
In the Supreme Court of the United States

CHARLES STEVENS,

Petitioner,

v.

RON DAVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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**CAPITAL CASE
QUESTION PRESENTED**

Whether the court of appeals erred in determining that petitioner was not entitled to federal habeas relief on his claim that the jury selection in his case violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

DIRECTLY RELATED PROCEEDINGS

United States Supreme Court:

Stevens v. California, No. 07-7499 (petition for writ of certiorari denied January 7, 2008).

United States Court of Appeals, Ninth Circuit:

Stevens v. Davis, No. 19-99004 (judgment entered February 14, 2022; petition for rehearing denied April 22, 2022).

Stevens v. United States District Court, No. 15-71919 (petition for writ of mandamus denied August 10, 2015).

Stevens v. United States District Court, No. 14-71123 (petition for writ of mandamus denied July 7, 2014).

United States District Court, Northern District of California:

Stevens v. Davis, No. 3:09-cv-00137-WHA (judgment entered January 17, 2019).

California Supreme Court:

In re Stevens on Habeas Corpus, No. S119354 (writ of habeas corpus denied August 26, 2009).

People v. Stevens, No. S034704 (judgment entered June 4, 2007).

Alameda County Superior Court:

People v. Stevens, No. 102962 (judgment entered July 30, 1993).

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STATEMENT

Petitioner Charles Stevens was convicted and sentenced to death for a four-month spree of highway shootings. He challenges the lower courts' conclusion that he is not entitled to federal habeas relief.

1. a. From April through July 1989, petitioner engaged in a series of random shootings on or near Interstate 580 in Oakland, California. Pet. App. 2a. Four victims died: Leslie Ann Noyer, Laquann Sloan, Lori Ann Rochon, and Raymond August. *Id.* Six survived. *Id.*

Petitioner's last two shootings led to his capture. On July 27, petitioner pulled alongside Rodney Stokes's car. Pet. App. 2a-3a, 55a-56a. Petitioner waved at Stokes, smiled, and then shot at Stokes three times. *Id.* at 2a-3a, 56a, 102a. Petitioner then drove toward another car and fatally shot the driver of that car, Raymond August. *Id.* at 3a, 56a, 102a-103a. Petitioner exited the freeway, entered an on-ramp facing the opposite direction, and stopped to watch the scene of August's car crash. *Id.* at 3a, 56a, 103a. Stokes, who had survived and pulled over, called 911. *Id.* at 56a-57a. When police located petitioner on the freeway on-ramp and approached him, petitioner attempted to flee and dropped a loaded gun. *Id.* He was arrested, and Stokes identified him at the scene. *Id.*

Ballistics evidence linked petitioner's pistol to all four murders and to all but one of the attempted murders. Pet. App. 3a, 102a, 104a. (The slug recovered from Stokes's car the night of the final shootings was not in a

condition that allowed a ballistics comparison. *Id.* at 3a, 56a-57a, 104a.) In petitioner's room, police found additional items related to the pistol; a collection of newspaper articles about the shootings; and an envelope bearing tally marks next to handwritten references to statutes relating to murder, assault, and weapons offenses. *Id.*

b. A jury convicted petitioner of four counts of first-degree murder and six counts of attempted murder. Pet. App. 2a, 53a, 101a; 4 CT 807-813.¹ The jury also found true, beyond a reasonable doubt, special circumstances of lying in wait and multiple murder. *Id.*²

In the penalty phase, the jury heard about an additional shooting by petitioner in 1987, petitioner's threat to kill his codefendant for talking to police, a jailhouse disturbance by petitioner, the effect of the crimes on the victims, and petitioner's prior felony convictions. Pet. App. 58a. The defense case featured extensive psychological and social history evidence revealing that petitioner was abused as an adolescent and possibly suffered from personality disorders, but that he showed no sign of mental illness, brain damage, or intellectual disability. *Id.* at 58a-60a. The jury set the punishment at death. *Id.* at 101a.

¹ CT refers to the Clerk's Transcript from the trial court; RT refers to the Reporter's Transcript.

