No. 09-894

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

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MATTHEW CATE, Director of California Department of Corrections and Rehabilitation, *Petitioner*

vs.

MOHAMMED HAROON ALI, *Respondent*

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Parties to the Proceeding

Petitioner Matthew Cate is named herein in his official capacity, as the chief administrator of the California state prison system; the real party in interest is the State of California. Petitioner will accordingly be referred to as "the State" throughout this brief.

Respondent is not aware of any other potential parties to this proceeding.

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STATEMENT OF THE CASE [1]

A. Jury Selection

On November 8, 1999, the State of California charged Mohammed Ali with the first-degree murder of his girlfriend, Tracey Biletnikoff. Ali entered a plea of not guilty, and stood trial.

During the jury selection process, the state prosecutor used two of his peremptory challenges to strike the only African-Americans in the jury pool, first striking M.C.[2] and

[1]Parts "A" and "B" of the following procedural history (including the footnotes) are taken *verbatim* from the Ninth Circuit's amended opinion in *Ali v. Hickman*, 584 F.3d 1174, 1177-79 (9th Cir. 2009). Although the State sets out that opinion in its Appendix ("App." at 1- 43), in the State's version the amendments – which are significant – are not incorporated into the body of the opinion. Respondent thus sets out the pertinent portion of the opinion below in its final version, for the Court's convenience.

[2] We refer to this juror by her initials in order to protect her privacy.

then Darrell Jefferson. Ali's trial counsel challenged both these strikes in turn under *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978) (California's equivalent of *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)]), requesting an evidentiary hearing on the issue of the prosecutor's motive. After the prosecutor struck Jefferson, the trial judge granted the request.

At the ensuing hearing the prosecutor provided the following explanation for his strike of MC.:

> M.C. – yesterday, I exercised my challenge there for the following reasons: We had an out-of-the-presence-of-the-jurors discussion with her about private matters wherein she talked about family members and the discussion with those involving the molestation of one child by another child, the involvement in the system. The way she described that, she ultimately told the Court she thought that that would not play a role, would not affect her judgment. Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family members within the system. That was, level one, a concern that I had. I have exercised challenges to other jurors for that same reason.
>
> No. 2, she was very emphatic that – about – to Mr. Morales, and then to me later, about her concerns about attorneys and the way they conducted themselves in the courtroom; that if it was anything less than professional and respectfully done that that would affect her.
>
> THE COURT: Would that be an unreasonable expectation?
>
> PROSECUTOR: It would not be an unreasonable expectation to say; that it would occur to say it would affect her judgment was unreasonable. That's why Mr. Morales initially dealing on this issue followed up with that with her to say there were times he might cross-examine witnesses in an aggressive fashion and do that, to find out whether that would affect her judgment of him on that. I then followed up with her in my questioning to inquire about the same things. I thought we would act respectfully, but did she think it would affect her. Her demeanor, and the way she responded to that made it very clear to me that something she would – I think all of us would like to have occur, I expect it will occur, but as Mr. Morales has properly pointed out to

several jurors, at times there could be an aggressive approach to the case; that sometimes there may not. That gave me cause for concern, more so, of course, is the prior involvement in the prior offense.

No. 3, Your Honor, the question was posed to her and it was posed by the defense about what she felt in terms of sitting in judgment of others. Her response to that was a pause, reflection, and then she said, yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith. Mr. Morales then explored that with her and went further into, Well, what we would be talking about here is judging facts and that type of a matter. She thought about it and said, Well, taking that into consideration, I believe that is something I could do without crossing my religious tenets. I thought there was hesitancy in what she said.

Obviously, it is my burden to get twelve jurors who could judge the case. I thought a combination of these factors gave me good reason 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.

The trial court then asked the prosecutor to provide his reasons for striking Darrell Jefferson, to which he responded:

I thought Mr. Jefferson was an excellent juror up until the questioning here, based on what he did – you recall he came in and engaged in some banter with the Court when he was talking about his hardship request; that he – I believe it was a hardship, not publicity, inquiry that was done in chambers. As the Court stated a few minutes ago, when you expressed it, there were two things that caused me to change my mind. One of them was in response to Mr. Morales' question. That question had to do with there was something – where he talked about, we make decisions as we go along. It gave Mr. Morales some concern. It gave me some concern.

Mr. Morales explored it a bit further with him. Well, wait. You can't make the decision. He said, Well, we do it. That's how life works. I know – and he said, We may change them as we go along but we make decisions. I have a phenomenally great concern about the intellectualizing. I thought that would do -- it would be an over-intellectualizing of the case.

I want jurors, what I think Mr. Morales was striving for with him, about keeping an open mind until the end and not making decisions. The Court arrived at a conclusion there that that may be a semantical difference or

something else, and I respect that conclusion, when you told Mr. Morales [during Jefferson's voir dire] to move on, but it gave me cause for concern there.

But at that point I was still considering the peremptory challenge, became evident to me when in response to a question from me he gave what – and it's personal to me. I respect it may be. I thought he gave me, and I respectfully use these words, a smart-ass answer.

THE COURT: Which [response]?

PROSECUTOR: The one when I commented to him, Is there anything else that you could think of that would cause you not to be fair and impartial, a question I have asked probably of over 50 jurors, 40 jurors in this case and never received other than no or maybe some answer. His was, I haven't done anything yet, immediately provoking a barrel of laughter throughout the courtroom. I was offended by that comment.

By those two things, combined with the fact that he had had some contact, although he said he could lay it aside, and I respect that possibility, with dealing with a public defender and hearing about those cases.

That combination of things caused me to change my mind. Race had nothing to do with either of these things.

Those are my reasons, Your Honor.

THE COURT: What was the reason again about the hardship that you assert, Mr. [prosecutor?]

. . .

PROSECUTOR: My comment was, when [Jefferson] came in and spoke with you in the hardship – I am relaying to the Court my thought process – and the banter he engaged in. I thought it was light-hearted. It was not the hardship itself that concerned me. I thought it was a lighthearted banter, but I thought it reflected – the word I'm looking for is not disrespectful, but I thought it reflected a casualness that was not typical of jurors.

Again, this is a very subjective item and in and of itself would never give cause, but what I noted was the banter he engaged in was very much at

> ease, and that is not what I'm looking for in a juror; however, again, I would never exercise a challenge on that alone. That is merely factors that go into it. I've given you four factors I believe that went into that decision.
>
> THE COURT: With all due respect, I thought I heard two, one having to do with his banter and, slash, casualness during the hardship discussion; and, two, the response to the question you had asked that elicited laughter in the courtroom and then the – make that three – the judgment back and forth and mindchanging.
>
> What was the fourth one?
>
> PROSECUTOR: Yes, I understand. The fourth one was the contact that he had had with cases where he had been – briefed may be too strong a word, but he had had a rundown from his brother, who was an appellate defender, on some case before the Supreme Court. Hearing about that, that gave me cause for concern.

