory challenges to excuse Black jurors and moved to quash the panel under *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 19-20. The trial court concluded that petitioner had established a prima facie case and asked the prosecutor to explain the basis for his strikes. *Id.* at 20. After hearing the prosecutor's explanation, the court found that the prosecutor had "valid reasons to justify excusing those three prospective jurors" and denied petitioner's motion. *Id.* In this Court, petitioner presses only a single *Batson* claim regarding the strike of juror Simeon G. *See* Pet. 18-28, 35-39.[3]

Before voir dire, each prospective juror had completed a 31-page questionnaire. Pet. App. 19. The prosecutor later identified three of Simeon G.'s responses to that questionnaire as the reasons for striking him. *Id.* at 186-188; *see generally* 21 J.Q. 5973-6006 (Simeon G.'s completed questionnaire). In the first, Simeon G. described himself as a "leader rather than a follower," and wrote, "I like my opinion over

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by prospective jurors are available in 25 volumes of Jury Questionnaires (J.Q.) at 1 J.Q. 1 through 25 J.Q. 7144.

[3] The petition does not challenge the strikes of the two other Black prospective jurors (Kevin C. and Isabella B) who were the subject of petitioner's initial *Batson* motion. Kevin C. revealed skepticism about DNA evidence (equating it to "a polygraph[,] not for sure certain") and expressed hesitation about the death penalty. Pet. App. 22-24. Isabella B. stated that she would "always" favor a life sentence over imposing the death penalty. 6 R.T. 1544; *see also* 19 J.Q. 5359 (questionnaire response "I advocate life, not death"). Nor does the petition challenge the strike of another Black juror (Mary B.), who was the subject of a subsequent *Batson* motion. Pet. App. 20. The trial court denied that motion based on Mary B.'s stated reservations about the death penalty. *Id.*; *see also* 6 R.T. 1735 ("I don't believe in the death penalty").

other peoples." Pet. App. 25. He acknowledged that he had not "previously worked with a group of people to make a decision" or ever served on a jury, although he believed "it would be very interesting" to work with other jurors to reach a verdict. *Id.* at 26.

In the second response, Simeon G. stated that he could follow the instruction that a defendant is presumed innocent unless proven guilty beyond a reasonable doubt, Pet. App. 26, but wrote, "If I have any ~~doubt~~ feeling that [the defendant] might not have done it, he's innocent," 21 J.Q. 5994 (copy of questionnaire response); *see also* Pet. App. 155. It appeared that Simeon G. had initially written the word "doubt" and then crossed it out and replaced it with the word "feeling." Pet. App. 26.

The third response answered a question seeking the prospective juror's reaction to the O.J. Simpson verdict. Pet. App. 187-188. That question was used to assess a juror's view about "DNA evidence and circumstantial evidence," given that petitioner's case also turned on such evidence. *Id.* at 54. Simeon G. checked a box, without further explanation, indicating that he was not upset by the verdict. *Id.*; *see* 21 J.Q. 5993.

During general voir dire, the prosecutor had discussed the concept of reasonable doubt with the panel. Pet. App. 27. The prosecutor explained that jurors would be instructed that a "reasonable doubt" is "basically a doubt based on reason." *Id.* "[T]he duty is that if the case has been proved by the prosecution beyond a reasonable doubt, your duty is to return a guilty verdict." *Id.* Part of the purpose of voir dire, the prosecutor explained, was to assess whether "we can expect everybody to come back with a guilty verdict" if the case is proved beyond a reasonable doubt. *Id.* at 28.

Immediately after that explanation, the prosecutor asked Simeon G. about crossing out the word "doubt" and replacing it with the word "feeling" in response to the question about whether he could follow the instruction on reasonable doubt. Pet. App. 28; *see* 6 R.T. 1699-1700. Simeon G. said he did not "quite remember" that response, but continued, "Well, I think what I was trying to say, if I'm correct, is that if the evidence showed that there wasn't—that there was some reasonable doubt, then I probably would not accuse him, because of the fact that, myself being in the same situation or anybody, I think that if the evidence didn't totally prove that I did it, then there is some doubt. You know what I'm saying?" Pet. App. 28-29. He concluded, "So it wasn't so much a feeling as it was if the evidence didn't show." *Id*. at 29. The prosecutor sought to clarify, "So you would base it on evidence?" Pet. App. 29. Simeon G. responded, "Basically, yes. I'm sorry." *Id*. He added, "I couldn't tell you, tell you what I said, because I don't have the paper to look at what I actually meant totally." *Id*.

