No. 06-1032

IN THE
Supreme Court of the United States

ANTHONY C. NEWLAND,
Petitioner,

v.

MOBASSA BOYD,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Mark D. Eibert
Counsel of Record
P.O. Box 1126
Half Moon Bay, CA 94019
(650) 638-2380

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes and Rules:

Other Authorities:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(d) 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—
>
> (1) 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner seeks review of a decision ordering it to provide a voir dire transcript to an indigent state prisoner, so that the prisoner may pursue in federal district court his plausible claim that the prosecution engaged in racial discrimination in selecting the jury that tried and convicted him of being a felon in possession of a firearm.

1. In 1998, the State of California charged respondent Mobassa Boyd, an African-American, with unlawful

possession of a sawed-off shotgun, having previously been convicted of a felony as a juvenile. During jury selection, the prosecutor peremptorily challenged African-American juror Shirley Brown. The voir dire of Ms. Brown was entirely unexceptional and entirely consistent with the conclusion that she would be an impartial juror. Ms. Brown worked as a coordinator for a federally funded home energy assistance program. Prior to working at that job, Ms. Brown had worked for the City of Oakland for 25 years in the Department of Aging. She is a widow with four adult daughters and seven grandchildren. One of her daughters is a computer programmer at the Lawrence Livermore National Laboratory, another works for a military sealift, the third is a homemaker, and the fourth is a sales representative for Pepsi.

Ms. Brown was personally acquainted with a San Leandro police officer. She said that she believed that the criminal justice system was "fair in some cases; depends on the case." But she had not had any personal experiences with the criminal justice system that she perceived as unfair. Ms. Brown explained that depending on the circumstances, she could imagine possibly calling the police about a loved one (as had happened to Mr. Boyd in this case).

Ms. Brown had been called for jury duty four previous times, but she had never sat on a jury. She had no difficulty with any of the legal principles that the judge described to her, nor did she have any difficulty with the circumstances of this particular case. She stated that she would like to serve as a juror and believed that she could be a fair juror.

After the prosecutor used a peremptory challenge to excuse Ms. Brown, defense counsel objected under *People v. Wheeler*, 22 Cal. 3d 258 (Cal. 1978), which under California law constitutes a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), *see* Pet. for Cert. 3. He argued:

> I have taken a look at the panel. It looks like we may have only two more African-American jurors in the panel in 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 I could glean in the responses of Ms. Brown during the course of her voir dire examination by the court or by [the prosecutor] 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.

Pet. App. 9a. The trial court held that "the showing falls short of showing a prima facie case," and overruled the objection.

The petition for certiorari asserts that respondent's trial counsel made no further objection under *Batson*, that he failed to document for the record the final composition of the jury panel, and that he never compared—by means of an argument to the trial court—the voir dire of Ms. Brown to that of any other jurors whom the prosecutor accepted on the jury. But because the State has never produced a transcript of any part of the voir dire except for the specific exchange regarding Ms. Brown, the record does not show whether the State's assumptions are correct.

Respondent was convicted and sentenced to six years in prison.

2. The primary issue in the ensuing appeals was whether the State engaged in racial discrimination during jury selection. Because respondent was indigent, appointed appellate counsel asked the California Court of Appeal to augment the record with the transcript of the entire jury voir

dire. His application noted that "virtually every court in the country—both state and federal—perform[s] comparative analysis to review the propriety of a prosecutor's [peremptory] challenge." Ninth Cir. Excerpts of Record at 23 n.1. He cited cases from the Ninth Circuit and six other circuits, and from eight other states, to support the proposition that comparative juror analysis was required—and with it, a review of the entire voir dire. *Id.*

The Court of Appeal denied the application on the ground that "it fails to comply with First District Local Rule 6(d) and controlling legal authority. (*See People v. Landry*, [49 Cal. App. 4th 785, 788-793] ([Cal. Ct. App.] 1996)." Pet. App. 1a. The "controlling legal authority" the court referenced was California's then-prevailing rule that California courts—in contrast with federal courts and the courts of other states at the time—were not obligated to conduct comparative jury analyses in deciding *Batson* claims.