After providing Ali with an opportunity to respond to these explanations, the trial court denied Ali's *Wheeler* motion. The court concluded that the prosecutor's proffered justifications were "reasonable". In reaching this conclusion, the trial court did not consider comparative evidence regarding the responses of M.C. and Darrell Jefferson and the responses of non-African American members of the jury pool during the jury selection process.

Following the denial of Ali's *Wheeler* motion, the case proceeded to trial. After three days of deliberations, the jury found Ali guilty of first-degree murder. He was sentenced to 55 years to life in state prison.

B. California Appellate Proceedings

The California Court of Appeal affirmed Ali's conviction on direct appeal in an

unpublished opinion. With respect to Ali's *Wheeler/Batson* claim, the appeals court concluded that "[t]he jury selection process was not marred by purposeful discrimination," holding that "substantial evidence support[ed] the trial court's finding that the peremptory challenges were exercised without a discriminatory purpose." Like the trial court, however, the California Court of Appeal did not engage in comparative juror analysis. At the time, California law did not permit a court to conduct comparative analysis for the first time on appeal. *See People v. Johnson*, 30 Cal.4th 1302, 1325, 71 P.3d 270 (2003), *rev'd sub nom. Johnson v. California*, 545 U.S.162 (2005).[3]

In a separate order, the California Court of Appeal denied Ali's state habeas corpus petition without further analysis. The California Supreme Court denied All's petition for review and, later, rejected his state habeas petition in a one-line disposition.

C. Federal Habeas Proceedings

1. Ali filed a federal habeas petition. The district court, unlike the California courts, performed a comparative juror analysis during its evaluation of Ali's *Batson* claim. In doing so, the district court found that such an analysis "called into question" two of the prosecutor's reasons for striking M.C., but concluded that, "based on the totality of relevant facts, Ali has not shown purposeful discrimination . . . ." (App. 66, 71).

2. The Ninth Circuit reversed and directed the district court to issue a conditional writ of habeas corpus. (App. 41). After examining the state court record in its totality, the Ninth

[3]California courts are now required to conduct a comparative juror analysis even if such an analysis was not performed by the trial court. *See People v. Lenix*, 44 Cal.4th 602, 187 P.3d 946 (2008).

Circuit held "that, in light of the overwhelming evidence indicating that the prosecutor in Ali's case acted with discriminatory intent when he struck M.C., the California appellate court's finding to the contrary was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings [within the meaning of] 28 U.S.C. §2254(d)(2)."[4] (*Ibid*.).[5]

In reaching this conclusion, the court examined each of the justifications offered by the prosecutor for striking the (only) two African American venire members. It began with the prosecutor's principal reason for striking M.C. – his asserted concern that her "judgment and objectivity as a juror might be adversely affected by the fact that her daughter had been the victim of an attempted molestation by the daughter's half-brother."[6] (App. 13). The Ninth Circuit rejected this justification primarily because it was disingenuous on its face. Like M.C.'s daughter, the victim in this case was a young woman, and the prosecution also

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[4]Further statutory references also will be to Title 28 of the United States Code, and in particular to the portions of that Title enacted or amended by the Antiterrorism and Effective Death Penalty Act of 1996, or "AEDPA."

[5]The Ninth Circuit grounded its decision squarely on the "unreasonable determination of the facts" provision of §2254(d)(2) – although the court noted that, in the alternative, the state court's determination would also fail to pass muster under §2254(e)(1). (App. 11 & n.4). Thus – despite what the State argues – the court below did not even purport to decide whether a rule requiring that state courts employ "comparative juror analysis for the first time on appeal," was "clearly established federal law" within the meaning of §2254(d)(1), and its decision in no way depended on the answer to that question.

[6]Throughout its petition, the State refers to the molester as M.C.'s "stepson" – but, as the Ninth Circuit observed, "tellingly, M.C. never refers to the perpetrator as either her son or her stepson." (App. 20). The record demonstrates that M.C. had very little connection with the young man prior to the molestation attempt, and even less afterwards, and there was no evidence that she harbored any sympathy for him. Rather, she "expressed clearly and repeatedly her ongoing concern for her daughter and her daughter alone." (*Id.* at 20-21).

intended to (and ultimately did) introduce a great deal of evidence regarding Ali's kidnaping and assaultive behavior toward young woman, some years earlier.[7] (App. 84-85) Thus, "to the extent that the attempted molestation of her daughter might affect M.C.'s impartiality, any bias on M.C.'s part logically would favor the prosecution, not the defense." (App. 19).

The court next observed that "a comparative juror analysis reveals, as one might expect, that the prosecutor *favored* jurors who had been the victims of domestic abuse . . . even if the juror indicated that his or her experiences might affect his or her objectivity." (App. 21 [emphasis in original]). The prosecutor had even accepted "Juror 6" whose husband had physically abused her and their son, but who – unlike M.C. – seemed to find such abusive behavior excusable. (App. 22). Addressing the argument that M.C.'s responses in this regard had been equivocal, the court observed that several of the seated jurors had given identical (or in some cases, more ambiguous) answers. (App. 26-27).

Similarly, in addressing the prosecutor's second justification – that M.C., when asked directly about it, said she expected the lawyers to conduct themselves in a professional and respectful manner – the Ninth Circuit began by noting that the purported justification made little or no sense on its own terms. The trial judge and even the prosecutor himself expressed the view that such expectations were reasonable. Moreover, one of the seated jurors ("Juror No. 1") had said virtually the same thing. (App. 30-31).

The third justification given by the prosecutor was that M.C. (again, when asked

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[7]That earlier victim had been Ali's fianceé; he had kidnaped and struck her after he found her in bed with his best friend – offenses for which he was on probation at the time of the crime in this case. (See App. 45).

directly about this) had said that her religious beliefs made it difficult for her to "judge" others – although she had immediately and spontaneously clarified that being on the jury,

> "would mean something totally different than I would apply as far as my Christian faith would be interpreted. More or less this is to make a decision based on information I've gained. 'Judging' to me means I've made a decision based on no information, just from what I see and not knowing the person or just arbitrarily. To me, that's a difference."

(App. 32-33).