When the trial court asked the prosecutor to explain the basis for striking Simeon G., the prosecutor first pointed to the statement that "he likes his opinion over others." Pet. App. 29, 186. The prosecutor also observed that Simeon G. had written that he would not convict if he had a "feeling" that someone "didn't do it," and "had crossed out the word doubt, which led me to believe that he certainly wasn't going to base it on evidence." *Id*. at 186.[4] The prosecutor acknowledged that Simeon G. "explained it differently in court,"

[4] During the voir dire process, Simeon G. and two others initially failed to appear in court, possibly because of a miscommunication about when they were scheduled to return. Pet. App. 27. The

but told the court that he still maintained "significant concerns." *Id.* at 186-187. Simeon G. "had crossed out the word doubt. And to me that made it sound like he was going to be basically basing it on a hunch, or a feeling, which was, as the presenter of evidence, I'm powerless to overcome. And that was the main concern on that." *Id.*

The prosecutor then addressed Simeon G.'s lack of unease about the O.J. Simpson verdict. In the prosecutor's view, that response raised concerns about how Simeon G. would consider another "DNA, circumstantial case." Pet. App. 187-188. "'I think those, those raise significant concerns in my mind as a guilt phase juror and the type of case that I'm dealing with.'" *Id.*

Petitioner's trial counsel responded that Simeon G. appeared to be a prosecution-friendly juror in general: He favored the death penalty; said he could be fair and impartial; had a father who was a federal law enforcement agent; and stated he "didn't know anything" about DNA. Pet. App. 189. Trial counsel did not, however, advance any arguments based on comparisons with other jurors who were not struck. *Id.*

The trial court denied the *Batson* motion. Pet. App. 190. Although the reasons for striking Simeon G. were "not as obvious" to the court as the strike of another Black prospective juror, Isabella B. (given her strong

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trial court called Simeon G.'s employer, and Simeon G. arrived in court at the bailiff's request that afternoon. *Id.* When explaining the basis for the strikes, the prosecutor noted Simeon G.'s morning absence and questioned whether the "responses in court should prevail over the answers he gave on his questionnaire." *Id.* at 186-187. Nonetheless, the prosecutor continued that the questionnaire responses still caused "significant concerns." *Id.* at 187; *see also id.* at 64-65.

anti-death penalty views), the court nevertheless concluded that the prosecutor relied on "valid reasons to justify excusing" Simeon G. *Id.*

3. The California Supreme Court affirmed. Pet. App. 18-72. The court concluded that each of the prosecutor's reasons for striking Simeon G. was "plausible, supported by the record, and race neutral." *Id.* at 71. In his questionnaire, Simeon G. expressed a preference for his opinion over others, raising concerns that he might have "difficulty considering other opinions and deliberating with fellow jurors—particularly given that [he] had not worked with a group of people to make a decision before." *Id.* at 57. Simeon G. also wrote that he would not convict if he had "any feeling" that a defendant "might" not have committed the crime, and his qualified explanations during voir dire were not "entirely reassuring to the prosecutor." *Id.* at 61, 64. And his reaction to the O.J. Simpson verdict raised concerns that he might discount the prosecutor's case, which was built on similar DNA and circumstantial evidence. *See id.* at 67.

The court rejected petitioner's assertion that a comparative juror analysis discredited each of those race-neutral reasons to support the strike. Pet. App. 35-41, 57-72. In conducting that analysis, the court recognized that in situations where a comparative analysis was not made at trial, "a prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges" in court. *Id.* at 36. So while this Court held in *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), that a prosecutor must state the basis for a *strike* of a juror in court—"and stand or fall on the plausibility of" those reasons alone—it was not inconsistent with *Miller-El* to "consider reasons not stated on the record for accepting *other* jurors" during

a comparative juror analysis conducted for the first time on appeal. Pet. App. 38. Rather, it was important, under this Court's precedents, to consider "'all of the circumstances that bear upon the issue of racial animosity,'" including reasons evident in the record why a non-struck juror is not similarly situated to the struck one. *Id.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) and citing *Foster v. Chatman*, 136 S. Ct. 1737 (2016)).

