***** CAPITAL CASE *****

No. 18-7094

In the Supreme Court of the United States

FLOYD DANIEL SMITH,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIOARARI

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Petitioner, Floyd Daniel Smith, respectfully submits this Supplemental Brief pursuant to Rule 15(8) in support of his Petition for Writ of Certiorari to the California Supreme Court ("Petition") to address the impact of this Court's recently announced decision in *Flowers v. Mississippi*, ___ U.S. ___ No. 17-9572, 2019 WL 2552489 (U.S. June 21, 2019) (*Flowers*).

The Petition raises questions regarding the State's alleged violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) (*Batson*) during the trial in this case, a case in which the prosecutor – over two consecutive trials – struck each black prospective juror from the jury. The pattern of excluding black jurors in petitioner's case was particularly stark because, at both trials, after singlehandedly culling all black jurors, the prosecutor immediately accepted the subsequent (African-American-free) panels, despite retaining numerous additional peremptory challenges – thus greatly increasingly the likelihood that none of the other African-Americans, who were much further down the line, would even be called into the box.[1]

[1] *See* Petition at 4-6 (in first trial, prosecutor accepted panel six times immediately after excluding final black juror with third peremptory; at second trial, prosecutor accepted panel immediately after excluding final black juror with

The Petition specifically requested that this case be held pending resolution of *Flowers*, which also dealt with a prosecutor's repeated, total exclusion of black jurors over subsequent trials of the same defendant. Petition at 36-40. On June 21, 2019, this Court issued its opinion in *Flowers*, holding that the prosecutor in that case had exercised peremptory challenges on the impermissible basis of race, in violation of *Batson*. Petitioner submits that the *Flowers* decision necessitates, at a minimum, a remand to the California Supreme Court to reconsider its decision in light of the principles of *Batson* analysis outlined in that case.

I. THE *FLOWERS* DECISION FOCUSES ON THE PAST HISTORY OF THE PROSECUTOR IN PRIOR TRIALS OF THE SAME DEFENDANT – AN ANALYSIS THAT THE CALIFORNIA SUPREME COURT FAILED TO UNDERTAKE

Central to the *Flowers* opinion is its direction that a reviewing court can – indeed must – consider evidence presented to it of prosecutor's past pattern of suspect strikes in considering a *Batson* challenge. *See Flowers v. Mississippi*, 2019 WL 2552489, at *13 (explaining that "[w]e cannot ignore [the prosecutor's] history" and "[w]e cannot take that history out of the case.")

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eleventh peremptory); CAL. CODE CIV. PROC. § 231(a) (allotting parties twenty peremptory challenges).

The California Supreme Court in this case, however, failed to consider *any* evidence regarding the jury selection process from petitioner's first trial. There was not a single reference in the opinion below to the total exclusion of African-American jurors in the first trial. In fact, during oral argument, one of the justices of the California Supreme Court questioned the propriety of considering evidence from the first trial, despite the fact that the evidence was properly before it.[2] The result was that the California Supreme Court never considered the prosecutor's past pattern of total exclusion of African-Americans.

Petitioner recognizes that *Flowers* presented a particularly extreme example of a history of racially exclusive jury selection. Nonetheless, the pattern of repeated elimination of black jurors in petitioner's case is still remarkable. At the very least, the California Supreme Court should have considered that pattern in assessing whether racial discrimination occurred.

In the first trial, the prosecutor quickly removed the only two black jurors in the box. Petition at 5. Given that there were only two black jurors to strike, this itself was statistically improbable. But what followed was highly unusual:

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[2] Archive of Webcast of California Supreme Court Oral Argument of March 7, 2018 at 6:24:20-6:25:20, https://www.courts.ca.gov/35333.htm (last visited June 24, 2019).

the prosecutor used only three of the twenty strikes allotted him under California law and instead immediately accepted the (African-American free) panel six consecutive times until the jury was ultimately selected.

The prosecutor's rapid exclusion of black jurors was particularly suspect. By exercising only three peremptories to exclude all the African-American jurors in the box at the beginning of jury selection, the prosecutor made it far less probable that any of the remaining African-American jurors from the venire (relatively far down the line to be called into the box) would ever be selected as jurors. This is precisely what happened at the first trial: the remaining black jurors from the venire only made it to the box during the selection of alternates (at which point the prosecutor eliminated an additional African-American juror, resulting in a *Batson* motion). Petition at 5.

Even more striking, the remarkable pattern originating in the first trial continued into the second. At the second trial, the prosecutor again succeeded in total exclusion of African-Americans from the jury by eliminating all four qualified prospective jurors with peremptory challenges. Petition at 5. Then, when the jury contained no more black jurors, the prosecutor again immediately accepted the panel. Petition at 6. Although the prosecutor retained nine additional peremptory challenges, he chose not to exercise them.

This tactic had the same effect as in the first trial. As noted by the defense counsel during the *Batson* hearing at the second trial, the remaining African-American jurors in the venire were so far down the line that the prosecutor's elimination of the four black jurors who first made it into the box resulted in only a "remote chance" that additional black prospective jurors would ever "have any opportunity to be sitting on the jury panel." 9RT:2709. And, as in the first trial, that is what happened: no additional qualified African-American prospective jurors made it into the box (even during the selection of alternates).