Respondent made three more attempts in the Court of Appeal and the California Supreme Court to augment the record with the transcript of the entire voir dire. The California appellate courts rebuffed each of these requests.

Ultimately, the California Court of Appeal affirmed respondent's conviction, stating that he "failed to identify with any specificity the proposed usefulness of the balance of the voir dire on appeal." Pet. App. 13a n.3. The California Supreme Court denied review without comment. Pet. App. 16a.

3. Respondent then filed a petition for habeas corpus under 28 U.S.C. § 2254, arguing in part that the California courts' resolution of his *Batson* claim contravened this Court's clearly established law. The U.S. District Court for the Northern District of California denied the petition. Pet. App. 17a.

4. The Ninth Circuit initially issued an opinion affirming the district court's denial of habeas relief. Although the Ninth Circuit had long held that a comparative juror analyses was "a well-established tool" for reviewing *Batson* claims, *McClain v. Prunty*, 217 F.3d 1209, 1220-21 (9th Cir. 2000) (quoting *Turner v. Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997))—even when undertaken for the first time on appeal, *United States v. Alanis*, 335 F.3d 965, 969 & n.5 (9th Cir. 2003)—it reasoned that this Court's decisions had not "clearly establish[ed]" that appellate courts were required to consider such analyses when presented to them. Pet. App. 75a.

While respondent's petition for rehearing was pending, this Court decided *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"). There, this Court granted habeas relief to a Texas prisoner on the basis of a *Batson* violation. This Court did so in large part based on a thorough comparative juror analysis. *Id.* at 240-52.

In light of *Miller-El II*, the Ninth Circuit granted rehearing and revised its earlier disposition. The Ninth Circuit explained that *Miller-El II* made clear that "under the clearly established Supreme Court precedent of *Batson*," which had been decided over a decade before the voir dire in respondent's case, "comparative juror analysis is an important tool that courts should utilize on appeal when assessing a defendant's plausible *Batson* claim." Pet. App. 126a. That being so, the Ninth Circuit also concluded 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. . . . . [I]n light of Petitioner's plausible *Batson* claim, the California appellate courts' denial of Petitioner's request for a complete voir dire transcript and a full juror analysis of the venire

> unreasonably applied clearly established federal law.

Pet. App. 126a-27a, 129a. Because this Court in *Miller-El II* relied upon a comparative juror analysis that it did not dispute was offered for the first time in federal habeas proceedings, *see* 545 U.S. at 241 n.2., the Ninth Circuit deemed it irrelevant whether respondent had presented a comparative juror analysis to the state trial court in this case. Pet. App. 123a.

The Ninth Circuit, however, did not grant respondent outright habeas relief. Instead, it remanded the case and directed the State to provide respondent, "without charge, a complete voir dire transcript within a reasonable period of time, after which [respondent] may renew his *Batson* claim in the district court." Pet. App. 132a. Only if the State fails to do so, or if respondent ultimately prevails on the merits of his *Batson* claim, will respondent be entitled to receive habeas relief. *Id.* 131a-32a.

5. Rather than continuing this litigation on remand, the State (through the warden-petitioner) filed the instant petition for certiorari.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because the Court of Appeals' decision is nothing more than a straightforward application of this Court's holding in *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), that federal habeas petitioners may use comparative juror analyses to support *Batson* claims, even if they did not specifically present such analyses at trial. Contrary to the State's assertions, the Court of Appeals' decision conflicts neither with any decision of the California Supreme Court nor with decisions of the Eleventh Circuit. Nor is the question petitioner presents one of exceptional importance. And even

if all of these deficiencies could be set aside, the interlocutory posture of this case right now renders it a poor vehicle for review in any event.

A. The Decision of the Court of Appeals is Correct

The Ninth Circuit held that because respondent has advanced a plausible *Batson* claim, the State must provide him with a full, free, voir dire transcript so that he may present a comparative juror analysis, even if he did not specifically present such an analysis to the state trial court. The State asserts that this holding is incorrect for two reasons: (1) courts reviewing denials of *Batson* challenges need not perform comparative juror analyses when the defendants did not specifically present such analyses at trial; and (2) even if reviewing courts now must undertake such analyses, this legal requirement was not clearly established at the time of respondent's state court proceedings. Neither of these arguments has merit.