The Ninth Circuit observed that the prosecutor's first two reasons had been pre-textual, which "raises an inference that this final rationale is also a make-weight." (App. 33, citing, *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008)). The court next noted that, in asserting his justification, the prosecutor had misstated what M.C. said on the topic ("'she said, yes, that it could be a problem for her, sitting in judgment of others, because of her Christian faith . . . .'"), which also strongly indicated pretext – as did the prosecutor's failure even to question her on the subject.[8] (App. 34, discussing, *Miller-El v. Dretke,* 545 U.S. 231, 244 (2005).

Finally, as a third basis for probing the sincerity of the prosecutor's justification, the Ninth Circuit compared it with the prosecutor's responses to two other venire members who had also been questioned about the potential effects of their respective religious beliefs on their ability to function as jurors. One of them, a practicing Buddhist who was also struck, had said that her faith would be an obstacle in a capital case, and the prosecutor had questioned her thoroughly on the subject – unlike M.C., to whom he had not addressed a

[8]Defense counsel asked the only questions regarding M.C.'s religious faith. (App. 34).

single question. (App. 35, citing *Miller-El v. Dretke*, *supra*). The other was a Jehovah's Witness, who was permitted to serve on the jury after saying telling defense counsel he did not "believe" that his faith would interfere. Again, the prosecutor did not ask that juror even one question on the subject, even though his response was "arguably more equivocal than M.C.'s unqualified statement that she would be able to engage in the type of judging required of a juror." (App. 35-36).

Following this Court's approach in *Snyder v. Louisiana*, the Ninth Circuit concluded that the discriminatory elimination of M.C. itself made out a constitutional violation, and made it unnecessary to evaluate the validity of the prosecutor's challenge of the only other African American on the venire, Darrell Jefferson. (App. 36, citing *Snyder*, 552 U.S. at 477-78). As this Court did in *Snyder*, the Court of Appeal briefly examined the justifications given for that other strike, to see what light they might shed on the prosecutor's intent. It concluded that at least two of the four reasons given for striking Mr. Jefferson were apparently pretextual as well, which further supported the "conclusion that M.C.'s strike was racially motivated." (App. 37; see, *id*. at 38-41).

3. The State filed a timely "Petition for Rehearing with Suggestion for Rehearing *En Banc*." The request for *en banc* hearing was denied, without a single Ninth Circuit Judge voting in favor of granting it. (App. 2). The court also denied the request for rehearing by the panel, but took the opportunity to amend its opinion in two places. (*Ibid*.). Both amendments concerned the procedural history of the case; they made clear that the state trial judge had *not* decided whether the prosecutor's asserted justifications were sincere but rather

had only held that the justifications were "reasonable," and that only the state appellate court had opined on the genuineness of those justifications. (*Ibid*).

WHY THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE DENIED

The State's petition takes aim at what it sees as defects in "the Ninth Circuit's approach to *Batson* claims" as a whole. (Pet. 9-12). The State has chosen an exceptionally poor vehicle for mounting such an assault, however, for what actually happened in this specific case – both in the state courts and in the Ninth Circuit – bears little or no relationship to the assertions on which the State has predicated its petition.

The crux of the State's argument is that the Ninth Circuit "violated *Batson* and AEDPA by substituting its own inferences drawn from 'comparative juror analysis' for the trial judge's credibility finding." (Pet. 12; see also, *e.g.*, *id.* at i ["Question Presented"]). According to the State, the underlying jurisprudential error was in the Ninth Circuit's (supposed) assumption that it was entitled to disregard the trial court's "credibility findings" because the state courts' failure to employ comparative juror analysis was "contrary to, or involved an unreasonable application of, clearly established federal law" within the meaning of 28 U.S.C. §2254(d)(1). (Pet. 20-22). The State argues that, when the instant case was in the California courts, those courts had a rule that comparative analysis could not be employed in *Batson* cases "for the first time on appeal," and there was no clearly established federal law to the contrary. (Pet. 22-23). The State urges the Court to grant *certiorari* to prevent the Ninth Circuit from committing the same errors in "many more" cases like this one. (Pet. 29; see also, *id. at* 25, n.7).

Each component of the State's argument proceeds from at least one false premise:

First, the trial judge never made any "credibility findings" regarding the genuineness of the prosecutor's justifications – he found only that they were objectively "reasonable,"which (as this Court has repeatedly explained) is not the issue tendered by the *Batson* inquiry.

Second, the Ninth Circuit's opinion was not based entirely, or even primarily, on "inferences drawn from 'comparative juror analysis.'" Rather, the Ninth Circuit began by taking each of the prosecutor's justifications on its own terms, and, evaluating its credibility using the (other) uncontroversial tools set out in this Court's *Batson* jurisprudence, found it lacking. The Court of Appeals only used comparative analysis to confirm conclusions that were already apparent.

Third, the Ninth Circuit never even purported to address whether "comparative juror analysis" was "clearly established Federal law" under §2254(d)(1) – nor did it need to do so. The Ninth Circuit determined only that the state courts' decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings," pursuant to §2254(d)(2), a separate provision that does not turn on the "clearly established Federal law" test.

Fourth, even if the Ninth Circuit had adopted the approach ascribed to it by the State, and held the state fact-findings to be unworthy of deference because the state courts refused to consider all the pertinent evidence in making those findings, it would only have been doing what was mandated by this Court's precedent. The failure – or in California's case,

the outright refusal – to employ comparative analysis in *Batson* cases was indeed an "unreasonable application" of Federal law as announced in *Batson* itself.

Fifth, the State's contention that this case involves a procedural bar on "comparative juror analysis for the first time on appeal" is baseless, for several reasons. Such a procedural bar was *not* the rule in California at the time of Ali's trial, and in this case, trial counsel actually *did* invoke comparative analysis. Moreover, the State itself contends, in its petition, that the trial court did compare the treatment of African American and non-African American jurors. (Pet. 12).

Finally, even if the State's various assertions about the decision below were true, this still would not be an appropriate case for the Court to review. As the State reluctantly concedes, the California Supreme Court has finally recognized that "comparative juror analysis" should be a part of *Batson* review at every level. *People v. Lenix*, 44 Cal.4th 602, 621 (2008); see Pet. 26, n.8. The state courts' belated acceptance of the constitutionally-mandated process will necessarily alter the nature and scope of federal review of California *Batson* decisions and obviate the complaint at the core of the State's petition.

It is also important to note a contention that is missing from the State's petition: there is no suggestion that the Court must intervene to resolve a split among the federal appellate circuits. That is because the Ninth Circuit's *Batson* jurisprudence – particularly in this case – is entirely congruent with the decisions of the other federal courts. *See, e.g., McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252 (11th Cir. 2009); *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009).