This is precisely the sort of highly improbable pattern that reviewing courts should consider in their analysis of the totality of the record. *Flowers,* 2019 WL 2552489, at *13 (peremptories in sixth trial "followed the same pattern" as prior trials of the defendant). The court below, however, simply ignored it.

II. THE *FLOWERS* DECISION'S EXPLICATION OF THE CORRECT METHOD OF COMPARATIVE JUROR ANALYSIS ALSO NECESSITATES REMAND

Another aspect of the *Flowers* decision which necessitates reconsideration by the California Supreme Court was its reiteration of the correct methodology for comparative juror analysis, a methodology the lower court did not properly

employ. *Flowers*, 2019 WL 2552489, at *15 ("Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred"). As argued in the Petition, the California Supreme Court employs an extremely cramped view of comparative analysis, using even minor differences in the characteristics of seated and stricken jurors to dismiss the relevance of comparisons, and has never found such analysis to prove pretext. Petition at 24-37.

Flowers demonstrates that the California approach is incorrect. As this Court explained, "[a]lthough a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers* 2019 WL 2552489, at *15 (emphasis in original). In contrast, under California's approach, compared jurors must have "expressed 'a substantially similar *combination* of responses,' *in all material respects*, to the jurors excused." *People v. Winbush,* 2 Cal. 5th 402, 443 (2017). In other words, California courts, unlike this Court, continue to require that seated and stricken jurors share virtually all of the same characteristics before they find similarities to be evidence of pretext.

The *Flowers* analysis of Prospective Juror Wright made clear, not each and every characteristic must be shared by seated and stricken jurors for a comparison to be evidence of pretext. In response to the prosecutor's justification, that Ms. Wright had worked with the defendant's father, the Court found it compelling that numerous other prospective jurors also had relationships with the defendant's family. *Flowers*, 2019 WL 2552489, at *16. Despite the urging of the State – and the dissent – that the comparison was invalid because "Wright had been *sued* by a witness and member of the victim's family, and worked at the same store as the defendant's father" (*Flowers*, 2019 WL 2552489, at *23 (dissenting op. of Thomas, J. (original emphasis)), the Court reaffirmed the principle that a justification for stricking a black juror cannot stand if it applies with equal reason to nonblack, seated jurors.

As such, the Court's analysis stands in stark contrast to the approach taken by the California Supreme Court in this case, and in its earlier cases on which it relied. To take one of many examples, comparative analysis of jurors' responses to questions related to O.J. Simpson strongly suggest these justifications – applied to all black jurors at the second trial – were merely pretext. As set out in the Petition, the prosecutor's selective use of black jurors' views on the racially divisive O.J. Simpson case, but not similar views of

numerous seated non-black jurors, affirmatively betrayed the prosecutor's race-based stereotyping. Petition at 13-24. For instance, the prosecutor characterized as "extremely negative" and "pro OJ and anti[-] prosecution" Prospective Juror Dredd's responses that the Simpson case had taught him what he "already knew" that there are "many sides to a story" and that he was "not upset" with the verdict because "I felt that their [sic] was doubt." Petition at 8. The force of this justification was strongly undermined by comparison to similar responses of non-black jurors accepted at the first trial. Petition at 33-34.

The point is strongly underscored when one takes into account the evidence from the prior trial, ignored by the California Supreme Court. In petitioner's case, the same jury questionnaire was used in both trials, allowing straightforward comparisons between the justifications provided at the second trial (grounded largely in the questionnaire responses) and the characteristics of the seated jurors at the first trial. Such comparative analysis of the jurors seated by the prosecution in *first* trial provided additional evidence that the reasons for striking black jurors provided in the *second* trial were merely post-hoc pretext. A *significant majority* of the non-black jurors seated at the first trial by the prosecution were (like Mr. Dredd and other stricken black jurors at

the second trial) not upset with the Simpson verdict. (See, e.g., 9:SCT:2599 (Seated Juror No. 104) (not upset with Simpson verdict because "[t]he jury did it's [sic] job – we must respect their decision"); 13:SCT:3759 (Seated Juror No. 151) (not upset with Simpson verdict because "I believe justice was served"); 1:SCT:149 (Seated Juror No. 9) (not upset and ". . . any other verdict would have been unwarranted").

The California Supreme Court never engaged in comparative analysis of the O.J. Simpson justifications. Petition at 33-34. *Flowers* demonstrates the flaw in this oversight. *See Flowers*, 2019 WL 2552489, at *15 ("When a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination") (internal quotations and citations omitted). The California court should be given the opportunity to engage in the fact-specific comparative juror analysis of both trials against petitioner in light of the *Flowers* decision.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the California Supreme Court in Petitioner's case. In the alternative, Petitioner respectfully requests that this Court

grant the petition, vacate the California Supreme Court's judgment, and remand this matter for consideration of the *Batson* claim in light of this Court's decision in *Flowers*.

Respectfully submitted,

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