No. 14-5442

In the Supreme Court of the United States

CALVIN DION CHISM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

When the California Supreme Court conducts comparative review on appeal from the denial of a motion brought pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and cites reasons other than those stated by the prosecutor as a basis for affirming the trial court's ruling, does this practice contravene this Court's holdings in *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) and other decisions?

LIST OF PARTIES

1. Calvin Dion Chism, Petitioner
2. The State of California, Respondent

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STATEMENT OF THE CASE

In 1998, Petitioner shot and killed Richard Moon during an attempted armed robbery that petitioner planned and orchestrated at Eddie's Liquor in Long Beach. Just prior to the attempted robbery, petitioner assigned tasks to his codefendants, Samuel Taylor and Marcus Johnson, as well as to Marcia Johnson.[1] Petitioner sent Marcia inside the store to scout the location. Moon was the only person working in the store at the time. Petitioner and codefendant Johnson then entered with a nine-millimeter Glock firearm while codefendant Taylor, who acted as the getaway driver, and Marcia waited around the corner in a van. Petitioner shot Moon in the back within a few moments of entering the store. Moon died before paramedics arrived.

Petitioner killed Moon less than three months after his release from the California Youth Authority (hereinafter "CYA") for committing an assault with a deadly weapon and another attempted robbery, and only one month after he committed an armed robbery at Riteway market in Compton. During the Riteway robbery, petitioner went inside the market to scout the location before his group entered. Jung Chung was the only person working in the store at the time. Petitioner left and then re-entered with his accomplices, including codefendant Johnson. One of the suspects pointed a gun at Jung's head and demanded money. Petitioner took a nine-millimeter

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[1] Respondent will refer to Marcia Johnson by her first name to avoid confusion with her brother, codefendant Johnson.

Glock firearm owned by Chun Chung, Jung's husband. Chung's nine-millimeter Glock firearm was the gun petitioner used to kill Moon approximately one month later, and was found in petitioner's residence one week after Moon's murder.

A jury found petitioner and his codefendants guilty of the first degree murder of Moon during the course of the attempted robbery at Eddie's Liquor as well as second degree robbery for the events at Riteway. The jury found the allegations that petitioner personally used a firearm and suffered one prior serious or violent juvenile adjudication within the meaning of California's Three Strikes Law to be true.

During the first penalty phase trial, the trial court declared a mistrial when the jury was unable to reach a verdict.[2] After the second penalty phase trial, the jury fixed the penalty at death.

The California Supreme Court affirmed the judgment of conviction and sentence of death on appeal. (*People v. Chism*, 58 Cal.4th 1266, 324 P. 3d 183 (2014); Pet., App. A 1-84.) Justice Kennard concurred in the judgment, but dissented on the ground that she believed petitioner's prior serious or violent juvenile adjudication could not properly be used to double his sentence for the Riteway robbery under California's Three Strikes Law. (Pet., App. A

[2] Codefendants Taylor and Johnson were sentenced to life without the possibility of parole and were not parties to petitioner's penalty phase trials or direct appeal.

(Kennard, J., dis.) 1.) Justice Liu dissented from the court's affirmance of the penalty verdict on the ground that he believed the prosecutor engaged in purposeful discrimination under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (Pet., App. A (Liu, J., conc. & dis.) 1-21.)

Specifically, as relevant here, the majority opinion rejected petitioner's claim that the prosecutor's peremptory challenges to two African American prospective jurors during the penalty phase retrial violated *Batson* and *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890 (1978). The court set forth the following relevant trial court proceedings. During the penalty phase voir dire and on appeal, petitioner objected to the prosecutor's challenges of prospective jurors J.S. and F.J. F.J. was an African American male who was seated as Prospective Juror Number 2. He said that he had been a driver with UPS for 18 years, but had never held any supervisory positions. F.J. had served on two prior criminal juries, one that ended with a verdict and another that ended with a hung jury. He felt frustrated that the jurors could not reach a decision in the latter case. (Pet., App. A 45-46.)

J.S. was an African American female who was seated as Prospective Juror Number 1. She said she had worked for Pacific Bell for 30 years first as a clerk and then "designing" telephone circuits. For the previous 20 years at the job, J.S. had trained others on inputting circuit design information into the computer system, but had never held a supervisory position. When the prosecutor asked what J.S. did as a circuit designer, J.S. said, "We get an

order, then we have to put together the circuit, where it's going from and where it ends up at." (Pet., App. A 46; Pet., App. A (Liu, J. dis) 14.) J.S. had served on one prior criminal jury and one prior civil jury. Both reached verdicts. (Pet., App. A 46.)

