No. 09-894

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

ARGUMENT

Respondent advances six reasons why he opposes review of the Ninth Circuit's decision overturning his California judgment of conviction for first degree murder. None of his arguments overcomes the state's substantial showing of fundamental error by the Ninth Circuit, or of the clear need for a definitive resolution by the Court of the issue under *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

1. Respondent contends the state trial judge never made a factual finding that the prosecutor's reasons for exercising peremptory challenges against two black jurors were genuine. Quoting two sentences from the transcript of the two-day *Batson* hearing, respondent asserts that the trial court only found that the prosecutor's reasons for the challenges were "reasonable." Brief in Opposition to Petition for Writ of Certiorari (Opposition) at 14-17.

Respondent is incorrect. The trial court clearly made the appropriate credibility finding at the *Batson* hearing. The court denied the *Batson* motion after conducting a lengthy and probing colloquy with the prosecutor and defense counsel. It also reviewed the two jurors' questionnaires and hardship excuses. It also obtained and reviewed a transcript of the prosecutor's voir dire of one of the jurors. During the colloquy at the hearing, the prosecutor said, "Your Honor, whether my reaction to the comment from the juror and my assessment of what he felt about decisions versus semantics, whether I'm wrong or right on that doesn't matter, as long as that is the basis for my decision, whether it makes sense or not. The question is, *[a]m I being candid with the Court in saying those are my decisions*? That's what the decision is." SER 801 (emphasis added). The trial

court also stated in denying the *Batson* motion, "The Court is also aware of the right of both parties to exercise peremptory challenges of *jurors they honestly feel they could not be fair and impartial* to their position or have concerns about." SER 812 (emphasis added). The court plainly understood that its task at the third step of the *Batson* inquiry was to determine "the persuasiveness of the justification" proffered by the prosecutor. *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (per curiam). Equally plainly, the trial court believed that the prosecutor's reasons were genuine. See *LaVallee* v. *Delle Rose*, 410 U.S. 690, 692 (1973) (per curiam) (trial court's denial of relief after hearing testimony amounted to credibility finding); *Marshall* v. *Lonberger*, 459 U.S. 422, 433 (1983) (same).

The California Court of Appeal pointed out when it rejected respondent's argument on direct appeal that this Court has used identical language to describe the required inquiry. Pet. App. 108. In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), the Court observed that "the 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 339 (emphasis added).

In light of this Court's own employment of language very similar to that employed by the California trial judge, the state appellate court correctly held that "the trial court's use of the word 'reasonable' in rendering its ruling does not demonstrate a misapprehension of the proper legal standard." Pet. App. 109. Even the Ninth Circuit did not find that the trial court used the wrong

standard or failed to make a credibility finding by ruling that the prosecutor's justifications were reasonable.

Since the trial court's use of the word "reasonable" is not error in this context, respondent mistakenly indicts California courts for routinely employing the term as an allegedly incorrect legal standard in assessing the prosecutor's credibility. Opposition at 15-16. Moreover, respondent conflates this step-three *Batson* inquiry with a different question, i.e., whether the state courts use the correct standard to determine whether the defense has established a prima facie case of discrimination at the step-one *Batson* inquiry. See *Johnson* v. *California,* 545 U.S. 162 (2005). Cases like *Johnson* are simply inapposite in the present context.

2. Respondent disputes petitioner's assertions that the Ninth Circuit disregarded the state trial court's credibility finding, relied "primarily" on its own comparative juror analysis, and concluded that the prosecutor's reasons for the peremptory challenges were pretextual. He contends the Ninth Circuit first evaluated the prosecutor's justifications on their face, and then compared those justifications to other jurors who were not challenged. Opposition at 18-20. This is a distinction without a difference.

It cannot be denied that the Ninth Circuit relied heavily—and primarily—on comparative juror analysis in finding a *Batson* violation. See Pet. App. 3, 8, 9, 10, 12, 13, 14, 18, 19, 21-25, 27, 28, 31, 34-36, 40. The circuit court's holding in the first paragraph of the opinion states that "a comparative juror analysis, in combination with other facts in the record, demonstrates that the prosecutor's purported race-neutral reasons for striking at least one of the jurors were pretexts for racial discrimination." Pet. App. 3. To the extent the Ninth Circuit also parsed

the prosecutor's reasons to draw its own conclusions about the prosecutor's sincerity, respondent proves the state's point that the Ninth Circuit ignored the trial judge's credibility finding. The Ninth Circuit failed even to discuss, much less to defer, to the trial court's finding (except in one instance when it distorted the record in a manner supporting its conclusion). See Petition for Writ of Certiorari at 15 n. 2. Without the tether of deference, the Ninth Circuit repeatedly drew antagonistic conclusions about the prosecutor's stated reasons. It made no difference to its analysis or its conclusion that the trial judge had accepted those reasons based on his first-hand observations of the prosecutor's demeanor. This is fundamental error. See *Snyder* v. *Louisiana*, 128 S. Ct. 1203, 1208 (2008) ("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.") (citations and internal quotations omitted); *Rice* v. *Collins,* 546 U.S. 333 (2006) (Ninth Circuit's reliance on "debatable inferences" to set aside state court's conclusion does not satisfy requirements for granting writ under 28 U.S.C. § 2254(d)).

