

No. 17-7634

In the
Supreme Court of the United States

David Minor,

Petitioner,

v.

Beverly Hastings, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

In 2003, a fairly-selected jury of petitioner David Minor’s peers convicted him of the armed robbery of Lidwyn Cummings and weapons offenses following a fair trial in New Jersey state court. Every court—state and federal—to review this record over the last 15 years has agreed. The questions presented by his petition for certiorari are:

- I. Did the New Jersey state courts apply the correct precedents and reach a reasonable conclusion by finding that petitioner failed to satisfy his step-one *Batson* burden of proving a prima facie case of racial discrimination in the selection of jurors by simply pointing out that four out of five of the excused jurors are members of a cognizable class, and nothing more?
- II. When a victim testifies at trial that he is “80 percent” sure petitioner is the perpetrator, and the defense argues in summation that “80 percent” is *not* beyond a reasonable doubt, is a petitioner entitled to habeas relief because the prosecutor in summation said that the victim’s near-certain identification five days after the robbery, coupled with his “80 percent” identification at trial, *did* satisfy the State’s “beyond a reasonable doubt” burden of proof?

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit (Pet. 3a to 10a) is reported in the Federal Appendix at 704 F. App'x 103 (3d Cir. 2017). The opinion of the United States District Court for the District of New Jersey (Pet. 13a to 46a) is unreported.

The last reasoned opinion of the state court, the Superior Court of New Jersey – Appellate Division (Pet. 47a to 62a), is unreported.

Statement of the Case

A. The Armed Robbery of Lidwyn Cummings by Petitioner David Minor

In January 2002, 52-year old Lidwyn Cummings stepped out of a local drug store where he had gone to pick up medication for his wife. The doctor hadn't called the prescription in, so Cummings bought a pack of cigarettes and headed back to his pick-up truck to go back to work. (Pet. 278a to 281a). As Cummings walked across the street to his vehicle, petitioner also crossed the street. He moved towards Cummings quickly, almost bumping into him. (Pet. 280a, 285a).

The area—which featured the drug store, a post office and a bar—was well lit. A traffic light and at least three street lights illuminated the neighborhood, one of which was near Cummings' truck. “The

lighting was good,” Cummings recalled. No other people were in the immediate vicinity, and Cummings had no difficulty seeing. (Pet. 278a to 279a, 286a to 287a).

Cummings put his key into the door to unlock the vehicle when a man pressed a gun into Cummings’ side. (Pet. 280a, 285a). “Give me your money,” demanded the man. It was petitioner, the man who had almost bumped into Cummings less than 30 seconds prior. Cummings, looking right into the face of his assailant, refused, but petitioner persisted: “Give me your fucking money or else I’m going to pop you one.” Cummings handed petitioner cash and cigarettes. The two men were face to face, possibly only 12 inches apart. “I was looking at his face. I saw his face,” Cummings recalled. (Pet. 280a to 281a, 298a to 300a).

Petitioner wanted more: “Give me your wallet.” Cummings resisted at first, but eventually handed that over, too. Petitioner then demanded Cummings’ keys. Cummings had to get back to work, and he begged petitioner not to take his keys. Unmoved, petitioner took the keys and threw them into a parking lot across the street from the drug store. (Pet. 281a, 294a). Cummings retrieved his keys. Defendant fled.

(Pet. 281a, 287a to 288a).

At the police station, Cummings gave a statement, and told a detective that the face-to-face robbery had lasted “three, four minutes.” He also said he could identify the man who had robbed him, and provided a physical description. Cummings agreed to come back a few days later to look at some mugshot books. (Pet. 275a to 277a, 281a to 282a, 289a, 299a). An initial review of photograph books did not reveal a suspect. (Pet. 282a, 289a, 295a).

Two days later, Cummings returned to the station and looked through a six-photo array and selected petitioner’s photograph. When he picked this photo out, he was “about 95 to 100 percent” sure petitioner was the man who robbed him. (Pet. 289a to 291a). The state trial court later found that no evidence existed that the out-of-court identification procedure was unfair or impermissibly suggestive, even viewing all circumstances in a light most favorable to petitioner. The identification was reliable. The trial judge denied the motion, and the Appellate Division later affirmed that decision. (Pet. 61a).

B. Petitioner's State Court Proceedings

Two issues arose during petitioner's state court trial that formed the basis of his habeas claims. First, during jury selection, after the prosecutor exercised just five peremptory challenges, *see* (Pet. 56a to 57a), defense counsel made a *Batson*¹ motion, accusing the prosecutor of improperly excluding jurors based on race.² Defense counsel stated that four of the five excused jurors "were dark-skinned or...considered black and possibly African-American." The trial judge found that four of the five excused jurors were African-American, as were petitioner and Cummings. (Pet. 117a to 121a).