1. The Court of Appeals correctly held that when a defendant advances a plausible *Batson* claim, a state appellate court must allow the defendant to present a comparative juror analysis on appeal, even if the defendant did not specifically present such an analysis at trial. This Court held in *Batson* itself that in deciding whether a defendant has established a *prima facie* case of purposeful racial discrimination in the striking of potential jurors, a court must consider the "totality of the relevant facts" and "all relevant circumstances." *Batson v. Kentucky*, 476 U.S. 79, 94, 96 (1986); *see also Hernandez v. New York*, 500 U.S. 352, 363 (1991) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .") (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). A comparative juror analysis is clearly "relevant" to determining whether a prosecutor struck a panelist on account of race. Pet. App. 121a. If a "reason for striking a black panelist applies just as well to an otherwise similar non-black who is permitted to

serve, that is evidence tending to prove purposeful discrimination . . . ." *Miller-El II*, 545 U.S. at 241.

Petitioner does not seriously dispute that comparative juror analyses are "relevant" to whether *Batson* violations have occurred. Rather, petitioner advances the narrower, procedural argument that when a defendant appeals the denial of a *Batson* challenge, a court need not conduct a comparative juror analysis for the first time on appeal.[1] But this argument, too, is foreclosed by *Miller-El II*. There, the State and the dissenting Justices in this Court argued that Miller-El was not entitled to present a comprehensive comparative juror analysis in support of his *Batson* claim because he "never presented [one] to the state courts." *Miller-El II*, 545 U.S. at

[1] The State bases this argument entirely on equal protection principles supposedly enunciated in "[t]his Court's *Batson* jurisprudence." Pet. for Cert. 8; *see also id.* 12-16. The State does *not* contend that respondent's failure to present such an analysis at trial constitutes a "procedural default." Nor could it. A federal habeas court can find procedural default only when a defendant failed to abide by a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). At the time of respondent's trial, there was no firmly established or regularly followed California law with respect to when a defendant had to present a comparative juror analysis—or, indeed, with respect to whether a defendant even had a right to present one at all. *Compare People v. Arias*, 13 Cal. 4th 92, 136 n.16 (Cal. 1996) (refusing to conduct comparative juror analysis on appeal and stating that even a trial court "has no obligation to perform such an analysis"); *People v. Montiel*, 5 Cal. 4th 877, 907-09 (Cal. 1993) (refusing to conduct comparative juror analysis on appeal even though trial court had performed one), *with People v. Bittaker*, 48 Cal. 3d 1046, 1091-92 & n.27 (Cal. 1989) (conducting comparative juror analysis on appeal even though trial court had not conducted one). The California Supreme Court never suggested before *People v. Johnson*, 30 Cal. 4th 1302 (Cal. 2003), *reversed*, 545 U.S. 162 (2005)—seven years after respondent's trial—that defendants had to present comparative juror analyses to trial courts in order to be able to rely on such theories on appeal. And even *Johnson* itself rested entirely on purported federal *Batson* principles, not state procedural law.

279 (Thomas, J., dissenting); *see also* Transcript of Oral Argument at 33 (State's attorney complaining that "arguments regarding disparate questioning were never raised until Federal habeas corpus proceedings"). This Court, however, squarely rejected this argument—not, as petitioner here erroneously suggests (Pet. for Cert. 14), by responding that Miller-El actually did present a comparative juror analysis to the trial court, but rather by holding that it *did not matter* whether he did.[2]

This Court explained that the State's and the dissent's procedural argument improperly "conflates the difference between *evidence* that must be presented to the state courts to be considered by federal courts in habeas proceedings and *theories about that evidence*." 545 U.S. at 241 n.2 (emphasis added). When a defendant raises a *Batson* objection, the voir dire itself is the evidence that must be presented to a state court; a comparative juror analysis is simply a theory based on that evidence. And "[o]nce a federal claim is properly presented, a party can make any argument [on appeal] in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *Accord Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 421 (8th ed. 2002).