During voir dire, the prosecutor asked both J.S. and F.J., as well as many other prospective jurors, about prior work and supervisory experience. Defense counsel also questioned prospective jurors about supervisory experience. (Pet., App. A 56.)

When the prosecutor exercised a peremptory challenge to F.J., which was her fourth challenge and first to an African American juror, defense counsel objected on *Batson* grounds. The trial court found no prima facie showing of discriminatory purpose, noting that some prosecutors automatically excluded jurors who had served on a hung jury, but invited the prosecutor to state her reasons. The prosecutor responded that F.J. had "'[n]o significant life experience that indicates strong decision-making skills. He's been throughout his occupation, a UPS driver, never supervised anybody. There is nothing about his background that indicates that he can engage in a decision … of this magnitude.'" The prosecutor further noted that she might have wanted F.J. on the jury in a different type of case, but she was asking only for a verdict of death in this case. She later added that the decision in a penalty phase was "'far more stressful and of greater magnitude than your

ordinary case, and I bear that in mind when I excuse jurors.'" (Pet., App. A 46-47.) The court denied the *Batson* motion.

After several more peremptory challenges by both parties, the prosecutor challenged J.S. Defense counsel again made a *Batson* motion. The trial court first noted that the prosecutor had "'relied on life's experience criteria'" in excusing F.J. and that J.S. had not supervised others. The court then invited the prosecutor to comment. (Pet., App. A 47-48.) The prosecutor stated that J.S. had not supervised anyone. She also felt that J.S.'s job description was misleading because J.S. did not make decisions and appeared to be in a data entry position, i.e., she was simply given information that she input into a computer and was "'basically a more sophisticated form of a filing clerk[.]'" The prosecutor explained that the penalty phase determination was "'a very stressful deliberative process [that] requires individuals who are seasoned decision makers.'" (Pet., App. A 48.) She further explained as follows:

> The fear factor involved any time you get a stressful and difficult decision to make, that can be very crippling in terms of the deliberation process when you get somebody in the jury room who doesn't have that experience. And that's one of the things, one of the many things that I look at in terms of a juror.
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> I've looked at her job description. She has basically been in clerk positions. If I were to not kick her, it seems to me that it would only be because she is an African American. And I don't believe that I'm going to discriminate in one direction or the other. I'm not going to keep her simply because she is African American.

(Pet., App. A 48.) The prosecutor also stated, "'[T]here's absolutely nothing about her background that tells me that she can operate in a high-stress situation. And that's very important in this type of case where the issue is life and death.'" (*Id*.)

The trial court again found that defense counsel failed to make a prima facie showing of racial discrimination. After further argument by defense counsel, the court found that the prosecutor had offered a "non-race based criteria" and her peremptory challenge was "'consistent with that non-suspect category use.'" (Pet., App. A 49.) The prosecutor added that "'it's not just supervisory positions that I look for. I look for how they handled stressful situations or incident[s] in their life.'" She explained that she had limited factors to look at and voir dire was like a job interview. Based on that, the prosecutor said, "'I don't believe that [J.S.] is up to the decision in this case.'" (*Id*.)

The majority of the California Supreme Court held that substantial evidence supported the trial court's rulings that the prosecutor's stated race-neutral reasons were genuine and credible. The court analyzed the matter as a third-step *Batson* case, explaining that it was a hybrid first-step/third-step *Batson* situation since the trial court had found no prima facie case, but then found the prosecutor's justifications for the challenges to be genuine. (Pet., App. A 50-51.) The majority opinion first evaluated the statistical evidence, noting that there were four or five African Americans in the 59-member

venire. The prosecutor exercised only two of her 13 peremptory challenges against African American prospective jurors, and she accepted the panel with one African American juror and one African American alternate juror. (Pet., App. A 53.) The court found that the statistics did not suggest improper discrimination, noting that the impaneled jury included roughly the same percentage of African Americans as the entire venire and that the inclusion of African Americans on the jury was an indication of good faith. (Pet. App. A 53-54.)

