NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY C. NEWLAND, WARDEN, *Petitioner,*

v.

MOBASSA BOYD, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of *Johnson* v. *California*, 545 U.S. 162 (2005), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), a state court reasonably applies *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by declining to undertake comparative analysis of challenged and non-challenged jurors for the first time on appeal.

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

ANTHONY C. NEWLAND, WARDEN, *Petitioner,*

v.

MOBASSA BOYD, *Respondent.*

Anthony C. Newland, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The second amended opinion of the United States Court of Appeals for the Ninth Circuit, issued upon the denial of a timely petition for rehearing en banc, is reported at 467 F.3d 1139. App. 106a-132a. The first amended opinion of the court of appeals is reported at 455 F.3d 897. *Id.* 81a-105a. The original opinion is reported at 393 F.3d 1008. *Id.* 63a-80a. The order of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus is unreported. *Id.* 17a-62a. The opinion of the California Court of Appeal affirming the judgment of conviction and its orders denying respondent's motions to supplement the record with a complete transcript of voir dire are unreported. *Id.* 7a-15a.

STATEMENT OF JURISDICTION

The court of appeals filed an opinion denying respondent's petition for writ of habeas corpus on December 29, 2004. App. 63a-80a. On June 26, 2006, the court of appeals filed an

amended opinion granting the petition for writ of habeas corpus and denying respondent's petition for rehearing and petition for rehearing en banc. *Id.* 81a-105a. By further amendment of the opinion on October 26, 2006, the court of appeals substituted as relief a conditional writ of habeas corpus. Under its terms, the writ would issue unless the State provides respondent, without charge, a complete voir dire transcript within a reasonable period of time, after which respondent may renew in the district court his claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals on that date also denied the Warden's petition for rehearing and petition for rehearing en banc. *Id.* 106a-132a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 2254(d)(1) of Title 28 of the United States Code provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (1996).

STATEMENT OF THE CASE

1. Respondent Mobassa Boyd was charged in the Alameda County, California Superior Court with unlawful firearms possession. App. 7a. At respondent's trial, the prosecutor used his third peremptory strike to remove prospective juror Shirley

Brown, an African-American. *Id.* 8a-9a. Respondent's counsel moved to dismiss the panel of prospective venire persons under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). *Id.* 9a. Under California law, a *Wheeler* motion also serves as an objection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). See *People* v. *Yeoman*, 31 Cal. 4th 93, 117-18, 72 P.3d 1166, 1187-88, 2 Cal. Rptr. 3d 186, 210-11 (2003). In attempting to meet his initial burden of making out a prima facie case of illegal discrimination, counsel for respondent offered only the following statement:

> I have taken a look at the panel. It looks like we may have only two more African-Americans in the panel total. The only other African-American who was potentially a juror in this particular case was excused for cause based upon a non-disclosure of some prior arrests. There was nothing that I could glean in the responses of Ms. Brown during the course of her voir dire examination by the court or by [the prosecutor] Mr. Hora or by myself which would lead me to believe that there was sort have [*sic*] any tangible reasons whereby someone might excuse her as being a potentially partial juror, and so I'm interjecting a *Wheeler* motion at this point.

App. 9a. Defense counsel made no mention of the prosecutor's questioning of other jurors, or of any similarities or dissimilarities between prospective juror Brown and other jurors.

The prosecutor declined to comment on respondent's objection. The trial court found that respondent had failed to establish a prima facie case. *Id.* 9a-10a. Defense counsel made no further objection under *Wheeler/Batson*, and made no record of the final composition of the jury. Respondent was convicted and sentenced to prison. *Id.* 10a.

2. On appeal to the California Court of Appeal, respondent filed three motions to augment the record and to obtain a free copy of the entire jury voir dire transcript, arguing that it was

necessary to conduct comparative juror analysis (by which he intended a comparison of the challenged minority juror to the non-challenged jurors), in order to show error in the trial court's denial of his *Batson* claim. In light of *People* v. *Landry*, 49 Cal. App. 4th 785, 788-93, 56 Cal. Rptr. 2d 824, 825-28 (1996) (holding there is no right to the entire voir dire transcript in order to conduct comparative juror analysis for the first time on appeal), the court of appeal concluded that respondent's request for a transcript of the voir dire of other jurors did not comply with a local rule of court requiring that motions to augment the transcript must "establish with some certainty how the requested material may be useful on appeal."[1/] App. 1a-5a. Instead, the appellate court provided respondent with an augmented transcript of the voir dire of juror Brown. Respondent filed a petition in the California Supreme Court seeking a writ of mandate directing the appellate court to augment the record with the entire voir dire transcript. That petition was denied. *Id.* 6a.