² Richard Clark, who had at various points admitted to involvement in Noyer's murder but claimed he acted under duress, was tried as petitioner's codefendant. Pet. App. at 4a, 54a, 102a; 4 CT 807. The court declared a mistrial as to Clark's charge after the jury deadlocked on guilt. Pet. App. 54a.

c. Petitioner’s jury contained one Black juror, two Hispanic jurors, and nine White jurors, in addition to one Black and two White alternate jurors. Pet. App. 108a; 49 CT 14307 - 51 CT 14865. His petition for a writ of certiorari challenges the prosecution’s use of peremptory challenges during the selection of that jury. Pet. 2-5.

The first defense objection to the prosecutor’s strikes occurred after the prosecutor’s twelfth peremptory challenge. Pet. App. 4a.³ At that point, the prosecution had exercised eight of its peremptory challenges against White jurors, *see* 12 C.A. E.R. 2842-2862, and four of its challenges against Black jurors: Henry Hill, Larry Foster, Jean Clemons, and Walter Simpson. Pet. App. 4a. The trial court ruled that the defense had satisfied the requirements for a *prima facie* showing and asked the prosecutor for his justifications for striking the Black jurors. *Id.* at 4a-5a. The prosecutor stated that the stricken jurors’ answers reflected a level of ambivalence about the death penalty that caused concern about how they would approach their penalty-phase decision. *See id.* at 5a, 32a, 110a; 12 C.A. E.R. 2853-2854.

The prosecutor elaborated that when Hill was asked in general about the death penalty, he had a practice of “‘bouncing around’” and “‘falling back’ on needing evidence,” and seemed to be trying to avoid answering questions. Pet.

³ Petitioner joined co-defendant Richard Clark’s motion challenging the strikes under *People v. Wheeler*, 22 Cal. 3d 258 (1978). Pet. App. 4a. *Wheeler* is California’s state-law analog to *Batson v. Kentucky*, 476 U.S. 79 (1986). *See Davis v. Ayala*, 576 U.S. 257, 263 (2015).

App. 37a-38a; 12 C.A. E.R. 2854. Hill also described himself as an alcoholic who had been convicted less than two years earlier for driving under the influence, and the prosecutor smelled alcohol on him during jury selection. Pet. App. 37a, 111a. Foster's and Clemons's answers, the prosecutor explained, indicated "a lack of commitment" and "lack of conviction" in their ability to impose the death penalty, "which gave me a great deal of concern as to whether I could afford to take the chance." *Id.* at 18a, 32a. And Simpson, in addition to seeming ambivalent about the death penalty, gave "evasive" answers that caused the prosecutor "concerns whether he would be willing to subordinate his beliefs to the law." *Id.* at 41a. After taking time to review his notes, the trial judge concluded that the prosecution had rebutted any inference of bias as to the four Black prospective jurors—a conclusion the trial judge explained was based on his analysis of the prosecution's reasons and "the court's own observations." *Id.* at 5a.

As jury selection continued, the prosecutor used seven more peremptory challenges. Four were against White jurors, and three were against Black jurors: Patricia King, Sarah McCall, and Joyce Gray. Pet. App. 5a. Each strike of a Black juror drew an objection from petitioner. As before, the prosecution responded by stating that the juror had been stricken because of that juror's uncertainty about their ability to impose the death penalty. *Id.* More generally, the prosecutor observed, this was not a case where a prosecutor might prefer White jurors with a goal of benefiting from jurors'

racial identification with the victims: in fact, “the bulk of the victims in [the] case” were Black. *Id.* at 110a. The trial court concluded as to each objection that there was no purposeful discrimination. *Id.* at 5a. Once again, the judge’s conclusions were based on the prosecutor’s reason for each challenge and the judge’s “own observations and recollection[s] of [each] juror.” *Id.*

2. On direct appeal, the California Supreme Court affirmed. Pet. App. 101a-161a. The court unanimously rejected petitioner’s claim that the prosecutor had discriminated during jury selection—a claim which, as the court noted, petitioner’s appellate brief argued only as to the strikes of Hill, Foster, and Clemons. *Id.* at 108a.

