

**CAPITAL CASE**

**No. 22-\_\_\_\_\_**

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IN THE

**Supreme Court of the United States**

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CHARLES STEVENS,

*Petitioner,*

v.

RON DAVIS

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In the two decades since this Court first demonstrated the importance of a comparative juror analysis in *Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003), the California Supreme Court has never found discrimination based on such an analysis. Instead, the state supreme court has declined to engage in comparative analysis, restricted its application, or conducted an analysis but found it unpersuasive—oftentimes because it has applied a standard that is contrary to this Court’s precedent in *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). Indeed, since 1989, the California Supreme Court has reviewed 144 cases with claimed violations of *Batson v. Kentucky*, 476 U.S. 79 (1986), finding error only three times. It has been nearly thirty-five years since the California Supreme Court last found a *Batson* violation involving the peremptory challenge of a Black prospective juror. Yet, when reviewing many of those cases, the Ninth Circuit has granted relief based on *Batson* violations twenty-two times since 1993, despite the application of the AEDPA to almost all of those cases.

Charles Stevens, who is half-Black and half-Native American, was tried by a jury that included only one Black juror, after the prosecution struck seven of the nine Black jurors he faced (78%). The district court found that the reasons articulated by the prosecutor for striking at least one of those jurors were pretextual, but denied relief pursuant to § 2254(d). After conducting a limited comparative juror analysis, the court of appeals expressed concerns about the same strike, but also deferred to the California Supreme Court’s narrow comparative juror analysis, despite the state court’s use of a “strikingly similar” standard, rather than the “similarly situated” standard this Court has repeatedly required. The questions presented are:

(I)

## II

1. Whether a state court improperly expands or modifies the standard this Court established in *Batson v. Kentucky* and its progeny, when it requires a defendant to establish that a juror who was removed peremptorily by the prosecution is strikingly similar to an accepted juror, rather than merely having to show that they are similarly situated, as this Court held in *Miller-El v. Dretke*.

2. As part of the third step of the mandated *Batson* analysis of a prosecutor's purported race-based peremptory challenge, does *Batson v. Kentucky* and its progeny require state courts to conduct a comparative juror analysis.

**PARTIES TO THE PROCEEDINGS AND RULE 29.6  
STATEMENT**

Petitioner is Charles Stevens. Respondent is Ron Davis.  
No party is a corporation.

**RULE 14.1(b)(iii) STATEMENT**

United States District Court (N.D. Cal.):

*Stevens v. Davis*, No. 3:09-cv-00137-WHA (Jan. 17, 2019)

United States Court of Appeals (9th Cir.):

*Stevens v. Davis*, No. 19-99004 (February 14, 2022) (resolving appeal)

*Stevens v. Davis*, No. 19-99004 (April 22, 2022) (denying petition for rehearing)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Charles Stevens respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a–51a) is reported at 25 F.4th 1141. The district court’s order denying relief (App., *infra*, 53a–99a) is not published in the Federal Supplement, but is available at 2019 WL 249398. The California Supreme Court’s decision on direct appeal (App., *infra*, 101a–161a) is reported at 41 Cal. 4th 182.

### **JURISDICTION**

The United States Court of Appeals for the Ninth Circuit entered judgment on February 14, 2022 (App., *infra*, 1a) and denied Charles Stevens’s petition for rehearing en banc on April 22, 2022 (App., *infra*, 162a). One sixty-day extension of time to file this Petition was granted on July 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

U.S. Const. amend. VI provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, section 1 provides that:

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

After the prosecutor exercised peremptory challenges to excuse four Black prospective jurors, Charles Stevens, who is half-Black and half-Native American, challenged the strikes as violations of *Batson v. Kentucky*, 476 U.S. 79 (1986).<sup>1</sup> He subsequently brought three more serial challenges after the fifth, sixth, and seventh Black prospective jurors were struck by the prosecution. The trial court accepted the prosecutor's stated reasoning for all seven strikes, even though one of the reasons misstated a juror's answer, and the prosecutor attributed statements to a Black juror that were actually said by a white empaneled juror.

Rather than determine whether the stricken prospective jurors were similarly situated to prospective jurors who were accepted by the prosecution, as this Court did in *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), the California Supreme Court applied its own legally unsup-

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<sup>1</sup> Stevens challenged pursuant to *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). "A *Wheeler* motion serves as an implicit objection under *Batson*, so Petitioner preserved his federal constitutional claim." *Boyd v. Newland*, 467 F.3d 1139, 1142 n.2 (9th Cir. 2006) (internal citation omitted).

ported “strikingly similar” standard and denied relief because it believed the prospective jurors who were struck were not “strikingly similar” to prospective jurors who were specifically accepted by the prosecutor.<sup>2</sup> In federal habeas proceedings, the district court held the “record belies the prosecutor’s statement” regarding his reason for striking juror Larry Foster. App., *infra*, 67a. Yet, the court denied relief under the belief that “[i]t cannot be said that [the California Supreme Court’s] deference to the trial court’s credibility determinations ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.’” App., *infra*, 68a (quoting *Harrington v. Richter*, 562 U.S. 86, 101–102 (2011)).

