No. _____

In the

Supreme Court of the United States

DEWOYNE CURTIS POTTS, Petitioner

v.

JOHN GARZA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

In this case involving a Black defendant, the prosecutor struck the sole Black juror remaining on the venire (the only other Black veniremember was struck for cause), after asking her only three questions, two of which focused on race – a subject the juror had not mentioned, and about which the prosecutor did not question white jurors. Then, in attempting to strike the Black juror for cause, the prosecutor mischaracterized her statements in a manner directly contrary to the juror's testimony.

In federal habeas proceedings, the prosecutor claimed that he struck the Black juror because he believed she might be biased against police, prosecutors, and the judicial system – but he did not ask her a single question about those purported biases. In explaining his mischaracterization of her testimony, he blamed the court reporter by suggesting that the trial transcript was inaccurate. He also submitted a sworn declaration in which he falsely claimed that he had compared the Black juror to two seated jurors at the time of the trial and found the seated jurors more favorable, while at his deposition and a later evidentiary hearing, he admitted that he had no recollection of the seated jurors referenced in the declaration and that he did not compare them to the Black juror at the time of the trial.

The question presented is this:

Did the Ninth Circuit err in crediting the prosecutor's stated reasons for the strike and failing to find discriminatory pretext under *Batson* and *Miller-El v. Dretke*, under the extraordinary circumstances of this case?

Related Proceedings

United States Court of Appeals for the Ninth Circuit

Dewoyne Potts v. John Garza, Case No. 17-56410

Order Entered: March 2, 2020; Mandate Issued: March 24, 2020

United States District Court for the Central District of California:

Dewoyne Curtis Potts v. John Garza, Case No. CV 07-1312-PSG (AJW)

Judgment Entered: September 8, 2017

Supreme Court of California:

In re Dewoyne Potts on Habeas Corpus, Case No. S131041

Judgment Entered: February 8, 2006

Court of Appeal of the State of California, Second Appellate District

In re Dewoyne Curtis Potts on Habeas Corpus, Case No. B180040

Judgment Entered: December 30, 2004

People v. Dewoyne Curtis Potts and Demond Willie Potts,

Case No. B163396 (Direct Appeal); Judgment Entered: March 30, 2004

Superior Court of California, County of Los Angeles

People v. Dewoyne Curtis Potts, Case No. LA039756 (Habeas Corpus)

Judgment Entered: September 14, 2004

People v. Dewoyne Curtis Potts and Demond Willie Potts,

Case No. LA039756 (Trial); Judgment Entered: November 20, 2002

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In the

Supreme Court of the United States

DEWOYNE CURTIS POTTS, Petitioner

v.

JOHN GARZA, Respondent

Petition for Writ of Certiorari

Dewoyne Curtis Potts petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's dispositive order in *Potts v. Garza*, Case No. 17-56410, was not published and is included in the Appendix at App. 1a.[1] The district's court's order denying the petition for a writ of habeas corpus in *Potts*

[1] "App." refers to the attached appendix. "ER" refers to the appellant's excerpts of record electronically filed in the Ninth Circuit on October 29, 2018 (Docket No. 14). "AOB" refers to the appellant's opening brief electronically filed in the Ninth Circuit on October 28, 2019 (Docket No. 13). "ARB" refers to Respondent's answering brief, electronically filed in the Ninth Circuit on February 27, 2019 (Dkt. #20).

v. Garza, CV 07-1312-PSG (AJW), also was not published, and it is included in the Appendix at App. 6a.

Jurisdiction

The Ninth Circuit's opinion affirming the district court's judgment was issued on March 2, 2020. App. 1a. On March 19, 2020, in light of the public health concerns related to COVID-19, this Court ordered an extension of time for the filing of any petition for a writ of certiorari due after the date of that order to 150 days from the date of the lower court judgment. Order List: 589 U.S. (March 19, 2020). This petition is therefore timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Amendment XIV of the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Introduction

Dewoyne Potts, who is Black, was convicted of robbery and assault by a jury that included no Black jurors, due to the prosecutor's use of a peremptory strike against the sole Black juror who remained on the venire after the only other Black veniremember was excused for cause. The prosecutor used his peremptory strike against Juror 2405 after asking her three questions, two of which focused on race – an issue that the juror herself had not mentioned. Before using the peremptory strike, he had tried unsuccessfully to excuse her for cause by mischaracterizing the statements she made during voir dire in a manner directly contrary to her testimony.

