No.

In the Supreme Court of the United States

MATTHEW CATE, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner,*

v.

MOHAMMED HAROON ALI, *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

On federal habeas review of a claim pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986), did the Ninth Circuit fail to comply with the deferential standard of review required by 28 U.S.C. § 2254 when it disregarded the trial court's factual finding that the prosecutor's reasons for exercising peremptory challenges were genuine, in favor of its own de novo comparative juror analysis?

LIST OF PARTIES

Director Matthew Cate of the California Department of Corrections and Rehabilitation succeeded the respondent in the federal district court and court of appeals, Roderick Q. Hickman, who has retired.

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Matthew Cate, Director of the California Department of Corrections and Rehabilitation, 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 amended opinion of the court of appeals (Pet. App. 1), reversing the district court's denial of respondent's petition for writ of habeas corpus, is reported at 584 F.3d 1174 (9th Cir. 2009).

The orders and opinions of the United States District Court for the Northern District of California (Pet. App. 42), the California Court of Appeal (Pet. App. 94), and the California Supreme Court (Pet. App. 115), are unreported.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was filed on July 7, 2009. The court of appeals amended the opinion and denied petitioner's timely-filed petition for panel rehearing and rehearing en banc on October 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section One of the Fourteenth Amendment of the United States Constitution states, in pertinent 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 . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and

Effective Death Penalty Act (AEDPA), provides in part:

> (d) 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.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In 1999, respondent—a probationer and native of Fiji facing deportation for a prior kidnapping conviction—strangled his girlfriend, Tracey Biletnikoff, after she refused to lend him her car so that he could obtain drugs. Respondent dumped her body on a hillside, fled to Mexico, and later was apprehended trying to reenter this country. He initially denied killing the victim, but subsequently confessed. Pet. App. 95-100.

2. During jury selection at respondent's trial for first-degree murder in 2001, his defense counsel

objected, pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the prosecutor's peremptory challenges of two black venire members: M.C., a female public school employee, and D.J., a male software designer. The trial court found no prima facie showing of racial discrimination when the prosecutor challenged M.C., but asked the prosecutor to justify the two strikes after D.J. was challenged late in the four-day jury selection process. SER 530, 789.[1]

The prosecutor gave three reasons for challenging M.C. First, the prosecutor explained that M.C.'s family had been involved in the criminal justice system as a result of her stepson's prosecution for molesting her daughter, and that she equivocated about whether that involvement would affect her judgment. SER 790. In jury voir dire, when the trial court asked M.C. how "that incident and all of its ramifications, going to court and all of that, might influence you in this case," M.C. had replied, "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would." SER 252. Subsequently, the trial court asked, "Would there be any lasting effect on either the defense or the prosecution in this case as a result of your experiences or knowledge about that?" M.C. replied, "No." SER 253. The prosecutor later asked M.C. whether "that prior experience would play into your decision-making process today," and she replied, "I'm not sure. The thoughts are there, the memories are there. But it's been a while, and the person that I reference is no longer—is now deceased. So I don't think that it would." SER 455.

Second, the prosecutor cited M.C.'s voir dire answers and her "very emphatic" demeanor suggesting that her judgment would be affected if, in her opinion, the attorneys were not sufficiently professional and respectful during trial. SER 790-791. During voir dire, defense counsel had asked M.C. how she would feel if he aggressively cross-

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[1] "SER" refers to the Supplemental Excerpt of Record filed by petitioner in the court of appeals.

examined witnesses. M.C. replied, "Well, I believe that as long as you don't cross the line of being disrespectful and still keep it in a professional manner." She agreed with defense counsel that she would not penalize the attorneys for aggressive advocacy, "as long as [they] do it in a respectful, professional manner." SER 399-400. She also agreed with the prosecutor that it was "important" to her that the attorneys conduct themselves in a professional and respectful manner. SER 456.

Third, the prosecutor cited M.C.'s hesitation in answering whether her religion would make it hard for her to sit in judgment of others. SER 791-792. When asked during voir dire if anything about her spiritual practice would prevent her from judging other people, M.C. had said no—but defense counsel then pointed out to her that she had hesitated before answering and, accordingly, questioned her further before receiving a final response. SER 400.

The prosecutor explained that the "combination of these factors gave me good reasons to be concerned about her ability to fairly and impartially do it, and I exercised a peremptory challenge for that reason and for that reason alone." SER 792.

Next, the prosecutor gave four reasons for challenging D.J. The juror indicated that he would be unable to avoid making decisions about the case until the end of trial. He answered a voir dire question in a flippant way that provoked laughter at the prosecutor's expense. He had assisted his brother, an appellate defense attorney, in preparing for argument before the Supreme Court in two criminal cases. And his "lighthearted banter" with the trial court "reflected a casualness that was not typical of jurors." The prosecutor said he had initially thought D.J. would be an excellent juror, but "[t]hat combination of things caused me to change my mind. Race had nothing to do with either of these things." SER 792-797.

The trial court repeatedly questioned the prosecutor during his recitation of reasons for the peremptory challenges. SER 790, 793, 794, 795, 796, 797. The court allowed defense counsel to respond

and also questioned defense counsel. SER 799, 800. Defense counsel never suggested that the prosecutor's challenges were suspicious because M.C. or D.J. were similar to any identified non-minority venire person whom the prosecutor had refrained from challenging. Nor did counsel ask the court to identify any such jurors itself for such comparison purposes. SER 797-801, 809-810. The prosecutor noted that the question was not whether his reaction to the jurors' comments was wrong or right, "as long as that is the basis for my decision, whether it makes sense or not. The question is, [a]m I not being candid with the Court in saying those are my decisions?" SER 801.