Defense counsel's only basis for making the motion was that four of the excused jurors were African-American: "I would submit that the assumption of the...bias would be that people who share the same race as the petitioner...80 percent of the challenged jurors being black, they would somehow be more sympathetic or more favorable to an outcome in favor of the petitioner by virtue of them having the same race." (Pet. 119a). Other than this generalization, defense counsel offered nothing

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986); *accord State v. Gilmore*, 511 A.2d 1150 (N.J. 1986).

² Counsel also made a gender-based objection, but petitioner later abandoned that claim.

to overcome the presumption that the prosecutor exercised her peremptory challenges on constitutionally-permissible grounds.

The prosecutor responded that she excused each of the jurors based on their answers to the voir dire questions, not race. She argued that not enough challenges had been used to show any pattern of racial exclusion that would satisfy petitioner's burden of proof. (Pet. 122a to 124a). The trial judge agreed, concluding that "a close examination of the record" bears out that no potential jurors were struck based on race. "At any rate, I do not believe that the defense has made a prima facie case," the trial court found. (Pet. 124a to 125a).

The defense never renewed its motion, as the District Court later noted, "even though jury selection went into the next day and the State ultimately used all of its peremptory challenges." (Pet. 29a).

The second issue deals with Cummings' trial testimony and the attorneys' summations. At trial, Cummings again identified petitioner as the man who robbed him. (Pet. 292a). The prosecutor asked Cummings how positive he was, and Cummings answered candidly: "[R]emembering back, I would say *about 80 percent*." (Pet. 290a) (emphasis added). He elaborated: "I'm not going to say I'm 100 percent

certain now because this happened a way back. ...I'd say *about 80 percent.*" (Pet. 291a) (emphasis added).

At the close of the State's case-in-chief, petitioner moved for a judgment of acquittal on all counts. *See* N.J. Ct. R. 3:18-1. Petitioner's counsel argued that Cummings "gave a percentage of about 80 percent, which in -- with respect to a criminal case is ... not sufficient." (Pet. 309a). The prosecutor disagreed: "[Cummings' in-court] identification was certainly proper. ...[H]e said 80 percent, Judge. And probably...in a civil case, by a preponderance of the evidence is just a little more than 50/50. Here, this victim said 80 percent, which I would submit, meets the standard beyond a reasonable doubt." The judge noted that he was aware of no law that set "beyond a reasonable doubt" at any specific numerical percentage, but allowed the prosecutor to continue her argument. The trial judge denied the motion. (Pet. 311a to 312a).

Closing arguments began. Petitioner's counsel focused on Cummings' identifications. About the in-court identification, counsel argued:

Now here in court, [Cummings] was down to 80 percent, *only 80 percent.* Now the judge will charge you with the definition of proof beyond a reasonable doubt. And 80 percent, when I was

growing up and taking classes, an 80 percent was a B. That was fine. When I was in college . . . I would have been thrilled with an 80 percent. But not today, ladies and gentlemen. This isn't a grade on a test. This is a statement about Mr. Minor. . . . And we need, as the State stated even in her opening, proof beyond a reasonable doubt.

[W]e cannot be sure. Certainly not sure . . . to the point of beyond a reasonable doubt. It's a qualitative statement. But *I would submit that 80 percent, a low B, is not proof beyond a reasonable doubt.*

[(Pet. 316a to 317a) (emphasis added).]

After summarizing the evidence of Cummings' out-of-court identification, about which Cummings testified he was "95 to 100 percent" certain, the prosecutor responded to defense counsel's "80 percent . . . is not proof beyond a reasonable doubt" argument in this way:

Is it understandable a year later -- memories fade -- that there might be only an 80 percent? But 80 percent is a very high percentage, ladies and gentlemen. That's beyond a reasonable doubt. Preponderance of [the] evidence in civil cases is a little more than 50/50. Beyond a reasonable doubt is 80 percent, 90 percent, 100 percent. That's all we need. That's sufficient. *And if the victim's certain of his identification five days later [out of court], then that is certainly more than enough for his guilt to be determined in this case.*

[(Pet. 324a to 325a). (emphasis added).]

In other words, *all* the evidence, including Cummings' 95-to-100-percent-certain out-of-court identification coupled with his 80-percent-sure in-court identification, established proof of guilt beyond a reasonable doubt. She continued:

The main identification you want to rely on is the one that was done when the victim -- when the Defendant's face was fresh in the victim's mind right after the incident took place, within five days.

. . . And I would just like to submit, *based on all the evidence collectively together, . . . the victim's testimony, the photographs, . . . the evidence of the short period of time between the crime and the identification of the Defendant*, that . . . the State has proven this case beyond a reasonable doubt as to each and every count in the indictment and as to each and every element.