Allowing defendants who are appealing denials of properly preserved *Batson* objections to elaborate or present comparative juror analyses for the first time on appeal is a particularly sensible application of the evidence/theory dichotomy. Trial judges are active participants in voir dire,

---

[2] In any event, contrary to petitioner's suggestion, a careful review of the state trial court transcript reveals that the State and this Court's dissenting Justices were correct that Miller-El did not present a comparative juror analysis to the state trial court. *See Miller-El II* J.A. Vol II 837-72.

and they pay close attention to panelists' remarks and to attorneys' proffered reasons for accepting or excusing panelists. It therefore is safe to assume that trial judges presented with *Batson* challenges implicitly perform comparative juror analyses even if not specifically requested to do so, and even if not specifically memorialized in the record. Furthermore, a prosecutor's questions and exercise of peremptory challenges may not reveal a pattern of discrimination until late in the jury selection process, so it would often be impractical to require a defendant to present a comparative juror analysis at the time he raises a *Batson* objection. *See Miller-El II*, 545 U.S. at 248-49 (examining prosecutor's actions both before and after initial *Batson* objection).

2. Petitioner's argument that *Miller-El II*'s holding constitutes a "new rule" and thus cannot support respondent's claim for federal habeas relief likewise lacks merit. *Batson* has *always required* comparative juror analyses. This Court's opinion in that case explained that "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider *all* relevant circumstances." 476 U.S. at 96 (emphasis added). And this Court expressly advised that "the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support . . . an inference of discriminatory purpose." *Id.* at 97. A comparative juror analysis is nothing more than a comparison of the prosecutor's questions and statements respecting black jurors with those respecting jurors of other races.

Lest there be any doubt that nothing in *Miller-El II* poses retroactivity concerns, *Miller-El II* itself was a habeas case in which this Court granted relief based in part on a comparative juror analysis that the state prisoner had not presented to the state courts. As the Ninth Circuit has recognized, therefore, this Court's comparative juror analysis in *Miller-El II* confirms, by definition, that the principles set

forth in that case were clearly established Supreme Court law for the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 "at least by the time of the last reasoned state court decision in *Miller-El [II]*, handed down in 1992." *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc); *accord* Pet. App. 120a.

B. The Court of Appeals' Decision Does Not Conflict with the Law in Any Other Jurisdiction.

Petitioner asserts that the Ninth Circuit's decision conflicts with decisions from the California Supreme Court and the Eleventh Circuit. In truth, however, it conflicts with neither.

1. The Ninth Circuit amended its decision in this case because it concluded that its initial holding—that Supreme Court precedent does not clearly establish that defendants are entitled to present comparative juror analyses in support of *Batson* claims for the first time on appeal—was untenable once this Court issued its decision in *Miller-El II*. *See* Pet. App. 75a-76a, 112a. The California Supreme Court, however, has not addressed the question whether, in light of *Miller-El II*, defendants are entitled to present comparative juror analyses in support of *Batson* claims for the first time on appeal.

The State nevertheless asserts that the Ninth Circuit's decision here conflicts with the California Supreme Court's decision in *People v. Johnson*, 30 Cal. 4th 1302 (Cal. 2003), *rev'd*, 545 U.S. 162 (2005). The California Supreme Court held in *Johnson*, among other things, that an appellate court need not conduct a comparative juror analysis when the defendant did not specifically present such an analysis to the trial court. But even assuming that this holding survived this Court's reversal of the California Supreme Court's resolution of the *Batson* claim there, *Johnson* was decided two years

before *Miller-El II*, in which this Court explicitly endorsed the approach taken by the Ninth Circuit here. *See* 545 U.S. at 241 n.2.