The California Supreme Court placed significant weight on the trial court’s statement that “it was relying not only on ‘an analysis of the proffered [*sic*] reasons,’ but also ‘the court’s own observations.’” App., *infra*, 117a. But the proffered reasons were demonstrably rebutted by the record, as a thorough comparative juror analysis, which the district court did not conduct, reveals. Affirming the denial of relief, the Ninth Circuit’s comparative juror analysis spanned twenty-six pages (App., *infra*, 21a-47a), but never mentioned or addressed the most critical point of comparison—Virginia Watkins, a white empaneled juror said the exact thing on voir dire that Foster never said, but was struck for allegedly saying. Stevens repeatedly highlighted that critical disparity to the court of appeals. Absent the

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<sup>2</sup> In Stevens’s trial, after individual voir dire was completed, the court put twelve qualified jurors in the jury box and peremptory strikes proceeded. As jurors were struck, their seat was randomly filled by another qualified juror. On his turn, the prosecutor accepted the twelve in the box on six occasions, thus he did more than not strike some jurors, he actively accepted them. Several of those accepted jurors were subsequently struck by Stevens’s counsel or co-defendant’s counsel.

most critical and oft highlighted point of comparison, the Ninth Circuit's lengthy comparative juror analysis was illusory.<sup>3</sup>

Denying relief based on 28 U.S.C. § 2254(d), the Ninth Circuit failed to recognize the basic reality that the state court's "strikingly similar" language can be found nowhere in this Court's caselaw and is clearly not the legal standard *Batson* requires, thereby rendering the state court's decision contrary to the clearly established law of *Batson* and its progeny. The Ninth Circuit erroneously excused the California Supreme Court's application of the improperly high "striking similarity" standard to the comparative juror analysis, in violation of § 2254(d)(1). See, e.g., *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam) (court's modification of Supreme Court standard was improper). The Ninth Circuit also justified the state court's failure to conduct a comprehensive comparative juror analysis, by announcing that one must be conducted only by federal courts, not state courts. That ruling is not only erroneous and unfounded anywhere in this Court's precedent, it is the antithesis of, and not reconcilable with, this Court's legion of cases making clear AEDPA's requirements of comity to state courts, deferring to state court reasoning, and making the state court the primary forum to adjudicate federal constitutional issues with regard to state court convictions. The Ninth Circuit flaunting these principles and directives could not be more evident than it is where the state court conducted a comparative juror analysis and recognized the obligation to have done so, but did so in a way that is contrary to *Batson* and its progeny. Allowing the Ninth Circuit's decision to stand would do irreparable damage to AEDPA's purpose, and allow it to pay lip service to this

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<sup>3</sup> Petitioner's appendix includes the voir dire transcripts and jury questionnaires for Foster, Watkins, and Mary Domenichelli, a juror who will be discussed *infra*.

Court's AEDPA precedents and directives that this Court has often reversed the Ninth Circuit for ignoring, or at least disregarding. The Ninth Circuit should not be permitted to do so again.

The Ninth Circuit's error here is so clear that this Court should grant certiorari and summarily reverse through a per curiam opinion, as it has done many times over recent years when the Ninth Circuit has flaunted this Court's precedent and the AEDPA. Alternatively, plenary review should be granted.

### STATEMENT OF THE CASE

1. Stevens, who is half-Black and half-Native American (Wá·šiw Tribe), was convicted of murder and sentenced to death after the prosecution used seven of its nineteen peremptory strikes on Black jurors.

The court of appeals concluded that in voir dire the prosecutor struck 78% of the Black jurors he faced, while striking just 26.5% of the non-Black prospective jurors called to the box.<sup>4</sup> App., *infra*, 28a. In response to the striking of the seven Black venirepersons, the defense made four challenges pursuant to *Wheeler*. The first was made after the fourth Black venireperson was struck, and the other *Wheeler* challenges were serially raised following each of the other three prosecutorial peremptories used against Blacks. Pet. C.A. Br. 4.

In response to the first *Wheeler* challenge, the trial court ruled that Stevens had “established a prima facie case,” and required a “response from the prosecution as to

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<sup>4</sup> In *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (“*Miller-El I*”), prosecutors used their peremptories to strike “91% of the eligible black jurors” (10 out of 11) and “13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner’s jury.” *Id.*, at 331.

the basis for the challenges exercised.” Pet. C.A. Br. 5. As to the remaining three *Wheeler* challenges, although no explicit finding was made, the court required responses from the prosecutor. *Id.*

At the second step, the prosecutor offered his alleged race-neutral reasons for each of his seven strikes, largely citing each prospective juror’s “ambivalence.”

At the third step, the court held that “[a]fter an analysis of the proffered reasons and the court’s own observations, the court will find that the prosecution met its burden to rebut the inference of group bias \* \* \* and at this time is satisfied that the peremptory challenges were not predicated solely on group bias.” *Id.*

2. With the *Batson* challenge rejected, the case proceeded to a jury trial, where Stevens was convicted on March 30, 1993, of four murders, six attempted murders, and personal firearm use (Pet. C.A. Br. 2). The jury, which included one Black female juror, found two special circumstances, lying-in-wait and multiple murder, to be true.<sup>5</sup> *Id.* The penalty-phase commenced on April 6, 1993, jury deliberations began on April 20, 1993, and death verdicts were rendered the following day. *Id.* Stevens was sentenced to death on July 30, 1993. *Id.*

3. On direct appeal, Stevens challenged the unconstitutional striking of the seven Black venirepersons and the trial court’s rulings on the four *Wheeler* motions. Pet. C.A. Br. 6. Excluding twelve pages of argument from Stevens’s opening brief that were in the “Argument” section under a subheading entitled “Factual Background,” the California Supreme Court ruled Stevens “challenge[d] only the ruling on the first motion” (App., *infra*, 108a), and only challenged the strikes of three Black venirepersons: Larry Foster,

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<sup>5</sup> One alternate was also a Black woman.