Thirteen years later, in federal habeas proceedings, the prosecutor claimed that race played no role in his decision to strike Juror 2405, and that he struck her because he was concerned that she would be biased against the police, prosecutors, and the justice system – despite the fact that he did not ask her a single question about such purported bias. He explicitly denied that he was concerned about the issues that he did question her about (race and misidentification), and he denied making the statements in the trial transcript in which he mischaracterized her testimony, blaming his error on the court reporter. Prior to the evidentiary hearing, the prosecutor signed a declaration in which he claimed to remember drawing comparisons between

Juror 2405 and two seated jurors whom he had sworn in an earlier deposition (and then later at the evidentiary hearing) that he did not remember and whom he did not compare to Juror 2405 at the time of the trial. He explained that he included those statements in the declaration not because they were true, but because Respondent's counsel had asked him to do so. Despite finding that the prosecutor's declaration was "arguably misleading" and "without excusing the conduct of either [the prosecutor] or Respondent's counsel [who helped prepare the declaration]," the district court nonetheless denied the petition.

The Ninth Circuit affirmed the judgment, crediting the prosecutor's stated reasons for the strike despite abundant record evidence that refuted those reasons, as well as the prosecutor's submission of a false declaration. The Ninth Circuit failed to address the fact that two of the prosecutor's three questions to Juror 2405 focused on the issue of race – an issue which the juror did not raise. The court further erred by ignoring this Court's holding in *Miller-El v. Dretke*, 545 U.S. 231, 245 (2005), that a prosecutor's failure to ask a single question about the bias he now claims was the reason for a strike is strong evidence of discriminatory pretext, as is the prosecutor's mischaracterization of the juror's testimony when he attempted to strike her for cause. Finally, the prosecutor's false claim in his declaration that he

conducted a comparative juror analysis that he admitted he did not conduct further demonstrates that the Ninth Circuit clearly erred by crediting the prosecutor's stated reasons for the strike. The record demonstrates that the strike of Juror 2405 was substantially motivated by race and therefore constituted purposeful discrimination, in violation of Potts's rights under the Equal Protection Clause, as set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court should should grant the petition for a writ of certiorari.

Statement of the Case

A. Trial Proceedings

In 2002, Mr. Potts and his brother were tried jointly for the robbery and assault of three individuals. The evidence against Mr. Potts consisted solely of in-court eyewitness identifications by two of the three victims – both of whom had failed to positively identify him in pretrial photospreads and lineups (the third victim never identified Potts). There was no evidence to corroborate the in-court eyewitness identifications.

There were only two Black potential jurors in the venire, one of whom was struck for cause. The other, Juror 2405, is the subject of Potts's *Batson* claim. She was a resident of the San Fernando Valley, married to an engineer, and had two teenage sons. ER 198. She worked two jobs, as a

college professor and a flight attendant. *Id*. She had relatives in several law enforcement agencies. ER 194. She had no prior jury experience. *Id*. At sidebar, in response to a question about whether the jurors knew anyone who had been a witness, a defendant, or in any way involved in a case of this type, Juror 2405 stated, "My son was picked up last year and he was mistakenly identified as doing a crime that he didn't do. So that's the only thing. He wasn't the person." ER 195.

The court then asked her how long her son was detained, and she responded, "overnight." *Id*. The court asked if her son participated in a live lineup, and she said that he did not. *Id*. The court then inquired, "Anything about that incident that you think would make it difficult for you to sit on this case?" *Id*. Juror 2405 answered, unequivocally: "No." *Id*.

The prosecutor, James Toro, then had an opportunity for follow-up questions. He asked Juror 2405 only three questions – two of which focused on race, and the third focused on identification:

> Mr. Toro: Do you think it was a case of racial profiling or being in the wrong place at the wrong time?

[Juror 2405][2]: I don't know. The lady thought he was the person and picked him out of the mall.

Mr. Toro: Do you know what her race was?

[Juror 2405]: She was white, but I never saw her. I don't know anything about her.

Mr. Toro: Now, the fact that this case, identification is probably going to be the issue. If you are picked as a juror in this case, are you going to think, oh, my God, you know, my own son was misidentified and I wonder if this is the case here before you even heard any of the evidence?

[Juror 2405]: No, I wouldn't do that. I would be completely unbiased.

ER 195-96.

[2] The transcript refers to Juror 2405 by her last name, but in the interest of privacy (and consistency), she will be referred to herein as Juror 2405.

At the first opportunity, Toro challenged Juror 2405 for cause. ER 206. He stated, "Juror Number 14 at our sidebar also mentioned the fact that her on [sic] son was accused of a crime and it was a case of mistaken identity." *Id*. The co-defendant's counsel then said, "He was released." *Id*. The prosecutor responded, in direct contradiction of the juror's unequivocal statements that she would be completely unbiased and that her son's experience would not affect her, "But she said it would leave her with an affect. And I would make a motion–." The court denied the cause challenge. *Id*.

Toro then exercised a peremptory strike against Juror 2405, prompting Potts's counsel to make a motion under *People v. Wheeler*, 22 Cal. 3d 258 (1978), California's analog to *Batson*. ER 208-09. The court denied the motion, speculating as to Toro's reasons for the strike and finding that Potts had not made a prima facie case of discrimination. *Id*. Toro was not asked to state a race-neutral reason for the strike, and Juror 2405 was excused. *Id*.

