No. 20-808

IN THE
Supreme Court of the United States

JOHNNY DUANE MILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

The State charged Johnny Miles, a Black man, with the capital murder and rape of a white woman. Before trial, the prosecutor used his peremptory strikes to ensure that no Black jurors would decide Mr. Miles's guilt. Although the prosecutor struck only 11.5% of eligible white jurors, he struck 80% of eligible Black jurors. Among them was Mr. Greene, a prospective juror who favored the death penalty, believed it was used fairly, and had considered a career in law enforcement. When defense counsel raised a *Batson* objection, the prosecutor provided multiple explanations for striking Mr. Greene that applied equally to non-Black jurors. This included the prosecutor's claim that he challenged Mr. Greene because he was not upset by the O.J. Simpson verdict, even though the prosecutor accepted two non-Black jurors who had provided the same answer.

Mr. Miles' appeal to the California Supreme Court hinged on whether the court viewed these juror comparisons as probative evidence that the prosecutor's justifications for striking Mr. Greene were pretextual. For two reasons, the California Supreme Court ruled they were not. First, the court discarded a comparison between Mr. Greene and a white woman who had provided a similar answer by hypothesizing that the prosecutor may have preferred the white woman for a reason he never articulated. Then, the court discounted the comparison between Mr. Greene and the jurors who answered the O.J. question the same way because the prosecutor's two other justifications for striking Mr. Greene did not apply to them. As Mr. Miles explained in his Petition,

the first ruling exacerbates an existing circuit split, and both rulings conflict with *Miller-El v. Dretke*, 545 U.S. 231 (2005).

As to the first question presented, Respondent attempts to deny a circuit split by emphasizing inconsequential differences between court decisions. But respondent cannot dispute that California and the Fifth Circuit allow appellate courts to consider new reasons for why a prosecutor accepted a non-Black juror, while the Seventh Circuit, Ninth Circuit, and Missouri Supreme Court do not. Respondent also defends the decision below on the merits but does not explain how the state court decision can be reconciled with this Court's directly contrary ruling in *Miller-El*.

As to the second question presented, Respondent denies that the *Miles* majority applied a rule that comparative juror analysis lacks force unless the comparator jurors express a substantially similar combination of responses in all material respects. But Respondent's argument ignores the fact that every single California Supreme Court decision to consider the issue since 2006 has applied this rule; that the *Miles* majority cited and relied on those predecessor decisions and conducted its comparative juror analysis in the same way; and that the analysis in *Miles* bears no resemblance to the analysis required by *Miller-El* and its progeny.

This Court should grant certiorari.

ARGUMENT

I. By Considering New Reasons on Appeal for Distinguishing Jurors Struck by the State from Those Accepted by the State, the California Supreme Court's Decision Conflicts with this Court's Precedent and Exacerbates an Existing Circuit Split.

The prosecutor said he struck Mr. Greene because he was a leader who preferred his own opinion over others'. But Mr. Greene was not the only prospective juror who expressed that sentiment; Juror 1, a white woman, also described herself as a leader and said, "I like to make my own decisions." App. 59. Yet the trial prosecutor did not strike her. The majority below dismissed this powerful evidence of pretext, asserting that the prosecutor "could reasonably have found Juror No. 1's response to be less concerning" based on her answer to a separate question on which the trial prosecutor did not rely. *Id*. The majority's approach directly contravened this Court's requirement that a prosecutor's discharge of a juror must "stand or fall" on the justification for the strike actually articulated by the prosecutor, *see Miller-El*, 545 U.S. at 252, Pet. 20–25, and entrenches an existing circuit split, *see* Pet. 27–28. Respondent offers no meaningful justification for the majority's errors.