The court took the matter under submission. Overnight the court asked the court reporter to prepare a transcript of the prosecutor's interchange with D.J., and the court also reviewed M.C.'s and D.J.'s juror questionnaires and hardship requests. The next day, the court denied the *Batson* motion. It recognized the right of both parties to exercise peremptory challenges against jurors whom they "honestly" feel cannot be fair and impartial. The court also noted that the prosecutor had excused a white prospective juror who, like D.J., was arguably too "independent minded." SER 809-812.

The jury convicted respondent of first degree murder, rejecting his defense that he killed without premeditation and in the heat of passion. The court sentenced respondent to prison for 55 years to life. Pet. App. 94.

3. The California Court of Appeal rejected respondent's *Batson* challenge, and other claims of error, on direct appeal and habeas corpus. Invoking *Miller-El* v. *Cockrell*, 537 U.S. 322, 338-39 (2003), the appellate court undertook an examination of the "persuasiveness of the prosecutor's justifications," which "largely turns on an evaluation of whether the prosecutor's facially race-neutral justifications are credible." Pet. App. 107-108. Citing *Batson*, 476 U.S. at 98 n. 21, *Miller-El I*, 537 U.S. at 339-40, and *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991), the appellate court noted that the trial court's factual

finding of the absence of discriminatory intent was entitled to great deference. Pet. App. 108. Pointing out that the trial court had "closely questioned the prosecutor and weighed the proffered explanations under correct standards," the appellate court found that substantial evidence supported the trial court's finding of no discriminatory intent by the prosecutor, and that the "jury selection process was not marred by purposeful discrimination." Pet. App. 104.

The state appellate court rejected respondent's argument that M.C.'s later less-equivocal statements overcame the inference the prosecutor had drawn from her hesitance in answering whether her religious beliefs and her prior contact with the criminal justice system would influence her as a juror. The court observed that "attorneys are entitled to exercise peremptory challenges based upon a prospective juror's first, unguarded responses to questioning, and discriminatory intent cannot be inferred from an attorney's reluctance to credit later responses." Pet. App. 110. As to D.J., the appellate court concluded that the prosecutor could fairly consider a prospective juror's attitude and intellectual proclivities in exercising a peremptory challenge, and noted that the prosecutor excused a white prospective juror who, like D.J., appeared well qualified but was also "independent minded." Pet. App. 110.

The appellate court declined to conduct further "comparative analysis" of jurors challenged by the prosecutor versus those not challenged by him, because state law precluded a reviewing court from attempting such analysis for the first time on appeal, and because respondent's counsel had made only general references to other jurors at the *Batson* hearing. Pet. App. 110 n. 6 (citing *People* v. *Johnson*, 30 Cal. 4th 1302, 1325, 71 P.3d 270, 285 (2003)). In 2004, the California Supreme Court denied further review. Pet. App. 115.

4. In 2005, respondent filed a federal habeas corpus petition under 28 U.S.C. § 2254. In an order filed in 2007, Judge Phyllis J. Hamilton decided that, pursuant to *Kesser* v. *Cambra*, 465 F.3d 351 (9th Cir.

2006) (en banc), California's rule that comparative juror analysis need not be undertaken for the first time on appeal was unreasonable under *Miller-El* v. *Dretke*, 545 U.S. 231 (2005). *Kesser* had deemed comparative juror analysis to be "clearly established Federal law"under § 2254(d) as of 1992 because *Miller-El II* had employed such an analysis in a habeas case in which the underlying state judgment had become final that year. Pet. App. 55-63. Accordingly, the district court reviewed respondent's *Batson* claim de novo, by conducting its own comparative jury analysis. Pet. App. 63-69. That comparative analysis revealed only "minor faults" in the prosecutor's reasoning, not racial bias. Concluding that the evidence of discrimination "pales in comparison" to that in *Miller-El II* and *Kesser*, the district court denied the *Batson* claim. Pet. App. 69-70.

5. A Ninth Circuit panel reversed and ordered the writ to issue on the *Batson* claim. Stating that it was applying 28 U.S.C. § 2254(d)(2), which prescribes deferential review of state-court fact-finding, the panel opined that the state court's finding that the prosecutor had not engaged in racial discrimination in striking juror M.C. was incorrect, "objectively unreasonable," and refuted by "clear and convincing evidence" to the contrary. Pet. App. 14. The panel, similarly, found the district judge's contrary finding to be "clearly erroneous." Pet. App. 12-13 n. 6. Further—although leaving undisturbed the earlier state-court and federal-court findings that the prosecutor had acted properly in dismissing juror D.J.—the panel nonetheless reasoned that the "weak" nature of some of the prosecutor's reasons for striking D.J. supported the panel's determination that the prosecutor's asserted neutral reasons for striking M.C. were in reality mere pretexts for discrimination. Pet. App. 39-40.

The Ninth Circuit reached its conclusion primarily via its own extensive comparative analysis of challenged and unchallenged jurors. The court of appeals did not evaluate the trial court's credibility finding in its opinion. It noted only that, in denying

the *Batson* motion, "the trial court did not consider comparative evidence regarding the responses of M.C. and [D.J.] and the responses of non-African American members of the jury pool during the jury selection process." Pet. App. 8-9.