On October 28, 2002, the jury convicted Potts of three counts of second-degree robbery and two counts of assault, and it found that he used a firearm in the commission of the robberies. On November 20, 2002, Potts was sentenced to 23 years and eight months in state prison.

B. Direct Review and State Habeas Proceedings

Potts appealed his conviction, raising (among other issues) a claim under *Batson*. The California Court of Appeal, incorrectly relying on the "strong likelihood of discrimination" standard of *Wheeler*, 22 Cal.3d at 280, rather than the less onerous "reasonable inference of discrimination" standard of *Batson*, concluded that Potts had not shown a prima facie case of discrimination. ER 32. The court rejected the remainder of Potts's claims and affirmed his conviction. *Id*. Potts sought review in the California Supreme Court, which denied review without comment.

On August 23, 2004, Potts filed a petition for a writ of habeas corpus in the Los Angeles County Superior Court, raising his *Batson* claim, among others. On Sept. 4, 2004, the Superior Court denied the petition, ruling that "all issues raised could or were raised on appeal." ER 231. Identical petitions filed in the California Court of Appeal and the California Supreme Court were denied without comment. ER 232-33.

C. Federal Habeas Proceedings

After his *Batson* claim was denied on direct appeal (and then in state habeas proceedings) under the incorrect legal standard, Potts filed a petition for a federal writ of habeas corpus. ER 234. During the proceedings, Potts compared Juror 2405's experience with misidentification to those of two seated,

non-Black jurors whom Toro did not strike (Jurors 1612 and 5147), despite the fact that they had had personal experiences with eyewitness misidentification and had affirmatively expressed doubts about the reliability of such evidence. CR 132, 138. The district court denied the petition. In doing so, the court found that the experiences of Jurors 1612 and 5147 were different from that of Juror 2405 because neither of those jurors had a family member who had been the victim of misidentification, and because the experiences of those jurors were in the distant past, as opposed to the experience of Juror 2405's son, which had happened a year before the trial. ER 318-21.

The Ninth Circuit reversed, finding first that because the state court had applied the improper "strong likelihood" standard to Potts's *Batson* claim, the federal courts had to review his claim *de novo*, rather than under the more deferential standard at 28 U.S.C. § 2254(d). ER 332-333. The Ninth Circuit went on to find that Potts had raised a prima facie case of purposeful discrimination under *Batson* because Juror 2405 was the only African American juror who remained in the venire; the prosecutor misstated her voir dire testimony when he tried to excuse her for cause; and two other jurors who were not African American had similar experiences with misidentification, and had stated that their experiences would cause them to be doubtful of eyewitness identifications, but they were not challenged by the

prosecutor. ER 332-33. The court remanded for an evidentiary hearing for the prosecutor to state his reasons for striking Juror 2405. *Id*.

In preparation for the hearing, Potts's counsel deposed Toro on July 22, 2015. Counsel asked Toro to state his reasons for striking Juror 2405, and he responded that he struck her because "her son had a very negative experience, and I didn't think she could put that behind her and be fair to me, as the prosecutor, or the police, or the justice system." ER 371-72. When counsel asked Toro if he thought that because of her son's experience, Juror 2405 would be unlikely to believe the eyewitness identifications of Potts, he responded, "I don't think the focus was on identification. The focus was on whether or not she would be biased or unbiased. So I wasn't focusing on identification. I was focusing on, what I presumed was a horrible experience, and a mother probably not being able to forgive and forget." ER 372.

With respect to Jurors 1612 and 5147, Toro testified that although he had reviewed the voir dire transcript several times with a focus on those jurors, because he was aware that they were the subject of comparative juror analysis by the parties and the Ninth Circuit, he was unable to remember anything about either of these two jurors, including any thoughts he had about them at the time of trial. ER 373-76. He then testified that he has "no recollection of any of the prospective jurors or jurors who sat." ER 376.

On September 30, 2015, Respondent filed a declaration from Toro in which he stated, "I remember the parties and events in this case, including the voir dire proceedings." ER 399. Toro again stated that he struck Juror 2405 because he believed that "her experience would not allow her to be fair and unbiased; she would or could be biased against law enforcement, the prosecution, and/or the judicial system based on her son's experience." ER 399-400. He stated that he challenged her for cause for the same reason, and while the transcript reflects otherwise (because it reflects that he said "But she said it would leave her with an affect. And I would make a motion--"), Toro wrote, "I do not know whether the court reporter accurately transcribed those comments," because "I do not understand what that sentence means, nor do I normally use the word 'affect' in that context." ER 400. He then stated, "Even assuming that the transcript accurately reflects what I stated in court, I did not intend to mislead the court or opposing counsel. If I made those remarks, I misspoke." *Id*. He did not explain how or why he could have made such a mistake.