The court reasoned that those jurors’ questionnaires and voir dire responses supported the prosecutor’s concerns that they were ambivalent toward the death penalty and would have trouble imposing it. Pet. App. 109a-110a. Petitioner argued that discrimination was proven by similarities between the three jurors at issue and specific seated jurors. *Id.* at 113a. The California Supreme Court determined, however, that petitioner’s comparisons did not reveal the trial judge’s conclusion to be error, *id.* at 113a-116a, because the answers given by the stricken and seated jurors about the death penalty were not sufficiently similar to warrant a finding of pretext. *Id.* at 114a.⁴

⁴ See Pet. App. 111a, 114a (additionally noting, with respect to Hill, that three of the seated jurors petitioner identified had no record of conviction, and the fourth had only an eight-year-old driving-under-the-influence conviction,

Among other things, the court reasoned, “[t]he best evidence of whether a race neutral reason should be believed is often ‘the demeanor of the attorney who exercised the challenge,’ and ‘evaluation of the prosecutor’s state of mind lies ‘particularly within a trial judge’s province.’”” *Id.* at 116a (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The court considered that principle to be relevant because the trial court had stated that it was relying in part on “‘the court’s own observations,’” and some of the prosecutor’s stated reasons involved prospective jurors’ nonverbal conduct. *Id.* at 117a.

3. Petitioner then filed a petition for writ of certiorari in this Court, arguing, among other things, that the California Supreme Court had erred by applying an elevated standard of “striking similarity” in its comparative analysis rather than looking to “similarly situated” jurors, and had ignored several indications of pretext set forth in *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*). See Pet. for Cert. at 16-17, *Stevens v. California*, 552 U.S. 1118 (No. 07-7499). This Court denied certiorari. *Stevens v. California*, 552 U.S. 1118 (2008).

4. Petitioner next filed a federal petition for a writ of habeas corpus in the United States District Court for the Northern District of California.⁵ The district court denied the petition. Pet. App. 53a-99a.

whereas Hill had a very recent conviction for driving under the influence and smelled of alcohol in court).

⁵ Stevens had previously filed a state habeas corpus petition, which the

The petition alleged a *Batson* violation with respect to all seven Black prospective jurors whom the prosecution had struck, rather than just the three about whom petitioner had raised arguments to the California Supreme Court. Pet. App. at 62a-71a. The district court determined that the record supported the California Supreme Court’s conclusion (*see supra* pp. 5-6) that petitioner had not raised claims about the dismissals of Simpson, King, McCall, and Gray in his state appeal. Pet. App. 62a-65a. As a result, the court held that it was without power to grant relief based on those unexhausted claims. *Id.* at 64a (explaining that the argument section of petitioner’s California Supreme Court brief had discussed only Foster, Hill, and Clemons, and the other four jurors were discussed only in a factual background section); *see generally* 28 U.S.C. § 2254(b)(1)(A) (barring relief for unexhausted claims).⁶

With respect to the dismissals of Foster, Hill, and Clemons—as to whom petitioner did exhaust his claims in state court—the district court determined that relief was unavailable under 28 U.S.C. § 2254(d). Pet. App. 65a-69a. It reasoned that Clemons’ answers in jury selection did “not reflect a firm conviction in either the death penalty itself or in Clemons’s ability to impose

California Supreme Court denied. *See* Pet. App. 100a. The state habeas petition did not include a *Batson* claim.

⁶ The pending petition for a writ of certiorari erroneously states that the district court deemed the claims as to these jurors “procedurally defaulted.” Pet. 8. *See generally Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (explaining relationship between exhaustion and procedural default).

it should the law support such a verdict,” and thus supported the prosecutor’s concerns. *Id.* at 68a. With respect to Hill, whom the prosecutor had described as smelling of alcohol, the court reasoned that “[t]he trial court was in the best position” to judge not only the credibility of that statement but also the credibility of the prosecutor’s statements about Hill’s physical demeanor and evasiveness. *Id.* With respect to Foster, although the district court did not believe that the transcript and questionnaire supported the prosecutor’s concerns that Foster “‘didn’t know’ how he would vote on a ballot initiative” regarding the death penalty and had expressed ambivalence about returning a death verdict, *id.* at 67a, it reasoned that the California Supreme Court did not commit any error on which there could not be “‘fairminded disagreement’” by crediting the trial court’s reliance on its “‘own observations.’” *Id.* at 68a (quoting *Harrington v. Richter*, 562 U.S. 86, 101-102 (2011)).⁷