The majority next found that the record substantially supported the trial court's determination that the prosecutor's stated desire for jurors who could make difficult decisions was race-neutral and genuine. The majority explained that the proper focus of its inquiry was on the subjective genuineness, not the objective reasonableness, of the prosecutor's race-neutral reasons. It then noted that the prosecutor "asked other non-African-American prospective jurors whether they had supervisory experience, and the defense, apparently sharing the prosecutor's view that supervisory experience was a factor worthy of consideration, sought the same information from several other prospective jurors." (Pet., App. A 56.)

Finally, the majority engaged in a comparative juror analysis, first noting that it would consider not only the prosecutor's reasons and the responses of unchallenged jurors, but also the reasons the record disclosed for why the prosecutor might not have challenged other non-African American

jurors who were similar in some respects to the excused jurors. (Pet., App. A 58.) The court then held that petitioner forfeited any argument based on the responses provided by Prospective Jurors B.A., R.P., W.F., and M.C. after the trial court denied his second *Batson* motion because he did not argue at that time that the trial court should consider those later developments. (Pet., App. A 59.) In any event, the majority addressed all eight of the prospective jurors' responses addressed by petitioner out of caution, finding that those jurors were not sufficiently similar to the two excused jurors such that racial discrimination was suggested.

Specifically, the majority found as follows: Prospective Juror W.B. did not supervise anyone at his network technician job at the time of trial, but he had supervisory experience in a previous office-management warehouse job. (Pet., App. A 59-60.)

L.F. might reasonably have been viewed as someone with experience making decisions in stressful circumstances and someone who would work well with others as a team to return a verdict. She handled worker's compensation and medical claims, working as "'a buffer between the injured worker and the insurance carrier.'" Although she did not make decisions on or approve or reject the claims, she provided input and consulted with others on those claims, discussed pertinent information with the person making the ultimate decision, and engaged in a lot of problem solving. (Pet., App. A 60; Pet., App. A (Liu, J., dis.) 11.)

Although G.M. did not supervise others, he was a "senior consulting engineer" who directed and reviewed the work of engineering contractors. He also sometimes worked as part of a team. G.M. might reasonably have been viewed as more favorable to the prosecution than F.J. or J.S. "based solely on his experience in directing and reviewing the work of others, as well as making independent, complex decisions, experience [the prosecutor] believed indicated the prospective juror could decide difficult questions." (Pet., App. A 60.)

While Prospective Juror K.K. lacked supervisory experience, he was a Raytheon lab technician, working in metallurgy and electronic failure analysis, who sometimes received instructions from engineers and sometimes instructed others depending upon the problem presented. He also had an advanced degree in financing that was related to his job. Thus, the prosecutor might reasonably have found that "his ability to receive and give instructions to solve problems on a continuing basis demonstrated a strong ability to make decisions." F.J.'s and J.S.'s work experience did not suggest the same skills. (Pet., App. A 60.)

Prospective Juror B.A. had supervisory experience, as she had been the assistant manager of a high school cafeteria for seven years. She also had been trained in the use of and owned several different types of firearms, which would have been a significant factor given the prosecution's reliance on ballistics evidence in the present case. (Pet., App. A 61.)

Although Prospective Juror R.P. lacked supervisory work experience, he had several life experiences suggesting he would be favorable for the prosecution. He served on a prior capital case involving murder charges and special circumstance allegations wherein the jury reached verdicts in both the guilt and penalty phases. (Pet., App. A 61-62.) Thus, he had made the same type of decision the prosecutor was asking him to make in this case, which "substantially distinguishe[d] him from F.J. and J.S." (Pet., App. A 62.) R.P. also had several law enforcement ties. He had further witnessed two separate killings, one where he identified the suspect for police and another where he testified at trial. These experiences suggested he would not be easily intimidated, could make hard decisions, and would have less difficulty deliberating than J.S. or F.J. (Pet. App. A 62.)

Prospective Juror W.F. did not work as a supervisor, but her work experience was distinguishable from that of J.S. and F.J. because it required decision-making and working in a team environment. She was an account coordinator for a coupon distribution company. In that capacity, she consulted with large manufacturers to decide which type of media to use for their advertising and she worked with her account manager in making decisions for her clients. W.F. had also previously worked for a public relations agency and as a marketing manager. (Pet., App. A 62-63.)