In the declaration, Toro indicated that at the time of the trial, he had compared Juror 2405 to Jurors 1612 and 5147, and he did not think their experiences with misidentification were similar. In several paragraphs of the declaration, he testified to specific thoughts he'd held about these jurors, and

why he thought they were different from Juror 2405. ER 400-401. In one paragraph, he described Juror 5147's experience with misidentifying a student who had assaulted him, and in the next paragraph, he stated,

> I did not believe that Juror 5417's experience of believing he had misidentified someone many years before was the same type of experience that happened to Juror 2405's son, who was the victim of misidentification. Juror 5417, in my opinion, was not negatively impacted by his experience to the level, or in the same manner, that juror 2450's was by her son's arrest."[3]

ER 400-401. With respect to Juror 1612, he devoted a paragraph to describing her experience with misidentification, and then he made the following assertions:

> I did not believe that Juror 1612 was comparable to Juror 2405.Juror 1612 did not suffer the personal trauma of having a loved one misidentified as a criminal.
>
> Jurors [5147] and 1612 also related incidents which had occurred many years prior. By contrast, Juror 2405 related her son's incident as having taken place within the past year.

[3] Toro mistakenly referred to Juror 5147 as Juror 5417.

ER 401. Toro made these statements even though just two months earlier, he'd testified that he was unable to remember anything about Jurors 5147 or 1612, including his thoughts or opinions about them, and that when he struck Juror 2405, he was not focused on the issue of identification.

The evidentiary hearing was held on December 4, 2016. Toro's declaration was admitted as his direct examination, and Potts's counsel cross-examined him. Toro again testified that he struck Juror 2405 because he was concerned that as a result of her son's experience, she would or could be biased against police, prosecutors, and the judicial system. ER 429. He again testified, despite the statements in his declaration that he was not focused on the issue of misidentification when he struck her. ER 430. He testified that his strike of Juror 2405 had "absolutely nothing to do with race." ER 466; *see also* ER 430-31 (stating that his concerns about Juror 2405's bias had "nothing to do with race").

With respect to the statements he made when he attempted to strike Juror 2405 for cause, Toro testified that he was aware that the Ninth Circuit had cited his mischaracterization of her testimony as a basis for granting an evidentiary hearing. ER 420. When asked about the first sentence of his cause challenge, when he said that Juror 2405's son was accused of a crime and it was a case of mistaken identity, Toro responded, "If that's what the

transcript says, then that's what I said, yes." ER 437. When asked about the second sentence of his cause challenge – the sentence that he claimed in his declaration was mistranscribed because he doesn't use the word "affect" in that context – Toro stated that he does not know if the emphasis on that word was on the first or the second syllable, and when asked if the word "affect" can be pronounced the same as the word "effect," he responded, "I will take your word for it, I don't know." ER 438.

He then testified that he does not remember what he actually said during the cause challenge, and that "[m]y emphasis for believing [the transcript is] wrong is that there would have been no reason for me to whatsoever mislead the Court or counsel. I've never done that in my career. I don't do that. And that's why I find it hard to believe when I saw that that that was there." ER 439. Toro testified that he believes, though he is not certain, that what he meant to say when striking Juror 2405 for cause was that even though she said that her son's experience would not affect her, he simply did not believe her. ER 440. He testified that he considered his personal disbelief of Juror 2405 to be a sufficient basis for a cause challenge. ER 441.

As for his memory of Jurors 1612 and 5147, Toro acknowledged that, contrary to the testimony in his declaration, he did *not* compare them to Juror 2405 at the time of the trial:

> Q. Mr. Toro, you offered up a comparative analysis in your declaration between Juror 2405 and Juror 5147, correct?
>
> A. This year I did, yes.
>
> Q. This year you did?
>
> A. Yes.
>
> Q. Did you do that in your head at the time? That's all I'm trying to get at.
>
> A. No -- because I was not even probably aware of comparative juror analysis until within the past year.
>
> Q. Well, and also because you don't actually have a recollection of Juror 5147 other than what's in the transcript, isn't that correct?
>
> A. The -- yes, that would be accurate.

ER 447.

When asked about the statements in his declaration in which he claimed to have made comparisons between Juror 2405 and the two seated jurors, he responded, "I'm having a hard time understanding because at the time I'm striking a juror for bias, and then we're discussing another juror as

to identification issues." ER 444. When counsel pointed out that Toro had chosen to include those comparisons about the jurors' experiences with identification in his declaration, he explained that his declaration included the statements comparing the seated jurors to Juror 2405 because "I was given a framework [by Respondent's counsel] to address those issues and why I would have kept them or kicked them or why they were – if they were in any way related to the *Wheeler* juror." *Id*. After the hearing, the court ordered the deposition transcript admitted into evidence in its entirety. ER 473-74.

After post-hearing briefing, on May 12, 2017, the magistrate issued a Report and Recommendation ("Report") concluding that Potts had not met his burden of establishing that the strike of Juror 2405 was substantially motivated by race, finding that "the race-neutral reason the prosecutor provided for striking Juror 2405 is credible." App. 8a. The magistrate found that Toro's demeanor during the evidentiary hearing "supports his credibility" and that "the Court found the prosecutor to be a conscientious and earnest witness who attempted to answer questions designed to finely parse his memory of events that occurred more than a decade earlier as honestly and precisely as possible." App. 20a. Yet he Report also described Toro's declaration as "arguably misleading" and "at best, sloppily phrased,

and at worst, misleading," and it made its credibility finding "without excusing the conduct of either Toro or respondent's counsel." App. 28a.