5. The court of appeals affirmed, holding that the California Supreme Court’s rejection of petitioner’s claim was neither an unreasonable determination of the facts as to the strikes of the three jurors whom that court considered, *see* Pet. App. 16a-39a; *see generally* 28 U.S.C. § 2254(d)(2),

⁷ Petitioner characterizes the district court’s order as having found that the strike of Foster was based on race. Pet. 8, 29. While that court reasoned that the transcript did not support the prosecution’s concern about ambivalence, it did not take the further step of considering whether the prosecutor’s statements reflected pretext—as opposed to honest mistake—or whether the prosecutor’s actual motivation was based on race.

nor an unreasonable application of this Court's precedents as to the jury selection as a whole, *see* Pet. App. 39a-51a; *see generally id.* § 2254(d)(1).

Given Foster's "varying responses" to questions about the death penalty, the court of appeals concluded that the state court could have reasonably viewed him as "reflecting [the] ambivalence" that the prosecutor had expressed concern about. Pet. App. 20a. The court of appeals came to similar conclusions regarding the strikes of Clemons and Hill. *See id.* at 31a-40a. Although petitioner argued that the prosecutor had misquoted one of Foster's statements, the court of appeals rejected that claim: the prosecutor was not purporting to quote the juror exactly, and the prosecutor's paraphrase ("I'll follow the law with regard to whatever the judge tells me") did not materially differ from the juror's statement (that he would "do what the law says"). *Id.* The court of appeals also rejected petitioner's claim that discrimination was proven by a comparison of Foster, Clemons, and Hill to various other prospective jurors. *Id.* at 22a. To the extent that seated White jurors had also expressed some ambivalence, their answers were not sufficiently similar to those given by Foster, Clemons, or Hill to make the California Supreme Court "objectively unreasonable in upholding the trial court's factual finding." *Id.* (discussing the jurors to whom petitioner had urged comparison at the California Supreme Court); *id.* at 22a-23a (considering "long list" of additional jurors whom petitioner did not discuss in

state court, and concluding that “[e]ven if we consider these additional jurors in the first instance, we see no basis for habeas relief”).

The court of appeals also determined that habeas relief would be improper with respect to the four additional jurors—Simpson, King, McCall, and Gray—as to whom the district court had deemed petitioner’s claims unexhausted. Because it concluded that relief would not be warranted on the merits even if those claims were exhausted, the court of appeals did not reach the exhaustion issue. Pet. App. 40a (citing 28 U.S.C. § 2254(b)(2)). As to the merits, the court of appeals held that petitioner had failed to establish by clear and convincing evidence that the state trial court erred in finding that there was no purposeful discrimination. *Id.* at 40a-47a; *see id.* at 40a-41a (noting that 28 U.S.C. § 2254(e)(1) required petitioner to prove that the trial court’s factual determination about an absence of discrimination was incorrect by clear and convincing evidence).

Petitioner argued that, rather than comparing stricken Black jurors only to the seated jurors whom petitioner had discussed in his briefing, the California Supreme Court should instead have compared each stricken juror to *every* juror whom the prosecutor did not strike—whether mentioned by petitioner or not. Pet. App. 47a. The court of appeals rejected that argument, reasoning that a “basic principle of our adversarial system is ‘the principle of party presentation,’” under which courts “‘rely on the parties to

frame the issues for decision.” *Id.* at 48a (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)).

Petitioner argued that the facts of his case were materially indistinguishable from those on which this Court granted relief in *Miller-El II* and *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019). But the court of appeals noted important differences. Here, unlike in *Miller El II*, “the comparative juror analyses do not show clear evidence of pretext, the prosecutor did not materially mischaracterize prospective jurors’ responses, and the strike rate was not as disproportionate.” Pet. App. 49a. As to *Flowers*, the court of appeals first observed that *Flowers*, which postdated the date on which the state court decision here became final, could not count as “clearly established law” under Section 2254(d) for purposes of this case. *Id.* In any event, there was “a principled distinction between *Flowers* and this case” because *Flowers* featured a prosecutor’s “‘dramatically disparate questioning’ of prospective jurors,” a “‘series of factually inaccurate explanations,” by the prosecutor, and a remarkable six separate trials featuring a cumulative strike rate of almost 100% against Black jurors. *Id.* (quoting *Flowers*, 139 S. Ct. at 2235, 2250).