[(Pet. 325a to 326a) (emphasis added).]

Defense counsel did not object to the prosecutor's summation, *contra* N.J. Ct. R. 1:7-2, or ask for any sort of curative instruction.

In its final charge, the trial court instructed the jurors to disregard any statements made by the attorneys regarding the law. (Pet. 328a). The court also gave the standard definition of "beyond a reasonable doubt," and told the jurors that the "summations of counsel are not evidence." Defendant had no objection. (Pet. 329a to 330a).

The jury had no questions, and convicted petitioner, who by that time had absconded the trial, on all counts. (Pet. 51a, 346a).

On direct appeal to the Appellate Division, petitioner raised several issues, including: 1) the trial court failed to conduct a *Batson* hearing; 2) the prosecutor “misstated the law and her burden of proof” during her summation; and 3) the trial court’s denial of a *Wade*³ hearing resulted in the admission of an unreliable identification to the jury. (Pet. 51a). Defendant admitted that he never raised the second issue in the trial court. (Pet. 70a).

Applying *Johnson v. California*, 545 U.S. 162, 170 (2005), among others, the Appellate Division found that petitioner failed to produce evidence “sufficient to permit the trial judge to draw an inference that discrimination has occurred.” In its analysis, the state appellate court analyzed each of the jurors struck and the prosecutor’s arguments in support of her challenges, and found that petitioner submitted nothing to support an inference of discrimination by the prosecutor, thus failing to satisfy *Batson*’s first step. (Pet. 55a to 59a).

Regarding the prosecutor’s summation, the Appellate Division

³ *United States v. Wade*, 388 U.S. 218 (1967).

found no impropriety. Applying the “plain error” standard of review because defense counsel did not object at trial, *see* N.J. Ct. R. 2:10-2, the court correctly pointed out that, in her summation, defense counsel “stressed that at the time of Cummings’ photo identification he says he was ninety-five to 100 percent sure and at trial said that with the passage of time he was eighty percent sure in his in-court identification.” The Appellate Division then quoted the prosecutor’s response in summation, and concluded that while “obviously an incorrect statement of law[,]” the prosecutor’s remarks did not deprive petitioner of a fair trial because the trial court properly instructed the jury on the meaning of reasonable doubt and to ignore any statements of law by the attorneys. (Pet. 59a to 60a).

Finally, the Appellate Division rejected petitioner’s argument that the out-of-court identification was unreliable. To succeed on such a claim, petitioner had to show

impermissible subjectiveness in the identification procedure. Here the trial judge determined that the photographic identification procedure was neither unfair nor unduly suggestive. His conclusion is buttressed by the fact that the defendant failed to prevent [sic] an adequate proffer of an impermissibly suggestive procedure.

[(Pet. 61a).]

The Supreme Court of New Jersey denied review on all issues. *State v. Minor*, 960 A.2d 745 (N.J. 2008). An unsuccessful round of collateral attacks in state court followed. *See* (Pet. 16a to 17a).

C. Petitioner's Federal Habeas Proceedings

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. He again argued that he was denied a fair trial by the trial court's failure to conduct a *Batson* hearing, and because of the prosecutor's summation. (Pet. 17a to 18a). The Honorable Jerome B. Simandle, Ch.U.S.D.J., rejected these arguments and denied habeas relief. (Pet. 14a).

After setting forth this Court's clearly-established precedent on the prosecutorial-misconduct claim, namely *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), Judge Simandle found no unreasonable application of those precedents by the state court:

Given the certainty of the out-of-court identification of Minor by Cummings, as well as the correct instructions by the trial judge regarding the legal standard of proof beyond a reasonable doubt, the Appellate Division was not

unreasonable in its application of *Darden*, *Donnelly* or other Supreme Court precedent when it concluded that the prosecutor's comments did not so infect the trial with unfairness as to make Minor's conviction a denial of due process.

[(Pet. 37a).]

As for the *Batson* issue, Judge Simandle correctly pointed out that even though *Johnson* had come out *after* petitioner's trial, and so the trial judge applied the now-rejected "substantial likelihood" standard, the Appellate Division applied the correct one: "The Appellate Division affirmed on this issue finding that, even under the new, lower standard, Minor had not produced evidence sufficient to permit the judge to draw an inference of discrimination against African-Americans[.]" (Pet. 31a).

Next, Judge Simandle found that petitioner "cited no Supreme Court holding that is inconsistent with the Appellate Division's determination that Minor failed to produce evidence supporting an inference of discriminatory intent" by the prosecutor. (Pet. 33a to 34a). Accordingly, Judge Simandle found "that the factual determinations regarding reasons for striking African-American jurors and regarding the composition of the trial jury were not unreasonable, and that the Appellate Division's determinations of law were not contrary to, or an

unreasonable application of, clearly established federal law.” (Pet. 34a to 35a).