The State is at its most candid when it complains, in its final argumentative heading, that "the Ninth Circuit's factual conclusions were wrong." (Pet. 26). While Respondent emphatically disagrees, the more significant point is that this Court does not accept cases for "simple error correction." See, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 422, n.1 (1995). And that is really all the State's petition presents: a request for error correction dressed up in someone else's clothes.

1. The entire thrust of the State's petition is that the Ninth Circuit erred by failing to accord proper deference to the state trial court's "credibility findings" on the issue of whether the prosecutor's justifications were genuine expressions of his true motives for eliminating prospective juror M.C. The fundamental problem with the State's argument is that the trial court never made any such findings.

It is worth noting that the State – which quotes liberally from the trial record when it serves the State's purposes – never sets out the actual text of the trial court's ruling. In that ruling, the trial court explicitly identified the legal standard it was using, and provided the following explanation (such as it is):

> The issue is whether or not the prosecutor's justification or the defendant's justification if the issue were flipped is reasonable. [¶] Having reviewed the documents of the two jurors that [defense counsel] has marked for identification; namely the questionnaires and request for hardship of both [M.C.] and Mr. Jefferson, hearing [the prosecutor's] justification for discharging them, the Court finds that the *Wheeler* motion will be denied.

(EOR 130).[9]

[9]"EOR" refers to the "Excerpts of Record" filed in the Ninth Circuit.

The trial court's statement of the applicable legal standard was manifestly incorrect. As this Court has repeatedly instructed: "'It does not matter that the prosecutor might have had good reasons; what matters is the real reason they were stricken.'" *Johnson v. California*, 545 U.S. at 172, quoting, *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004); *see also, Purkett v. Elem*, 514 U.S. 765, 769 (1995) [the ultimate issue in *Batson* review is *not* "the reasonableness of the asserted nonracial motive" but "rather . . . the genuineness of the motive."]. The trial court addressed the wrong question, and as a result there was simply no pertinent "credibility" finding to which deference would be owed.

It is unsurprising that the state trial court made that error, for at the time it was routine for the California courts – trial and appellate – to mistakenly conflate the objective "reasonableness" of a prosecutor's justifications with the question actually required by *Batson*, namely, whether those were the prosecutor's "real reasons" for eliminating minority jurors. See, *e.g.*, *Green v. LaMarque* 532 F.3d 1028, 1031 (9th Cir. 2008); *Williams v. Runnels*, 432 F.3d 1102, 1109 (9th Cir. 2006); *Paulino v. Castro*, 371 F.3d 1083, 1089-1090 (9th Cir. 2004); *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000)*; Love v. Yates*, 586 F.Supp.2d 1155, 1176-1177 (N.D. Cal. 2008); *Patterson v. Alameida*, 2008 U.S. Dist. LEXIS 43749, 33-34 (E.D. Cal. June 3, 2008); *Cook v. Lamarque*, 2007 U.S. Dist. LEXIS 81061, 10-12 (E.D. Cal. Oct. 31, 2007). That changed (for the most part, anyway) in 2003, when this Court's opinion in *Johnson v. California* made the error pellucid.[10]

[10]Despite the varying dates on which they were resolved on federal habeas, all of the cited cases were tried and heard on appeal in the California courts prior to the filing of this Court's (continued...)

The instant case, however, was different in one respect: Although it was tried (and the wrong *Batson* standard was applied) prior to *Johnson v. California*, it was considered by the California Court of Appeal after the *Johnson* opinion was issued. Rather than acknowledge the trial court's error, however, the California appellate court responded by labeling daylight nighttime. According to the state appellate court: "The trial court properly considered the reasonableness of the prosecutor's explanations in assessing credibility, and the court's use of the word 'reasonable' in rendering its ruling does not demonstrate a misapprehension of the proper legal standard."[11] (EOR 45.)

The problem is that the trial court did not just "use . . . the word 'reasonable.'" It explicitly stated that "*[t]he issue is whether or not the prosecutor's justification . . is reasonable*." What demonstrates "a misapprehension of the proper legal standard" is that the trial court flatly misstated the proper legal standard.[12] As the Ninth Circuit correctly

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[10](...continued)
opinion in *Johnson*.

[11]It bears note that the author of the state appellate opinion denying the *Batson* claim in the instant case – Justice Patricia Sepulveda – was the same jurist who, as a trial judge, had presided over the trial in *Johnson*. (See, App. 114, and *People v. Johnson,* 30 Cal.4th 1302, 71 P.3d 270, *rev'd sub nom. Johnson v. California*, 545 U.S.162). It was her denial of Mr. Johnson's *Batson* motion (and her apparent application of the wrong legal standard) that ultimately led to the reversal by this Court.

[12]The State's petition acknowledges this problem, albeit in a backhanded fashion, by pointedly noting the trial judge's comment regarding "the right of both parties to exercise peremptory challenges of jurors they honestly feel could not be fair and impartial to their position or have concerns about it." (EOR 130, ll. 1-4; see Pet at 5). What the State emphasizes (indeed, the only word from the trial judge that it actually quotes) is the adverb "honestly," which the State would like to pretend was the pivot point of the trial court's (continued...)

concluded, to the extent that the state appellate court's contrary view could be taken as a finding of fact, it is an unreasonable one in light of the state court record, and merits no deference. *See*, 28 U.S.C. §2254(d)(2).

The State relies heavily on *Rice v. Collins*, 546 U.S. 333 (2006), in which this Court reversed a decision to grant habeas relief in a *Batson* case because the Ninth Circuit had failed to afford proper deference to the state trial court's credibility findings regarding that prosecutor's justifications. The lack of any actual credibility finding by the trial court in the instant case is enough, in itself, to render *Rice* inapposite.[13]

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[12](...continued)
decision. But what amounts to a passing comment by the trial court cannot supersede its clear and specific articulation of the standard that it actually applied – which was *not* that it found the prosecutor's justifications "honest," but just that they were "reasonable." Any possible doubt in this regard is dispelled by the sentence that immediately follows the one referred to by the State (and quoted earlier in this note): "This Court is not here to second guess the *reasonable* decisions that are made." (EOR 130, ll. 4-6 [emphasis supplied]). It is clear that the trial judge – following the lead of the higher California courts during that time period – believed that his job, in attempting to ascertain the prosecutor's intent, went only so far as to determine whether the stated justifications were objectively "reasonable."