Henry Hill, and Jean Clemons. App., *infra*, 109a. The neglected arguments challenged all four *Wheeler* motions and the striking of four additional Black venirepersons. Pet. C.A. Br. 6.

After performing a limited comparative juror analysis on only three of the struck Black venirepersons against four empaneled jurors, rather than a complete analysis of the seven Black venirepersons struck by the prosecutor against the twenty-five venirepersons he accepted, the California Supreme Court held that “nothing in these jurors’ questionnaire or voir dire answers indicates such striking similarity to the challenged prospective jurors’ responses that pretext is evident.” App., *infra*, 116a. The court largely “defer[red] to the trial court’s credibility determination \*\*\* [because the] best evidence of whether a race-neutral reason should be believed is often ‘the demeanor of the attorney who exercises the challenge,’ and ‘evaluation of the prosecutor’s state of mind based on demeanor and credibility lies ‘peculiarly within a trial judge’s province.’” *Id.* (citing *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). Accordingly, the court held that Stevens “failed to demonstrate purposeful racial discrimination” against the three considered venirepersons. App., *infra*, 117a.

The California Supreme Court affirmed Stevens’s conviction and sentence. App., *infra*, 101a–161a. Two Justices concurred in judgment, but dissented on a claim other than the one raised herein. App., *infra*, 142a–159a.

4. On September 29, 2003, Stevens filed a state petition for a writ of habeas corpus. Pet. C.A. Br. 3. On August 26, 2009, the state court denied the petition without an evidentiary hearing. App., *infra*, 100a.

5. Stevens filed a timely petition for a writ of habeas corpus with the United States District Court for the Northern District of California and later amended the Petition. Pet. C.A. Br. 3; App., *infra*, 7a. In his federal habeas petition,

Stevens argued that seven Black venirepersons were improperly struck in violation of *Batson* and that § 2254(d)'s limitations on relief have been overcome. With respect to its evaluation of the three Black venirepersons considered by the California Supreme Court, the district court found a clear constitutional error regarding struck Black venireperson Foster, concluding that "the analysis does not show the prosecutor's reasons for excusing venire member Foster to hold up." App., *infra*, 66a. However, the district court concluded § 2254(d) prevented it from granting relief for this constitutional violation that is structural error, because it "cannot be said that [the California Supreme Court's] deference to the trial court's credibility determinations 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" App., *infra*, 68a (quoting *Richter*, 562 U.S. at 101–102).

With respect to the claims regarding the remaining four Black venirepersons, the district court relied on a subheader to avoid reaching the merits of those claims. In the absence of an explanation from the California Supreme Court for disregarding a significant portion of Stevens's arguments, the district court imagined a basis for denying relief that was not a reason the state court gave. The district court said the arguments had not been "properly pleaded" in the state court because they were under a subheading in the "Argument" section entitled "Factual Background." App., *infra*, 64a; Pet. C.A. Br. 8. On that basis, the district court held the arguments were procedurally defaulted. App., *infra*, 64a. The district court denied relief on the *Batson* claim, but granted a certificate of appealability on the claim. App., *infra*, 53a, 99a.

6. Stevens presented two issues to the Ninth Circuit:

Having found a clear violation of *Batson*, did the District Court then err in holding that the Antiterrorism

and Effective Death Penalty Act of 1996 (“AEDPA”) prevented relief?

Did the District Court err in concluding that Stevens did not fairly present his claims to the California Supreme Court that an additional four [Black] jurors were improperly struck, as well as his challenges to the decisions on three of his four *Wheeler* motions, on the sole ground that those claims were contained in a subsection with a poorly worded subheading?

Pet. C.A. Br. 1–2.

Stevens argued he overcame sections 2254(d)(1) and (d)(2)’s limitation on relief. The court of appeals did not counter the district court’s finding that Foster was improperly struck, but affirmed the denial of relief based on Stevens’s failure to overcome 2254(d)(1) and (d)(2). App., *infra*, 26a, 51a. The court of appeals’ comparative juror analysis spanned twenty-six pages (App., *infra*, 21a-47a), but never mentioned or addressed the most critical point of comparison—that a white empaneled juror said exactly what Foster was peremptorily challenged for allegedly saying, but never said. That critical disparity was repeatedly highlighted to the court of appeals. See section C, *infra*.

The court of appeals also determined that § 2254(d)(1) had not been violated because the California Supreme Court applied the correct legal standard stemming from this Court’s precedent. App., *infra*, 50a–51a. When conducting its limited comparative juror analysis, the California Supreme Court twice stated the seated jurors identified by Stevens did not show a “striking similarity” in ambivalence to struck prospective jurors. App., *infra*, 114a, 116a. Disregarding the plain meaning of “striking similarity” and its difference from similarly situated, the court of appeals held that, in context, the California Supreme Court had not used a higher standard for comparison than the “similarly

situated” test articulated by this Court in *Miller-El II*, 545 U.S. at 247.

7. Stevens sought rehearing *en banc* based on two issues. First, the court of appeals’ decision in Stevens’s case created an intra-circuit split with *Ervin v. Davis*, 12 F.4th 1102 (9th Cir. 2021), regarding the application of *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). Second, Stevens asked whether only federal courts are required to perform a comparative juror analysis advanced by a state prisoner, or has this Court also established that state reviewing courts have such an obligation. The court of appeals declined to grant rehearing *en banc*. App., *infra*, 162a.