Finally, the court of appeals rejected petitioner’s argument that the California Supreme Court had applied the wrong legal standard. Pet. App. 50a-51a. Petitioner’s contention was that the California Supreme Court applied too strict of a standard when it explained that it did not discern a

“striking” enough similarity between seated and stricken jurors to overturn the trial court’s evaluation, because this Court has spoken merely about whether candidate jurors were “similarly situated.” *Id.* Examining the California Supreme Court’s words in context, however, the court of appeals perceived no application of an elevated standard. The state court “stated that the seated jurors did not demonstrate ‘*such a* striking similarity’ or ‘*such* striking similarity’ to warrant a finding of pretext.” *Id.* at 50a (emphasis added by court of appeals). The state court’s meaning was that “the congruence between the ambivalence expressed by the seated jurors and that expressed by the struck prospective jurors was not *so significant* that it raised an inference contrary to the trial court’s observations that the prosecutor was not credible.” *Id.* Rather than constituting “an unreasonable application of any Supreme Court case,” the state court’s language reflected an application of this Court’s instruction to defer to trial court credibility findings. *Id.* at 51a (citing *Davis v. Ayala*, 576 U.S. 257, 274 (2015)).

Petitioner filed a petition for rehearing en banc. The court of appeals denied the petition without any judge requesting a vote. Pet. App. 162a.

ARGUMENT

The court of appeals correctly applied this Court’s precedent to petitioner’s case and its decision does not implicate any conflict with the decisions of other courts. This Court previously denied certiorari when petitioner challenged the California Supreme Court’s denial of his *Batson* claims on direct review. Petitioner identifies no reason why the outcome

should be different here, when his *Batson* claims are now subject to the additional strictures of 28 U.S.C. § 2254. The petition should be denied.

1. a. The Equal Protection Clause forbids a party from exercising peremptory challenges because of a juror's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). When a strike is challenged on that ground, the trial court proceeds in three steps. *See Johnson v. California*, 545 U.S. 162, 168 (2005). First, the defendant must “make out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’” *Id.* Second, the prosecutor must “‘give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].’” *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*) (quoting *Batson*, 476 U.S. at 98, n.20) (internal quotation marks omitted). Finally, the trial court must “determine if the defendant has established purposeful discrimination,” *Batson*, 476 U.S. at 98, a question on which “the ultimate burden of persuasion regarding racial motivation” rests with “the opponent of the strike,” *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

Various factors may be relevant to a court's assessment of whether a defendant has established purposeful discrimination, *see Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (listing examples), including whether “a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve,” *Miller El II*, 545 U.S. at 241. Another “important” factor is often “[t]he trial judge's

assessment of the prosecutor’s credibility.” *Id.*; *see id.* (“the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge,” and a “reviewing court ordinarily should give those findings great deference”). “[T]he trial court’s firsthand observations” are “of an even greater importance” where the prosecutor’s reasons implicate “a juror’s demeanor.” *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Finally, “a trial court’s ruling on the issue of discriminatory intent must be sustained [on appeal] unless it is clearly erroneous.” *Flowers*, 139 S. Ct. at 2244.

The standards for granting federal habeas relief under 28 U.S.C. § 2254(d) are also clear. Relief is generally unavailable unless the applicant has “exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1). For a claim that a state court adjudicated on the merits, the federal court may grant relief only if the state-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Id.* § 2254(d). “Clearly established . . . refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). A decision is “contrary to” clearly established federal law “if the state court applies a rule that contradicts the governing law set forth in [United States Supreme Court] cases,” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [this Court] and nevertheless arrives at a result different from [that]

precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). The standard is satisfied only if there is “no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