As the Ninth Circuit viewed it, the prosecutor's professed concern about M.C.'s earlier involvement with the criminal justice system, and the juror's equivocation about whether that experience would affect her judgment, were "pretextual make-weights." Pet. App. 19. The prosecutor, the court of appeals asserted, did not excuse white jurors who also had experienced domestic violence and given equivocal responses about how it might affect their impartiality. In contrast, finding the juror was insufficiently similar to M.C., the court of appeals discounted the fact that the prosecutor had struck another prospective juror whose son had molested his daughter. Pet. App. 24-25. The panel concluded, "This comparative analysis therefore leads to only one reasonable conclusion: the prosecutor's asserted concern about objectivity was not an actual reason for his decision to strike M.C., but was pretext." Pet. App. 27.

The Ninth Circuit also rejected the prosecutor's reliance on M.C.'s suggestion that a perceived lack of professionalism by the attorneys would affect her judgment. It found that M.C's "expectations were reasonable" and that she actually had not made such a statement—even though the juror had said she would not penalize the attorneys only as long as they did not, in her assessment, "cross the line of being disrespectful." The court of appeals also relied on its view that another non-minority juror had stated that he expected similar professionalism but was not challenged by the prosecutor. Pet. App. 31.

Further, the Ninth Circuit rejected the prosecutor's reliance on juror M.C.'s hesitation about whether her religion would allow her to sit in judgment. It found that M.C. did not actually say her religion would make it difficult to judge, although it did not dispute that the record supported the prosecutor's claim that she had hesitated before

answering the question. The court of appeals also found that a non-minority juror whom the prosecutor also had challenged was not comparable, and that yet another assertedly similar juror whom the prosecutor challenged had given more equivocal answers than M.C. on the issue. Pet. App. 32-36. The Ninth Circuit thus concluded that its "comparison of M.C. to other potential and actual jurors convincingly refutes each of the prosecutor's non-racial justifications for his peremptory challenge of M.C." Pet. App. 36.

Finally, recognizing that the prosecutor's concern about D.J.'s bad attitude and connection to a criminal defense attorney appeared "credible," the court of appeals stated that it might well have affirmed the judgment if D.J. had been the only black juror excused by the prosecutor. However, in light of the explanations for striking M.C., the court decided that two allegedly questionable reasons the prosecutor gave for striking D.J.—that he was concerned D.J. would not wait to decide the case until the end of trial and that D.J. was unusually casual—took on additional significance and supported its conclusion that the prosecutor's actual reason for striking M.C. was race-based. Pet. App. 40-41.

6. On October 23, 2009, the court of appeals denied panel rehearing and rehearing en banc. Pet. App. 2. On October 30, the court of appeals stayed its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's approach to *Batson* claims improperly disregards the credibility determination made by the state trial judge who witnessed the voir dire and questioned the prosecutor face to face, and instead indefensibly elevates "comparative juror analysis" of the cold written record years after trial as the primary method of assessing the prosecutor's credibility. The erroneous product of such an approach is the substitution of tendentious and debatable inferences drawn by the remote federal appellate court in place of the on-the-scene factual

determination made by the judicial officer in the best position to make the most reliable call.

This Court has made clear that the trial court's conclusion about the prosecutor's demeanor is the "best evidence" on the issue of discriminatory intent. *Snyder* v. *Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 1208 (2008). The Ninth Circuit's failure to accord any deference to the trial court's conclusion on the ultimate factual issue of the honesty of the prosecutor contravenes this Court's recognition of the preeminence of the trial court's finding on the *Batson* claim. Further, it circumvents additional restrictions, imposed by Congress, on second-guessing state court fact-finding in federal habeas corpus proceedings where finality and comity concerns count as strong additional reasons for deferring to the state court judge. See 28 U.S.C. § 2254(d)(2), (e)(1). As this Court emphasized in *Rice* v. *Collins*, 546 U.S. 333, 341-342 (2006), where it rejected the Ninth Circuit's grant of the writ on a *Batson* claim, "Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." Here, in reaching a result contrary to *Collins*, the Ninth Circit never even mentioned this Court's decision in that case.

This Court has recognized, moreover, that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial," *Snyder* v. *Louisiana*, 128 S. Ct. at 1211, and that "a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations," *Miller-El I*, 537 U.S. at 339. The particular weakness of the comparative analysis here is illustrated by the fact that the court of appeals compared challenged minority jurors to selected non-minority jurors whose voir dire did not even merit comment at the *Batson* hearing. More troubling, the Ninth Circuit's comparative analysis was based wholly on the appellate court's idiosyncratic view of who might be a similarly situated juror and what weight to assign

sometimes vague or conflicting answers of the designated similar juror. It is untenable to believe that such comparisons, mined from self-selected portions of jury voir dire years after the trial, could prove compelling enough to supplant a contrary finding, otherwise supported by the record, by the state judge who presided over the voir dire and observed the main witness face to face. It is even less tolerable that a federal habeas court may cast aside a trial court's *Batson* credibility finding on a basis as weak as that of comparative juror analysis, especially when the analysis is performed for the first time years after the fact. The grant of the writ on race-discrimination grounds in such circumstances gravely impugns the reputation of the prosecutor who never receives a fair opportunity to address the comparisons and defend himself.