The state court also recognized that "jurors need not be identical in all respects for a comparison among them to be probative." Pet. App. 70. A "*per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable." *Id.* at 40. And when a prosecutor stated "multiple reasons" for challenging a juror, "a comparison between the challenged juror and similar nonchallenged juror in regard to *any one of* the prosecutor's stated reasons is relevant" on the "issue of purposeful discrimination." *Id.* To be sure, a "formulaic comparison of isolated responses," *id.*, is "not necessarily dispositive," *id.* at 39. "[T]he ultimate question . . . concerns the prosecutor's motivations in exercising the challenge in question," and the court must still assess "whether there were any *material* differences among the jurors—that is, differences, other than race, that we can reasonably infer motivated the prosecutor's pattern of challenges." *Id.* at 40.

Applying those standards, the court concluded that petitioner's comparative juror analysis did not show purposeful discrimination. Pet. App. 57-72. For example, petitioner pointed to a non-Black prospective juror who characterized herself as a leader and wrote, "I like to make my own decisions." Pet. App. 59; *see also* 4 J.Q. 1152. The court acknowledged that this

remark, viewed in isolation, was similar to Simeon G.'s response about being a leader who prefers his own opinion; but it noted that the prospective juror also revealed that she previously served on a jury and worked with a group to reach a decision, mitigating concerns about her "openness to considering other opinions before returning a verdict." Pet. App. 59-60. Moreover, her responses did not "raise any of the other concerns" the prosecutor raised for striking Simeon G. *Id.* at 60. The court also rejected as "strained" petitioner's effort to draw similarities between Simeon G.'s written response about relying on feelings when deliberating and another prospective juror's response that she would "[t]ry to follow instructions" governing the presumption of innocence. *Id.* at 66-67.

Petitioner pointed to two other prospective jurors who had responded in their questionnaires, like Simeon G., that they were not upset by the O.J. Simpson verdict. Pet. App. 69-70. The court acknowledged that the prosecutor's decision not to strike those jurors had "some probative value" and tended to "undermine[] to some degree" the prosecutor's credibility on whether a juror's view of the O.J. Simpson verdict reflected a serious concern about DNA and circumstantial evidence. *Id.* at 70. But the court observed that neither of those comparator jurors indicated that they might "have difficulty considering the opinions of or deliberating with others," or that they would "rely on their feelings in reaching a verdict." *Id.* at 69, 70.[5]

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[5] In the California Supreme Court, petitioner also argued that the trial court erred in evaluating his *Batson* motion with respect to another Black prospective juror, Kevin C. Pet. App. 21. Both the majority and the dissent rejected that argument, *id.* at 41-57, 148-149, and petitioner does not renew it before this Court. *See* Pet. 18-39.

Justice Liu dissented. Pet. App. 148-168. He acknowledged that "the issue of how similar two jurors must be to yield a probative comparison is not reducible to a simple formula." *Id.* at 164. But he believed the relevant circumstances made "single-issue comparisons" highly probative of discrimination in this case, *id.* at 166, and that "it was more likely than not" that the strike of Simeon G. was improperly motivated, *id.* at 168. Justice Liu also suggested that it is "past time to ask whether the *Batson* framework . . . must be rethought." *Id.*[6]

ARGUMENT

Petitioner argues that the California Supreme Court contravened *Miller-El v. Dretke*, 545 U.S. 231 (2005) and other precedents of this Court when it rejected his *Batson* claim regarding the peremptory strike of Simeon G. That is incorrect. The state court adhered to the requirement that a reviewing court must evaluate the prosecutor's stated reasons for the strike of a juror. And it properly recognized that, in conducting a comparative juror assessment for the first time on appeal, it was necessary to consider all of the particular record-based circumstances that bear on whether the strike was discriminatory. The state court's analysis of the particular facts surrounding the strike of Simeon G. does not conflict with any other lower-court decision and does not warrant further review.