a. *Miller-El* is clear: It prohibits a reviewing court from substituting reasons for striking a juror when the prosecutor did not proffer those new reasons at trial. "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of

the reasons he gives." *Miller-El*, 545 U.S. at 252. As explained in the Petition, this principle applies whether the new reason is a justification for striking a Black prospective juror or a reason for keeping a white one. *See* Pet. 24; *see also Miller-El*, 545 U.S. at 245 n.4. The majority below flouted this clear principle by supplying a new justification for striking Mr. Green but retaining Juror 1. Respondent agrees that *Miller-El* controls here, *see* Resp. 11–12, and concedes the state court justified the prosecutor's strike by referencing reasons not originally given for the strike, *see* Resp. 7, 8. But Respondent altogether fails to reconcile the state court's approach with that required under *Miller-El* or to otherwise grapple with *Miller-El*'s stand-or-fall mandate. Respondent instead offers a cursory non-response that "*Miller-El* did not restrict review of the record in this way." Resp. 12. But the Petition explains *Miller-El* did just that: it unequivocally rejected an approach to comparative juror analysis that permits appellate courts to supply new reasons for striking a Black juror *or* keeping a white juror. *See* Pet. 21–24.

Respondent suggests that because the majority below conducted a comparative juror analysis for the first time on appeal, *Miller-El* permitted the court to reference uncited portions of the record to assess whether the comparators were similar and the prosecutor's strike was discriminatory. *See* Resp. 10, 11. But this argument finds no purchase in *Miller-El*, which expressly prohibits courts of appeals from invoking reasons for striking a prospective juror that were not cited by the prosecutor. *Miller-El*, 545 U.S. at 245 n.4. Respondent's position also ignores that

Miller-El was in the same procedural posture as this case: there, too, the trial court did not undertake a juror comparison at the time of the *Batson* challenge, and the trial prosecutor did not provide reasons for retaining white comparators. *See id*. at 236–37, 241 n.2; *id*. at 279–80, 294 n.4 (Thomas, J., dissenting).

Respondent also argues that an interpretation of *Miller-El* precluding courts from supplying new reasons for retaining white jurors would deviate from *Snyder*'s instruction that courts consult "all of the circumstances that bear upon the issue of racial animosity." Resp. 13 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). But as the Petition explains, *Snyder* simply means that a court must consider all relevant circumstances that bear on the plausibility of the prosecutor's stated justifications. *See* Pet. 24–25 (discussing *Snyder* and *Miller-El*). This makes sense, since the purpose of the third step in *Batson* is to assess the true reason underlying the trial prosecutor's strike. Post-hoc justifications conjured by reviewing courts, be they reasons for striking a Black juror or reasons for keeping a white juror, do not have any bearing on the reason for the *trial prosecutor's* strike.

Snyder also refutes Respondent's interpretation more directly. In *Snyder*, the State made the identical argument that Respondent makes here: that similar answers between a Black juror struck by the State and a white juror kept by the State did not prove pretext because the State likely kept the white juror for different reasons that the prosecutor did not offer at trial. Brief of Respondent at 43, *Snyder v. Louisiana*, No. 06-10119, 2007 WL 3307731 at * 43

(U.S. Nov. 5, 2007). According to Respondent, *Snyder*'s statement that "all of the circumstances that bear upon the issue of racial animosity must be consulted" means that an appellate court "must consult" new reasons on appeal that the State may have kept the white juror in question. Resp. 13. If that were correct, the *Snyder* Court would have been compelled to "consult" the new reasons offered by the State on appeal in that case. Instead, it ignored them entirely.

Finally, Respondent argues that a new reason for retaining a white juror is different from a new reason for striking the Black juror. But this Court has recognized that they are the same. Thus, *Miller-El* rejected as irrelevant the prosecutor's reasons for keeping white jurors as new reasons the prosecutor did not offer. *Miller-El*, 545 U.S. at 252 n.4.

b. The decision below also entrenches a division among lower courts. As the Petition highlights, lower courts have long recognized that *Miller-El* prohibits reviewing courts from creating or accepting post-hoc justifications for discriminatory strikes. *See* Pet. 27–28 (citing *United States v. Taylor*, 636 F.3d 901, 905–06 (7th Cir. 2011); *Love v. Cate*, 449 F. App'x 570, 572–73 (9th Cir. 2011); *State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002) (en banc)). Respondent never addresses those courts' recognition and application of *Miller-El*'s requirement that courts may not consider new reasons on appeal for keeping a non-Black juror. *See Taylor*, 636 F.3d at 905–06 (rejecting prosecutor's attempt to justify strike by pointing out characteristics that distinguished retained white jurors from struck Black venire-members); *Cate*, 449

F. App'x at 573 (same); *Marlowe*, 89 S.W.3d at 469 (same). Instead, Respondent adverts to inconsequential differences between *Miles* and those cases without explaining how those differences could undermine the fact that *Miles* expressly permitted the practice in question while those cases prohibited it. Resp. 15.