The systemic problem manifested by the Ninth Circuit's opinions in cases such as *Collins* and this one may be ascribed to the Circuit's erroneous perception that a rule requiring comparative juror analysis became "clearly established Federal law," for purposes of 28 U.S.C. § 2254(d), under this Court's precedents as of 1992. According to the Ninth Circuit, post-1992 criminal judgments resting on state court fact-finding crediting the prosecutor's race-neutral explanation for jury strikes under *Batson* will be subject to dismissal as unreasonable unless the state court engaged in comparative analysis to the federal habeas court's liking. That view, however, runs afoul of this Court's strict interpretation of "clearly established Federal law" under § 2254(d). By backdating an asserted requirement of comparative juror analysis, the Ninth Circuit has established a methodology that improperly allows the federal habeas court to set itself up as the sole arbiter of the prosecutor's credibility—without ever examining the prosecutor or, for that matter, without ever seeing the prospective jurors deemed similar to the challenged minority jurors.

Here, the prosecutor offered logical race-neutral reasons, supported by the record, for his peremptory challenge of juror M.C. The trial court then went

above and beyond the requirements of *Batson* in assessing the prosecutor's credibility. It closely questioned both the prosecutor and defense counsel, and reviewed the challenged jurors' questionnaires, hardship excuses, and a transcript of the relevant voir dire. And, in fact, it compared one of the challenged jurors to a similarly situated juror, even though not requested to do so by defense counsel. It is hard to imagine how a trial court could better "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" See *Batson*, 476 U.S. at 93. The Ninth Circuit's opinion is not merely aberrant in light of the record, it is in profound conflict with AEDPA and with the *Batson* jurisprudence of this Court.

A. The Ninth Circuit Violated *Batson* And AEDPA By Substituting Its Own Inferences Drawn From "Comparative Juror Analysis" For The Trial Judge's Credibility Finding

1. This Court has repeatedly held that reviewing courts must defer to the trial court's factual finding that the prosecutor's reasons for exercising peremptory challenges were genuine. In *Batson* itself, the Court stated, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n. 21.

In *Hernandez* v. *New York*, 500 U.S. 352 (plurality opinion), the Court reaffirmed that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Id.* at 364. The Court explained:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." In

> the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Id. at 365 (citations omitted).

In *Miller-El* v. *Cockrell*, 537 U.S. 322, the Court held that "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 338-39. "Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *Id.* at 339.

Most recently, in *Snyder* v. *Louisiana*, 128 S. Ct. 1203, the Court reaffirmed that "[t]he trial court has a pivotal role in evaluating *Batson* claims." *Id.* at 1208. The Court summarized this role as follows:

> Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often

> invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to the trial court.

Id. (citations, brackets, and internal quotes omitted).

In addition, the Court has accorded particular deference to credibility findings generally. In *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985), the Court observed that factual findings based on determinations regarding the credibility of witnesses demand even greater deference than other kinds of factual findings, because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." In *Marshall* v. *Lonberger,* 459 U.S. 422, 433-34 (1983), the Court emphasized that credibility findings are especially insulated on habeas review by federal courts, which have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." See also *Concrete Pipe & Prods. of Cal. Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993) ("the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.").

2. The Ninth Circuit, however, ignored the trial court's credibility finding in this case. It is true that,

in setting forth the "*Batson* framework," the Ninth Circuit said a "finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court." Pet. App. 11 (quoting *Batson*, 476 U.S. at 98 n. 21). But no further mention of that standard appears in its 41-page opinion. Nor did the court of appeals discuss the trial court's considered conclusion that the prosecutor's justifications were genuine.[2] As this Court has repeatedly explained, the reason for this extraordinary deference is because the question involves a credibility determination and the "best evidence" of the answer is usually the prosecutor's demeanor. See *Snyder* v. *Louisiana*, 128 S. Ct. at 1208. The Ninth Circuit only paid lip service to this standard, discarding it altogether for the remainder of its analysis, in violation of the principle that the trial court's credibility determination is the "pivotal" finding at issue. See *id.*

2. The Ninth Circuit's approach also violates both general and specific principles of federal habeas review. As a general matter, this Court has made

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[2] The Ninth Circuit's sole reference to the trial court's inquiry was to note that the trial court had questioned whether D.J.'s willingness to reevaluate his position was evidence of close-mindedness, which the Ninth Circuit found supported its conclusion that this justification was "dubious." Pet. App. 38. However, the Ninth Circuit neglected to acknowledge the entire record on this point. The trial court stated, "it's natural for someone who is hearing things in piecemeal to have impressions of senses or make judgments as things go on and then change them back and forth." The prosecutor responded, "[W]hat you just said, Your Honor, may be an extremely reasonable and fair approach. Those weren't the terms he used, in my evaluation, having cause for concern about that." SER 796-797. When defense counsel subsequently asserted that he had been "impressed" by D.J.'s comments about the process for making up his mind, the trial court observed, "But you were concerned about it because you explored it some more. You didn't just hear the answer and then leave it. You continued on [] as if it were something he ought not to be doing." SER 799.

clear that the purpose of AEDPA is "to ensure that state-court convictions are given effect to the extent possible under law." *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). This "demands that state court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). The Ninth Circuit took the opposite tack in this case, combing the record eight years after trial to unearth any word or phrase that could possibly constitute grounds for finding that the prosecutor's reasons were pretextual, and then construing all such responses against the prosecutor and the finding of the trial court.[3] The Ninth Circuit's disregard of the state court proceedings cannot be reconciled with the requirement of deference to state court opinions