Respondent also asserts that the Ninth Circuit simply employed an analytical tool from *Miller-El* v. *Dretke*, 545 U.S. 231, 244 (2005), which states that the failure to ask follow-up questions can suggest a pretextual reason for a peremptory challenge. Opposition at 19. However, as we stated in the petition, the Ninth Circuit's reliance on that factor is based on an erroneous reading of the record. The Ninth Circuit claimed, "After the trial court finished asking M.C. about the molestation incident, including questions about how the incident might

affect her objectivity, the court provided the prosecution with an opportunity to ask questions of his own. He did not do so." Pet. App. 25. The Ninth Circuit believed this omission indicated that the prosecutor's "alleged concern with her objectivity was a make-weight." Pet. App. 26. In fact, the prosecutor *did* subsequently question M.C. about whether she thought her prior experience with the criminal justice system would affect her decision-making process—and she again equivocated, which was the basis for the prosecutor's concern. SER 455. The Ninth Circuit's mischaracterization of the record does not support respondent's assertion that it "merely performed the task that *Batson* and its progeny require of all courts." See Opposition at 20.

3. Respondent argues that because the Ninth Circuit stated it was analyzing this case under 28 U.S.C. § 2254(d)(2), the question whether it was entitled to use comparative juror analysis under 28 U.S.C. § 2254(d)(1) "was not at issue in this case." Opposition at 20-22.

However, whether the state court's decision regarding the third step of the *Batson* inquiry was based on an unreasonable determination of the facts under § 2254(d)(2) must be resolved under this Court's clearly established law directing how to evaluate the claim. *Thaler* v. *Haynes*, 175 L. Ed. 2d 1003, 1007 (Feb. 22, 2010) (court of appeals erroneously rejected credibility finding because there was no clearly established law holding that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalled that conduct). As respondent points out, the Court has set forth various factors to be considered in reviewing the factual assessment of the prosecutor's credibility, including whether the prosecutor asked follow-up

questions, *Miller-El II*, 545 U.S. at 244, and whether the prosecutor's explanations were reasonable and had some basis in accepted trial strategy, *Miller-El I*, 537 U.S. at 339. However, as the petition explains, the Court has not specifically held that comparative juror analysis is required on habeas review of a step-three *Batson* claim, because the cases discussing that analysis arose in states that did not object to that factor. See Petition for Writ of Certiorari at 22-24. We have and do object.

Respondent also contends the issue of whether comparative juror analysis constitutes "clearly established" Supreme Court law under § 2254(d)(1) is not discussed in the Ninth Circuit's opinion, and that it was not necessary to the court of appeals' "mode of inquiry or ultimate conclusion." Opposition at 22. Respondent's view is unsupportable. The state of California has consistently objected to the use of comparative juror analysis in *Batson* cases on federal habeas review, as it did here. The Ninth Circuit responded in this case by citing *Kesser* v. *Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc), where the court decided that issue against the state. Pet. App. 14; see *Kesser*, 465 F.3d at 360-361. That the Ninth Circuit resolved the issue in an earlier case does not shield its subsequent reliance on circuit precedent from this Court's review. See *Hedgpeth* v. *Pulido*, 129 S. Ct. 530, 531 (2008) (per curiam) (reversing Ninth Circuit holding that was based on earlier circuit law). In this case, the Ninth Circuit not only utilized comparative juror analysis as an essential element of its conclusion, it presupposed that analysis was clearly established and constitutionally compelled.

4. Respondent argues that comparative juror analysis is not a discrete legal doctrine that needs to be clearly established by this Court in order to apply

to state cases on federal habeas review. He further appears to contend that comparative juror analysis was clearly established in *Batson* itself. He notes that *Batson* required courts to examine the "totality of the relevant evidence" when assessing claims of discrimination in peremptory challenges. Opposition at 22-24.

Unlike respondent, even the Ninth Circuit did not conceive of comparative juror analysis as a free-standing tool to be invoked on federal habeas review in its discretion. It deemed the analysis to be compulsory, because, allegedly, this Court clearly established that rule in *Miller-El II,* not *Batson. Kesser* v. *Cambra,* 465 F.3d at 360. Despite respondent's afterthought efforts to replant the revisionist roots of the court of appeals' comparative juror analysis in deeper soil, its bloom is still off. His argument is refuted by *Thaler* v. *Haynes*, 175 L. Ed. 2d 1003, which respondent has not addressed, although his opposition postdated that decision. The Court held in *Haynes* that the specific question of whether a judge must personally observe and recall a juror's demeanor-based explanation must be clearly established before it can be the basis of federal habeas relief. *Id*. at 1007-08. The Court also rejected the notion that *Batson* clearly established such a rule: *Batson* does require a judge to "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," but nothing in that "general requirement" clearly established the demeanor-recollection rule on which the court of appeals' decision rested. *Id*. at 1007. Likewise, a rule that the prosecutor's reasons for a peremptory challenge have to satisfy comparative juror analysis must be clearly established before it can support a grant of the writ by a federal habeas court. And a comparative juror analysis rule like the Ninth

Circuit's is even less apparent in *Batson's* general language than the demeanor-recollection rule. See also *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004) (no clearly established law requiring consideration of suspect's age and experience in determining whether he was in custody, even though *Miranda* required consideration of all objective circumstances generally).