[13]The State also seems to misapprehend the significance of *Rice v. Collins*. Despite what the State appears to argue, *Rice* does not stand for the proposition that the federal courts must always accede to state trial court credibility findings in *Batson* cases. Rather, this Court's other decisions have made it absolutely clear that even the most explicit of such credibility determinations can constitute "an unreasonable determination of the facts" within the meaning of § 2254(d)(2). *See*, *e.g.*, *Miller-El v. Dretke*, 545 U.S. at 236, 266 [holding prosecutor's jury challenges invidious despite trial court finding that justifications were "completely credible' and 'sufficient.'"]. As the Court has repeatedly made clear in precisely the same context: "'Deference does not by definition preclude relief.'" *Id*. at 240; quoting, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). There is no assertion that, in the instant case, the Ninth Circuit made the specific errors of reasoning that infected its opinion in *Rice* (*e.g.*, rejecting the prosecutor's explanation that the challenged juror was young and without community roots). All that remains is the State's disagreement with *how* the Ninth Circuit went about applying the (correct) legal standard; even if the State's criticisms were valid (and
(continued...)

2. In the State's formulation, repeated throughout its petition, the Ninth Circuit "disregarded the trial court's factual finding that the prosecutor's reasons were genuine, in favor of its own de novo comparative juror analysis." (Pet. i ["Question Presented"]; see also, *id.* at 9, 10, 11, 12-15, 18, 29 [complaining of "[t]he Ninth Circuit's isolation of comparative juror analysis as the primary, if not exclusive means of determining the prosecutor's credibility . . . ."]). We have already seen that the first part was wrong – there was no such factual finding. It is even clearer that the second half of the formulation is inaccurate: The Ninth Circuit evaluation of the prosecutor's reasons in this case did not consist "primarily" – much less "exclusively" – of comparative juror analysis.

As traced above, the Ninth Circuit began its assessment with the prosecutor's principal reason for striking M.C. (and the only justification discussed at any length in the State's petition) – his purported concern that the prospective juror might have been biased by the attempted molestation of her daughter. The Court of Appeals found the justification "wholly unpersuasive for several reasons." (App. 19). The principal basis for that conclusion was simply that, as a justification for striking M.C., the explanation made no sense, for any bias on M.C.'s part as a result of the molestation would have been in favor of the *prosecution*. (App. 19-21). While the conclusion, that the justification was pretextual, was *also* supported by a comparison with the prosecutor's treatment of other, non-African-American jurors (*id*. at 21-25), it was similarly bolstered by the prosecutor's "failure to clear

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[13](...continued)
they are not), its petition presents nothing more than a request for "simple error correction."

up any lingering doubts about M.C.'s objectivity by asking follow-up questions."[14] (App. 25-26; citing, *Miller-El v. Dretke,* 545 U.S. at 244).

To the same effect, the Ninth Circuit rejected the prosecutor's second justification (that M.C. purportedly was overly concerned with the professionalism of the attorneys) primarily because it failed on its own terms: "M.C. simply expressed reasonable expectations concerning attorney behavior. She did not say, as the prosecutor stated during the *Wheeler/Batson* hearing, that unprofessional conduct or aggressive cross-examination would 'affect her judgment.'" Thus, not only was the justification betrayed by logic, but it also involved a second telling factor, that this Court has flagged in *Batson* cases: "The prosecutor's mischaracterization of M.C.'s testimony [was itself] evidence of discriminatory pretext." (App. 31, citing, *Miller-El v. Dretke*, 545 U.S. at 244). Once again, comparative juror analysis was employed – but only to seal the conclusion formed by even more direct inferences, namely, that the prosecutor's justification was pretextual.

The Ninth Circuit followed the same analytical process with regard to the prosecutor's final justification, regarding M.C.'s religious beliefs. It began by noting "[t]hat the other reasons were pretextual raises an inference that this final rationale is also a make-weight." (App. 33, relying upon, *Snyder v. Louisiana*, 552 U.S. at 485). The Court of Appeal next observed that, once again, the prosecutor had mischaracterized M.C.'s testimony on *voir*

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[14]The Court of Appeal likewise addressed a sort of alternate justification raised in the State's briefs below – that M.C.'s "involvement in the system" as a result of the molestation might have soured her on law enforcement – by first pointing out that the *voir dire* record itself did not support such an inference, and only then noting that a comparative analysis also put the lie to it. (App. 26-27).

dire, and that, once again, the prosecutor had failed even to question the prospective juror regarding the subject matter of his purported concern. As the Ninth Circuit discussed, these are both reasons cited by this Court for inferring that a prosecutor's justification is pretextual. (App. 34, discussing, *Miller-El v. Dretke*, 545 U.S. at 244). Only then did the court embark on a comparative juror analysis, which it found to confirm the finding of pretext which had already been indicated. (App. 34-36).

In short, if the Ninth Circuit ever (as the State claims) relied upon "comparative juror analysis as the primary, if not exclusive means of determining the prosecutor's credibility" it did so in some other case – not the case in which the State now seeks *certiorari*.

3. The Ninth Circuit thus merely performed the task that *Batson* and its progeny require of all courts when a *prima facie* case of discrimination in jury selection has been made out: It examined the "'totality of the relevant facts' to decide 'whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" App. 10, quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991); see also, *Batson*, 476 U.S. at 93 ["In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."] It did so using precisely the same tools prescribed for the task – and utilized – by this Court's opinions in *Miller-El v. Dretke* and *Snyder v. Louisiana*. And the Ninth Circuit reached the same conclusion as this Court reached in *Miller-El* – namely that the state courts' decisions were based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," within the meaning of 28 U.S.C. § 2254(d)(2). *Miller-El v.*

Dretke, 545 U.S. at 240, 266.

This leads to two significant points. One is that, if the Ninth Circuit closely followed this Court's own methodology (which it did), but came to the wrong result (which it did not, but we will pretend for a moment that it did), there is absolutely nothing to the State's petition but a bare request for error correction. As already reviewed, "simple error correction" is assuredly not a reason for this Court to expend its limited resources on granting *certiorari*.

The other point is that, just as in *Miller-El*, the Ninth Circuit's analysis in this case was based on § 2254(d)(2) – rather than the alternative provision of § 2254(d)(1). As this Court observed in the case most cited by the State: "The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice v. Collins*, 546 U.S. at 342; see *Wiggins v. Smith*, 539 U.S. 510, 529 (2003) [because the state courts' decision was, *inter alia*, an "unreasonable determination of the facts," the other "requirements of 2254(d) . . . pose no bar to granting . . . habeas relief."] see generally, 2 Hertz & Leibman, *Federal Habeas Corpus Practice & Procedure*, §32.4 & n. 10 (5th ed. 2005).