The California Supreme Court is now expressly considering whether *Miller-El II* requires appellate courts to be more receptive to comparative juror analyses than it was in *Johnson*. In January, the California Supreme Court granted review of the California Court of Appeal's decision in *People v. Lenix*, No. F048115, 2006 WL 2925354 (Cal Ct. App. Oct. 13, 2006), *review granted*, (Cal. Jan. 24, 2007), which, according to the California Supreme Court's website, presents the following issue: "Must an appellate court perform a comparative juror analysis for the first time on appeal to evaluate the genuineness of the prosecutor's reasons for peremptorily challenging prospective jurors?" *People v. Lenix*, No. S148029, (Cal. 2007), http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=447857&doc_no=S148029.

There is every reason to believe that the California Supreme Court in *Lenix* will realize—just as the Ninth Circuit did in this case (Pet. App. 123a)—that *Johnson* is not good law in light of *Miller-El II*. The *Johnson* court justified its holding partly on the ground that it was "hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." *Johnson*, 30 Cal. 4th at 1325. This Court's systematic review of the prosecution's treatment of black and white panelists in *Miller-El II*, however, makes clear that such analysis can reveal "powerful" evidence of discrimination, even when conducted for the first time on appeal. *Miller-El II*, 545 U.S. at 241.[3]

[3] Nothing in the California Supreme Court's decision in *People v. Bell*, ___ Cal. 4th, ___, 151 P.3d 292 (Cal. 2007), suggests a contrary result in *Lenix* or a case like this one. *Bell* held that *Miller-El II* does not require

There is no reason for this Court to pretermit this issue's full percolation in the California Supreme Court. Contrary to petitioner's suggestion (Pet. for Cert. 10), there is not any risk while *Lenix* is pending that California appellate courts will rely on *Johnson* to refuse to conduct a comparative juror analysis for the first time on appeal. Since *Miller-El II*, the California Supreme Court has been "assuming without deciding" that it must perform a comparative juror analysis, even if the defendant did not argue that theory to the trial court. *People v. Guerra*, 37 Cal. 4th 1067, 1103 (Cal. 2006), *cert. denied*, 127 S. Ct. 1149 (2007); *accord People v. Avila*, 38 Cal. 4th 491, 545-47 (Cal. 2006), *cert. denied*, 127 S. Ct. ____ (Mar. 26, 2007). If a California Court of Appeal decision over the next several months somehow refuses to conduct a proper comparative juror analysis, the California Supreme Court could simply "hold" that case pending its forthcoming decision in *Lenix*.

2. Nor has the Eleventh Circuit addressed whether an appellate court on direct review must conduct a comparative juror analysis if a defendant presses such a theory in support of a plausible *Batson* claim after failing to do so at trial. The Eleventh Circuit, instead, has held only that a federal court hearing a habeas petition may not conduct a comparative juror analysis when the defendant did not attempt to present such a theory to *any* state court on direct review. *See*

---

an appellate court to conduct a comparative juror analysis "when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons." *Id.* at 305. In this case, however, the state appellate court did "hypothesize[] . . . possible reasons" for the prosecutor's strikes, so a comparative analysis is eminently possible. *See* Pet. App. 12a ("Brown's responses to several of the prosecutor's questions suggest that legitimate reasons may exist for the exercise of the peremptory challenge. For example, contained within this record are the prosecutor's comments that Brown sounded hesitant in responding to the question of whether missing work would be a distraction . . . .").

Hightower v. Terry, 459 F.3d 1067, 1070-72 (11th Cir. 2006) (habeas petitioner "could have made [a comparative juror argument] in the Georgia Supreme Court but did not"; petitioner "added" this argument to his *Batson* challenge for the first time in federal district court), *pet'n for cert. filed* (No. 06-1209) (Feb. 8, 2007); *Atwater v. Crosby*, 451 F.3d 799, 807 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 951 (2007) (defendant "presented comparative evidence of discrimination to the post-conviction courts and in his petition for habeas relief" but not to state trial court).[4]

Whether an appellate court must allow a defendant to present a comparative juror analysis on direct review is a different question than whether a federal court must allow a state prisoner to present one for the first time in a federal habeas proceeding. The former principle is nothing more than an unremarkable application of the well-established rule that litigants may advance new theories on appeal in support of claims they raised at trial. *See supra* at 9.[5]

In contrast, the Eleventh Circuit's holdings in *Hightower* and *Atwater* are grounded in the heightened federalism concerns that arise when a state prisoner seeks federal habeas relief on a basis he never even attempted to present to *any* state court. As the Eleventh Circuit has

---

[4] Although the Eleventh Circuit did not explicitly say whether Atwater presented a comparative juror theory to the Florida appellate courts, a review of the Florida Supreme Court's opinion makes clear that he failed to do so. *See Atwater v. State*, 626 So.2d 1325, 1327 (Fla. 1993) (rejecting *Batson* claim on direct review and not mentioning any comparative juror argument).