The Court of Appeals granted a certificate of appealability on both issues, accepted briefing and heard oral argument, and affirmed. In his opinion for the court, the Honorable Theodore A. McKee, U.S.C.J.,⁴ applied, as had the District Court, the deferential standard of review in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d)(1)-(2). (Pet. 5a).

On the *Batson* issue, it concluded:

[T]he prosecutor did offer race-neutral reasons for the strikes removing African American jurors, the record supports those nonracial reasons, and the trial court found that the prosecutor's reasons were credible. Therefore, although the prosecution's comments on the second day of voir dire are worrisome, given the ultimate composition of the jury, the credited race-neutral explanations for the challenged strikes, and the significant deference we afford to the trial court's finding, we cannot say that the state court's denial of Minor's *Batson* claim “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

[(Pet. 10a).]

⁴ Joining Judge McKee’s opinion were Chief Judge D. Brooks Smith and Judge Marjorie O. Rendell. (Pet. 3a).

Applying AEDPA, the court noted that while it may have reached a different result on de novo review, it found that the state court's determinations were not unreasonable. (Pet. 6a, 10a).

The panel reached the same result on the summation issue. The prosecutor's comments about the beyond-a-reasonable-doubt standard "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process" under AEDPA, for three reasons:

First, the prosecution's comments did not manipulate or misstate the evidence. Second, the comments were in response to defense counsel's arguments. Third, the trial court provided the jurors with curative instructions, including the correct explanation of the standard of proof beyond a reasonable doubt and instructed the jury to ignore any statement made by counsel regarding the law.

[(Pet. 7a).]

For these reasons, the Court of Appeals found no basis to conclude that the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (Pet. 7a).

A petition for rehearing by the panel and the Court of Appeals en banc was denied. (Pet. 11a).

Reasons Why This Court Must Deny Certiorari

The Court of Appeals correctly concluded that petitioner is not entitled to habeas relief. The state court reasonably applied this Court's governing precedents, and rejected petitioner's banal claims of trial error. No basis exists for this Court to intervene.

Minor raises two issues in his petition for a writ of certiorari, arguing essentially that, “[a]s a result of errors in both jury selection and during the State’s closing arguments, [his] trial was unfair and warrants this Court’s intervention...” (Pet. 2). But every court, state and federal, to review these claims over the last 15 years has found them to be either without merit or of insufficient merit to warrant reversal under AEDPA. Further, ordinary correction of alleged state court trial errors is not among the compelling reasons that would justify this Court granting certiorari. This Court must deny the writ.

Habeas corpus “is a ‘guard against extreme malfunction in the state criminal justice system,’ not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (citation omitted). Nor is it “a second criminal trial, and federal courts are not to run roughshod over the considered findings and

judgments of the state courts that conducted the original trial and heard the initial appeals.” *Williams v. Taylor*, 529 U.S. 362, 383 (2000) (opinion of Stevens, J.). A petitioner is not entitled to relief “if the state court decision can be said to be one of several equally-plausible outcomes.” *Jackson v. Frank*, 348 F.3d 658, 662 (7th Cir. 2003), *cert. denied*, 541 U.S. 963 (2004).

This view is embodied in the standards of review set forth in AEDPA, which strictly limits a federal court’s power to grant writs of habeas corpus to state prisoners. *Williams*, 529 U.S. at 399. A state prisoner whose claim has been adjudicated on the merits in state court may obtain relief under AEDPA only if the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court. 28 U.S.C. § 2254(d)(1). The phrase “clearly established Federal law” refers to holdings, not dicta, “as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412 (quoting 28 U.S.C. § 2254(d)(1)).

A state court decision is “contrary to” established Supreme Court precedent only “if the state court applies a rule that contradicts the governing law set forth in [this Court’s] cases” or “if the state court

confronts a set of facts that are materially indistinguishable from” those underlying a Supreme Court decision and nevertheless arrives at the opposite result. *Id.* at 406. By contrast, “a run-of-the-mill state-court decision applying the correct legal rule from [the Court’s] cases to the facts of a prisoner’s case would not fit comfortably within § 2254(d)(1)’s ‘contrary to’ clause.” *Ibid.* So, even though “the state-court decision may be contrary to the federal court’s conception of how [the correct precedent] ought to be applied in that particular case, [if] the decision is not “mutually opposed” to [that precedent] itself[,]” habeas relief should be denied. *Ibid.*

To be deemed an “unreasonable application” of clearly-established Supreme Court case law, the state court’s application must be “objectively unreasonable.” *Id.* at 409-10. A federal court may not grant habeas relief simply because in its independent judgment the state court decision applied the law “erroneously or incorrectly[;]” the application must also be unreasonable. *Id.* at 411. Stated differently, “a state prisoner must show that the state court’s ruling on the claim being presented in federal court was *so lacking in justification that there was an error well understood and comprehended in existing law*

beyond any possibility for fairminded disagreement.” Harrington, 562 U.S. at 103 (emphasis added).