b. The court of appeals correctly applied those principles here. With respect to Foster, Clemons, and Hill—whose dismissals petitioner had challenged on direct review—the court denied habeas relief because the jurors’ own statements could reasonably be interpreted as supporting the conclusion that the prosecutor’s strikes were motivated by a desire to avoid ambivalent jurors, rather than by racial discrimination. *See* Pet. App. 19a (noting Foster’s response that he “honestly [did not] know” how he would vote if given the chance to abolish California’s death penalty at the ballot box); *id.* at 33a (when Clemons was asked whether she could vote to impose the death penalty, she “framed her answers by saying ‘I think I could’ or ‘I really believe I could,’ but recognized that it would be ‘kind of hard’ to be in the position to vote for death”); *id.* at 37a-38a (characterizing Hill as giving “lengthy, sometimes rambling answers” when asked about his approach to the death penalty, and noting the trial court’s superior ability to determine whether Hill, a self-described alcoholic with a recent drunk driving conviction, had alcohol on his breath in court as the prosecutor described).

The court of appeals also correctly recognized that its conclusion was not undercut by petitioner’s comparison of the stricken jurors to seated jurors,

given the differences between jurors' answers with respect to the key question of willingness to impose a death penalty. *See id.* at 21a (seated juror Watkins supported recalling a California Supreme Court Chief Justice who had been accused of being against the death penalty); *id.* (seated juror Mercie's responses evinced awareness of the gravity of a death-sentence decision, but not ambivalence toward the death penalty); *id.* at 22a (seated juror Collondrez viewed the death penalty as "needed," and he and seated juror Favareille each confirmed they could cast a twelfth vote for death).

And the court of appeals also correctly rejected petitioner's allegation that discriminatory intent was proven by the prosecutor's alleged misattribution to Foster of a statement made by another juror. Pet. 2, 31. A fairminded jurist could conclude that the prosecutor had been paraphrasing Foster, and that the paraphrase ("I'll follow the law with regard to whatever the judge tells me") was similar to Foster's actual words (that he would "do what the law says"). Pet. App. 20a.⁸

⁸ Petitioner characterizes as "critical" his theory that the prosecutor in fact mixed up Foster's words with those of a White juror, Watkins. Pet. 9; *see also id.* at 9, 30-32. The actual text of Watkins's statement makes that interpretation questionable. *See* Pet. App. 349a (when asked whether she could listen to the evidence with an open mind and make her final decision at the end, Watkins responded "Yes, I—assuming also that the judge tells us where the law lies and which way to go as far as the law is concerned."). In any event, the transposition of one juror's words into another juror's mouth would be far more indicative of an honest mistake than an intent to discriminate.

Finally, the court of appeals correctly recognized that regardless of whether petitioner's non-exhaustion might be excused with respect to his claims regarding King, McCall, Gray, or Simpson, those claims would still fail on the merits because the trial court's finding of a lack of discriminatory motive could be disturbed only if it was "incorrect by clear and convincing evidence." Pet. App. 41a (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003)). This court has required special respect for trial court determinations that rest on a judge's observation of a prosecutor's or juror's demeanor. See *Flowers*, 139 S. Ct. at 2244; *Snyder v. Louisiana*, 552 U.S. at 477. And petitioner could not meet the clear and convincing standard, given the record's support for the trial court's assessment.⁹

⁹ See Pet. App. 42a (Simpson used the word "ambiguous" to describe not only his feelings about the criminal justice system but also his view of the recall of California's Chief Justice after a campaign focusing on her alleged hostility toward the death penalty); *id.* at 42a n.17 (when asked "[w]ill you follow the law, or would you rely upon your own beliefs if it conflicts with what the law is?" Simpson responded, "I can[]not give you those assurances"); *id.* at 44a (King admitted that, "I don't know if I could or couldn't vote to impose death"); *id.* (McCall, when "[a]sked twice about whether she could vote to end Stevens's life," gave "an unresponsive answer" and "declined to elaborate"); *id.* (Gray stated that perhaps she was not fit to serve on the jury, said she had been "'against the death penalty' for most of her life" and had only "recently 'questioned the strength of that belief,'" and at one point "said 'No'" when asked whether "voting for the death penalty was a 'real option' for [her] in [petitioner]'s case"). Indeed, the prosecutor's concerns about Gray had caused him to seek her removal for cause. *Id.* at 46a. In denying the for-cause challenge, the trial court agreed that her "answers were at times inconsistent or equivocal," but determined that her overall views did not entitle the prosecution to a for-cause dismissal. 14 CT 2850.