II. The Decision Below Conflicts with this Court's Precedent by Refusing to Accord Significant Weight to Comparative Juror Analysis Unless the Non-Black Comparators Provided A Substantially Similar Combination of Responses in All Material Respects to the Struck Juror.

Miller-El held that where a prosecutor provides multiple reasons for striking a Black juror, the fact that one of those justifications applies to a similarly situated non-Black juror is "powerful" evidence of pretext that "severely undercut[s]" the plausibility of the prosecutor's stated justification for the strike. 545 U.S. at 241, 248. In so doing, this Court rejected Justice Thomas's dissenting argument that juror comparisons lack force unless the comparators match all the reasons cited by the prosecutor. *See id.* at 247 n.6.

For the past fifteen years, the California Supreme Court has intoned *Miller-El*'s holding that that compared jurors do not have to be "identical" while simultaneously ruling that comparative juror analysis only "has force 'when the compared jurors have expressed a 'substantially similar combination of responses,' in all material respects to the jurors

excused." *People v. Armstrong*, 6 Cal. 5th 735, 780 (2019) (quoting *People v. Winbush*, 2 Cal. 5th 402, 443 (2017)). As explained in the Petition, this requirement is indistinguishable from the position advanced by the *Miller-El* dissent and rejected by the *Miller-El* majority. *See* Pet. 30, 33–34.

The California Supreme Court's failure to follow *Miller-El* is not limited to one or two isolated cases. Rather, the court has been unwavering in its requirement that comparator jurors must match in all material respects before a comparative juror analysis can contribute any significant probative value to a *Batson* inquiry. *See* Pet. 29–30, 32–35. In most cases, the court has stated this requirement explicitly. *See, e.g.*, *People v. Jurado*, 38 Cal. 4th 72, 105 (2006); *People v. DeHoyos*, 57 Cal. 4th 79, 107 (2013); *Winbush*, 2 Cal. 5th at 443; *Armstrong*, 6 Cal. 5th at 780. In other cases, the court has applied the same analysis without stating the rule. *See, e.g.*, *People v. Huggins*, 38 Cal. 4th 175, 233–36 (2006); *People v. O'Malley*, 62 Cal. 4th 944, 977–80 (2016).

Respondent does not dispute that the California Supreme Court applied this rule from 2006 through 2019; that the rule conflicts with *Miller-El*; or that the rule governs the facts here. Instead, Respondent simply asserts that "Petitioner's criticism of other California Supreme Court decisions is no reason for further review in this case" because *Miles* never expressly "endorsed" the rule from those cases. Resp. 16 n.10. This position is untenable because the "other California Supreme Court" decisions set out the applicable legal rule, and *Miles* applied that rule.

Respondent offers three statements from *Miles* as proof that it applied *Miller-El* correctly. Resp. 16. But each statement also appears in the prior cases that applied *Miller-El* incorrectly. The first and third statements offered by Respondent simply paraphrase *Miller-El*'s observation that "[n]one of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects ...." *Miller-El*, 545 U.S. at 247 n.6. But this quotation is a mainstay in the California Supreme Court's comparative juror analysis case law. It repeatedly appears in cases that cite this principle just before conducting a comparative juror analysis that is inconsistent with it. *See, e.g.*, *Winbush*, 2 Cal. 5th at 443; *DeHoyos*, 57 Cal. 4th at 107; *People v. Melendez*, 2 Cal. 5th 1, 18 (2016). The same is true for Respondent's second quotation, which is present in no fewer than 18 California Supreme Court cases, including *Winbush*, 2 Cal. 5th at 42, and *O'Malley*, 62 Cal. 4th at 975. Respondent cannot prove that *Miles* applied *Miller-El* correctly and overruled an entire line of erroneous case law *sub silentio* by showing that *Miles* repeated the very same language from *Miller-El* as the cases that misapplied *Miller-El*.