1. Petitioner first contends that the California Supreme Court improperly considered "new reasons on

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[6] In September 2020, the California legislature passed statutory reforms relating to the way courts assess challenges to peremptory strikes. *See* Cal. Assem. Bill No. 3070 (2019-2020 Reg. Sess.) § 318.

appeal" when examining whether Simeon G. was comparable to other jurors who were not struck, Pet. 18, and that "this issue has divided the lower courts," *id.* at 27. He is wrong in both respects.

a. In *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), this Court explained that a court reviewing a *Batson* claim may not "substitut[e] . . . a reason for eliminating" a struck juror, because that new justification would do "nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions." This Court reasoned that "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Id.* Rather, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.*

The decision below accords with *Miller-El.* The California Supreme Court recognized that a court conducting a *Batson* analysis "must examine only the reasons actually given" for striking a juror. Pet. App. 38. In applying that rule, the court considered the three reasons proffered by the prosecutor during voir dire to justify the strike of Simeon G. and assessed whether those three reasons were plausible in light of all the circumstances evident in the record. *Compare id.* at 186-188 (prosecutor's three reasons for the strike proffered in court), *with id.* at 57-72 (California Supreme Court's examination of those reasons).

Petitioner urged the court below to forbid consideration of "reasons not stated on the record for accepting *other* jurors" when conducting comparative juror analysis for the first time on appeal. Pet. App. 38. But the court properly concluded that this Court's *Batson* precedents do not require that approach. *Id.* at 37-40

(discussing *Miller-El*, 525 U.S. at 252, *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), and *Foster v. Chatman*, 136 S. Ct. 1737 (2016)). Indeed, *Miller-El* emphasized that a comparative juror analysis requires examination of "nonblack jurors *similarly situated*" to the struck juror. 545 U.S. at 247 (emphasis added); *see also id.* at 252 (considering the "whole of the *voir dire* testimony subject to consideration").

Petitioner seizes on a footnote in *Miller-El*, which declined to consider "reasons the prosecution itself did not offer" as to why comparator jurors were "otherwise more acceptable to the prosecution" than the struck juror. 545 U.S. at 245 n.4; *see* Pet. 22. According to petitioner, that footnote means that the rule against considering new reasons applies equally "whether the new reason is a justification for striking a Black panelist or a new reason for keeping a white one." Pet. 24. But *Miller-El* did not restrict review of the record in that way.[7]

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[7] In any event, in *Miller-El*, differences between the struck and non-struck jurors could not have overcome the substantial evidence of racial discrimination. This Court acknowledged that a side-by-side comparison of the jurors revealed "some differences," but those "differences seem[ed] far from significant." *Miller-El*, 545 U.S. at 232. And the Court described the prosecutor's stated reasons for striking Black jurors as "incredible," implausible, based on "mischaracterized" juror testimony, and "reek[ing] of afterthought." *Id.* at 244, 246, 266. It also pointed to "widely known evidence" of the prosecution's long-standing efforts to exclude Black jurors through jury shuffling, *id.* at 253; its practice of engaging in disparate and "manipulative" questioning of Black jurors to create cause to strike, *id.* at 261; and its use of a "20-year-old manual of tips on jury selection," which outlined reasons to exclude minorities from jury service, *id.* at 264, 266.

And petitioner's understanding of *Miller-El* would be inconsistent with this Court's later admonition that "'all of the circumstances that bear upon the issue of racial animosity must be consulted'" when conducting a comparative juror analysis. *Snyder*, 552 U.S. at 478. As *Snyder* recognizes, "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483. "In that situation, an appellate court 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." *Id.*[8]

The court below was mindful of those concerns. When conducting the comparative juror analysis, it examined whether and to what extent the three reasons listed by the prosecutor for striking Simeon G. applied to the compared jurors. Pet. App. 57-72. For example, it recognized that there was an isolated similarity between Simeon G. and the juror who identified herself as a leader. *Id.* at 59. "Unlike Simeon G.," however, the comparator juror wrote that she believed O.J. Simpson was guilty—suggesting she credited DNA and circumstantial evidence—and "did not suggest that she might rely on her feelings in reaching a verdict in the guilt phase." *Id.* at 60; *see infra* pp. 15-19.