#### **REASONS FOR GRANTING THE PETITION**

The California Supreme Court regularly fails to follow this Court’s clearly established law in regards to *Batson*, and the Ninth Circuit regularly ignores, or at least flaunts, this Court’s rulings interpreting and applying § 2254(d), doing so once again in Stevens’s case. Rather than correcting the state court’s clear disregard of *Batson* and its requirements, as it has had to do twenty-two times over the past three decades (App., *infra*, 475a), the court of appeals improperly excused the state court’s disregard for this Court’s clearly established precedents.<sup>6</sup> In doing so, the court of appeals, like the state court, endorsed theories found in this Court’s dissents, and justified its actions by reading the state court opinion creatively, rather than literally, thereby also ignoring the comity principles this Court has regularly espoused to be the purpose of § 2254(d) to defer to the state court’s decision and reason-

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<sup>6</sup> The Ninth Circuit found *Batson* error in *Walker v. Davis*, 822 F. App’x 549 (9th Cir. 2020), after the publication of the *Whitewashing* report found at Appendix O.

ing, as opposed to making up reasons or otherwise disrespecting the role of state courts and the reasons the state court provided for its decision.

In four significant cases over the past two decades: *Miller-El II*, *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Foster v. Chatman*, 578 U.S. 488 (2016), and *Flowers*, this Court has consistently spelled out how courts considering *Batson* violations shall make a determination as to whether jurors were improperly struck based on their race. Much like the Fifth Circuit and Texas Court of Criminal Appeals have done on *Batson*, intellectual disability, and other death penalty issues, only to then be repeatedly reversed and chastised by this Court, the California Supreme Court regularly refuses to follow the clearly enunciated steps this Court has announced and seems to think this Court will continue to allow it to get away with it, just as the Ninth Circuit continues its efforts to ignore this Court's case law on the meaning and application of § 2254(d).

Indeed, this is not the first time this Court has been presented with California's application of higher standards in *Batson* evaluations than this Court's precedents instruct. In *Johnson v. California*, 545 U.S. 162 (2005), this Court found that California's courts were using too high a standard at *Batson*'s first step, holding, "we conclude that California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." *Johnson*, 545 U.S. at 168.

The results of the California Supreme Court's repeated malfeasance are telling. It has reviewed 144 cases with claimed violations of *Batson* since 1989, finding error only three times (2.1%). App., *infra*, 473a.<sup>7</sup> Despite having to

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<sup>7</sup> The California Supreme Court has reviewed two more cases since the publication of the *Whitewashing* report found at Appendix O. Those (footnote continued)

apply AEDPA, the Ninth Circuit has granted *Batson* relief in about 15% of the cases it has reviewed from California. *Id.* In the two decades since this Court first endorsed comparative juror analysis in *Miller-El I*, 537 U.S. at 331, the California Supreme Court has never found discrimination based on such an analysis. App., *infra*, 446a. As a result, it has been nearly thirty-five years since the court has found a *Batson* error involving a Black juror. See *People v. Snow*, 746 P.2d 452 (Cal. 1987).

In this case, the prosecutor struck seven Black jurors, including one, Larry Foster, whose strike concerned both the district court and the court of appeals, but relief was denied because of Stevens’s failure to overcome § 2254(d). App., *infra*, 25a, 67a. That, however, should not be the end of the matter because the California Supreme Court’s anemic comparative juror analysis looked to whether jurors were “strikingly similar.” That standard is well above the measure set forth by this Court. Time and again, in state-on-top cases where the courts of appeals have ignored this Court’s clearly established Federal law, particularly the Sixth and Ninth Circuit, this Court has summarily reversed. It should do the same here.

**A. The Ninth Circuit Erred In Excusing The California Supreme Court’s Application Of An Improperly High Standard To Assess The Comparative Juror Analysis**

When considering whether pretext has been established, the California Supreme Court has long employed a higher threshold in its comparative juror analyses than this Court set forth in *Miller-El II*. See *People v. Winbush*, 387 P.3d 1187, 1220 (Cal. 2017) (Pretext is established “when

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cases are *People v. Battle*, 489 P.3d 329 (Cal. 2021); and *People v. McDaniel*, 493 P.3d 815 (Cal. 2021).

the compared jurors have expressed ‘a substantially similar *combination* of responses,’ in all material respects, to the jurors excused.” (quoting *People v. DeHoyos*, 303 P.3d 1, 24 (Cal. 2013))).

That practice is in tension with, and contrary to, how this Court has conducted comparative juror analysis in *Batson* cases since *Miller-El II*. See *Flowers*, 139 S. Ct. at 2249–2250; *Foster*, 578 U.S. at 504–512; *Snyder*, 552 U.S. at 483–484; *Miller-El II*, 545 U.S. at 241–249. In each of those cases, the prosecutor gave more than one reason for each contested strike, and this Court, even when conducting comparative juror analysis for the first time on appeal, drew inferences of discrimination by individually comparing the stated reasons for striking jurors with the circumstances of the accepted jurors. This Court has not required that excused and empaneled jurors have a substantially similar combination of responses in all material respects to be probative of discrimination, but that is what California requires. *Winbush*, 387 P.3d at 1220. Nor has this Court articulated that “striking similarity” is required. Instead, this Court has ruled in favor of convicted individuals when these showings have not been made, thereby demonstrating that such a requirement is both not required and more onerous than what *Batson* and its progeny require.

First, the requirement that there be a combination of similar responses has been expressly rejected by this Court. See *Miller-El II*, 545 U.S. at 247 n.6. (“A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.”). The California Supreme Court’s articulated standard channels the dissenting position that was explicitly refused in this Court’s *Miller-El II* opinion.