A state courts’ factual findings are presumed to be correct unless petitioner rebuts them by clear and convincing evidence. *Burt v. Titlow*, 571 U.S. 12, 15 (2013); 28 U.S.C. § 2254(e)(1)

I. The prosecutor exercised her peremptory challenges in a fair, non-discriminatory, and thus constitutional manner. The state court applied the correct precedents, and reached a reasonable conclusion.

Batson and *Johnson* are the established precedents governing petitioner’s first claim. In *Batson*, this Court recognized that, “[p]urposeful racial discrimination in selection of the venire violates a petitioner’s right to equal protection[.]” and held that, “a petitioner may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the petitioner’s trial.” 476 U.S. at 86, 96.

To assess *Batson* claims, the Court devised a three-step test:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race neutral basis for striking the juror in question; and third, in light of the parties’

submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

[*Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (citations omitted)⁵.]

In *Johnson*, a case before this Court on direct appeal, the Court held that “a petitioner satisfies the requirements of [that] step by producing evidence sufficient to draw an inference that discrimination has occurred.” 545 U.S. at 168, 170. In that case, the state trial court had found the inference of discrimination “very close,” and on direct review, the California Supreme Court found it “suspicious that all three African-American prospective jurors were removed from the jury.” *Id.* at 173 (citation omitted). The state courts had found, however, that Johnson did not satisfy California law’s “more-likely-than-not” standard, and so denied relief at the first step. Relying on “[t]hose inferences that discrimination may have occurred[,]” the Supreme Court found Johnson had satisfied step one, and remanded for further proceedings. *Ibid.*

Rather than federal reviewing courts, “the trial court is better

⁵ The test is the same under New Jersey law. See *State v. Thompson*, 132 A.3d 1229, 1238-41 (N.J. 2016).

positioned to decide the *Batson* prima facie issue, which involves a “‘factual inquiry’ that ‘takes into account all the possible explanatory factors’ in the particular case.” *Tolbert v. Page*, 182 F.3d 677, 683 (9th Cir. 1999) (en banc) (quoting *Batson*, 476 U.S. at 95, which quoted *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)). “[T]he trial judge plays a pivotal role supervising voir dire[,]” and thus is “‘best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes[.]’” *Crittenden v. Chappell*, 804 F.3d 998, 1021-22 (9th Cir. 2015) (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2201 (2015)); see also *Tolbert*, 182 F.3d at 683 (noting that, at step one, “the trial judge’s unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events” and to “personally witness[] the totality of circumstances that comprises the ‘factual inquiry’” at issue, making heavy deference appropriate).

Here, the Appellate Division’s decision was not contrary to or an unreasonable application of *Johnson* or *Batson*. Applying *Johnson*, the Appellate Division recognized that the question at *Batson*’s first step was whether the petitioner “produced ‘evidence sufficient to permit the

trial judge to draw an inference that discrimination had occurred.”

(Pet. 55a) (citation omitted); see *Johnson*, 545 U.S. at 170. The question is one of quantum of proof: Did petitioner produce enough evidence for the trial court to draw the inference necessary to shift the burden to the prosecutor?

The state courts thought not. They found petitioner failed in this showing, and the trial judge’s answer to the question, “whether the defendant has made the requisite prima facie showing[,]” is, as the Appellate Division recognized, entitled to “substantial deference . . .” (Pet. 57a to 58a). Other than pointing out that four out of five strikes were used against Africa-Americans, petitioner produced nothing that would have permitted the trial court to make the requisite step-one showing. He still doesn’t.

After noting petitioner’s failure of proof at the trial level, and deferring to the trial judge’s finding on this issue, it is true that the Appellate Division discussed some factors that are more relevant to *Batson*’s later steps. See (Pet. 58a to 59a). But by then the state appellate court had already deferred to the trial court’s finding of petitioner’s lack of proof to support his step-one claim. The language in

the opinion that follows can more fairly be read as dicta than some conflation of *Batson*'s tripartite framework, or some objectively unreasonable application of this Court's precedents. And it is simply a mischaracterization to say that the Appellate Division's additional language increased the burden on a question it had already definitively answered. What matters is that petitioner submitted insufficient proof, not even enough to overcome the slight burden *Johnson* imposes, and the Appellate Division recognized this and denied relief.