2. Petitioner principally contends that the court of appeals' judgment should be "summarily reversed." Pet. 5, 44. He argues that the California Supreme Court applied the wrong legal standard in holding that petitioner's comparisons of stricken jurors to seated ones did not establish purposeful discrimination, because the state court observed that the two sets of jurors were not "strikingly similar" instead of asking simply whether they were "similarly situated." See Pet. ii, 12-24. Petitioner raised the same argument in the certiorari petition arising from his direct appeal that this Court denied. See Pet. for Cert. at 16-17, *Stevens v. California*, 552 U.S. 1118 (No. 07-7499). He points to no consideration that would make this argument more suitable for this Court's review on federal habeas. In any event, the court of appeals correctly rejected this claim.

The California Supreme Court was not purporting to exclude jurors from comparison because they were not similarly situated; nor was it using the words "strikingly similar" to describe an abstract standard that petitioner had to meet. Instead, the California Supreme Court stated that the stricken and seated jurors in this case did not "demonstrate such a striking similarity in ambivalence regarding the death penalty *that a finding of pretext is warranted.*" Pet. App. 116a (emphasis added). In other words, the congruence between the ambivalence expressed by the seated jurors and that expressed by the struck prospective jurors "was not *so significant*" as to

undercut the trial court’s conclusion about the prosecutor’s credibility. *Id.* at 50a.

That reasoning did not violate this Court’s holdings, which instruct that “[i]f the 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[.]” *Miller-El II*, 545 U.S. at 241 (emphasis added). The state court simply acknowledged that the strength of that evidence depends on the degree and nature of the similarities—and that, depending on the degree of similarity, any inference of discrimination might be outweighed by other factors this Court has instructed courts to consider. *See* Pet. App. 50a. Here, those other factors included the trial court’s ability to compare “responses that differ in only nuanced aspects” and to make a “sensitive assessment of jurors’ demeanor,” each of which “the trial court is best situated to evaluate.” *Davis v. Ayala*, 576 U.S. 257, 273-274 (2015); *see supra* pp. 5-6.¹⁰ To premise habeas relief on the California Supreme Court’s use of a single word in its balancing of the factors described by this Court would be inconsistent with the requirements of Section 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) (reversing grant of habeas relief where court of appeals had faulted state court for an alleged imprecision in wording and observing that “[t]his

¹⁰ It is notable that in *Miller-El II*, this Court did not simply cease its analysis when it found seated jurors similarly situated to stricken ones; instead, it went on to consider a variety of other factors. *See* 545 U.S. at 253.

readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.”).

3. Petitioner next argues that the court of appeals should be reversed because it believed that state courts “have no obligation to perform a comparative juror analysis advanced by a prisoner.” Pet. 25 (capitalization altered). But regardless of whether clearly established federal law *requires* state courts to conduct such an analysis, that argument cannot provide a basis for federal habeas relief in this case because the California Supreme Court *did* consider every comparison “advanced by [petitioner].” *Id.* It compared the three stricken jurors about whom petitioner raised arguments to the seated jurors petitioner identified as similar. *See supra* p. 5.¹¹

Petitioner argues that the California Supreme Court should have gone further and compared each stricken juror with *all* seated jurors, including jurors about whom the defendant made no argument. Pet. 22-24, 27, 28.