Second, in *Miller-El II* this Court noted that when conducting a comparative juror analysis, a court must “look for

nonblack jurors *similarly situated*” to the Black venireperson the prosecution struck. *Miller-El II*, 545 U.S. at 247 (emphasis added). Rather than considering whether jurors were “similarly situated,” the California Supreme Court has heightened the standard by adding that even if a prospective juror is similarly situated, one cannot prevail unless that similarity is also substantial. App., *infra*, 512a. That heightened standard is contrary to this Court’s precedent. Already frequently passing into impermissible territory, the state court went much further in Stevens’s case, raising the threshold another step by reviewing whether jurors were “strikingly similar.” That plainly elevated standard was contrary to clearly established Federal law. 28 U.S.C. § 2254(d)(1).

**1. *This Court considered and rejected a rule that, in evaluating pretext, jurors must be similar in multiple respects***

The dissent in *Miller-El II* argued for a limited evaluation when comparing jurors, in consonance with the limited comparison the state court engaged in, but as the Fifth Circuit explained, “[t]he majority soundly rejected [that] argument.” *Reed v. Quarterman*, 555 F.3d 364, 372 (5th Cir. 2009). In *Reed*, the Fifth Circuit examined the boundaries of a comparative juror analysis, noting *Miller-El II* “referred to the comparative analysis as something it would conduct, not something that the parties must submit,” and stressed that “the Supreme Court, on habeas review, considered the entire voir dire transcript because the comparative analysis simply was a theory that involved the evidence before the state court.” *Id.* at 372–73. Even more specifically, *Reed* noted “[t]he failure of the defendant to explicitly point out other parts of the voir dire transcript did not preclude the Supreme Court from considering the comparative analysis in *Miller-El II*.” *Id.* at 374.

While *Miller-El II*'s dissent contended that "[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror--it means matching *all* of them," *Miller-El II*, 545 U.S. at 291 (Thomas, J., dissenting), the majority clarified that, "[n]one of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." *Miller-El II*, 545 U.S. at 247 n.6.

Prior to *Miller-El II*, the California Supreme Court had long expressed that it "did not believe that comparative juror analysis for the first time on appeal is constitutionally compelled." *People v. (Jay) Johnson*, 71 P.3d 270, 284 (2003).<sup>8</sup> After the issuance of *Miller-El II* and *Snyder*, it begrudgingly accepted that, "as to claims of error at *Wheeler/Batson*'s third stage, our former practice of declining to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." *People v. Lenix*, 187 P.3d 946, 961 (Cal. 2008). But the state court has never truly embraced *Miller-El II*, instead requiring jurors to match up on multiple data points. That is not the test repeatedly articulated by this Court. Indeed, as one member of the California Supreme Court has pointed out, the court's approach to comparative juror analysis is "out of step with controlling authority and ripe for reconsideration." *Winbush*, 387 P.3d at 1253 (Liu, J., concurring in part).

In Stevens's case, the state court combined the jurors' questionnaire and voir dire answers to look at their overall match. Thus, when the California Supreme Court says "in sum," it does not mean that the court has considered "all of the relevant facts and circumstances taken together."

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<sup>8</sup> *Johnson* was reversed by this Court on a different *Batson* related issue in *Johnson v. California*, 545 U.S. 162, discussed *supra*.

*Flowers*, 139 S. Ct. at 2235. It means the jurors are not strikingly similar enough to establish pretext.

As explained above, this Court expressly rejected a requirement that there be a similar combination of responses. Thus, the California Supreme Court twice failed: first in looking for a combination of responses; and second, in requiring that grouping to exhibit striking similarities.

A fundamental precept for this Court's AEDPA jurisprudence is that "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion \* \* \* a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (citing *Porter v. McCollum*, 558 U.S. 30, 39–44 (2009) (per curiam). Again, the default is to accept that the California Supreme Court said what it meant and meant what it said. But, much as *Batson* requires that a prosecutor stand or fall on the plausibility of the reasons they give, so does a state court's decision stand or fall on the words and standard it uses. Here, using an improperly heightened "striking similarity" threshold, the state court's decision necessarily falls.

***2. The Ninth Circuit erroneously justified the state court's use of a significantly heightened standard for evaluating the similarities between compared jurors***

This Court has explained that, in conducting a comparative juror analysis, a court must "look for nonblack jurors *similarly situated*" to the Black venireperson the prosecution struck. *Miller-El II*, 545 U.S. at 247 (emphasis added). Instead of using the correct "similarly situated" test, contrary to this Court's clearly established law the California

Supreme Court used a twice heightened “striking similarity” test. App., *infra*, 114a.<sup>9</sup> The California Supreme Court’s reference to this heightened standard was not simply a misstatement or poorly chosen verbiage; the court mentioned the “striking similarity” requirement a second time, while the correct “similarly situated” standard never appeared in its opinion. See App., *infra*, 116a (“nothing in these jurors’ questionnaire or voir dire answers indicates such striking similarity to the challenged prospective jurors’ responses that pretext is evident”).

As has been recognized by federal courts in other areas of the law, such as copyright, the distinction between “striking similarity” and “substantial similarity” is significant. See *Malibu Textiles, Inc. v. Label Lane Int’l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019) (“a plaintiff must separately plead access only when alleging substantial similarity, not when alleging striking similarity.”); see also *Hofmann v. Pressman Toy Corp.*, 790 F. Supp. 498, 508 (D.N.J. 1990) (striking similarity requires a much higher showing than substantial similarity.); *Mowry v. Viacom Int’l, Inc.*, 2005 U.S. Dist. LEXIS 15189, at \*38 n.15 (S.D.N.Y. July 29, 2005) (“the test for striking similarity is ‘stringent’ and more so than substantial similarity.”).