On the merits, the California Court of Appeal concluded that the trial court properly found that respondent had failed to establish a prima facie case under either *Wheeler* or *Batson* for the challenge of juror Brown and affirmed the judgment. App. 12a-14a. The court of appeal explained that respondent had "offered no basis for his motion other than the fact that Brown was African-American and [respondent] could not see any reason for excusing her," *id.* 12a, and that he had "not point[ed] to anything in the prosecutor's line of questioning that suggests racial motive. To the contrary, the prosecutor engaged Brown in substantial voir dire before excusing her." *Id.* 12a. The state appellate court further noted that "Brown's responses to several of the prosecutor's questions suggest that legitimate reasons may exist for the exercise of the peremptory challenge." *Id.* It cited the prosecutor's remark during voir dire regarding

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1. See former First District Court of Appeal Local Rule 6(d) (now First District Court of Appeal Local Rule 7(d), effective October 16, 2006).

Brown's hesitant response about whether missing work would be a distraction. *Id*. 12a. The state appellate court further noted, based on Brown's responses to the prosecutor's voir dire questions, that she "appeared to be holding something back when asked about her personal experiences with the justice system," and the possibility she might adopt "an unfavorable view" of a prosecution witness based on a past experience. *Id.* 12a. The court of appeal found that respondent "clearly did not establish a prima facie case of group discrimination. . . ." *Id*. 13a. The California Supreme Court denied review on March 1, 2000. *Id.* 16a.[2/]

3. Respondent filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the district court in December 2000. In August 2003, the district court rejected respondent's argument that *Batson* constituted "a holding requiring the use of comparative juror analysis" and noted that "the Ninth Circuit has not interpreted *Batson* as requiring such analysis." App. 30a-31a. Observing that this Court had upheld a federal statute requiring indigent federal habeas corpus petitioners to make a showing of need and non-frivolousness in order to obtain a free transcript, see *United States* v. *MacCollom*, 426 U.S. 317, 322 (1976), and that *Batson* allows discretion in determining "what evidence is 'relevant' in resolving" claims, App. 31a, the district court ruled that no "clearly established Federal law" prohibited the States from enacting similar limitations, *Id*. 38a-39a. In light of *Burks* v. *Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994), which had noted the different approaches on this score of the California Supreme Court and the Ninth Circuit Court of Appeals, the district court further ruled that it was neither contrary to nor an unreasonable application of clearly established Federal law for the California court to refrain from conducting comparative juror analysis for the first time on

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2. Respondent filed various other petitions seeking writs from the Alameda County Superior Court, California Court of Appeal and California Supreme Court based upon claims that are not germane to this petition. Those petitions were denied.

appeal. Therefore, the district court concluded, respondent was unable to establish his need for a transcript of the entire voir dire. App. 38a.

4. On appeal, the Ninth Circuit initially affirmed the judgment of the district court, holding that "*Batson* does not clearly establish a requirement of comparative juror analysis on appeal." App. 75a; see *id.* 75a-76a ("In summary, Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal."). In 2006, however, the Ninth Circuit issued an amended opinion, reaching the opposite conclusion and granting a conditional writ of habeas corpus on the *Batson* claim. App. 106a-132a. The Ninth Circuit found that, "in light of [respondent's] plausible *Batson* claim, the California appellate courts' denial of [respondent's] request for a complete voir dire transcript and a full comparative analysis of the venire unreasonably applied clearly established federal law." *Id.* 129a.