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[3] For example, when M.C. was asked how she would feel if defense counsel had to aggressively cross-examine witnesses, she stated, "Well, I believe that as long as you don't cross the line of being disrespectful and still keep it in a professional manner." She also agreed with defense counsel that she would not penalize the attorneys for aggressive advocacy, "as long as we do it in a respectful, professional manner." SER 399-400. In the Ninth Circuit's view, M.C. "did *not* say, as the prosecutor stated during the *Wheeler/Batson* hearing, that unprofessional conduct or aggressive cross-examination would 'affect her judgment.' [] Instead, she said the opposite—that she would *not* penalize the attorneys for aggressively advocating on behalf of their clients." Pet. App. 30-31. The Ninth Circuit therefore concluded that the prosecutor had "mischaracteriz[ed]" M.C.'s testimony, which therefore showed "evidence of discriminatory pretext." Pet. App. 31. However, it was clear that M.C. in fact had established a "line" in her own mind for what constituted sufficiently respectful advocacy, and that she would penalize the attorneys if they crossed that line. Only an antagonistic reading of the record supports a conclusion that the prosecutor deliberately misstated M.C.'s response in order to conceal a racial motivation for the peremptory challenge. See *Rice* v. *Collins*, 546 U.S. at 340 ("Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible.").

under 28 U.S.C. § 2254. Whether a trial court's third-step *Batson* determination is reviewed under 28 U.S.C. § 2254(d)(2) or (e)(1), it cannot be cast aside simply because the trial court did not conduct exacting after-the-fact comparisons of the kind available to a federal habeas court with the luxuries of time, written briefs, and complete voir dire transcripts. Rather, to warrant habeas relief, either the trial court's determination of the facts must be objectively unreasonable under (d)(2), or its presumptively correct factual finding must be rebutted by clear and convincing evidence under (e)(1).[4]

3. The Ninth Circuit's error in this case cannot be reconciled with *Rice* v. *Collins*, 546 U.S. 333. In terms that dictate why the court of appeals' decision in this case also should be reversed, this Court in *Collins* held that the Ninth Circuit's attempt to override the state court's fact finding "misappl[ied] settled rules that limit its role and authority." *Id.* at 335. The Court explained that the Ninth Circuit's "attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Id.* at 342; see *Wood v. Allen,* 2010 U.S. LEXIS 763, *20 (Jan. 20, 2010) ("a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance"). Here,

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[4] The Court has declined to address whether AEDPA review of a third-stage *Batson* claim falls under 28 U.S.C. § 2254(d)(2) or (e)(1) or both. *Collins*, 546 U.S. at 338-39; see *Miller-El II*, 545 U.S. at 240, 265-66 (holding that petitioner had shown by clear and convincing evidence that the finding of no racial discrimination was wrong, the standard under § 2254(e)(1), and also that the state court's conclusion was unreasonable, the standard under § 2254(d)(2)). The Court has treated the matter as a presumptively correct factual finding in pre-AEDPA cases. See *Purkett* v. *Elem*, 514 U.S. 765, 769 (1995) (*per curiam*); *Hernandez* v. *New York*, 500 U.S. at 366.

Ninth Circuit again has overturned a California court's *Batson* credibility finding with respect to a prosecutor whom the appellate court never saw, and did so on the flimsy basis of merely debatable inferences the panel chose to draw from an after-the-fact reading of the cold written record—including comparative analysis of voir dire by jurors whom the appellate court never saw either.

The Ninth Circuit error in this case was even more egregious than it was in *Collins*. In *Collins*, the prosecutor's stated reasons were not supported by the record in some signicant respects, and she otherwise acknowledged that she might have been seeking balance on the jury among certain groups. Here, in contrast, the prosecutor's reasons all were supported by the record, and all of them were clearly race-neutral on their face. Further, the Ninth Circuit granted *Batson*-based relief in this case without so much as mentioning this Court's controlling opinion in *Collins*.

4. Given the inherent weakness of employing comparative analysis for the first time on habeas review, it will override the trial court's factual finding and satisfy the onerous burden justifying relief under § 2254(d) only in "exceptional circumstances." *Snyder,* 128 S. Ct. at 1208 (quoting *Hernandez,* 500 U.S. at 366). Where the prosecutor's stated reasons are race-neutral, and where they are supported by the record, remote comparative analysis of a few jurors alone can hardly demonstrate that the judge's credibility call was either "objectively unreasonable" or controverted by "clear and convincing evidence." Instead, it will at most give rise to the merely "debatable" alternative inferences that this Court in *Collins* recognized are insufficient to support habeas corpus relief.

The Court made this exacting standard clear in the two cases where it found *Batson* error. In *Miller-El* v. *Dretke*, 545 U.S. 231, the prosecutor exercised a peremptory challenge against prospective juror Fields on the ground that he would impose the death penalty only if he thought the defendant could not be rehabilitated. However, Fields had unequivocally

stated that he *could* impose the death penalty regardless of the possibility of rehabilitation, and three non-black jurors who were not challenged by the prosecutor had indicated they would consider whether a defendant could be rehabilitated in making that decision. *Id.* at 243-245. The prosecutor also challenged prospective juror Warren because he said the death penalty might be "the easy way out," but three non-black jurors who were not challenged by the prosecutor expressed virtually identical views. *Id.* at 247-249. The Court observed that these comparisons showed the the prosecutor's stated reasons for the strikes were "so far at odds with the evidence that pretext is the fair conclusion." *Id.* at 265.

The Court in *Miller-El II*, moreover, also relied on additional factors that made out a compelling case of discrimination: the obviously lop-sided statistical analysis; the purposeful use of the unusual Texas procedure known as the "jury shuffle;" the prosecutors' longstanding policy and written manual recommending the exclusion of minority jurors; the fact that the prosecutors in that case recorded the race of each juror; the prosecutors' pattern of manipulative questioning of minority jurors; and the prosecutors' questions of the challenged jurors at issue. The Court held, "when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Id.* at 265.