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[8] Petitioner reads *Snyder* to permit a reviewing court to consider new circumstances only when considering the "plausibility of a prosecutor's strike of one Black juror" compared to the "strike of a different Black juror." Pet. 25. But the Court did not limit its holding in *Snyder* in that way and it cautioned against relying on isolated similarities on a cold appellate record. *Snyder*, 552 U.S. at 483.

Petitioner contends that the California Supreme Court improperly supplied "new reasons" why the "prosecutor 'could have' reasonably preferred" the comparator juror based on her prior jury service. Pet. 19-20. But that was not a "new" reason for striking Simeon G.; it was a distinction that tended to show why the two jurors presented different risks despite superficially-similar leadership responses. *Cf. Miller-El*, 525 U.S. at 244-245 (assessing whether juror responses on rehabilitation were similar). As the decision below explained, "[t]wo panelists might give a similar answer on a given point," but "the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable." Pet. App. 40 (internal quotation and citation omitted).

Here, the questionnaire revealed that Simeon G. preferred his opinions over others and had no demonstrated history of working with a group to reach a consensus. 21 J.Q. 5982, 5984. The comparator juror also liked to make her own decisions, but had a demonstrated history of working with a group to reach a decision. 4 J.Q. 1152, 1154. The California Supreme Court considered this difference because it "closely relate[d]" to the prosecutor's stated reason for striking Simeon G. Pet. App. 41. The court ignored other differences that were "wholly unrelated" to the prosecutor's stated reasons for challenging Simeon G, *id*. That approach was not inconsistent with this Court's precedents.

b. Petitioner next contends that "this issue has divided the lower courts." Pet. 27. But this case does not actually implicate any "split of authority." *Id.* at 28. As petitioner acknowledges (*id.* at 27), the decision below is consistent with the approach adopted by the

Fifth Circuit in *Chamberlin v. Fisher*, 885 F.3d 832, 840 (5th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2773 (2019). In that case, the en banc panel held that a court conducting a comparative juror analysis for the first time on appeal may consider record-based reasons that show that a non-struck juror was dissimilar from the struck juror. "[I]f a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered comparisons to other prospective jurors," nothing in the "'stand or fall' statement" in *Miller-El* "means that the prosecutor would forfeit the opportunity to respond to such contentions." *Id*. at 841.

The cases petitioner cites as being in conflict with this approach (Pet. 27-28) are not. In *United States v. Taylor*, 636 F.3d 901, 906 (7th Cir. 2011), the Seventh Circuit criticized the trial court for considering seven new reasons for striking a Black juror on remand after trial, which directly contravened the requirements of *Miller-El*. In *Love v. Scribner*, 278 F. App'x 714, 716-717 (9th Cir. 2008), the Ninth Circuit reversed the state court's refusal to conduct *any* comparative juror analysis and disapproved of the court's speculation about differences that could have motivated the prosecutor—who had declined to address that very issue in the trial court when pressed by the defense attorney. And in *State v. Marlowe*, 89 S.W.3d 464, 466-468 (Mo. 2002), the defendant identified comparable non-struck jurors during the *Batson* hearing in the trial court and the prosecutor raised only certain justifications for their differential treatment. The Missouri Supreme Court refused to allow the prosecution to raise on appeal differences that the prosecutor never proffered—when given the opportunity—in trial court. That approach is not at odds with the decision below.

2. Petitioner next contends that the state court contravened this Court's precedents by imposing a rigid requirement that a comparator juror "match *all* of the reasons" offered by the prosecutor to support a strike. Pet. 29-38. But the decision below did not adopt any such rule.