That in turn means that the test set forth in the alternative provision – *i.e.*, whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" – was not at issue in this case. *See, Rice v. Collins*, 546 U.S. at 342 [declining to assess whether the §2254(d)(1) standard was met when the only determination made by the Ninth Circuit was that the state courts' *Batson* decision was "based on an unreasonable determination of the facts" under §2254(d)(2)]. Nor did the Ninth Circuit

purport to make any ruling that regard.[15]

Yet the analytical heart of the State's petition is its argument that the Ninth Circuit erroneously adopted a rule permitting federal courts to disregard trial court credibility findings if the state court failed to employ a comparative analysis in *Batson* cases – erroneous (the State argues) because comparative juror analysis was not "clearly established Federal law" when this case was tried. (Pet. 21-26). Not only was there no articulation of any such rule in this case, but no part of it – not the business about "disregarding credibility findings" nor the question of whether comparative juror analysis was required by "clearly established Federal law"– was even discussed, for no part of it was necessary to the Ninth Circuit's mode of inquiry or ultimate conclusion. The heart of the State's argument is thus made entirely of straw.

4. Perhaps the most dismaying thing about the State having created a fictional Ninth Circuit ruling, solely in order to demolish it, is that if the Ninth Circuit *had* so ruled, it would have been correct. The fight the State has picked with a straw man is one it could not win.

Contrary to what the State seems to assume, "comparative juror analysis" is not some independent doctrine of federal constitutional law, recently concocted and imposed upon the states by this Court's decisions in *Miller-El*, *Johnson*, and *Snyder*. Rather, as the State's supreme court itself (all too) recently acknowledged,

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[15]Nonetheless, as will be discussed presently, the state courts' decision was indeed "an unreasonable application of clearly established federal law" within the meaning of 2254(d)(1) – in addition to being an "unreasonable determination of the facts in light of the evidence presented," within the meaning of 2254(d)(2).

> ". . . those cases stand for the unremarkable principle that reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent. Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below."

People v. Lenix, 44 Cal.4th at 607.

Again, this Court has consistently taught that *Batson* requires courts to examine the "*totality* of the relevant evidence" when assessing colorable claims of discrimination against African Americans and other minorities in the selection of juries. The stubborn refusal of the California courts in this case [16] even to look at obviously pertinent facts regarding the comparative treatment of African-Americans and other, similarly situated, jurors was by definition an "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." See, *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) [state court's failure to "evaluate the totality of the available . . . evidence" in determining the existence, *vel non*, of constitutional error was an "unreasonable application of clearly established Federal law]; *id*. at 415 (O'Connor, J., concurring)[same]; see also, *Wiggins v. Smith*, 539 U.S. at 527-28 [state court's assumption, made without reviewing all pertinent evidence, that counsel conducted adequate investigation, was "objectively unreasonable."]

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[16] And not just in this case: as will be discussed presently, the California courts' animosity toward "comparative juror analysis," and their resulting blinkered approach to assessing *Batson* claims, was the rule rather than the exception prior to the state supreme court's 2008 *Lenix* decision.

"When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), citing *Wiggins v. Smith, supra*. Because the state courts in this case failed to examine all of the pertinent record evidence in evaluating the *Batson* claim – a failure that constituted an "unreasonable application of federal law" – the Ninth Circuit was both empowered and obligated to examine the claim *de novo*.

In short, not only the Ninth Circuit's treatment of the *Batson* claim in this case was correct under the approach actually taken by that court, it would also have been correct under the approach falsely ascribed to it by the State.

5. With its resistance to the use of "comparative juror analysis" having been undercut by the decision of its own supreme court in *People v. Lenix*, the State retreats to a more nuanced (or at least more complicated) argument. It asserts that the Ninth Circuit erred in this and other *Batson* cases by failing to respect an established state procedural bar on the use of "comparative juror analysis for the first time on appeal." (Pet at 22-25). This is perhaps the least tenable of all of the assertions made by the State in a petition full of problematic arguments.

To the extent that the State's assertion is just a variation on its theme about the Ninth Circuit's purported misinterpretation of the "clearly established Federal law" language in §2254(d)(1), it is irrelevant for the reasons already discussed – namely, that the Ninth Circuit

neither sought nor need to interpret that language, and certainly did not misinterpret it. But the assertion fares no better if we give it a more coherent shape than the State's petition provides, and take it as an argument to the effect that Respondent procedurally defaulted on the right to comparative juror analysis by not seeking it in the trial court – a default which thus barred the federal courts from conducting such an analysis. See, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Even that best version of the State's argument fails.

The State's assertion depends on several predicates, including, (a) that comparative juror analysis was neither raised by Respondent at trial nor conducted by the trial court; (b) that, at the time of Respondent's trial, there was a recognized state procedural rule requiring that comparative analysis be requested at trial or forever waived; and (c) that the rule was "'firmly established and regularly followed'" at the time of the trial. *Ford v. Georgia*, 498 U.S. 411, 424 (1991) [citation omitted]. Not one of those predicates was satisfied in the instant case.

a. Contrary to what the State asserts (and what the state appellate opinion suggests) comparative juror analysis was *not* "raised for the first time on appeal." Rather, the record plainly demonstrates that Respondent's counsel urged such analysis in support of his *Batson* claim in the state trial court.

In responding to the justifications offered by the prosecutor for challenging potential juror M.C., counsel asked the trial court to compare her to other (seated) jurors. He pointed out that at least one other juror had (like Ms. C.) stated that she expected the attorneys to

conduct themselves in a respectful and professional manner,[17] and that other jurors had made similar statements about the effect that their religious beliefs might have on their deliberations.[18] Trial counsel thus rebutted the prosecutor's rationales for excusing Ms. C. by showing that the "other jurors" to whom he made comparison were permitted to serve without challenge.

Similarly, trial counsel pointed out that the "light-hearted remark" which the prosecutor seized upon as an excuse for eliminating Mr. Jefferson was similar to those made by other jurors (EOR 124), and counsel specifically compared Mr. Jefferson's interaction with the prosecutor to his own interaction with another, seated juror. (EOR 124-25).

In short, the notion that comparative juror analysis was urged "for the first time on appeal" in this case is a canard. Even the state appellate court acknowledged, in a footnote, that trial counsel had tendered comparisons – but it shrugged them off as being "general references," not a "meaningful showing sufficient for the trial court," and in any event unrelated to the comparisons that were urged on appeal. (App. 110-11, n.6).