The state court's finding is entitled to deference, especially in habeas cases under AEDPA. Petitioner has failed to show how the state court's analysis was an unreasonable application of this Court's precedents. The Appellate Division's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Its decision, even if debatable, was not so wide of that mark that this Court must step in and grant certiorari.

II. The prosecutor's comment was based on the trial evidence, responsive to defense counsel's summation, and did not infect the trial with unfairness as to make the resulting conviction a denial of due process.

Darden is this Court's controlling precedent when considering a prosecutor's summation under AEDPA. *Parker v. Matthews*, 567 U.S. 37, 45 (2012). The comments at issue in *Darden* were so egregious they make "conscientious prosecutors cringe." 477 U.S. at 189 (Blackmun, J., dissenting). Darden, out on furlough from prison, shot and killed one man, shot a second, and was apprehended after he was in a motor vehicle accident. *Id.* at 171-74.

During trial, the prosecutor called the petitioner "an animal" who should have "been killed in the accident." *Id.* at 179, 180 n. 12. He accused the state prison system of being a co-defendant for releasing Darden into the public, and openly confessed that he wished the victim had had a shotgun so he could have "blown [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." *Id.* at 180 n. 12. All Justices agreed the remarks were worthy of strong and universal condemnation. *See id.* at 179, 181 n. 13; *id.* at 189 (Blackmun, J., dissenting).

But the Court concluded that even comments that are

“undesirable” or “universally condemned[.]” like the ones before it, are not necessarily ones that deprive a petitioner of a fair trial; rather, “the relevant question is whether the prosecutors’ comments ‘*so infected the trial with unfairness as to make the resulting conviction a denial of due process.*’” *Darden*, 477 U.S. at 181 (quoting *Donnelly*, 416 U.S. at 637) (emphasis added); *see also Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (mandating habeas courts to determine whether the comments had a “substantial and injurious effect or influence in determining the jury’s verdict.”). The *Darden* standard is “a very general one,” and leaves state courts “more leeway ... in reaching outcomes in case-by-case determinations[.]” *Parker*, 567 U.S. at 48 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Applying that holding, this Court found no due process violation. *Darden*, 477 U.S. at 181-83. The comments, while no doubt improper, “did not manipulate or misstate the evidence,” nor did they “implicate other specific rights of the accused[.]” such as the right to counsel or the right to remain silent. *Id.* at 181-82. The complained-of comments were “invited by” or “responsive to” the defense’s own summation, and the trial court repeatedly instructed the jury that its decision was to be

based exclusively on the evidence, which counsels' arguments were not. *Id.* at 182. The Court also noted that the government's case was strong, and, under a state rule, the defense had the opportunity to rebut the prosecutor's attacks, and did so. *Ibid.*

The *Darden* standard has its origins in *Donnelly*. There, the prosecutor had made a remark which could have been characterized as an untoward comment on the defendant's failure to plead guilty, and implied that the prosecutor withheld evidence favorable to the defense and misled the jury. *Donnelly*, 416 U.S. at 639-41. A divided Court of Appeals found that the comment had this inappropriate effect, and granted habeas relief. *Id.* at 642.

Reversing, this Court found that it was "by no means clear that the jury did engage in the hypothetical analysis suggested by the majority of the Court of Appeals, or even probable it would seize such a comment out of context and attach this particular meaning to it." *Id.* at 644. Moreover, the trial judge had instructed the jury that the prosecutor's comments were not evidence, and gave a specific charge regarding the comment at issue, which it did because trial counsel made a timely objection. *Id.* at 644; *see id.* at 640-41.

In language worth repeating here, then-Justice Rehnquist explained for the Court:

[C]onsistent and repeated misrepresentation of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. *Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions.* Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that *a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.*

[*Id.* at 646-47 (internal quotation marks omitted and emphasis added).]

In this case, the key State's witness, Cummings, testified that, at the time of trial, he was only 80-percent certain Minor was the person who had robbed him at gunpoint. Both attorneys focused on that testimony in their summations. The defense said it was not sufficient to meet the beyond-a-reasonable-doubt standard; the State said it, coupled with other evidence, was. The jury received proper instructions

on the legal definition of beyond a reasonable doubt, and concluded that the totality of the evidence met that burden. The prosecutor's comment did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181.

Addressing petitioner's allegation of prosecutorial misconduct, the Appellate Division, while not specifically citing *Darden* or *Donnelly*,⁶ applied the correct standard. It found that while the prosecutor's comment was "obviously an incorrect statement of law[,] it "did not deprive petitioner of a fair trial." (Pet. 60a). The comment was responsive to defense counsel's summation, and "the trial court properly instructed the jury on the meaning of reasonable doubt, and further instructed the jury to follow the instructions of the court and to ignore any statements by the attorneys on the law." (Pet. 59a to 60a).