That, too, would have made little difference in petitioner’s case: as the court

¹¹ Petitioner contends that his appellate brief filed in the California Supreme Court also raised arguments about the four other stricken Black jurors. Pet. 6. But both the California Supreme Court and the district court disagreed—with the latter explaining that petitioner had not made arguments about the other jurors but rather merely mentioned them in a “Factual Background” section. Pet. App. 64a (district court order); *see also id.* at 6a (court of appeals’ observation that “[i]n the sections setting out his legal arguments, [petitioner] specifically addressed only the strikes of Hill, Foster, and Clemons”). In any event, the court of appeals did consider petitioner’s comparisons regarding the additional jurors, and concluded that they did not change the result. *See supra* pp. 9-10.

of appeals explained below, “[e]ven if we consider these additional jurors in the first instance, we see no basis for habeas relief.” Pet. App. 22a.¹² In any event, as the court of appeals also recognized, this Court has never held that a state court must undertake the task of comparing every stricken juror to every seated juror—and combing through potentially hundreds of pages of voir dire transcripts and questionnaires—without some direction from counsel about which jurors and which portions of the record matter. *Id.* at 47a-48a. Such a requirement would be extraordinary and problematic in a justice system ““designed around the premise that”” parties represented by competent counsel ““know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”” *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

Nor does the Ninth Circuit’s reasoning in this regard differ from that of the Fifth Circuit in *Reed v. Quarterman*, 555 F.3d 364, 370 (5th Cir. 2009). *See* Pet. 14-15. The Fifth Circuit interpreted *Miller-El II* as authorizing a federal habeas court to engage in comparative juror analysis as to the whole

¹² Three of the newly raised jurors whom the prosecutor did not strike demonstrated markedly less ambivalence about imposing death than did Foster. Pet. App. 22a-23a (discussing jurors Newbegin, Jordan, and Prodger). As to the last juror, Domenichelli (who was seated as third-alternate), the court of appeals concluded that because “[r]easonable minds could disagree” about how her answers compared to Foster’s, the new comparison did not show that it was unreasonable for the California Supreme Court to defer to the trial court’s determination of the prosecutor’s credibility, *id.* at 25a; *see generally Ayala*, 576 U.S. at 274 (“even if ‘[r]easonable minds reviewing the record might disagree about the prosecutor’s credibility, . . . on habeas review that does not suffice to supersede the trial court’s credibility determination”).

record when the petitioner did not request *any* comparative analysis at all before the state court. *See Reed*, 555 F.3d at 373 (stating that at the *Batson* hearings in both *Miller El II* and *Reed*, “neither defendant presented a comparative analysis”). It did not interpret that case as establishing that a state court errs when, after a defendant affirmatively asks the court to make comparisons only to some jurors, the court does exactly what the defendant requested. At the very least, *Miller-El II* did not clearly establish such a proposition beyond any possibility of fairminded disagreement, as Section 2254(d)(1) would require for petitioner to gain relief here. *See supra* p. 15.

4. Finally, petitioner argues that certiorari is necessary because of broader concerns with California’s administration of the *Batson* test. Pet. 10-12. Petitioner alleges that, as a general matter, the California Supreme Court requires defendants to show that seated jurors and challenged prospective jurors are similar in all or most respects for their comparative juror analysis to be relevant. Pet. 14-16, 17-18. But petitioner points to no such statement or reasoning in this case: the California Supreme Court rejected petitioner’s claim not because it believed that minor differences between prospective jurors foreclosed the availability of comparative juror analysis, but because, assessing the comparative analysis in the context of other factors this court has enumerated, it concluded that the degree of any similarity revealed by the record was insufficient to establish that the trial

court erred in its assessment of credibility and juror ambivalence. *See supra* pp. 5-6.

In any event, legislation that took effect January 1, 2022, has imposed new state-law standards for evaluating allegations of race-based peremptory challenges and procedures for comparative juror analysis. *See* 2020 Cal. Stat., ch. 318. California courts considering an objection under *Batson* or *Wheeler* must now prohibit a peremptory challenge whenever “there is a substantial likelihood that an objectively reasonable person would view race as a factor in the use of the peremptory challenge.” Cal. Code Civ. Proc. § 231.7(d)(1). And where the striking attorney’s explanation for the peremptory challenge is a justification “that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party,” the peremptory challenge will be “presumed” invalid. *Id.* § 231.7(e). To overcome that presumption requires proof “by clear and convincing evidence” not only that race was not a factor but also that the articulated justifications for the strike “bear on the prospective juror’s ability to be fair and impartial in the case.” *Id.* The statute’s alterations to the burden of proof as to comparative juror analysis address petitioner’s prospective concerns about future applications of the *Batson* framework by California state courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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