On September 8, 2017, the district court adopted the Report and issued a judgment denying the petition. App. 6a, 7a. The district court also denied a certificate of appealability ("COA"), but on February 7, 2018, the Ninth Circuit granted Petitioner's motion for a COA. ER 28; Dkt. #28.

On March 2, 2020, the Ninth Circuit affirmed the judgment of the district court in an unpublished memorandum disposition. App. 1a.

Reasons for Granting the Writ

This Court should grant the writ because the Ninth Circuit failed to consider or even address the prosecutor's unprompted race-based questioning of Juror 2405, in violation of the mandate this Court set forth in *Batson* and *Miller-El* that the reviewing court consider all relevant factors in determining whether Petitioner has met his burden of proving purposeful discrimination. The Ninth Circuit also ran afoul of *Miller-El*'s holding that a prosecutor's failure to question a juror about a purported bias that he later cites as the reason for a strike is strong evidence of discriminatory pretext, as well as *Miller-El's* holding that a prosecutor's mischaracterization of a juror's testimony is further evidence of discriminatory pretext. Moroever, in

accepting the prosecutor's stated reasons for the strike, despite substantial record evidence contradicting his claims – including a declaration in which he falsely claimed to have conducted a comparative juror analysis that he later admitted he did not conduct – the Ninth Circuit further contravened this Court's jurisprudence. All of these errors violated *Batson*'s central premise that "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 522 U.S. 472, 478 (2008) (internal quotation marks omitted). The Ninth Circuit's order in this case rendered *Batson* and its progeny a nullity, and it decided Potts's critical claim of a violation of the Equal Protection Clause in a manner that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

I. The *Batson* Framework

The Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson*, 476 U.S. at 89. When a defendant asserts that a prosecutor's peremptory challenge was impermissibly based on race, the court must apply a three-step process under *Batson*. First, the defendant must make a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Id*. at 93-94. Next, the burden shifts to the state to offer "permissible race-neutral justifications for the strike[]." *Johnson v. California*, 545 U.S. 162, 168 (2005). Third, the court "must

determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2241 (2019). "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.'" *Id*. at 2244 (quoting*Snyder*, 552 U.S. at 485.

"In *Miller-El v. Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear on the issue of racial animosity must be consulted." *Id.* 478; *see also Flowers*, 139 S.Ct. at 2243 (listing the factors to be considered in determining whether a strike was substantially motivated by discriminatory intent). Although substantial deference is given to the trial court's assessment of the prosecutor's demeanor, which is reviewed for clear error, "[t]his is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness's story…." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). In the *Batson* context specifically, "evidence that the race-neutral justifications offered by the state at step two are unworthy of credence supports a finding of race discrimination." *Crittenden v. Ayers*, 624 F.3d 943, 958 n. 5 (9th Cir. 2010) (emphasis added) (citing *Snyder,* 552 U.S. at 478).

II. The Ninth Circuit Failed to Address the Prosecutor's Race-Based Questioning of Juror 2405, In Violation of *Batson*

The most significant evidence that the prosecutor's stated reason for striking Juror 2405 is pretextual is his entirely unprompted emphasis on race when questioning her. Toro asked her only three questions: whether she thought the incident with her son "was a case of racial profiling or being in the wrong place at the wrong time;" whether she knew the race of the woman who had misidentified her son; and, after reminding her that identification was likely to be the issue in the case, "If you are picked as a juror in this case, are you going to think, oh, my God, you know, my own son was misidentified and I wonder if this is the case here before you even heard any of the evidence?" ER 195-96.

What is telling about this questioning is that it was the prosecutor – not Juror 2405 – who injected the issue of race into her voir dire, and in particular into the discussion of her son's arrest. Juror 2405 had said nothing about race. Yet Toro's *first* question to her was whether he thought the incident with her son was a case of racial profiling. Even when she answered that she did not know, he persisted in asking her the race of her son's accuser. *He asked her three questions, two of which were about race.* Toro's questions reveal his assumption that Juror 2405 perceived the incident with her son as a case of racial profiling – and therefore would be more

sympathetic to Potts – simply because she was Black. This alone violated *Batson*, which held that the Constitution "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. Notably, when the prosecutor questioned non-Black jurors who'd had negative experiences with the police or relatives who had been arrested, he did not ask them whether they thought that race had been an issue in the incidents they described. Those questions were reserved for Juror 2405.

In fact, the only other juror whom Toro questioned *at all* about race was a juror named Galvez, of whom Toro asked, "And I notice that you have a Latino surname. Have you ever felt that either the court system or the police have treated you or anyone you know unfairly based on your race?"[4] ER 174. This unprompted question further reveals Toro's assumption that people of color might harbor anti-police bias *because of their race*.