In *Snyder* v. *Louisiana*, 128 S. Ct. 1203, a direct appeal case that was not subject to the restrictions on factual findings mandated by § 2254, the prosecutor challenged prospective juror Brooks because he was a college senior who was attempting to fulfill his student teaching requirement and might vote for a lesser guilt verdict to avoid the time required for a penalty phase. However, the prosecutor knew that the entire trial, including any penalty phase, would last only a week, and Brooks's dean had indicated he would not have a problem completing his work given that time frame. Accordingly, this Court found the proffered justification on its face "suspicious." *Id.* at

1211. In addition, after emphasizing that the record of the jurors' concerns about serving on the jury due to conflicting obligations had been thoroughly developed at trial, the Court found it "particularly striking" that the prosecutor did not excuse a white juror who was a contractor about to complete a house and whose jury service would mean that the occupants would not be able to move in that weekend as scheduled. That juror also had to take his children to and from school because his wife had just had surgery. The Court found that these obligations were "substantially more pressing" than those of Brooks. *Id.* at 1211. A second white juror who was not challenged had twice expressed concern about an important work commitment scheduled for that week at which his presence was essential. *Id.* at 1211. In light of these undeniable discrepancies, the Court concluded that the peremptory challenge was pretextual.

Miller-El II and *Snyder* illustrate that the inference of pretext as drawn from comparative juror analysis must be conspicuous, egregious, and unmistakable before it will amount to "exceptional circumstances" that trump the trial court's contemporaneous credibility finding. *Collins* stressed that merely arguable competing inferences will not suffice to supersede the trial court's finding under AEDPA. The Ninth Circuit's singular approach to *Batson* claims flouts these principles and allows the federal habeas court to conjure its own reasons for granting relief, regardless how tenuous or debatable those reasons may be.

B. No Rule Requiring Comparative Juror Analysis Was Clearly Established At The Time Of The State Court Decision

1. In reaching its erroneous result, the Ninth Circuit apparently assumed that, if the trial court "did not consider comparative evidence regarding the responses of M.C. and [D.J.] and the responses of non-African American members of the jury pool

during the jury selection process," Pet. App. 8-9, then its factual finding could be disregarded as unreasonable. The Ninth Circuit has endorsed exactly that methodology in a number of published and unpublished cases. *Kesser* v. *Cambra*, 465 F.3d at 358 ("the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine"); *Green* v. *Lamarque*, 532 F.3d 1028, 1030-31 (9th Cir. 2008) (California courts' decision was an unreasonable determination of the facts in light of the failure to undertake comparative juror analysis); see *Boyd* v. *Newland*, 467 F.3d 1139, 1147-51 (9th Cir. 2006) (because reviewing court should conduct comparative analysis, it unreasonably denied motion for full transcript of voir dire).[5]

The Ninth Circuit relied on *Kesser* v. *Cambra*, 465 F.3d at 360, see Pet. App. 14, where the en banc court reasoned:

> The Court in *Miller-El* applied comparative juror analysis to a case originally tried in 1986, remanded for a *Batson* hearing in 1988, and appealed under AEDPA in 2000. The Court's holding means that the principles

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[5] In *Cook* v. *Lamarque*, __ F.3d __, 2010 U.S. App. LEXIS 334 (9th Cir. Jan. 7, 2010), the Ninth Circuit again relied on its own comparative review of the record, although it rejected the *Batson* claim in that case. The majority purported to give some deference to the trial court's finding that the prosecutor's peremptory challenges were not racially motivated, see *id.* at *8-10, but in actuality based its decision on its own determination that the prosecutor's reasons were persuasive, *id.* at *11-41. The dissenting judge accorded no deference to the trial court's finding, stating that the state courts' failure to conduct comparative analysis rendered its conclusion "contrary to" Supreme Court law. *Id.* at *54-55 (Hawkins, J., dissenting). In *Cook*, as here, the Ninth Circuit failed to cite *Collins*, 546 U.S. 333.

> expounded in *Miller-El* were clearly established Supreme Court law for AEDPA purposes at least by the time of the last reasoned state court decision in *Miller-El*, handed down in 1992, before Kesser's 1993 trial.

Kesser, 465 F.3d at 360.

2. The Ninth Circuit's view reflects its misunderstanding of the requirement in 28 U.S.C. § 2254(d) that habeas relief must be based only on "clearly established" Supreme Court law. This refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). If reasonable jurists could differ about the meaning of the Supreme Court's decisions, the rule is not clearly established. See *id.* This Court has repeatedly reminded the Ninth Circuit that the statute must be interpreted narrowly. For example, in *Yarborough* v. *Alvarado,* 541 U.S. 652 (2004), the Ninth Circuit had faulted the state court for failing to consider a suspect's youth and inexperience in evaluating whether a reasonable person would feel free to leave for purposes of determining whether he was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1965). This Court reversed the grant of the writ because, although the *Miranda* custody test requires consideration of all objective circumstances, no Supreme Court opinion had mandated consideration of those particular factors. *Id.* at 666; accord, *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1419 (2009); *Schriro* v. *Landrigan*, 550 U.S. 465, 479 (2007); *Carey* v. *Musladin*, 549 U.S. 70, 77 (2006).