The wrongfulness of the California Supreme Court’s misstated test is clear from *Miller-El II*, where this Court addressed the factual equivalent of a “striking similarity” test. “None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.” *Miller-El II*, 545 U.S. at 247 n.6.

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<sup>9</sup> The California Supreme Court’s opinion cited to *People v. Schmeck*, 118 P.3d 451, 471 (Cal. 2005), but in *Schmeck* the court only used the impermissibly high “substantially similar” standard, not the even more exacting standard used in Stevens’s case.

By shifting the standard to “striking similarity,” the California Supreme Court’s opinion required the kind of exact, or near-exact, similarity of statements that this Court expressly disavowed in *Miller-El II*. Because the state court misstated the test, impermissibly relying on an erroneous standard, that court’s decision was contrary to clearly established Federal law, and the court of appeals denied relief erroneously on the basis of Stevens’s inability to overcome § 2254(d).<sup>10</sup>

A state court’s decision is contrary to clearly established federal law where, as here, it applies a test more stringent than the one articulated by this Court. Because the state court employed the incorrect legal standard in reviewing Stevens’s claim, § 2254(d)(1) poses no bar to granting the habeas relief to which Stevens was entitled. Rather than granting relief, the court of appeals fancied that:

In context, the California Supreme Court used the phrase “striking similarity” to mean that the congruence between the ambivalence expressed by the

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<sup>10</sup> Stevens was only denied relief because the courts below held that “the California Supreme Court’s determination that the prosecutor’s reasons for striking Foster were not pretextual was not an objectively unreasonable determination of the facts in the record. 28 U.S.C. § 2254(d)(2).” App, *infra*, 25a–26a. In fact, the court of appeal had concluded that it was questionable

whether Foster expressed greater ambivalence regarding the death penalty than [alternate juror] Domenichelli. But we are not making de novo determinations here; rather, we must evaluate whether the California Supreme Court’s deference to the trial court’s conclusion that the prosecutor was credible was an objectively unreasonable determination of the facts. We conclude it was not.

App, *infra*, 25a.

seated jurors and that expressed by the struck prospective jurors was not so significant that it raised an inference—contrary to the trial court’s observations—that the prosecutor was not credible.

App., *infra*, 50a.

The court of appeals focused on the modifiers, i.e., “*such* a striking similarity” and “*such* striking similarity,” to conclude that the California Supreme Court’s approach was not contrary to or an unreasonable application of any of this Court’s cases. App., *infra*, 50a–51a. That interpretation both ignored a host of this Court’s precedents and failed to accept the plain meaning of the state court’s decision.

This Court has repeatedly operated on the assumption that a court means what it says. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 320 n.2 (1986); see also *Mathis v. United States*, 579 U.S. 500, 514 (2016) (“a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.”). The plain meaning of words is important and something this Court has frequently considered in determining meaning. See *Moskal v. United States*, 498 U.S. 103, 114 (1990); *Astrue v. Ratliff*, 560 U.S. 586, 592 (2010). Likewise, this Court has recognized that certain words are so strong they may have distinct meanings. Accordingly, this Court found that “unreasonable” is more than “wrong.” See *(Terry) Williams v. Taylor*, 529 U.S. 362, 410 (2000) (“an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”).

The California Supreme Court said “striking similarity,” not “similarly situated.” Looking to the dictionary definition, as this Court often does, “striking” is defined as “at-

tracting attention or notice through unusual or conspicuous qualities.”<sup>11</sup> Rather than looking to jurors with common characteristics and answers, as similarly situated dictates, the California Supreme Court required unusual or conspicuous commonalities. That is simply not the test articulated by this Court. The plain meaning of the words the state court used are clear and not properly subject to reinterpretation by the court of appeals.

The California Supreme Court said, “[i]n sum, nothing in these jurors’ questionnaire or voir dire answers indicates such striking similarity to the challenged prospective jurors’ responses that pretext is evident.” App., *infra*, 116a. Focusing on the modifier “such” before the reference to “striking similarity,” the court of appeals concluded that the California Supreme Court meant “that the congruence between the ambivalence expressed by the seated jurors and that expressed by the struck prospective jurors was not *so significant* that it raised an inference—contrary to the trial court’s observations—that the prosecutor was not credible.” App., *infra*, 50a. That is a contrived reading. “Such” in the context it was being used was an adjective describing how strikingly similar. The degree of striking similarity was still the standard being measured.

In post *Miller-El II* cases, where courts have used a derivation of “striking similarity” to connote a strong similarity between jurors, the reference has (with the exception of Stevens’s case and the one case citing his) uniformly been phrased as a positive modifier denoting how strong the similarities between compared jurors were, i.e., non-Black

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<sup>11</sup> See <https://www.merriam-webster.com/dictionary/striking>.

jurors gave answers “strikingly similar” to the answers given by a stricken juror.<sup>12</sup>

In framing it in the negative, the California Supreme Court turned those two words into a standard that had not been met. The positive corollary to the California Supreme Court’s negative statement is: for pretext to be evident, an accepted juror’s questionnaire or voir dire answers must indicate a striking similarity to the challenged prospective juror’s responses.