The District Court and the Court of Appeals agreed, the former saying: "Given the certainty of the out-of-court identification of Minor by Cummings, as well as the correct instructions by the trial judge regarding the legal standard of proof beyond a reasonable doubt, the Appellate Division was not unreasonable in its application of *Darden*,

⁶ Nor did petitioner. *See* (Pet. 70a to 72a).

Donnelly or other Supreme Court precedent” (Pet. 37a). The Court of Appeals similarly found that the remark did not manipulate or misstate the evidence, was responsive to defense counsel’s summation, and any prejudicial effect was negated by the trial court’s accurate legal instructions. (Pet. 7a).

These courts were correct. The prosecutor’s “80 percent” comment cannot be ripped from its trial moorings. Cummings testified unequivocally that when he first identified petitioner out of court, five days after the robbery, he was “95 to 100 percent” certain petitioner had robbed him. At trial, he again identified petitioner as the culprit, but this time said he was only “80 percent” certain. After the prosecutor made the comment at issue, she stressed that, “if the victim is certain of his identification five days later, then that is certainly more than enough for his guilt to be determined in this case.” She then emphasized that, “[t]he main identification” the jury should rely on “is the one that was done . . . [w]hen the Defendant’s face was fresh in the victim’s mind . . . [.]” *i.e.*, the out-of-court identification. The prosecutor concluded her point by asking the jury to look at “all the evidence collectively together,” including Cummings’ testimony and the out-of-

court identification, and find that “the State has proven this case beyond a reasonable doubt”

Thus, fairly read in proper context, the prosecutor’s point was that Cummings’ “80 percent” identification at trial, *plus* his “95-to-100 - percent certainty” five days after the robbery, was enough to find petitioner guilty beyond a reasonable doubt. It was not an instruction on the law, and, even if it could be taken as one, the trial court was clear that an attorney’s comments on the law were to be disregarded. No rational juror would have disregarded this instruction and elevated a few words in the prosecutor’s summation above the trial court’s charge. *See Donnelly*, 416 U.S. at 644 (“[I]t is by no means clear . . . or even probable that [the jury] would seize such a comment out of context and attach this particular meaning to it.”).

Moreover, the prosecutor’s comment was responsive to defense counsel’s summation. Just minutes before the comment was made, defense counsel seized upon Cummings’ “80 percent” testimony, saying at trial Cummings “was down to 80 percent, *only 80 percent*[,]” and that figure was not enough to meet the beyond-a-reasonable-doubt

standard.⁷ The prosecutor was duty-bound to respond to that attack, and acted well within constitutional bounds when she did so. *See Darden*, 477 U.S. at 182 (citing *United States v. Young*, 470 U.S. 1, 13 (1985), and discussing the “invited response” doctrine).

Donnelly is clear: reviewing courts are not to pull a prosecutor’s remark out of context, ascribe to it some sinister meaning, and then assume the jury gave it that same meaning. 416 U.S. at 646-47. To that end, petitioner asks this Court to do just that, and assume the jury: 1) took the prosecutor’s statement as one of law, rather than argument based on the evidence and made in response to defense counsel’s summation; 2) ignored the trial court’s repeated instructions that comments by the attorneys on the law did not control; 3) ignored the trial court’s repeated (and correct) instructions on the definition of “beyond a reasonable doubt”; and 4) found petitioner guilty by some

⁷ Petitioner acknowledges that his own counsel argued that “80 percent” was a “low B,” which does *not* rise to the level of beyond a reasonable doubt. (Pet. 25 n. 6); *see* (Pet. 316a to 317a). The prosecutor simply took the opposite view, as attorneys battling in the heat of a criminal trial often do. Given that both attorneys tied the “80 percent” testimony to the governing beyond-a-reasonable-doubt standard in their summations, it appears the only thing separating good advocacy from an improper quantification of the burden of proof, at least according to petitioner, is the identity of the client.

lesser standard of proof. *Darden* in no way requires state courts to engage in this sort of tortured analysis, and *Donnelly* makes it quite plain that federal courts shouldn't either.

Petitioner urges this Court to grant certiorari to clarify that the burden of proof in a criminal trial cannot be quantified. (Pet. 23). But, as his own research shows, there is consensus among federal and state courts that reducing reasonable doubt to a quantitative measure is generally inappropriate. *See* (Pet. 24-25) (collecting cases). Such harmony counsels against certiorari.