To the contrary, the court expressly recognized that "jurors need not be identical in all respects for a comparison among them to be probative." Pet. App. 70. It quoted *Miller-El* for the principle that "'[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.'" *Id.* at 39 (quoting *Miller-El*, 545 U.S. at 241).[9] And it noted that "[w]hen a prosecutor states multiple reasons for challenging a juror, a comparison between the challenged juror and a similar nonchallenged juror in regard to *any one of* the prosecutor's stated reasons is relevant," even if it is "not necessarily dispositive." *Id.*[10]

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[9] *See also* Pet. App. 40 ("[W]e bear in mind that comparative juror analysis is not simply an exercise in identifying any conceivable distinctions among prospective jurors. 'A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.'") (quoting *Miller-El*, 545 U.S. at 247 n.6).

[10] Petitioner's criticism (Pet. 32-35) of *other* California Supreme Court decisions is no reason for further review in this case. The court here never endorsed the position, for example, that compared jurors must "express a substantially similar combination of responses in all material respects" for the differential treatment to have probative value in a *Batson* analysis. Pet. App. 33.

Applying those principles, the state court examined the claims of differential treatment based on a comparison of particular questionnaire responses. Pet. App. 70. The court explained that it would "continue to consider [petitioner's] comparisons to be relevant and probative on the issue of purposeful discrimination," and did not discount the differences simply because the jurors were not identical in *all* respects. *Id.* And the court credited some of petitioner's arguments, acknowledging that certain differences identified by petitioner "undermined to some degree" the prosecutor's stated reasons for exercising a strike. *Id.* at 68; *see also id.* at 69 (recognizing that one particular comparison had "some probative value" and was "more convincing" than others). It is only because the court carefully considered those differences—as this Court's precedents demand—that it viewed "the issue to be close." *Id.* at 71.

The court's ultimate conclusion that "each of the prosecutor's reasons for striking Simeon G. is plausible, supported by the record, and race neutral," Pet. App. 71, does not show that it merely "profess[ed] adherence to *Miller-El* while effectively" taking a conflicting approach, Pet. 34. The court recognized that a comparative juror analysis is one "form of circumstantial evidence that is relevant on the issue of purposeful discrimination." Pet. App. 39. On the particular facts of this case, however, it properly concluded that "'all of the circumstances that bear upon the issue of racial animosity'" do not establish a race-based strike of Simeon G. *Snyder*, 552 U.S. at 478.

As petitioner notes (Pet. 16, 31-32, 35), this Court has found *Batson* violations in cases where a comparative juror analysis showed that the compared jurors were similar in only one of several respects. But those

cases also presented extremely troubling indicators of pretext that this case does not:

- In *Miller-El*, 545 U.S. at 253, 263-264, there was evidence that the district attorney's office had a formal policy of excluding Black venire members from juries and that the prosecutor had mischaracterized what the struck Black juror said in voir dire (*id*. at 244); questioned Black and non-Black jurors in substantially different ways (*id*. at 245, 255); asked trick questions of the Black jurors (*id*. at 261-263); shuffled the venire panel to avoid seating Black jurors (*id*. at 253-254); and conspicuously marked the race of each prospective juror on their juror cards (*id*. at 264).
- In *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016), the case involved "shifting explanations, . . . misrepresentations on the record, and the persistent focus on race in the prosecution's file." And only after considering "all of the circumstantial evidence" involved in that case did this Court find that the challenged strikes were motivated in substantial part by discriminatory intent. *Id.*
- In *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019), this Court emphasized the "extraordinary facts" present and underscored that the comparative jury analysis should not be conducted "in isolation," but "in light of the history of the State's use of peremptory strikes in the prior trials, the State's decision to strike five out of six black prospective jurors at Flowers' sixth trial, and the State's vastly disparate questioning of black and white prospective jurors during jury selection at the sixth trial." *Id.* at 2250-2251

- And in *Snyder*, 522 U.S. at 478-479, the prosecutor gave just one reason for striking the Black juror that did not withstand scrutiny. *Id*. at 482-485.

In conducting the analysis in *Snyder*, this Court acknowledged that a "retrospective comparison of jurors based on a cold appellate record" may be misleading. 522 U.S. at 483. While the "shared characteristic" identified in the comparative analysis in *Snyder* "was thoroughly explored by the trial court" in that case, the Court recognized that, in other cases, "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Id*. Here, the court below properly considered the relevant facts and circumstances to evaluate the proffered reasons for the strike and conclude that the struck juror was not truly comparable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 16, 2021