Finally, Prospective Juror M.C. did not have supervisory work experience, but she had other life experiences suggesting she would be

desirable for the prosecution as someone who could deliberate effectively. She had experience running a large household (nine adult children), had volunteered as a docent at the Torrance criminal courthouse for 13 years, she had served on a robbery case where a verdict was reached, and she had ties to the legal community as well as law enforcement. (Pet., App. A 63.)

Based on its statistical analysis, review of the prosecutor's reasons for excusing F.J. and J.S., and comparative juror analysis, a majority of the California Supreme Court determined that petitioner failed to show the prosecutor's two peremptory challenges at issue were motivated by improper discrimination. (Pet., App. A 63.)

Justice Liu disagreed. (Pet., App. A (Liu, J., dis.) 1-21.) He noted first that petitioner was African American and the victim was Caucasian. He then relied on defense counsel's assertion that the two jurors who did not vote for death in petitioner's first penalty phase trial were African American.[3] (Pet., App. A (Liu, J. dis.) 9.) Justice Liu further believed that the record "cast doubt" on the prosecutor's reasons for excusing J.S. because the prosecutor did not ask J.S. about her life experiences, two of the empaneled

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[3] Justice Liu's statement that petitioner's assertion was "undisputed" is misleading. The Attorney General could not dispute petitioner's claim because it was based solely on a comment by defense counsel and the record in this appeal does not state whether any of the holdout jurors were African American. (*See* Pet., App. A 56 [majority opinion finding that defense counsel's statement was "not otherwise supported in the record"].)

Caucasian jurors were not supervisors, and a third had "only a minor supervisory role in a previous job." (Pet., App. A (Liu, J. dis.) 10.) Justice Liu also expressed his opinion that the court should have been limited to looking only at the reasons given by the prosecutor, i.e., past supervisory experience and life experience, and no other factors mentioned by the empaneled non-African American jurors. (Pet., App. A (Liu, J. dis.) 10-16.)

Justice Liu's dissent concluded with his opinion that there were several "dubious aspects" of the California Supreme Court's *Batson* jurisprudence. (Pet., App. A (Liu, J. dis.) 16-21.) First, he did not believe the majority should have given deference to the trial court's ruling because the trial court did not compare J.S. to Caucasian jurors who remained. Second, Justice Liu disagreed with the majority that the utility of a comparative juror analysis done for the first time on appeal was limited. Third, he disagreed that the focus should be on the subjective genuineness of the prosecutor's reasons. Finally, Justice Liu did not believe that petitioner forfeited discussion of juror responses given after his *Batson* motions were denied. (Pet., App. A (Liu, J. dis.) 18-21.) Thus, he concluded that the prosecutor's strike of J.S. was motivated in substantial part by improper discrimination. (Pet., App. A (Liu., J. dis.) at 1-2, 21.)

REASONS THE PETITION SHOULD BE DENIED

THE LAW APPLIED BY THE CALIFORNIA SUPREME COURT, WHICH INCLUDED DEFERENCE TO THE TRIAL COURT'S RULING AND CONSIDERATION OF ALL RELEVANT FACTORS, EVEN THOSE NOT RELATED TO THE REASONS GIVEN BY THE PROSECUTOR FOR HER CHALLENGES TO CERTAIN JURORS, IN EVALUATING A CASE AT THE THIRD STEP OF A *BATSON V. KENTUCKY* ANALYSIS COMPORTS WITH THIS COURT'S AUTHORITY

Petitioner contends that this Court should grant certiorari to decide whether, when conducting a comparative juror analysis, the California Supreme Court's review of factors in the record other than those stated by the prosecutor to justify her challenges to certain jurors contravenes this Court's rulings in *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*) and other *Batson*-related opinions. (Pet. at 1-23.) He also contends that the California Supreme Court's deference to the trial court's ruling conflicted with this Court's authority because the trial court had not engaged in a comparative juror analysis. (Pet. at 20-21.)