Toro's race-based questioning squarely contradicts his testimony that his concerns about Juror 2405's bias had nothing to do with race, and it demonstrates that race was a substantial motivating factor behind the strike of Juror 2405. Toro's questions to Juror 2405 violated *Batson*'s central

[4] Galvez ultimately was excused for hardship. ER 184.

premise that "[a] person's race is simply unrelated to his fitness to serve as a juror." *Batson*, 476 U.S. at 87.

Yet the Ninth Circuit did not address, or even mention, Toro's unprompted emphasis on race in his questioning of Juror 2405 – even after Respondent made the startling claim that this race-based questioning was appropriate *because* Juror 2405 was Black. ARB at 34. Although Juror 2405 had said nothing about race during her voir dire, and she had given no indication that she thought race had played a role in the misidentification of her son, Respondent claims that "[t]he prosecutor *logically asked Juror 2405*, *who was African-American*, if the incident [with her son] was racial profiling or a mistake." ARB at 34. Respondent's answer to Toro's unprompted injection of race into his questioning of Juror 2405 is to rely on the fact that she is Black – an argument that clearly runs afoul of *Batson*'s warning that "[t]he Equal Protection Clause forbids the prosecutor to challenge potential jurors…on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 87, 89; *see also Flowers*, 139 S.Ct. at 2244 (courts "must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, *and in light of the arguments of the parties*.") (Emphasis added).

Perhaps this is why Ninth Circuit, in crediting the prosecutor's stated reason for the strike, chose to ignore his racially-focused questioning of Juror 2405 entirely. To do otherwise would be to acknowledge that his voir dire of Juror 2405 squarely contradicts his testimony that his strike of Juror 2405 "had absolutely nothing to do with race," (ER 466, 430-31), and that his purported concern with her bias against police, prosecutors, and the judicial system is pretextual.

III. The Ninth Circuit Contravened This Court's Holding in *Miller-El* that Failure to Question a Juror About a Purported Bias That is the Stated Reason for a Strike is Evidence of Discriminatory Pretext

In affirming the district court, the Ninth Circuit stated that "the prosecutor asserted he had excused Juror 2405 because her son had recently been misidentified as a criminal suspect and held overnight by police." App. 3a; *see also* App. 4a ("The prosecutor maintains that he excused Juror 2405 because, within a year of the trial, her son had been misidentified as a criminal suspect and held in jail overnight."). But Toro's proffered reason was not merely the fact that the juror's son was detained. It was his purported concern that, as a result of her son's experience, Juror 2405 would be biased against police, prosecutors, and the judicial system. The record refutes this purported concern about the biases the prosecutor cited, demonstrating that

it is pretextual. *See Foster*, 135 S.Ct. at 1748 ("On their face, [the prosecutor]'s justifications for the strike seem reasonable enough. Our independent examination of the record, however, reveals that much of the reasoning provided by [the prosecutor] has no grounding in fact.").

First, Juror 2405 said nothing about her son's interaction with police (it was not the police who misidentified her son, it was the "lady [who] picked him out at the mall"). She said nothing about prosecutors or the judicial system, as her son was never charged. Unlike several other jurors, Juror 2405 did not raise her hand when Toro asked the venire if they "ever had any dealings with either the police department or the judicial system regardless of whether or not it was good or bad." ER 199-203.

Perhaps more importantly, the problem with the prosecutor's purported concern about Juror 2405's potential bias against police, prosecutors, or the judicial system is that he *did not ask Juror 2405 a single question* about these potential biases. He asked her no questions about her son's experience with the police (such as whether she thought he had been treated fairly, or whether she had any lingering feelings about the police). He asked her no questions about whether her son's experience left her with lingering feelings about the prosecution, likely because her son was not prosecuted. He asked her no questions about whether her son's experience left her with any

lingering feelings about the judicial system, with which her son was not involved. Toro asked Juror 2405 only about race and misidentification – two topics which he now claims were not the reasons for the strike.

As this Court has held, this "failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El v. Dretke*, 545 U.S. at 245 ((prosecutor's alleged concern that a juror's brother had been convicted and served prison time for multiple offenses was pretextual because "the prosecution asked nothing further about the influence his brother's history might have had on [the struck juror], as it probably would have done if the family history had actually mattered.").

In crediting Toro's stated reason for the strike, the Ninth Circuit nonetheless held that "[t]he prosecutor's failure to further question Juror 2405 does not show pretext….Once Juror 2405 revealed the incident with her son and stated that she did not think it would affect her performance as a juror, there was no apparent need for the prosecutor to ask additional questions." App. 4a. This reasoning is clearly erroneous under *Miller-El*. Given that this Court required prosecutor in *Miller-El* to question a struck juror about the influence his brother's *multiple convictions and prison*

sentences would have on his ability to be fair, in order for his stated concern about the brother's history to be credited, then Toro cannot be excused from failing to question Juror 2405 about the biases he now claims he thought she harbored because her son was detained for one night and released with no charges filed – particularly when she reiterated several times that the incident would not affect her ability to be fair. *See Miller-El*, 545 U.S. 250 n.8 (prosecutor's claim that he struck a juror because his brother-in-law had been convicted of a crime was pretextual because the prosecutor "never questioned [the juror] about his errant relative at all; as with Fields's brother, the failure to ask undermines the persuasiveness of the claimed concern.").