In its amended opinion, the panel expressed its view that, in light of *Johnson* v. *California*, 545 U.S. 162 (2005), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), its original opinion had "misunderstood *Batson* and that, without an entire voir dire transcript, the California appellate courts could not have considered the circumstances surrounding the contested strike, could not have evaluated the potential inference of racial bias, and therefore could not properly have found that [respondent] failed to establish a prima facie case." App. 117a. The panel rejected the Warden's argument that *Miller-El II* was inapplicable to the instant case under *Teague* v. *Lane*, 489 U.S. 288 (1989); in the court of appeals' view, both *Johnson* and *Miller-El II* were mere clarifications of *Batson*, not new rules. *Id.* 119a.[3/] The Ninth Circuit found that respondent had "raised

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3. The Ninth Circuit analyzed the retroactivity issue only under *Teague v. Lane*, 489 U.S. 288 (1989). App. 119a-121a. The Warden's opposition to rehearing argued principally that *Miller-El II* did not clearly establish a rule compelling comparative juror analysis for purposes of 28 U.S.C. § 2254(d), and alternatively that such a rule applied in this case also

at least a plausible *Batson* claim [in the trial court] and that contextual analysis is therefore appropriate," *id.* 121a. It ruled that "*Miller-El II* made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims. . . ." *Id.* 118a.

> Because we hold that, under the clearly established Supreme Court precedent of *Batson*, comparative juror analysis is an important tool that courts should utilize on appeal when assessing a defendant's plausible *Batson* claim, we also must conclude that all defendants, including those who are indigent, have a right to have access to the tools which would enable them to develop their plausible *Batson* claims through comparative juror analysis.

App. 126a-127a.

5. On November 2, 2006, the Ninth Circuit granted the Warden's motion for a ninety-day stay of the mandate pending the filing of this petition for certiorari.

REASONS FOR GRANTING WRIT

The Ninth Circuit's Erroneous Opinion Creates An Intolerable Conflict With The California Supreme Court And A Split Among The Federal Courts Of Appeals On An Important Question Implicating AEDPA, Federalism, And The Proper Administration Of This Court's *Batson* Procedure.

Introduction.

1. In reversing itself in this habeas corpus case, the Ninth Circuit held that "clearly established law" requires that a State defendant, having failed to bring the evidence to the attention of the trial court, must be allowed to litigate for the first time in

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would violate *Teague*.

his state appeal the question of whether "comparative analysis" of jurors not subjected to peremptory challenge by the prosecutor might show them to be so similar to a minority juror challenged by the prosecutor as to give rise to a retroactive inference of racial discrimination under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). But, especially when their decisions are reviewed with the deference required by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the trial court cannot be condemned for any failure to consider the import of latent "comparative analyses"of jurors not called to its attention by the defense, and the state appellate court cannot be condemned for declining to consider such comparisons for the first time on appeal. This Court's *Batson* jurisprudence neither requires nor "clearly establishes" that state courts must undertake such comparisons sua sponte, without any identification of the pertinent comparisons by the defense at the time of trial. Certiorari should be granted for at least three reasons.

First, the new "comparative analysis" rule adopted by the Ninth Circuit in its habeas corpus decision squarely conflicts with the California Supreme Court's interpretation of *Batson* and threatens to continue to collide with the state supreme court's teaching to the lower California courts. Second, the Ninth Circuit rule also conflicts with that of the Eleventh Circuit. Third, the Ninth Circuit's new rule is inconsistent with the role assigned to the trial judge in this Court's *Batson* jurisprudence; and its retroactive enforcement of the rule represents a failure to abide by the limitations imposed on federal habeas corpus courts by Congress in AEDPA.

2. California courts, reasonably and properly, seek to root out improper bias in the exercise of peremptory challenges against prospective venire-persons by reviewing the record before the trial court when it ruled. They do not adjudicate factual inferences purportedly derivable from a cold transcript of the voir dire of prospective venirepersons not the subject of the objector's *Batson* claim unless those inferences were brought to the attention and litigated before the factfinder, the

trial judge. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1318, 71 P.3d 270, 280, 1 Cal. Rptr. 3d 1, 13 (2003), rev'd on another ground in *Johnson* v. *California*, 545 U.S. 162 (2005) ("We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case."). California's courts nevertheless are open to comparative analysis and make *Batson* rulings in light of such evidence—when offered to the trial court for evaluation in the first instance. See *People* v. *Johnson*, 30 Cal. 4th at 1322-23, 71 P.3d at 282-83, 1 Cal. Rptr. 3d at 16-17. Where not raised by the defense and litigated at trial, however, the California Supreme Court considers comparative analysis to be both unrealistic in terms of jury selection dynamics and "highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected." *People* v. *Johnson*, 47 Cal. 3d 1194, 1220-21, 767 P.2d 1047, 1056-57, 255 Cal. Rptr. 569, 578-79 (1989). It is unfair to expect the trial judge to discern which of potentially myriad comparisons are the most pertinent ones.