To the contrary, the California Supreme Court's consideration of factors in the voir dire record suggesting why the prosecutor might have distinguished unchallenged jurors from challenged jurors, as well as the deference it gave to the trial court's findings, comports with this Court's *Batson* jurisprudence. Moreover, the California Supreme Court authority permitting consideration of factors beyond those stated by the prosecutor is based upon this Court's opinions in *Miller-El II* and *Snyder v. Louisiana,* 552 U.S. 472, 475-477 (2008) (*Snyder*), both of which reiterated that *all* factors

must be considered, explained that an exploration of alleged similarities might show jurors are not actually comparable, and set forth that a comparative juror analysis can evidence discrimination where the prosecutor's reason applies equally to an empaneled non-African American juror who is "otherwise similar." Likewise, this Court has repeatedly stated that a trial court's *Batson* ruling is entitled to deference, and it specifically gave deference to the trial court's ruling in *Snyder* although the trial court similarly had not engaged in a comparative juror analysis. Accordingly, this Court should deny the Petition.

A. The Applicable Law

The Equal Protection Clause of the federal constitution prohibits the use of peremptory challenges to exclude prospective jurors based on bias against members of a cognizable group, such as one identified by race, ethnicity, or gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); *Batson*, 476 U.S. at 89. A trial court's evaluation of a *Batson* motion involves three steps. *Rice v. Collins*, 546 U.S. 333, 338 (2006); *Johnson v. California*, 545 U.S. 162, 168 (2005). First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race or membership in another cognizable group. *Id*. Second, if a prima facie case is shown, the burden shifts to the prosecution to provide a race-neutral explanation for striking the juror in question. Finally, if the prosecution meets this burden, the trial court must determine whether the defendant

carried his burden of proving the true reason for the prosecutor's strike was purposeful discrimination. *Id*.

In the present case, the California Supreme Court deemed the matter to be a hybrid *Batson* situation and evaluated it at the third step of the analysis, but also included a second-step discussion of whether the prosecutor's explanation was race-neutral and genuine. Thus, as relevant here, at the second step of the analysis, the "'issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Id*. at 768 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). The justifications tendered need not be minimally persuasive; even implausible, fantastic, silly, or superstitious reasons will satisfy the prosecution's burden at step two. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995).

At the third step, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*). "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*.

A court should also consider, inter alia, a comparative juror analysis even if such an analysis was not conducted by the trial court. *See Snyder*, 552 U.S. at 475-77; *Miller-El II*, 545 U.S. at 241-52; *accord* Pet., App. A 57.

As this Court has explained, "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El II*, 545 U.S. at 241.

However, "'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" *Snyder*, 552 U.S. at 477 (quoting *Hernandez*, 500 U.S. at 365). "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." *Id.* Thus, "[t]he trial court has a pivotal role in evaluating *Batson* claims" and its factual determinations are afforded great deference absent "exceptional circumstances." *Id.*

"[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all of the circumstances* that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (italics added) (citing *Miller-El II*, 545 U.S. at 240).

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B. California Law Which Permits Courts to Consider Factors in Addition to the Prosecutor's Stated Reasons for a Peremptory Challenge When Assessing Third-Step *Batson* Claims Not Only Comports with, But Is Also Based Upon This Court's Authority

Certiorari should be denied because the law applied by the California Supreme Court in this case not only comports with, but is also based on, this Court's authority. The California Supreme Court's consideration of factors that distinguished the non-African American empaneled jurors from J.S. and F.J., whether or not those factors related to the prosecutor's stated reasons for challenging J.S. and F.J., was consistent with this Court's third-step *Batson* jurisprudence and comparative juror analyses. As this Court has explained, a comparative juror analysis provides evidence of discrimination where a prosecutor's proffered reason for striking an African American juror "applies just as well to an *otherwise-similar* nonblack who is permitted to serve[.]" *Miller-El II*, 545 U.S. at 241 (italics added). A court would be hard-pressed to determine whether an empaneled juror and challenged juror were "otherwise similar" if it were limited to considering only the prosecutor's proffered reason for the challenge. *See also Snyder*, 552 U.S. at 478 (courts are to consider all relevant circumstances when analyzing *Batson* claims).

Contrary to petitioner's contention, the California Supreme Court never suggested that non-African American jurors had to be identical or similar on all points to J.S. or F.J. for comparison. (*See* Pet., App. A 57-63; *Miller-El II*, 545 U.S. at 247 n.6 (jurors do not need to be identical or similar on all points

for comparison).) The court, instead, explained that, "'[w]hen asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.'" (Pet., App. A 58, quoting *People v. Jones*, 51 Cal. 4th 346, 365-66, 247 P. 3d 82 (2011).) "'Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable.'" (Pet., App. A 58-59, quoting *People v. Lenix*, 44 Cal. 4th 602, 624, 187 P. 3d 946 (2008).) "'These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding.'" (Pet., App. A 58-59, quoting *Lenix*, 44 Cal. 4th at 624.) The majority opinion's reasoning is consistent with this Court's rule that all relevant circumstances must be considered as well as the principle that the prosecutor's stated reasons must apply equally to challenged and unchallenged jurors that are "otherwise similar" in order for a comparative juror analysis to show discrimination. *See Snyder*, 552 U.S. at 478; *Miller-El II*, 545 U.S. at 240-41.