IV. The Prosecutor's Mischaracterization of the Juror's Testimony is Further Evidence of Discriminatory Pretext

Toro's mischaracterization of Juror 2405's testimony when he attempted to strike her for cause – his statement "[b]ut she said it would leave her with an affect" – is additional evidence of discriminatory pretext, particularly given how clear and unequivocal Juror 2405 was in repeatedly stating that her son's experience would *not* affect her, and that she would remain "completely unbiased." ER 195-96. This Court has clearly held that a prosecutor's mischaracterization of a prospective juror's testimony is evidence of discriminatory pretext. As this Court explained in *Miller-El*,

> [The prosecutor] simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps [the prosecutor] misunderstood, but unless he had an ulterior motive for keeping Fields off the jury, we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

545 U.S. at 244; *see also Foster*, 136 S.Ct. at 1753 ("Hood asserted no fewer than four times during voir dire that he could impose the death penalty. A prosecutor is entitled to disbelieve a juror's voir dire answers, of course. But the record persuades us that Hood's race…was [the prosecutor]'s true motivation. The first indication to that effect is [the prosecutor]'s mischaracterization of the record."). Here, as in *Miller-El*, the prosecutor's failure to ask any questions about the bias that he now claims was the reason for the strike increases the significance of his mischaracterization of Juror 2405's statements.

Rather than acknowledging this Court's jurisprudence regarding a prosecutor's mischaracterization of a prospective juror's testimony, the Ninth Circuit first inaccurately described the prosecutor's false statements about Juror 2405's testimony at the time of the cause challenge as an "apparent misstatement." App. 4a. But there is no ambiguity as to whether Toro mischaracterized the juror's testimony. She had said, unequivocally, that the incident with her son would not affect her, and that she would remain completely unbiased; yet when attempting to strike her for cause, Toro claimed she had said the exact opposite: "But she said it would leave her with an affect." He directly contradicted what the juror had said – something that this Court has held to be strong evidence of discriminatory pretext, but which the Ninth Circuit ignored in its order. Instead, the Ninth Circuit affirmed the district court's finding that the prosecutor was "a conscientious and earnest witness who attempted to answer questions designed to finely parse his memory of events that occurred more than a decade earlier as honestly and precisely as possible." App. 5a. But the issue with respect to his mischaracterization of Juror 2405's testimony is not his credibility at the time of the evidentiary hearing, 13 years after the trial – it's what he said at the time of the trial, when he attempted to strike the juror for cause by

making false statements about her testimony – statements that, today, he will not even admit that he made.

Indeed, in the face of the trial record, and a prior ruling from the Ninth Circuit that the prosecutor's mischaracterization of Juror 2405's testimony was evidence of discrimination, the prosecutor's only explanation for his misstatement is to as attempt to shift the blame to the court reporter, stating that he doesn't know if she accurately transcribed what he said. Yet when asked what he actually said during the cause challenge (if he did not say what's in the transcript), Toro could not remember. ER 439. He testified that his reason for believing that the transcript is inaccurate is simply because he had no reason to mislead the court, and he's never done so in his career. *Id*. No prosecutor, however, will readily admit to intentionally misleading the court. As this Court held in *Batson*, "Nor may the prosecutor rebut the defendant's case by denying that he had a discriminatory motive or affirming his good faith in making individual selections. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause would be but a vain and illusory requirement." *Batson*, 476 U.S. at 98. This Court also has noted that "[a]nyone familiar with trial court practice knows that the court reporter is relied on to furnish an accurate

account of what is said in the courtroom." *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

The prosecutor went on to explain that even if the transcript accurately reflects his comments, what he meant to say during the cause challenge is that even though Juror 2405 said she could be fair, he simply did not believe her. ER 440. But a prosecutor's personal disbelief of a juror's repeated, unwavering assertions that she could be fair, in the absence of any record evidence of bias, is an improper basis for a challenge for cause – as an experienced prosecutor like Toro would know. *See* Cal. Code Civ. Pro. § 229 (stating grounds for implied bias, none of which applied to Juror 2405), and Cal. Code Civ. Pro. § 225(b)(1)(C) (defining actual bias as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party"). Therefore Toro's explanation about what he meant to say during the cause challenge, if believed, is additional evidence of purposeful discrimination – evidence that the Ninth Circuit failed to address. *See Foster*, 136 S.Ct. at 1752 ("Of course it is possible that [the prosecutor] simply misspoke in one of the two proceedings. But even if that were so, we would expect at least one of the

purportedly principal justifications for the strike to withstand closer scrutiny. Neither does.").