[5] The Missouri Supreme Court reached the same conclusion in *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006), *cert. denied*, 127 S. Ct. 666 (2006). There, the Missouri Supreme Court conducted a comparative juror analysis even though the defendant had not argued that theory to the trial court. The State sought certiorari on the ground that this was procedurally improper, but this Court denied the petition.

explained, "[t]he Rules Governing Section 2254 Cases in the United States District Courts . . . limit[] the district court's examination of the state high court's decision to what was before the state high court." *Hightower*, 459 F.3d at 1071 n.7. In the Eleventh Circuit's view, this rule requires federal courts to "ignore[]" specific "argument[s]" supporting legal claims—here, comparative juror theories supporting *Batson* claims—that were not made to any state appellate court. *Id.* at 1071 & n.7; *see also Atwater*, 451 F.3d at 807 ("[G]iven the great deference afforded the determinations of state courts under § 2254," a federal court may not consider a comparative juror theory when "[n]o . . . effort" was made to present such a theory in state court.).

Even if the Eleventh Circuit's decisions were in some tension with the Ninth Circuit's here, it would not justify granting certiorari in this case. The Ninth Circuit's decision rests upon *Miller-El II*'s express distinction between "evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Miller-El II*, 545 U.S. at 241 n.2, *cited in* Pet. App. 123a. The Eleventh Circuit, however, has not even addressed this aspect of *Miller-El II.* Further percolation will allow the Eleventh Circuit an opportunity to consider this critical (and controlling) aspect of *Miller-El II*, or at least an opportunity to explain how it reconciles footnote two in *Miller-El II* with its reading of § 2254 and its implementing rules.

C. Petitioner's Question Presented Is Not Important Enough to Warrant This Court's Attention

Certiorari also should be denied because the question presented can affect the ultimate outcome in few, if any, cases. The Ninth Circuit's decision here requires only that the State give indigent habeas petitioners who raise plausible *Batson* claims complete transcripts of the voir dire. But

indigent defendants in all of the nineteen divisions of the California Court of Appeal besides the one that handled this case—and, as far as we know, in all other states—already have the ability to get complete voir dire transcripts on direct appeal whenever a *Batson* challenge was made at trial.[6] Thus, the immediate effect of the Ninth Circuit's ruling is only to compel the State of California to provide transcripts to those few indigent prisoners from one part of the State whose properly raised *Batson* claims depend on transcripts that they could not otherwise obtain from the California Court of Appeal prior to *Miller-El II*.

Even if one views the Ninth Circuit's holding more broadly as allowing prisoners across the state who properly raised *Batson* claims but failed specifically to present

[6] The Second District of the California Court of Appeal, for instance, which is located in Los Angeles and contains eight divisions of that court, has long provided full reporter's transcripts of voir dire "whenever a motion regarding the composition of the jury or jury panel (for example, a motion under *People v. Wheeler* (1978) 22 Cal.3d 258) . . . was made during the jury voir dire and decided in whole or in part adversely to the defendant." Cal. Ct. App. Second Dist., Local Rule 1(1). Other divisions, even within the district that handled respondent's direct appeal, informally have followed the same practice since before *Miller-El II*. *See* Brief of California Appellate Defense Counsel as Amicus Curiae Supporting Appellant's Petition for Rehearing and Suggestion of Rehearing En Banc at 4-5 & App. A, *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006) (brief filed Feb. 2, 2005) (collecting cases). By contrast, Division Five of the First District of the Court of Appeal, in 1996, interpreted that District's local rules, which generally require motions to augment the record to establish with "some certainty" how the requested material may be useful on appeal, Cal. Ct. App., First Dist., Local Rule 6(d), to prohibit providing free transcripts of entire voir dires on the ground that comparative juror theories are "simply not cognizable on appeal." *People v. Landry*. 49 Cal. App. 4th 785, 792 (Cal. Ct. App. 1996). Several years ago, Division Five itself indicated displeasure with *Landry*, explaining that "the only manner by which . . . counsel can . . . prepare the appeal is by review of the trial record." *People v. Shambatuyev*, 50 Cal. App. 4th 267, 273 (Cal. Ct. App. 1996). It has not yet returned to the subject in the wake of *Johnson* or *Miller-El II*.