The majority opinion's reasoning further amounts to a logical application of the law. For a comparative juror analysis to have any utility at all, the jurors in question must be sufficiently similar such that a fair

comparison can be made and a reliable inference can be drawn therefrom. When a non-African American juror's answers distinguish him or her in a meaningful way from the challenged African American juror at issue, the jurors are not truly comparable or "otherwise similar." *See Miller-El II*, 545 U.S. at 241, 247 (finding that non-African American jurors were similarly situated to a challenged African American juror because there were "strong similarities" and only "some differences" that were "far from significant").

Moreover, the California law applied here is based upon this Court's authority. In setting forth the applicable law for a third-step *Batson* case, the majority opinion here relied heavily on its prior opinions in *Lenix*, 44 Cal. 4th 602, and *Jones*, 51 Cal. 4th 346. (Pet., App. A 57-59.) In *Lenix*, the California Supreme Court analyzed *Miller-El II* and *Snyder* in detail. *Id*. at 614-21. Following those decisions, the California Supreme Court found that its former practice of declining to engage in a comparative juror analysis for the first time on appeal was unduly restrictive and did not follow *Snyder*'s dictate that "'*all* of the circumstances that bear upon the issue of racial animosity *must* be consulted'" when conducting a *Batson* analysis. *Lenix*, 44 Cal. 4th at 622 (quoting *Snyder*, 552 U.S. at 487). The California Supreme Court then ruled that California courts should conduct a comparative juror analysis on appeal even when such an analysis did not occur in the trial court. *Lenix*, 44 Cal. 4th at 607, 612, 614-23 (citing *Snyder*, 552 U.S. 472 and *Miller-El II*, 545 U.S. 231).

The California Supreme Court further discussed the utility of engaging in a comparative juror analysis as well as the limitations of doing so for the first time on appeal, again relying upon this Court's authority. *Lenix*, 44 Cal. 4th at 621-22 ("In *Snyder*, the high court recognized the potentially misleading nature of a retrospective comparative juror analysis performed on a cold record, but nevertheless relied on this evidence as bearing on the question of the prosecutor's credibility") (citing *Snyder*, 552 U.S. at 482-85). In *Snyder*, this Court had explained the following:

> 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, 545 U.S. at 483.

The California Supreme Court's later ruling in *Jones* similarly aligned with this Court's authority when it elaborated on the limitations of conducting a comparative juror analysis for the first time on appeal and rejected a claim, similar to that presented here, that courts may consider only the reasons given by the prosecutor. *Jones*, 51 Cal. 4th at 365-66. The court explained, "We agree with defendant that in judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given." *Id.* "'If the stated reason does not

hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.'" *Id.* (quoting *Miller–El II*, 545 U.S. at 252). "But we disagree … that we may not consider reasons not stated on the record for accepting other jurors. The prosecutor was not asked why he did not challenge the other [jurors at issue]." *Jones*, 51 Cal. 4th at 365.

The *Jones* court further reasoned that "no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged." *Jones*, 51 Cal. 4th at 365. "One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges." *Id.* Accordingly, the court ruled that a reviewing court must not "turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors." *Id.* at 365-66.

Nothing in the California Supreme Court's rulings in *Jones* or *Lenix* or the majority opinion here conflict with this Court's authority. The California rule that reviewing courts conducting a comparative juror analysis for the first time on appeal may consider distinguishing factors, other than the prosecutor's stated justifications for a particular challenge, is based on and naturally follows from this Court's authority. In particular, this rule is the logical extension of this Court's dictates that all relevant circumstances must

be considered and that a comparative juror analysis evidences discrimination only where the prosecutor's justification applies equally to an "otherwise similar" juror.