The state court's opinion did not cite any authority for the proposition that what

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[17] "As to Ms. Combs, her statement about wanting the attorneys to be professional . . . she answered that question, I thought, very well. And as *we heard from another juror today, on television you see attorneys screaming at each other and both of them told us their thoughts that they don't really want to see that happening*. You know, they want to see a professional – they want to see the attorneys act like professionals. . . . . She was thoughtful, and I would have expected really the same answer from everybody else, *actually this woman over here gave pretty much the same answer as Ms. Combs.*" (EOR 121-22 [emphasis supplied]).

[18] "As to her religious and spiritual beliefs in passing judgment, that's a non-issue also. *She gave a very similar answer to everybody else that was not challenged* by Mr. Wagstaffe." (EOR 122-23 [emphasis supplied]).

counsel urged was something less or other than "comparative juror analysis." In seven years of post-trial litigation, counsel for the State has not come up with a single precedent in support of that pronouncement. In fact, there is not a shred of support, in state or federal decisions, in the record, in logic or in common sense for the conclusion that there was anything inadequate about the comparison invited by trial counsel's remarks. On the contrary, the courts have found far more general statements sufficient to trigger a trial court's duty to engage in comparative analysis. *E.g.*, *Burks v. Borg*, 27 F.3d 1424, 1428 (9th Cir. 1994), *cert. denied*, 513 U.S. 1095 (1995) [accepting the California Attorney General's contention that comparative juror analysis was adequately triggered when "defense counsel argued that the prosecution's reasons for peremptory strikes of Blacks and Hispanics were not credible when 'compared and contrasted to . . . the non-minority persons with the same problem . . . .'"]. And no published California case has ever rejected a request for comparative juror analysis on the ground that it was (to quote the state appellate court) "too general." (EOR 47, n.6.) Rather, the level of specificity in this case was ample to comport with the very broad standards in California law for preserving issues for appellate review. *See, e.g.*, *People v. Mattson*, 50 Cal.3d 826, 854, 789 P.2d 983 (1990); see generally, *People v. Bruner*, 9 Cal.4th 1178, 1183 n.5, 892 P.2d 1277, 1279 n.5 (1995).

To be sure, counsel did not use the words "comparative juror analysis." It is no wonder he did not, for (as will be reviewed presently), at the time of Appellant's trial, such analysis was at best disfavored – if not completely prohibited – under California precedent.

The state appellate court's alternative "reason" for shrugging off the comparisons

made in the trial court – that "the juror comparisons urged on appeal are unrelated to trial counsel's references to the alleged similarities between the responses of seated jurors and challenged jurors" (*ibid*.) – is simply false. The comparisons urged in that court were identical to the ones presented in the federal courts, and the same as those detailed in the panel's opinion. They include all of the comparisons made by trial counsel in his *Batson* argument.

Finally in this regard, the State itself emphasizes that the trial judge undertook his own comparison between an excluded African American venire member and another who was not African American. (Pet. 12). While Respondent views the remarks cited by the State as being more akin to idle musings than to a "comparative analysis" of any sort, it does not lie for the State to both assert that the trial judge undertook such an analysis and argue that this case involves "comparative juror analysis for the first time on appeal."

b. The supposed state procedural prohibition on "comparative juror analysis for the first time on appeal" was never asserted by the California courts until some two years after Appellant's 2001 trial. The first time the phrase, or anything like it, appeared in a California Supreme Court opinion was in *People v. Johnson*, 30 Cal.4th at 1325, 71 P.3d at 284, *reversed by*, *Johnson v. California,* 545 U.S. 162. Prior to that, "California caselaw provided that *neither* the court of appeal nor the trial court need 'compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered.'" *Kesser v. Cambra*, 465 F.3d 351, 360, n.3 (9th Cir. 2006) (*en banc*) [emphasis supplied]; quoting, *People v. Arias*, 13 Cal.4th 92, 136 n.16, 913 P.2d 980, 1008 n. 16 (1996). In fact,

earlier opinions of the California Supreme Court seemed explicitly to discourage – if not outright prohibit – courts at *any* level from conducting comparative juror analysis in *Batson* cases. As that court reiterated, the year before Appellant's trial:

> "'[W]e have previously rejected a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial.'"

People v. Box, 23 Cal. 4th 1153, 1190, 5 P.3d 130, 154 (2000); quoting, *People v. Turner*, 8 Cal.4th 137, 169, 878 P.3d 521, 537 (1994).[19] Indeed, in another case from that same era, the California Supreme Court disapproved the use of comparative juror analysis on appeal even when it *had been* implemented in the same case in the trial court. *People v. Montiel*, 5 Cal.4th 877, 909, 855 P.2d 1277, 1293 (1993)

But then this Court issued *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003) [*Miller-El*

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[19]In a footnote to its petition, the State cites *People v. Box* and a string of other state high court cases as standing for the rule that comparative juror analysis was waived if not raised at trial. (Pet. 25, n.7). Like much else in the State's petition, that is plainly false. In every one of the cases cited by the State that was decided prior to Respondent's trial, the California Supreme Court reasserted its position that it would not engage in comparative jury analysis *under any circumstances* – with nary a reference to the supposed limitation on doing so "for the first time on appeal. See, *People v. Caitlin*, 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) [holding that appealing defendant was not entitled to jury questionnaires of non-minority jurors, as "this court will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis."]; *People v. Box*, 23 Cal.4th at 1190, 5 P.3d at 154; *People v. Ervin*, 22 Cal.4th 48, 76, 990 P.2d 506, 520 (2000). The only exception is *People v. Heard*, 31 Cal.4th 946, 971, 75 P.3d 53, 69-70 (2003), which was decided after *People v. Johnson* – and two years after Respondent's trial – and which ascribed the "not for the first time on appeal" rule to *Johnson* (also decided two years after Respondent's trial).

I], which made clear that comparative juror analysis is a useful and necessary tool for parsing *Batson* claims. Recognizing that a prohibition against all comparative juror analysis was clearly an untenable application of *Batson*, as explicated in *Miller-El I*, the state supreme court refashioned its rule into a prohibition against such comparative analysis "for the first time on appeal" – and then pretended that the (revised) rule was exactly what it had been saying all along.[20] *People v. Johnson*, 30 Cal.4th at 1318-1325, 71 P.3d at 280-83.

After the Court reversed *that* decision (*Johnson v. California,* 545 U.S. 162), the state high court finally bowed to the weight of constitutional authority and announced that it would permit California courts to employ comparative analysis "for the first time on appeal" in *Batson* cases. *People v. Lenix*, 44 Cal.4th at 607.