Only two post-*Miller-El II* decisions anywhere appear to have ever utilized “striking similarity” as a negative measure, i.e., “not such a striking similarity,” the state court in Stevens’s case, and a California appellate court citing to Stevens’s California Supreme Court case. In the latter, the California Court of Appeals said, “the seated jurors identified by defendants simply do not ‘demonstrate such a striking similarity’ to E.B. in any meaningful way that a finding of pretext is warranted.” *People v. (Corey) Johnson*, 2013 Cal. App. Unpub. LEXIS 6838, at \*218 (Sep. 25, 2013). *Johnson’s* quote of *People v. Stevens*, 158 P.3d 763 (2007)

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<sup>12</sup> See *State v. Hurd*, 784 S.E.2d 528, 534 (2016) (trial court correctly denied peremptory when two jurors’ compared responses concerning the death penalty revealed “that at a minimum their views were strikingly similar.”); *Addison v. State*, 962 N.E.2d 1202, 1215 (Ind. 2012) (holding that trial court erred in ruling that State’s use of peremptory strike to remove Black juror was permissible where non-Black jurors gave answers “strikingly similar” to the answers given by the stricken juror that formed the State’s proffered “race-neutral” reason for striking the juror); *People of the V.I. v. Smith*, 59 V.I. 13, 29 (Super. Ct. 2010) (granting mistrial because each male juror struck peremptorily by the prosecution had corresponding female jurors with “the exact or strikingly similar background,” who went unchallenged; and *Nowell v. State*, 998 So. 2d 597, 601–606 (Fla. 2008) (reversing conviction because struck Latino juror possessed strikingly similar qualities to a white empaneled juror who was not challenged by the State.).

shows that Stevens's interpretation is not unique; the California Court of Appeal viewed the California Supreme Court as having articulated a standard to be followed.

**3. *The California Supreme Court's juror comparison was far too narrow***

The California Supreme Court held in *Lenix*, 187 P.3d at 961, that following *Miller-El II* and *Snyder*, it has a constitutional duty to conduct a comparative juror analysis; but, at the same time, it has repeatedly looked for substantial similarities between jurors and venirepersons, rather than using the correct "similarly situated" test. App., *infra*, 512a.

Nonetheless, the court of appeals moved cursorily past the state court's use of the wrong standard by both overlooking the express words of the state court, and by failing to give deference to this Court's well-established jurisprudence. App., *infra*, 50a–51a. Following *Snyder*, in *Lenix* the court held that "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." *Lenix*, 187 P.3d at 961; but see *Winbush*, 387 P.3d at 1220. The court's requirement that the defendant specify the comparisons between jurors runs counter to this Court's practice. In *Miller-El II*, this Court analyzed thirty-seven jurors, only twenty-three of whom were briefed by *Miller-El*, another twelve were referenced in the state's brief, and two were not briefed at all (Witt and Moses). The dissent likewise referenced unbriefed juror Charles Smith, and focused a substantial portion of its argument on Paul Bailey, who was referenced only in the state's brief, not defendant's. This Court's actions in *Miller-El II* affirmatively show that the state court should have looked at all relevant comparators, not just those identified by Stevens.

Even before utilizing the overly stringent standard, the California Supreme Court first erred in conducting an abbreviated comparative juror analysis. Briefed at length in the court of appeals (Pet. C.A. Br. 67–83), the California Supreme Court determined that Stevens “challenge[d] only the ruling on the first [*Batson*] motion” (App., *infra*, 108a) rather than all four motions brought in the trial court, and only challenged the strikes of three Black venirepersons, rather than all seven Black jurors struck by the prosecution (App., *infra*, 109a). The state court reached those conclusions by ignoring twelve pages of argument from Stevens’s opening brief on direct appeal that were in the “Argument” section under a poorly chosen subheading in the argument entitled “Factual Background.” (Pet. C.A. Br. 69–83). The overlooked arguments challenged all four *Wheeler* motions and the striking of four additional Black venirepersons. Before the court of appeals, Stevens quoted at length from some of the most highly regarded legal writing specialists, such as Bryan Garner, whose works support the finding that Stevens put much more before the state court than it considered. (*Id.* 80–83.) Stevens also cited to this Court’s cases establishing that the heading of a section cannot limit the plain meaning of the text (*Id.* at 78–79). See *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528–29 (1947).

After performing the limited comparative juror analysis on only three of the struck Black venirepersons against four empaneled jurors, rather than a complete analysis of the seven Black venirepersons struck by the prosecutor against the twenty-five venirepersons he accepted, the California Supreme Court held, as detailed above, that “nothing in these jurors’ questionnaire or voir dire answers indicates such striking similarity to the challenged prospective jurors’ responses that pretext is evident.” App., *infra*, 116a. The court largely “defer[red] to the trial court’s credibility determination” because the “best evidence of whether a race-neutral reason should be believed is often

‘the demeanor of the attorney who exercises the challenge,’ and ‘evaluation of the prosecutor’s state of mind based on demeanor and credibility lies ‘peculiarly within a trial judge’s province.’” App., *infra*, 116a–117a (citing *Hernandez*, 500 U.S. at 365). Accordingly, the state court concluded that Stevens “failed to demonstrate purposeful racial discrimination” against the three considered venirepersons. App., *infra*, 116a.

One of those three venirepersons was Larry Foster. As the court of appeals noted, “[t]he record shows that the third alternate juror, Mary Domenichelli, evinced an ambivalence toward the death penalty and a conditional willingness to vote for that penalty which were fairly similar to Foster’s.” App., *infra*, 24a. Domenichelli was not put forward by Stevens; and therefore, under the California Supreme Court’s limited parameters, was not considered as part of the comparative juror analysis. Ultimately, the court of appeals conceded that it was questionable “whether Foster expressed greater ambivalence regarding the death penalty than Domenichelli,” who was white, but held that the California Supreme Court’s conclusion that *Batson* was not violated was not objectively unreasonable. App., *infra*, 25a.