Moreover, both the Court of Appeals and the Appellate Division in this case agreed that the remark was “troublesome,” and “obviously” incorrect as a statement of law, respectively. (Pet. 7a, 60a). The only question was one of application: did the particular remark in this case so infect the trial with unfairness that the resulting conviction was a denial of due process? *Darden*, 477 U.S. at 181. On this point every court below has agreed: it did not. (Pet. 7a, 60a).

Petitioner argues the previous courts that considered this issue erred by not evaluating the strength of the prosecution's evidence. (Pet.

26 to 31).⁸ To be sure, the strength of the State’s case is a relevant factor when weighing whether the remark infected the entire trial. *See Darden*, 477 U.S. 182. But it is only one among many others, and no decision from this Court holds that this factor outweighs any other, or that the failure to expressly consider it renders a state-court decision an “unreasonable application” of *Darden*, *Donnelly*, or any other clearly-established precedent from this Court. The other *Darden* factors—whether the comments manipulated or misstated the evidence; whether they implicated specific rights, such as the right to counsel or the right to remain silent; whether the remarks were invited by defense counsel’s summation; and whether the trial court instructed the jurors that their decision was to be based on the evidence alone, not the arguments of counsel—were considered by both the federal and state courts in finding

⁸ While the Court of Appeals’ opinion does not explicitly discuss this factor, (Pet. 6a-7a), the District Court found Cummings’ identification “certain[.]” (Pet. 37a). And, most importantly for habeas review, the Appellate Division, albeit in a different section, rejected defendant’s argument that Cummings’ out-of-court identification was unreliable, agreeing with the trial judge that no evidence existed that the identification was obtained unfairly or in an unduly suggestive manner. (Pet. 61a). The record, as a whole, therefore supports the conclusion that the evidence was strong enough that the fleeting and rather insignificant remark by the prosecutor reduced to nil “the likelihood that the jury’s decision was influenced” by it. *Darden*, 477 U.S. at 182.

that the prosecutor's remark did not deprive petitioner of a fair trial. (Pet. 6a to 7a, 60a). This was a correct application of *Darden*, and certainly not an unreasonable one. Petitioner received a fair trial, and no basis exists for this Court to grant certiorari.

III. Ordinary correction of alleged state court trial errors is not among the compelling reasons that would justify this Court granting certiorari.

As the preceding Points show, petitioner's claims that his state court robbery and weapons convictions were not the product of a fair trial are belied by the trial record and this Court's precedents. But, even if petitioner is correct that the state court decision had flaws, it does not follow that this Court should grant a writ of certiorari to correct them.

Petitioner has failed to establish any legitimate circuit split or any direct contravention, by either the state court or the Court of Appeals, of this Court's precedents. "[W]hen no new principle of law is presented, [this Court] should generally leave undisturbed the decision of a court of appeals that upon the particular facts of any case habeas corpus relief should be granted—or denied." *Donnelly*, 416 U.S. at 648 (Stewart, J., concurring).

Once exposed, all that remains of Minor's petition are alleged trial errors in the state proceedings. Ordinary error correction is not the business of this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari") (quoted in *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring)). *Batson*, *Johnson*, *Darden*, and *Donnelly* are settled law. Petitioner's claims are ordinary, oft-raised trial errors that have been thoroughly vetted and rejected by both state and federal courts applying those decisions. His generalized claims of misapplication of those precedents provide no basis for this Court to intervene, even if some minor deviations could be squeezed from the lower courts' decisions.

To close, this is a habeas case brought by a state prisoner attacking a state court decision. This Court has explained:

If [AEDPA's] standard is difficult to meet, that is because it was meant to be. ... § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a “guard against extreme malfunctions in the state criminal justice systems,” not a substitute for ordinary error correction through appeal.

[*Harrington*, 562 U.S. at 102-03 (internal citations and quotation marks omitted).]

Petitioner pressed his claims in New Jersey trial court (the *Batson* one anyway; the *Darden* claim he did not raise until direct appeal), the intermediate appellate court, and the Supreme Court of New Jersey, which denied review. He then filed a collateral attack on his convictions, which was rejected by the trial court and the intermediate appellate court, before being deemed unworthy of review by the state Supreme Court. Finally, petitioner filed a federal habeas action, which was denied by the District Court, reviewed and rejected by a three-judge panel of the Court of Appeals, and then denied by that full court. To the extent there could be “fairminded disagreement” about the state court decision, such disagreement counsels in favor of not disturbing the

New Jersey court's decision. *Harrington*, 562 U.S. at 103. Both the District Court (Pet. 33a to 34a, 37a) and the Court of Appeals (Pet. 7a, 10a) recognized this. So should this Court.

Conclusion

This Court must deny the petition for a writ of certiorari.

Respectfully submitted,

s/Frank J. Ducoat

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