comparative juror analyses at trial to present such theories to federal habeas courts, the import of this holding is quite limited. The most important issue in any habeas case is whether the state prisoner at issue gets relief, thereby requiring the state to retry him. Yet, at most, all the Ninth Circuit's holding does is allow prisoners who made *Batson* objections at trial to offer an additional theory to federal habeas courts in support of their challenges to state courts' resolutions of those objections. This holding does not entitle anyone to habeas relief. That is, it does not affect the outcome of any cases in which prisoners cannot clearly show that the State dismissed jurors on the basis of their race—surely a small category. Nor does the Ninth Circuit's ruling even affect the outcome of cases in which prisoners would have been able to show clear *Batson* violations without comparative juror analyses. So while the State may now have to defend against an extra legal theory in a handful of cases that spilled over into federal court before this Court decided *Miller-El II* and the California Supreme Court granted review in *Lenix*, the extra burden of doing so is extremely slight.

D. This Case is a Poor Vehicle for Addressing The Question Presented

Even if the State's petition did present an issue worthy of this Court's consideration, this case would be a poor vehicle for addressing it. This Court prefers awaiting a final judgment before exercising certiorari jurisdiction. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893). Yet this case comes to this Court in an interlocutory posture and contains an underdeveloped record. These deficiencies present two significant problems, each of which reinforces the advisability of allowing this case to continue proceeding in the lower courts.

1. Further proceedings may make the question presented legally irrelevant. The Court of Appeals held only that the State must "provide[] to [respondent], without charge, a complete voir dire transcript within a reasonable period of time, after which he may renew his *Batson* claim in the district court." Pet. App. 132a. After the state augments the record with the complete vior dire transcript, petitioner may defeat respondent's *Batson* claim on the merits. If it does, then the question presented here makes no difference to the outcome of the case.[7] On the other hand, if petitioner loses on the merits in part due to a comparative juror analysis, and if the Ninth Circuit affirms, the State will be free to seek certiorari at that time on the basis of the fully developed record. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916).

2. Further proceedings may also reveal that the question presented is not even at issue on the facts of this case. Petitioner asks this Court to decide whether an appellate court must conduct a comparative juror analysis if the defendant did not argue that theory to the trial court. But because the record does not yet contain a full transcript of the voir dire, it simply does not show whether respondent's trial counsel presented some form of comparative juror analysis to the trial

[7] If for some reason the State does not provide a transcript to respondent on remand, then resolving the question presented will not affect the outcome of this case either. The Ninth Circuit held that the State had to provide respondent with a complete voir dire transcript for two independent reasons: (1) so that he could present a comparative juror analysis; and (2) so that the federal courts could engage in a statistical comparison between the number of minority prospective jurors stricken and the number of non-minority jurors stricken. Pet. App. 122a; *see also Miller-El II*, 545 U.S. 240-41 (considering latter theory); *see also Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000) (reviewing the statistical evidence of the number of African-American potential jurors struck compared to the racial makeup of the other potential jurors who were struck and of the pool at large). Petitioner does not challenge the latter holding.

court at some point *after* his initial *Batson* objection. If respondent's trial counsel (who is not the same person as respondent's current counsel) did argue a theory of comparative juror analysis to the trial court, then petitioner's procedural argument simply is not presented on the facts of this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Mark D. Eibert
Counsel of Record
P.O. Box 1126
Half Moon Bay, CA 94019
(650) 638-2380

March 2007