The mere fact that this Court performed comparative juror analysis in *Miller-El II* does not clearly establish that such analysis thereby became constitutionally compelled. To the contrary, the constitutional question did not arise in *Miller-El II*, because Texas, unlike California, did not bar comparative juror analysis for the first time on appeal at the time of the state court decision in that case. See *Cornish* v. *State*, 848 S.W.2d 144, 145 (Tex.

Crim. App. 1993) (citing *Young* v. *State*, 826 S.W.2d 141, 150-51 (Tex. Crim. App. 1991)); see also *Reed* v. *Quarterman*, 555 F.3d 364, 369-70 (5th Cir. 2009). Accordingly, in *Miller-El II*, this Court did not address whether comparative juror analysis was required even if state law barred such analysis for the first time on appeal. See *People* v. *Gray*, 37 Cal. 4th 168, 189, 118 P.3d 496, 511 (2005) ("*Miller-El* thus did not consider. . . whether an appellate court must conduct a comparative juror analysis for the first time on appeal, when the objector failed to do so at trial."); *Kesser* v. *Cambra*, 456 F.3d at 377 (Rymer, J., dissenting) ("In my view, appellate judges should not purport to undertake such a fact-intensive process for the first time on collateral review. As there is no clearly established law allowing—let alone requiring—us to do so in the circumstances of this case, I dissent on this footing as well."). The Court certainly did not "squarely address" that issue, a necessary ingredient for "clearly establishing" the law for AEDPA purposes. See *Wright* v. *Van Patten*, 552 U.S. 120, 125 (2008) (*per curiam*).

Kesser's reading of *Miller-El II* was further cast into doubt by *Snyder* v. *Louisiana*, 128 S. Ct. 1203. Although *Snyder* relied in part on comparative analysis, the Court expressly acknowledged the limitations of the practice when such comparisons have not been explored at trial:

> We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. In this case, however, the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause.

Snyder, 128 S. Ct. at 1211. The Court also pointed out that the Louisiana Supreme Court "did not hold that petitioner had procedurally defaulted reliance on a comparison of the African-American jurors whom the prosecution struck with white jurors whom the prosecution accepted. On the contrary, the State Supreme Court itself made such a comparison." *Id.* at 1211 n. 2.[6]

Given the procedural postures of *Miller-El II* and *Snyder*, it remains uncertain whether comparative juror analysis is required for the first time on appeal in all cases. See *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003) (only limited rule could be considered clearly established where Supreme Court's cases had "not been a model of clarity").

3. Even if *Miller-El II* can be read to clearly establish a rule compelling comparative juror analysis, it did so only as of the filing of that opinion in June 2005. This conclusion is underscored by the Ninth Circuit's own decisions. Prior to *Miller-El II*, the Ninth Circuit itself had unequivocally held that the issue had not been resolved by this Court. *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

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[6] The California Supreme Court has noted that it is unclear whether this Court intended to signal from this footnote that it would honor a state procedural rule requiring that comparative juror analysis be conducted first in the trial court or be deemed forfeited. *People* v. *Lenix*, 44 Cal. 4th 602, 620, n. 14, 187 P.3d 946, 959, n. 14 (2008) ("The intended meaning of the footnote remains unclear. Without further guidance from the Supreme Court, we do not attempt to discern its meaning."). Thus, *Snyder* further clouded the issue. This case provides the opportunity to supply the clarity sought by the California Supreme Court.

Supreme Court is right"). Even more telling, in *Boyd* v. *Newland*, 467 F.3d at 1144-1146, the Ninth Circuit ruled first in a pre-*Miller-El II* opinion that comparative analysis was not required, but then granted rehearing and decided that it was required after *Miller-El II*. Thus, any comparative juror analysis rule was not clearly established when respondent's case became final in 2004. It follows that the state courts' approach was not unreasonable. See *Knowles* v. *Mirzayance*, 129 S.Ct. at 1419 ("it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court").

The California Supreme Court had reasonably concluded, in its own pre-*Miller-El II* opinion in *People* v. *Johnson*, 30 Cal. 4th at 1324, 71 P.3d at 284, that comparative juror analysis was not required for the first time on appeal. *Id.* ("permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal."). [7] The California Court of Appeal in this case followed *Johnson*, and also expressly relied on the relevant precedents from this Court that were available at the

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[7] The California Supreme Court has applied this rule in numerous capital cases that have not yet been finally resolved in the federal courts on habeas review. See, e.g., *People* v. *Heard*, 31 Cal. 4th 946, 971, 75 P.3d 53, 69-70 (2003); *People* v. *Catlin*, 26 Cal. 4th 81, 119 n. 5, 26 P.3d 357, 381 n.5 (2001); *People* v. *Ayala*, 24 Cal. 4th 243, 270, 6 P.3d 193, 208 (2000); *People* v. *Box*, 23 Cal. 4th 1153, 1190, 5 P.3d 130, 154 (2000); *People* v. *Ervin*, 22 Cal. 4th 48, 76, 990 P.2d 506, 520 (2000). If certiorari is not granted here, these cases will be subject on habeas corpus to the same untethered comparisons that the Ninth Circuit performed in this case.

time of its opinion, including *Batson*, *Hernandez*, and *Miller-El I*.[8] The state court's credibility finding was correct, and nothing more was required.

C. The Ninth Circuit's Factual Conclusions Were Wrong And At Best Merely Debatable

As noted, this Court has recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder* v. *Louisiana*, 128 S. Ct. at 1211. In this case, the Ninth Circuit failed to heed these inherent limitations on comparative juror analysis conducted for the first time by the federal habeas court. It clearly was not cautious about the possibility that the cold record could produce an unreliable inference. As a result, it reached factual conclusions that, if not wrong altogether, showed at most debatable disagreement with the state court.