V. Toro's false declaration claiming that he conducted comparative juror analysis during trial is additional evidence of discriminatory pretext

Toro's credibility is eroded further by his shifting and misleading testimony about what he remembers about Jurors 5147 and 1612, whom Potts's counsel had used for comparative juror analysis at earlier stages of the litigation, and whom the Ninth Circuit had found had had similar experiences to that of Juror 2405 but were not struck by Toro, raising an inference of discrimination at Step 1 of the *Batson* analysis. At the deposition, Toro was asked about these two jurors. Although he had reviewed the voir dire transcript several times with a focus on these jurors, because he knew that they were the subject of comparative juror analysis by Potts and this Court, he was unable to remember anything about them, including any thoughts he had about them at the time of trial. ER 373-76.

Less than three months later, Toro signed a declaration in which he swore to multiple thoughts and opinions he held about Jurors 5147 and 1612, stating that he had compared their experiences with misidentification to that of Juror 2405 and found that they were not similar. When questioned about this discrepancy at the evidentiary hearing, Toro did not claim that his

memory of the 2001 trial had improved in the time between the deposition and when he signed the declaration. He acknowledged that the declaration was drafted *before* he testified at the deposition, at which time he had no memory of Jurors 5147 and 1612, or his thoughts about them at the time of the trial. ER 469. He expressed confusion about why he would even compare those jurors to Juror 2405: "I'm having a hard time understanding because at the time I'm striking a juror for bias, and then we're discussing another juror as to identification issues." ER 444. And he reiterated what he said at the deposition: he does not remember any thoughts he had about Juror 5147 at the time of the voir dire. He testified similarly as to Juror 1612. Most importantly, he testified that he did *not*, in fact, compare those jurors to Juror 2405 at the time of the trial – despite the statements in his sworn declaration that he had done so. ER 447.

Toro's explanation for the statements in his declaration is that Respondent's counsel gave him "a framework to address those issues and why I *would have kept them* or kicked them or why they were – if they were in any way related to the *Wheeler* juror." ER 444 (emphasis added). But in his declaration, he made sworn statements, using the past tense, designed to convince the Court that *at the time of the trial*, he compared Jurors 5147 and 1612 to Juror 2405, and he did not think their experiences with

misidentification were similar, leading him not to strike the two seated jurors. Toro admitted that he made these statements – even though he does not remember what he thought about these jurors, and he did not compare them to Juror 2405 during the trial – because Respondent's counsel asked him to do so.

The District Court recognized the discrepancy between Toro's declaration and the testimony he gave both before and after he signed it, describing the declaration as "arguably misleading," and "at best, sloppily phrased, and at worst, misleading." ER at 20-21. Noting that Respondent's counsel brought the two seated jurors to Toro's attention and gave him a framework that included comparing and contrasting them to Juror 2405, the district court declined to "excus[e] the conduct of either Toro or Respondent's counsel." *Id*. The court nonetheless concluded, without explanation – that "the Court does not believe that these inaccuracies significantly undermine Toro's credibility or the credibility of his asserted reason for striking Juror 2405." *Id*. The Ninth Circuit affirmed this finding, conclusorily stating (also without explanation) that "Potts has not shown that the district court's credibility determination was clearly erroneous." App. 5a.

This finding, of course, does excuse Toro's conduct, and it does so inexplicably. The statements in the declaration cannot be characterized as

mere "inaccuracies," "sloppily phrased," or anything other than deliberately misleading and/or actively false. In a substantial portion of a sworn declaration, crafted with forethought and deliberation well before it was submitted, Toro claimed to remember facts and opinions that he does not actually remember, and he claimed to have performed a comparison of jurors that he did not actually perform. As this Court stated in a recent *Batson* opinion, "This was not some off-the-cuff remark; it was an intricate story expounded by the prosecution in writing," in a declaration sworn under penalty of perjury and filed with the district court as Toro's direct testimony. *Foster*, 136 S.Ct. at 1750 (rejecting prosecutor's attempt to explain away his contradictory statements as "merely misspeak[ing]").

Toro's attempt to mislead the court about his reasons for keeping or striking any juror, including and especially Juror 2405, and to convince the court that he performed a comparative juror analysis that he did not actually perform, provides further evidence that his testimony about Juror 2405 cannot be believed, and that his stated reasons for striking her are pretextual.

Although the voir dire transcript alone demonstrates the pretextual nature of Toro's stated reasons for the strike, his willingness to mislead the Court about what he remembers and what he was thinking when he struck

Juror 2405 compels the conclusion that the strike was substantially motivated by race. The Ninth Circuit's holding to the contrary decided an important federal question in a way that conflicts squarely with the decisions of this Court in *Batson*, *Miller-El*, and their progeny.

Conclusion

For the foregoing reasons, Mr. Potts respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: July 28, 2020

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