C. California's Rule Which Gives Deference to a Trial Court's Third-Step *Batson* Ruling, Even Where the Trial Court Was Not Asked to Engage in a Comparative Juror Analysis, Is Consistent with This Court's Authority

Certiorari should be denied because California law comports with this Court's authority in giving deference to a trial court's third-step *Batson* findings. In the instant case, the California Supreme Court majority opinion relied on its prior opinions in *People v. Johnson*, 47 Cal. 3d 1194, 767 P. 2d 1047 (1989) (*Johnson I*) and *Lenix*, as well as on *Batson*, in ruling that reviewing courts must give great deference to a trial court's ruling that a peremptory challenge was not improperly based on class bias. (Pet., App. A 57-58.) The court had explained as follows in *Johnson I*:

> [T]he very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. The dissent's attempt to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose.

Johnson I, 47 Cal. 3d at 1221. The *Johnson I* court then found, "As stated in *Batson*: '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.'" *Id*. (quoting *Batson*, 476 U.S. at 98 n. 21.)

The California Supreme Court further explained in *Lenix* that "comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard." *Lenix*, 44 Cal. 4th at 624. As a result, the court concluded that "[d]efendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." *Id*. (citing *Hernandez*, 500 U.S. at 365).

The *Lenix* and *Johnson* decisions properly followed this Court's authority. First, this Court ruled in *Batson* as well as *Hernandez* that trial court decisions on the question of discriminatory intent under *Batson* are afforded "great deference on appeal." *Hernandez*, 500 U.S. at 364-65 (finding 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" and explaining that deference to the trial court's finding "makes

particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility'"); *Batson*, 476 U.S. at 98 n.21; *see also Lenix*, 44 Cal. 4th at 625 (noting that *Miller-El II* "emphasized that it is the trial court's duty to 'assess the plausibility of the prosecutor's proffered reasons'" in light of the evidence (quoting *Miller-El II*, 545 U.S. at 252), and that *Snyder* reiterated that the trial court has a "'pivotal role in evaluating *Batson* claims'" because it must assess the prosecutor's demeanor in determining credibility (quoting *Snyder*, 552 U.S. at 477)).

Second, and significantly, this Court deferred to the trial court's rulings on the issue of discriminatory intent in *Snyder*, even though the trial court similarly had not engaged in comparative review. *Snyder*, 552 U.S. at 477-78. There, this Court found that, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Id*. at 477. This Court explained that the trial court is in the best position to assess the prosecutor's credibility as well as the demeanor of the jurors at issue. *Id*. This Court then evaluated the trial court's ruling under that deferential standard. *Id*. However, after reviewing all of the relevant circumstances, which included a comparative review done for the first time on appeal, this Court held that the trial court's finding was clearly erroneous. *Id*. at 478-86; *compare* Pet., App. A 52-53, 57-58, 63 (reviewing trial court's ruling for substantial evidence even though trial court did not engage in comparative juror analysis).

Despite the foregoing authority, petitioner contends the trial court's ruling here is not entitled to deference because it did not engage in a comparative juror analysis. He concludes that the lack of any comparative review demonstrates the trial court did not make "a sincere and reasoned effort to evaluate 'all of the circumstances that bear upon the issue' of purposeful discrimination." (Pet. at 20-21, quoting *Snyder*, 552 U.S. at 478.) However, the trial court did not engage in a comparative review because *petitioner failed to request it*. The trial court properly assessed all of the factors that existed and that were brought to its attention at the time of the *Batson* motions. Petitioner cannot now take advantage of his own failure to make a full and complete record in the trial court and claim that, because a specific finding on comparative review did not occur, the trial court's findings are not entitled to deference. *See Snyder*, 552 U.S. at 477; *Lenix*, 44 Cal. 4th at 624.

Moreover, the California Supreme Court deferred to the trial court's ruling that the prosecutor's reasons were genuine and race-neutral as well as its overall ruling, based on the record at the time of the denial of the *Batson* motions, that the challenges were not motivated by racial bias. The supreme court did not give deference to any non-existent findings about factors that distinguished some of the non-African American empaneled jurors. (*See* Pet., App. A 45-63.) Comparative juror analysis is only one of several factors that, combined, might show discriminatory purpose. The lack of specific findings

by the trial court on only this one point should not eviscerate the deference due to the trial court's overall ruling and findings about the genuineness of the prosecutor's justifications. *Lenix*, 44 Cal. 4th at 622 (*Miller-El II* and *Snyder* "demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination"); *see Snyder*, 552 U.S. at 477-486 (comparative analysis was one of several factors showing discriminatory purpose); *Miller-El II*, 545 U.S. at 240-66 (same).