Haynes also observed: "Even if *Snyder* did alter or add to *Batson*'s rule (as the Court of Appeals seems to have concluded), *Snyder* could not have constituted 'clearly established Federal law as determined by' this Court for purposes of respondent's habeas petition because we decided *Snyder* nearly six years after his conviction became final and more than six years after the relevant state-court decision." *Haynes*, 175 L. Ed. 2d at 1008 n. 2. As shown in the petition, even if *Miller-El II* could be viewed as clearly establishing a rule requiring state judges to accept only comparative-juror- analysis-compliant reasons for a peremptory challenge, the Ninth Circuit in *Kesser* unquestionably miscalculated the date such a rule would apply on habeas corpus review. See Petition for Writ of Certiorari at 24-25. The Ninth Circuit backdated the rule to the last reasoned state court decision in *Miller-El*, which was in 1992, thirteen years before this Court issued its merits opinion. See *Kesser* v. *Cambra*, 465 F.3d at 360. *Haynes* makes clear that calculation is wrong. Even under the most favorable construction to respondent, comparative juror analysis was not clearly established until 2005, the year after respondent's case became final.

5. Respondent's backfilling extends to an attempted revision of the state's position in this case. As noted, we contend the Ninth Circuit improperly insists that the prosecutor's reasons must conform to

comparative juror analysis, even though that rule has not been clearly established by this Court. Petition for Writ of Certiorari at 20-26. For reasons not entirely clear, respondent claims petitioner's real argument is that respondent procedurally defaulted on his right to a comparative juror analysis of those reasons on appeal. He then argues no procedural default exists. Opposition at 24-32. As we did not rely on that argument in the petition, it does not warrant further discussion.

In the same vein, respondent misconstrues our citation to capital cases in which the California courts did not undertake comparative juror analysis. In connection with those decisions, the petition points out that judgments involving some of the state's most serious offenders would be in jeopardy if federal courts employ the non-deferential approach to *Batson* claims adopted by the Ninth Circuit in this case. Petition for Writ of Certiorari at 25 n. 7. Respondent cites those cases to dispute the state's approach to comparative juror analysis for purposes of the procedural default doctrine. Opposition at 29 n. 19. As noted, our petition does not assert procedural default.

Respondent also asserts that petitioner's contention is "undercut" by the California Supreme Court's decision in *People* v. *Lenix,* 44 Cal. 4th 602, 187 P.3d 946 (2008). Opposition at 24. In *Lenix* the court 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." *Id*. at 621, 187 P.3d at 960. *Lenix* shows that the California Supreme believes that if comparative juror analysis is required, that rule arose at the earliest when this Court decided *Miller-*

El II, which supports our assertion that such a rule was not clearly established prior to that time.

6. Finally, respondent contends the petition seeks mere "error correction" of a single case. Opposition at 32-34. This ignores the fact that the Ninth Circuit's approach to federal habeas review of state court *Batson* adjudications reflects a systemic failure to comply with this Court's jurisprudence, necessitating certiorari review under Supreme Court Rule 10(c). The Ninth Circuit has repeatedly refused to accord the requisite deference to the state courts' third-step factual findings, and has insisted that it has the authority to conduct comparative juror analysis de novo. E.g., *Green* v. *Lamarque,* 571 F.3d 902 (9th Cir. 2008); *Kesser* v. *Cambra*, 465 F.3d 351; *Boyd* v. *Newland*, 467 F.3d 1139 (9th Cir. 2006); *Brown* v. *del Papa*, 2006 U.S. App. LEXIS 28148 (9th Cir. 2006); *Currie* v. *Adams*, 2005 U.S. App. LEXIS 19793 (9th Cir. 2005).

Further, in light of the Ninth Circuit's sustained recalcitrance to the mandates of AEDPA, even if the state courts conduct comparative juror analysis for the first time on appeal, there is no guarantee the Ninth Circuit will find those conclusions sufficient to warrant deference. See, e.g., *Doody* v. *Schriro*, 2010 U.S. App. LEXIS 3937, *106-107 (9th Cir. Feb. 25, 2010) (en banc) (Tallman, J., dissenting) (citing seven habeas cases where this Court reversed the Ninth Circuit for failing to give sufficient deference to state courts' conclusions, and lamenting, "we are unrepentant"). Certiorari review is necessary to stem the tide of unwarranted reversals.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 8, 2010

Respectfully submitted

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