Respondent contends that *Miles* "never *endorsed* the position ... that compared jurors must 'express a substantially similar combination of responses in all material respects' for the differential treatment to have probative value in a Batson analysis." Resp. 16 n.10 (emphasis added). But the California Supreme Court has repeatedly embraced that very principle—including in cases cited by the decision below—and the *Miles* majority applied it.

Consider the majority's treatment of the matching O.J. answers given by Mr. Greene and the non-Black jurors (Juror 6 and Alternate Juror 5), who the State accepted. As soon as the court acknowledged the comparators' similar answers to the O.J. question, it asked whether Alternate Juror 5 and Juror 6 "were dissimilar from [Mr. Greene] in regard to the prosecutor's other two stated reasons for striking [Mr. Greene]," App. 70—the precise comparison required by the California Supreme Court's prior cases. *See, e.g.*, *Winbush*, 2 Cal. 5th at 443.

And once the *Miles* Court determined that Alternate Juror 5 and Juror 6 did not "express a substantially similar combination of responses in all material respects" to Mr. Greene, *see* Resp 16 n.10, it did what prior California Supreme Court precedent demanded. It treated the comparative juror analysis as too thin a reed to support a finding of pretext and ended its *Batson* analysis without mentioning a single other fact. *See* App. 71.

This analysis cannot be reconciled with the dictates of *Miller-El* and its progeny. First, this Court has made clear that individual matches are "powerful," *see Miller-El*, 545 U.S. at 241, and "compelling" evidence, *see Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016), that "severely undercut" the plausibility of the prosecutor's stated justifications. *Miller-El*, 545 U.S. at 248. *Miles*, in contrast, described comparisons between individual responses as "an exceptionally poor medium to overturn a trial court's factual finding." App. 40.

Second, every comparative-juror-analysis case from this Court has ruled that individual matching answers between jurors are proof of pretext and has then considered the matching answers in conjunction with the other available evidence of pretext. *See* Pet. 31–32, 33, 35–37. No case from this Court has ever considered whether comparator jurors provided the same combination of responses or declined to assess the totality of the evidence on that basis. Respondent has offered no answer to these arguments.

Third, beginning with *Miller-El*, this Court has repeatedly found *Batson* violations when the State's reasons for striking a Black prospective juror were equivalent to answers provided by non-Black jurors whom the State accepted. Respondent contends that these cases are distinguishable because they "also presented extremely troubling indicators of pretext that this case does not." Resp. 17–18. But that it is inaccurate. As Mr. Miles explained in his petition, this case also presents several troubling indicators of pretext, including, among others, the nature of the alleged crime (the rape and murder of a white woman by a Black man), the prosecutor's disparate pattern of strikes, the prosecutor's use of questions about a racially divisive crime to target Black prospective jurors, and the lack of record support for the prosecutor's justifications. *See* Pet. 10–16, 35–37. The majority below simply chose to ignore that evidence. Furthermore, Respondent's effort to distinguish *Snyder* is incorrect—the prosecutor in *Snyder* provided two justifications for his strike, not one, *see Snyder*, 552 U.S. at 478 (citing Black prospective juror's nervousness and student teaching conflict to

explain strike)—and serves to highlight the abundant evidence of pretext that existed in Mr. Miles' case, *see* Pet. at 35–37, and not in *Snyder*, *see* Resp. 19.

Finally, the rule applied by the *Miles* majority clashes with *Miller-El* because it recreates the very same problem *Miller-El* sought to avoid. *Miller-El* held that comparative juror analysis could not require that the comparator jurors be identical because such a rule "would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El*, 545 U.S. at 247 n.6. But a rule that no juror comparison has force unless "'the compared jurors have expressed 'a substantially similar combination of responses,' in all material respects,'" *Armstrong*, 6 Cal. 5th at 780 (quoting *Winbush*, 2 Cal. 5th at 443), leaves *Batson* inoperable for the very same reason. And here, the proof is in the pudding. Since *Miller-El*, the California Supreme Court has never found that a comparative juror analysis supports a finding of pretext. In California, *Batson* is very much an inoperable doctrine, and the California Supreme Court's disregard of binding precedent from this Court is to blame.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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