A. The Ninth Circuit's Erroneous Rule Conflicts With The California Supreme Court Rule That Continues To Govern California Courts

This case represents an intolerable split between the Ninth Circuit and the California Supreme Court on the important question of whether the defendant must first present "comparative juror analysis" to the trial court before urging it on appeal or in post-conviction proceedings. See *People* v. *Johnson*, 30 Cal.4th at 1325, 71 P.3d at 285, 1 Cal. Rptr. 3d at 19. The conflict, first, unnecessarily jeopardizes the finality of California convictions, including death penalty judgments long since final in state court but only slowly working their way through the federal habeas process.

Moreover, the Ninth Circuit's ruling confronts California with a continuing dilemma. State appellate courts, in the wake of the California Supreme Court's rulings on this question, might well refrain from conducting comparative analysis offered for the first time on appeal.[4/] In habeas corpus, however, the federal courts will subject those judgments to the intrusive "comparative analysis" review mandated by the Ninth Circuit in the decision below.

This split of authority should be resolved now. Certainly, the California rule should be vindicated. But, even if California truly were obliged to conduct comparative juror analysis for the first time on appeal, then nothing can be gained from allowing more *Batson* claims to be decided in state court under California's rule when such review is superseded by the federal courts of this circuit, which now will conduct such analysis in federal habeas corpus proceedings.

B. The Ninth Circuit's Decision Reflects An Irreconcilable Split Of Authority Among The Federal Courts

In addition to the Ninth Circuit–California Supreme Court conflict, the decision below also gives rise to a similar conflict among the federal courts of appeals. Here, the Ninth Circuit held that a plausible *Batson* objection requires comparative juror analysis by the California Court of Appeal even though such analysis would have necessitated the appellate court's drawing factual inferences concerning matters in voir dire that formed no part of respondent's showing and were never at issue in the *Batson* hearing in the trial court. App. 123a-126a. By contrast, the Eleventh Circuit holds that such comparative juror analysis is not required for the first time on appeal. *Hightower*

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4. See *People* v. *Williams*, 40 Cal. 4th 287, ___, 148 P.3d 47, ___, 52 Cal. Rptr. 3d 268, 289 (2006) (citing to *Miller-El-II*, court assumes without deciding appellate courts are obliged to undertake comparative juror analysis offered for the first time on appeal); *People* v. *Guerra*, 37 Cal. 4th 1067, 1106, 40 Cal. Rptr. 3d 118, 152, 155 (2006).

v. *Terry*, 459 F.3d 1067, 1070-72 (11th Cir. 2006) (federal habeas court is limited to considering the evidentiary record developed in state trial court and the trial court's ruling); *Atwater* v. *Crosby*, 451 F.3d 799, 807 (11th Cir. 2006) ("Although Atwater presented comparative evidence of discrimination to the post-conviction courts and in his petition for habeas relief, conspicuously absent from the trial record is some argument or evidence of comparability at the time that the *Batson* challenge was made to refute the prosecutor's reason for the strike. Here, then, '[t]he lesson to claimants of *Batson* violations and prosecutors is that comparisons must be made between the black jurors removed from jury service and the white jurors remaining for service.' Without this comparison evidence, Atwater's *Batson* claim fails.") (internal citations omitted).

In both *Hightower*, 459 F.3d 1067, and *Atwater*, 451 F.3d 799, the Eleventh Circuit decided that this Court's decision in *Miller-El II* does not stand for the proposition that a defendant must be allowed to make a postconviction comparative juror analysis where the defendant had failed to do so before the trial court acting as the factfinder. See *Hightower*, 459 F.3d at 1069; *Atwater,* 451 F.3d at 807 ("'defendant bears the burden of convincing the district court that the proffered reasons are pretextual by introducing evidence of comparability'") (citation omitted).

In essence, the Eleventh Circuit, like California, has applied to comparative juror analysis the well-established rule that appellants cannot rely on factual inferences drawn from evidence not considered by the factfinder. The existing split between federal circuits on the use of comparative juror analysis in *Batson* cases is significant and requires review.