For example, in rejecting as "wholly unpersuasive" the prosecutor's reliance on M.C.'s equivocation about whether she could be fair and impartial given the incident where her stepson had been prosecuted, Pet. App. 19, the Ninth Circuit

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[8] The California Supreme Court recently held that, after *Miller-El II* and *Snyder*, the California appellate courts should consider comparative juror analysis as "one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." *People* v. *Lenix*, 44 Cal. 4th at 621, 187 P.3d at 960. As that holding did not arise in the context of AEDPA, the court did not consider when the rule was "clearly established" for purposes of 28 U.S.C. § 2254(d). At most, *Lenix* shows that the California Supreme Court believed the rule emerged upon the issuance of *Miller-El II*.

relied on its comparison of M.C. with Juror 6. In discussing an incident of drunken violence in her household, Juror 6 characterized the incident as a "onetime unfortunate occurrence." When asked if the incident would influence her, Juror 6 stated, "I think I would be fair and impartial. It did affect me. I do believe that people do things under the affects of certain drugs or alcohol that maybe they wouldn't ordinarily do." SER 248. The Ninth Circuit found it "difficult to see how her response to the court's question about how the incident would affect her objectivity was any less equivocal than M.C.'s initial response." Pet. App. 22. However, when asked if her experience with the criminal justice system would affect her, M.C. oscillated between saying, "I don't think it would," "I don't know," "No," and "I'm not sure." SER 252, 253, 455. Juror 6, however, simply said she thought she would be fair and impartial.

Moreover, Juror 6's use of the words "I think" does not establish that she was equivocal; she could just as likely have demonstrated certainty by that phrase. "On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning. The sentence, "She never said she missed him," is susceptible of six different meanings, depending on which word is emphasized.'" *People* v. *Lenix*, 44 Cal. 4th at 622, 187 P.3d at 961 (citation omitted).[9]

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[9] The Ninth Circuit also relied on other supposedly equivocal responses cited by the district court. Pet. App. 26. Those all involved the kind of qualifiers that, like "I think," do not necessarily show equivocation. See Pet. App. 64 n. 8 ("I would certainly try my best to do that [listen carefully to the evidence];" "I don't think it [Ali's substance abuse] would affect my judgment.").

The Ninth Circuit also compared M.C. to Juror 8, who said several close friends had been sexually assaulted by men and a friend's father had tried to kill her mother. Juror 8 stated, "I guess what I was trying to say in the questionnaire was that if I learned that there had been some kind of conflict with, you know, the defendant and the Biletnikoff woman, I might be more sympathetic with the victim." SER 266. The Ninth Circuit found that Juror 8's statements were "far more equivocal than M.C.'s," and that the prosecutor's failure to strike Juror 8 "substantially undermines one of his supposed reasons for striking M.C.—that he was concerned about selecting a juror whose past experiences with domestic violence might affect her objectivity as a juror." Pet. App. 24. This remarkable conclusion simply is not sustainable. It cannot be surprising that the prosecutor would decline to strike a juror who had announced her sympathy for the victim.

In addition, the Ninth Circuit discounted M.C.'s "alleged initial equivocal statements," because she later said that there would not be any lasting effect on either the defense or prosecution as a result of her prior experience with the criminal justice system. Pet. App. 27. However, this Court has acknowledged that a prosecutor may genuinely harbor concerns despite a juror's assertions of fairness. In *Rice* v. *Collins*, 546 U.S. at 341, the challenged juror replied affirmatively when asked if she believed the charged crime should be illegal and disclaimed any other reason she could not be impartial, but this Court explained, "[t]hat the prosecutor claimed to hold such concerns despite Juror 1's voir dire averments does not establish that she offered a pretext." Under these circumstances, it was not unreasonable for the state appellate court to hold that "attorneys are entitled to exercise peremptory challenges based upon a prospective juror's first, unguarded responses to questioning, and discriminatory intent cannot be inferred from an attorney's reluctance to credit later responses." Pet. App. 110.

Finally, the Ninth Circuit faulted the prosecutor for "his failure to clear up any lingering doubts about M.C.'s objectivity by asking follow-up questions." The Ninth Circuit noted that the prosecutor asked a follow-up question of potential juror D.W. on his potential bias, and concluded that the prosecutor's alleged failure to similarly question M.C. "indicates that his later alleged concern with her objectivity was a make-weight." Pet. App. 25-26. However, the Ninth Circuit ignored the relevant record. The prosecutor *did* subsequently question M.C. on whether she thought her prior experience with the criminal justice system would affect her decision-making process. Moreover, M.C. again demonstrated her equivocation on this point, stating, "I'm not sure." SER 455. Thus, it was the Ninth Circuit, not the prosecutor, who mischaracterized the record in order to manipulate the outcome.

* * *

The Ninth Circuit's isolation of comparative juror analysis as the primary, if not exclusive, means of determining the prosecutor's credibility has resulted in the granting of the writ in a number of California judgments. Many more final convictions will be unnecessarily and unjustly at risk if the circuit court continues to review *Batson* claims without regard for the state court's credibility findings. As this case illustrates, such a result is particularly offensive where the trial court conducted a thorough and searching inquiry and reached a considered conclusion that the prosecutor's reasons were genuine. In granting relief in this case, the Ninth Circuit violated this Court's settled *Batson* rule requiring deference to the trial judge, as well as Congress' AEDPA restriction on federal court second-guessing of rational state-court factfinding.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

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