Whatever other lessons are to be drawn from the tortured history of California jurisprudence in this area, one thing is quite clear: When Appellant was tried, in 2001, there was no rule requiring him to employ comparative juror analysis in the trial court lest he be

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[20]The state supreme court concluded its review of state caselaw regarding comparative juror analysis as follows: "Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling." *People v. Johnson*, 30 Cal. 4th at 1324-1325, 71 P.3d at 284, *reversed by*, *Johnson v. California,* 545 U.S. 162. As explained above, there was nothing "long-standing" about that practice. In her dissenting opinion, Justice Joyce Kennard reviewed the state court's *Batson* cases from 1989 through 2001 and observed more frankly that they, "without exception rejected comparative juror analysis. None says that the reason for not engaging in comparative juror analysis was that the defendant did not raise the matter at trial; many do not even indicate whether the defendant urged comparative juror analysis in support of the motion in the trial court." *People v. Johnson*, 30 Cal.4th at 1331, 71 P.3d at 289 (Kennard, J., dissenting) [citations omitted].

barred from asserting that analysis in subsequent proceedings. Thus, even if the State were correct in arguing that federal courts must respect such state procedural rules and defer accordingly, there was no such rule to respect in this case.

c. The State's argument is, at best, an assertion of a procedural bar: it proposes that, under California law, Respondent waived the right to comparative juror analysis of his *Batson* claim in the reviewing courts by (supposedly) not asserting that right, or not asserting it specifically enough, in the trial court. Again, for such a bar to have any effect on federal review, it must have been "'firmly established and regularly followed" at the time of the trial. *Ford v. Georgia*, 498 U.S. at 424.

The rule, however, was not even arguably "firmly established" until the California Supreme Court's 2003 decision in *Johnson*, some two years *after* Petitioner's trial. As the Ninth Circuit summarized, such "[n]ovel procedural rules do not bar federal review because petitioners are not put on sufficient notice that they must comply." *King v. LaMarque*, 464 F.3d 963, 965-66 (9th Cir. 2006); *citing*, *Ford v. Georgia*, 498 U.S. at 423-25.

Nor can the State seriously argue that the rule was "consistently applied." The California Supreme Court itself stipulated that it need not be: "While *we decline to prohibit the practice outright*, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." *People v. Johnson*, 30 Cal.4th at 1325 [emphasis supplied], *reversed by Johnson v. California*, 545 U.S. 162. The state court's difficulty envisioning appropriate scenarios soon cleared up. In 2005, responding to *Miller-El v. Dretke*, the state high court began

"assuming, without deciding," that it was it was required to apply "comparative analysis for the first time on appeal" and did so (without further explanation) in a number of cases. *People v. Schmeck,* 37 Cal.4th 240, 270-273, 118 P.2d 451, 471 (2005); *People v. Zambrano,* 41 Cal.4th 1082, 1109, 163 P.3d 4, 25 (2007); *People v. Ledesma,* 39 Cal.4th 641, 669, 140 P.3d 657, 687-88 (2006). The supposed procedural bar against the application of "comparative analysis for the first time on appeal" was not "well-established" at the time of Respondent's trial and it was never "consistently applied." It thus could not preclude the federal courts from applying the mandated constitutional analysis in *Batson* cases arising on habeas corpus review of California criminal judgments.

6. Despite the State's many inventions, what is absent from the State's petition is any cogent explanation as to why this case deserves the Court's review on *certiorari.* The petition clearly fails to meet any of the Court's traditional criteria. The State does not even pretend that the Ninth Circuit's opinion is in conflict with a decision of any of the other federal Courts of Appeals. *See*, Supreme Court Rule 10(a). Indeed, the Ninth Circuit's *Batson* jurisprudence – in this case and in general – appears to be completely congruent with that of the other Circuits.

Nor is there any colorable suggestion that the Ninth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). On the contrary, the Ninth Circuit's opinion in this case demonstrates a scrupulous effort to apply the precise principles and tools of *Batson* review set out in this Court's several opinions in the area. While the State certainly takes

exception with the Ninth Circuit's thinking, and the result reached using those principles and tools, that is obviously not a reason for this Court to expend its resources on retracing the same path.

For the same reason, it is manifest that the Ninth Circuit did not decide some new question of federal law that requires this Court's attention or that conflicts with this Court's precedent. *See*, Supreme Court Rule 10(c). The Ninth Circuit simply examined the state court's resolution of a *Batson* claim under the standard set out in §2254(d)(2), just as this Court did in *Miller-El v. Dretke,* and it used the same analytical methods employed by the Court in *Miller-El* and again in *Snyder.*

Nor can the State honestly claim that review is required in order to resolve a conflict between the federal and state courts. *See*, Supreme Court Rule 10(a). The supposedly novel rule that the State accuses the Ninth Circuit of adopting – that comparative juror analysis should be utilized by courts reviewing *Batson* cases, even if such an analysis was not sought in the trial court – is now an accepted principle in the California courts. *People v. Lenix*, 44 Cal.4th at 607; see Pet. 24, n.6.

The State protests that "many more final convictions" will be "at risk" if the Ninth Circuit continues to disregard state court "credibility findings" in favor of employing "comparative juror analysis as the primary, if not exclusive means of determining the prosecutor's credibility" in *Batson* cases. If the Ninth Circuit has committed those purported sins, it has done so in some other case. No state court credibility findings were disregarded here, and "comparative juror analysis" was neither the exclusive nor even the primary tool

utilized by the Court of Appeals. As for the "many more final convictions:" the few pending cases actually cited by the State in fact did not involve the rule of law ascribed to them by the State. (Please see note 20, *ante*, discussing Pet. 25 & n.7).

It is the nature of federal habeas corpus review that "final" state criminal convictions are regularly "at risk" – if that means they are subject to review under specified standards, and subject to being vacated if they offend the United States Constitution. The State has not begun to demonstrate the existence of any unsettled question of law, or any error in the Ninth Circuit's interpretation of the law or method of analysis in this case, of sufficient scope or magnitude as to merit the expenditure of the Court's limited time and resources in review.[21] Neither the fact that the State believes the Ninth Circuit has gone off track in other *Batson* cases, nor the fact that it believes the Ninth Circuit got the result wrong in this case, presents a cognizable basis for a grant of *certiorari.*

[21]Respondent wishes to emphasize that he believes the Ninth Circuit's opinion was correct in its analysis as well as its result, and that the State's criticisms of the Court of Appeal's "factual conclusions" are based on a tendentious, often misleading, and at times false description of the record evidence. Moreover, several of the State's arguments in this regard were never presented to the Ninth Circuit, either in the regular course of appellate briefing or in its Petition for Rehearing. This is not the appropriate context – nor is there sufficient time or space – to reargue the underlying appeal from scratch.

CONCLUSION

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

Dated: February 24, 2010

Respectfully submitted,

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