C. *Batson* Does Not Clearly Establish A Requirement That Comparative Juror Analysis Must Be Conducted When Asserted For The First Time On Appeal

Certiorari review is necessary, also, because the Ninth Circuit's decision failed to abide by the limitations on habeas corpus enacted by Congress in 28 U.S.C. § 2254(d). In rejecting California's reasonable understanding of *Batson*, the Ninth Circuit in this case failed to base its ruling on "clearly established Federal law" as determined by this Court—as 28 U.S.C. § 2254(d) requires.

"Clearly established" federal law refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time the relevant state-court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). Nothing in *Batson*, the only relevant Supreme Court case existing at the time the state court decided this case, compels the States to use comparative juror analysis for the first time on appeal to determine whether a defendant made a prima facie case of racially discriminatory motive for the exercise of a peremptory challenge. Nor, despite what the Ninth Circuit stated, does *Miller-El II*, 545 U.S. 162, mandate comparative juror analysis. And, far from lending support to the court of appeals' holding, *Johnson* v. *California*, 545 U.S. 162, established only that a prima facie case under *Batson* does not require the objector to show in the trial court that it is more likely than not the other party's peremptory challenges, if unexplained, are based on impermissible group bias, but need only establish an inference of discrimination. In sum, nothing in *Batson* or its progeny "clearly established" the comparative analysis rule the Ninth Circuit applied retroactively to award habeas relief to respondent in this case.

1. In *Batson* v. *Kentucky*, 476 U.S. 79, 94, this Court held that a prima facie showing of discriminatory purpose in the exercise of a peremptory challenge could be demonstrated from "the totality of circumstances." See also *id.* at 96 ("all relevant circumstances"). This Court gave several examples of factors

the trial court should take into account in determining whether the defendant had made out a prima facie case, including evidence of a pattern of strikes against particular jurors and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.* at 97. These examples were "merely illustrative." *Id.* *Batson* itself said nothing that mandated the States to conduct comparative juror analysis whenever objection is made to the challenge of prospective venirepersons at trial. Similarly, *Batson* imposed no requirement that such analysis be conducted for the first time on appeal. Indeed, the Court in *Batson* expressly declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99; see David D. Hopper, Note, *Batson* v. *Kentucky* and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?, 74 Va. L.Rev. 811, 817 (1988) ("The Supreme Court has left the lower courts to grapple with the proper implementation of the *Batson* test.").

2. Central to the Ninth Circuit's conclusion is its view that "*Miller-El II* fits within the *Batson* framework, which provides that 'the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.'" App. 120a. But, as already noted, the reference in *Batson* was illustrative of the types of evidence that might be relevant to the *trial court*. 476 U.S. at 97. And, in any event, *Miller-El II* does not require the trial court to undertake comparative analysis sua sponte upon a *Batson* objection. Even if that illustration might denote an actual rule, it cannot attain a status greater than that of dicta when applied to appellate courts. Dicta does not amount to "clearly established Federal law" under 28 U.S.C. § 2254(d). *Williams* v. *Taylor*, 529 U.S. at 412. To whatever extent *Miller-El II* itself arguably might be read to require comparative juror analysis for the first time on appeal—or, for that matter, at step one of a *Batson* hearing in the trial court—any such reading of that decision plainly amounts to an "extension" of the *Batson* language.

Such issues were not before this Court in *Miller-El-II*, where the trial predated *Batson*. The state appellate court remanded to the trial judge for a *Batson* hearing since defendant's trial motion objecting to the prosecutor's excusal of jurors had been decided under the by-then disapproved standard of *Swain* v. *Alabama*, 380 U.S. 202 (1965). *Miller-El II*, 545 U.S. at 236. At the *Batson* hearing, the trial judge had considerable evidence including the entire voir dire and statements of reasons from a prosecutor. *Id*. at 236, 241 nn.1-2, 264 n. 38. In finding the prosecution had truthfully stated nondiscriminatory reasons for striking minority jurors, the trial judge specifically noted the result of a comparison of jurors struck by the prosecution with those not struck by the prosecution. *Miller-El II*, Joint Appendix Vol. II of II, 2004 WL 2891870 at *929, ¶¶ 6, 9. The state appellate court did not attempt factual findings on appeal and instead found "'ample support' in the voir dire record" for the trial judge's findings. *Miller-El II*, 545 U.S. at 237.