As this Court deferred to a trial court's *Batson* ruling in *Snyder*, even though the trial court had not engaged in a comparative juror analysis, petitioner cannot show the law applied to his case by the California Supreme Court is contrary to or conflicts with this Court's authority. Consequently, certiorari should be denied.

D. Certiorari Should Be Denied Because Petitioner Cannot Show a *Batson* Violation in the Present Case

Petitioner contends that the instant case is "an excellent vehicle" for this Court to resolve the alleged conflict between California law and Supreme Court authority. (Pet., App. A 21-22.) However, in addition to the fact that there is no conflict between the California law applied here and this Court's authority, the factors considered by the California Supreme Court that distinguished the three empaneled jurors whom petitioner contends were similarly situated to J.S. related directly to the prosecutor's statement that she was looking for seasoned decision-makers.

Here, the prosecutor said that she was looking for seasoned decision-makers. J.S. and F.J. had both held long-term jobs without ever having any supervisory experience and neither mentioned other life experiences suggesting they were accustomed to making difficult decisions. (Pet., App. A 47-49.) Contrary to the suggestion made by petitioner, the prosecutor never stated that she was looking only for jurors who held the title "supervisor." (*See* Pet. at 9, 11, 15.) Thus, petitioner's contention that the California Supreme Court should not have considered anything beyond specific and current supervisor roles (Pet. at 11, 15) unfairly narrows the justification the prosecutor provided.

Further, when distinguishing the non-African American empaneled jurors whom Justice Liu believed were similarly situated to J.S.– W.B., K.K., and L.F.[4] – the California Supreme Court focused on the decision-making skills suggested by their employment. The majority first found that W.B. had, in fact, worked as a supervisor. Although L.F. was not a supervisor, she worked as a "buffer" between injured workers and management on worker's

[4] Petitioner does not identify which empaneled jurors he believes the California Supreme Court improperly distinguished based on factors other than the prosecutor's reasons for excusing J.S. and F.J. (*See* Pet. at 15-17.) Since the California Supreme Court, including Justice Liu in his dissent, found that petitioner forfeited any challenge to jurors who were empaneled after the *Batson* motions were denied (B.A., R.P., W.F., and M.C.) (Pet., App. A 59; Pet., App. A (Liu, J. dis.) 17); petitioner set forth Justice Liu's dissent in some detail (Pet. at 2-14); and Justice Liu identified W.B., L.F., and K.K. as the jurors he believed were similarly situated to J.S., respondent assumes those are the jurors petitioner addresses here.

compensation claims, engaged in "a lot of problem solving," discussed pertinent information with both parties, and had input on the ultimate decisions. Her job duties suggested she made decisions in stressful circumstances and could work well with other jurors as a team to return a verdict. Similarly, although K.K. was not a supervisor, he was a Raytheon lab technician who worked in metallurgy and electronic failure analysis, and regularly received instructions from and gave instructions to engineers to solve problems. This suggested a strong ability to make decisions. (Pet., App. A 59-61; *see also* Pet., App. A (Liu, J. dis.) 17.) As the California Supreme Court further explained, most of the non-African American empaneled jurors had either supervisory experience or other work experience suggesting they were seasoned decision-makers, i.e., regularly made difficult or complicated decisions. The remaining empaneled jurors possessed other life experiences or qualities that would have made them appear more favorable to the prosecution, including ties to law enforcement, having run a very large household, or having served on a prior capital jury that reached a verdict. (Pet., App. A 59-63.)

Moreover, even Justice Liu agreed the court may consider distinguishing factors other than the prosecutor's stated reasons for excusing the challenged jurors when conducting a comparative jurors analysis. (Pet., App. A (Liu, J. dis.) 17.) He simply believed that doing so was inappropriate in this case based on the particular facts. Because the prosecutor said that

strong decision-making skills were "required" in a penalty phase juror, he felt that was the only legitimate factor to consider when comparing non-African American jurors. (*Id.*)

Any request by petitioner for this Court to review the foregoing position is simply an improper request for the Court to re-evaluate the facts of this case, not any conflict in the law. Accordingly, this Court should deny the Petition.

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Respectfully submitted

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