The case then came to this Court on review of a denial of habeas corpus under 28 U.S.C. § 2254, "following the Texas trial court's prior determination of the fact that the States's race-neutral explanations were true" and, consequently, this Court devoted its analysis to the *state trial court's* factual findings. *Miller-El II*, 545 U.S. at 240. Aside from the fact that comparative juror analysis was before the trial court consistent with Texas law, see *Young* v. *State*, 826 S.W.2d 141, 150-51 (Tex.Crim.App. 1991), and both sides actually employed comparative juror analysis at the evidentiary hearing conducted by the trial judge, the State had no objection when Miller-El asked the federal district court to augment that record to consider other evidence, including juror questionnaires and juror information cards. See *Miller-El II*, 545 U.S. at 241 & n.2; *id*. at 256 n.15; see *People* v. *Johnson*, 30 Cal. 4th at 1321, 71 P.3d at 282, 1 Cal. Rptr. 3d at 16 (*Miller-El II* "merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court").

Miller-El II, moreover, involved the use of comparative juror

analysis at the *third* step of the *Batson* analysis, after the defendant had made a prima facie showing and the prosecutor was ordered to explain his challenges, not at the first step at issue here, where the sole question was whether respondent had established a prima facie case of discrimination in the trial court. See *People* v. *Gray*, 37 Cal. 4th 168, 189, 118 P.3d 496, 511, 33 Cal. Rptr. 3d 451, 468-69 (2005) (noting *Miller-El II* did not consider whether appellate court must conduct a comparative juror analysis in first instance, when objector failed to make prima facie showing of discrimination, or whether appellate court must conduct a comparative juror analysis for first time on appeal, when objector failed to do so at trial). The court of appeal's decision that *Batson* clearly established a requirement of comparative juror analysis for the first time on appeal misreads *Miller-El II*.

3. At one time, this point was sufficiently clear that the Ninth Circuit itself understood *Batson* as not requiring comparative juror analysis on appeal. See *Burks* v. *Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994) ("The U. S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right."). Consistent with that understanding, the Ninth Circuit's original opinion in this case found that "Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal," App. 75a-76a, and ventured that *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*), decided after the finality of respondent's judgment on appeal, had not changed this fact, *id*. 75a ("Because *Miller-El [I]* did not decide anything about how to establish a prima facie case, or about how to examine a prima facie case on appeal, it cannot stand for the proposition that comparative juror analysis is required to be done for the first time on appeal.").

Now, however, the Ninth Circuit views *Batson* as "clearly establishing" that a state appellate court, in evaluating whether the defendant made out a prima facie case of racial discrimination, must consider the defendant's proffered

comparative juror analysis, by examining the voir dire questions and answers of peremptorily-challenged minority jurors against those of unchallenged non-minority jurors. Further, in the Ninth Circuit's view, this must be done even where, as in the present case, the defendant failed to bring those matters to the attention of the trial court in the *Batson* hearing. *Batson*'s "clearly established" law on this point is triggered, according to the court of appeals, whenever the defendant lodges what the federal court characterizes after the fact as at least a minimally "plausible" objection to the challenge of a minority juror.

The Ninth Circuit is wrong. Its approach constitutes a new rule in violation of *Teague* v. *Lane*, 489 U.S. 288.[5/] Moreover, under AEDPA, no clearly established rule exists where the relevant precedents by this Court "exhibit a lack of clarity," *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003), or are "at best, ambiguous," *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003), or require a habeas court to "extend a rationale before it can apply to the facts at hand," *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004). The fact that the Ninth Circuit in this case originally found nothing in *Batson* compelling comparative juror analysis for the first time on appeal, then rested its ultimate judgment upon the purported "clarification" it gleaned from *Miller-El II*, a decision coming five years after the California courts completed review of respondent's *Batson* claim, pointedly illustrates that comparative juror analysis for the first time on appeal was not a rule clearly established in *Batson*.

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5. Respondent's judgment became final for purposes of retroactivity analysis on June 1, 2000. See *Beard* v. *Banks*, 542 U.S. 406, 411 (2004).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 23, 2007

Respectfully submitted,

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