In *Flowers*, this Court once again indicated that *Batson* requires the California Supreme Court to have conducted a thorough comparative juror analysis, as was done in *Miller-El II*. See *Flowers*, 139 S. Ct. at 2248. But, even if such an analysis had not been required, once the state court chose to do one, it had an obligation to use the proper standard of review.

**B. The Ninth Circuit Court Of Appeals Believed Incorrectly That This Court Has Established That Federal Courts Have An Obligation To Perform A Comparative Juror Analysis Advanced By A State Prisoner, But That State Reviewing Courts Do Not**

The court of appeals excused the California Supreme Court's failure to conduct a comprehensive comparative juror analysis by explaining that, "[a]lthough federal courts must perform a comparative juror analysis advanced by a state prisoner, even if the state reviewing court has not done so \* \* \* the Supreme Court has not established that state reviewing courts have such an obligation." App., *infra*, 48a (citing *Sifuentes v. Brazelton*, 825 F.3d 506, 518 n.4 (9th Cir. 2016); *Jamerson v. Runnels*, 713 F.3d 1218, 1224 (9th Cir. 2013)).

Were this inversed it would make sense, as a state's constitution is not controlling on one's federal rights, but the constitutional parameters that require such an inquiry for a federal court would equally apply to state courts. Moreover, a requirement that federal courts must conduct a comparative analysis without an initial requirement for the state court to do so raises comity and state deference issues, and makes no sense. That is because it means a federal court must conduct, and rely on, an analysis to determine if the state court decision was contrary to or an unreasonable application of clearly established law, and reach that decision based on something the state court was never, according to the court of appeals, required to do. If a state court is not required to do something, then that cannot be the basis for finding the state court decision to have been contrary to or an unreasonable application of clearly established law. That is a basic precept. So, if a federal court is required to conduct a comparative juror analysis when adjudicating a *Batson* claim in the federal habeas

context, that is because this Court's law mandates that comparative juror analysis is part of the *Batson* inquiry/analysis and must be done by the state court. As discussed *infra*, this Court's law makes clear that state courts must conduct a comparative juror analysis; therefore the court of appeals' rationale seems to be nothing more than a desperate means to deny habeas relief in a case where it is abundantly clear habeas relief should have been granted on the *Batson* claim.

The court of appeals concluded erroneously that state courts have no duty to conduct a comparative juror analysis. First, this Court's decisions regarding constitutional interpretation bind state courts. The California Supreme Court understands that fact.

It is an elemental principle of our system of federalism that ultimate responsibility for interpretation of the federal Constitution rests with the United States Supreme Court. Thus that court's pronouncement \*\*\* delineating the scope of protection afforded by the Sixth Amendment's guarantee \*\*\* is binding on this court as well as all other state and federal courts in our nation.

*People v. Hannon*, 564 P.2d 1203, 1214 (Cal. 1977).

The California Supreme Court has also recognized that "in the area of fundamental civil liberties \*\*\* we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter." *People v. Longwill*, 538 P.2d 753, 758 n.4 (1975). Thus, "decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." *Id.*

Second, this Court has never limited its holding in *Miller-El II* to federal courts, nor could it, because states are bound by the Constitution and because limiting it that way would mean *Miller-El II* would have not applied retroactively; thus *Miller-El* could not have received the benefit of that case, but this Court made clear that he did. The Fourteenth Amendment to the United States Constitution—the provision this Court has relied on in deciding cases involving jury discrimination based on race—specifically applies to the states. In *Miller-El II*, this Court noted that, “[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.” *Miller-El II*, 545 U.S. at 238. The Equal Protection Clause’s safeguards do not stop at the front door to the California Supreme Court, they are binding upon it. Indeed, the California Supreme Court has recognized as much itself. *People v. Hines*, 86 P.2d 92, 93 (1939).

Tellingly, the California Supreme Court—the very court the court of appeals sought to exempt from a comparative jury analysis requirement—believes this Court has mandated an obligation to conduct such review. *Lenix*, 187 P.3d at 950. Acknowledging *Miller-El II*, the California Supreme Court admitted and partially accepted its obligation to conduct comparative juror analyses, as explained above. But the California Supreme Court did not fully embrace its responsibility, placing, contrary to this Court’s clearly established law, limitations on its duty, as it then explained that while, “appellate review is necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment.” *Lenix*, 187 P.3d at 962. That is not what this Court did in *Miller-El II* and is thus not what this Court’s precedent mandates or even permits, as explained *supra*.

The court of appeals' conclusion that the California Supreme Court had no requirement to conduct a comparative juror analysis is odd because the court of appeals recognized *Lenix's* articulated requirement over a decade ago. See *Ali v. Hickman*, 584 F.3d 1174, 1179 n.3 (9th Cir. 2009) (citing *Lenix*) ("California courts are now required to conduct a comparative juror analysis even if such an analysis was not performed by the trial court."). Later, the court of appeals affirmed that "state courts were not required to conduct a comparative juror analysis prior to *Miller-El II*." *Walker v. Davis*, 822 F. App'x 549, 552 (9th Cir. 2020) (citing *McDaniels v. Kirkland*, 813 F.3d 770 (9th Cir. 2015) (*en banc*)).

Mr. Stevens' appeal did not become final until 2007; accordingly, if the California Supreme Court had an obligation to conduct a thorough comparative juror analysis, then it failed to fulfill that requirement. The state court failed to properly implement this Court's mandate that "all of the circumstances that bear upon the issue of racial animosity must be consulted," *Snyder*, 552 U.S. at 478, and the deviance is even less justified following *Flowers*, where this Court announced that "[c]omparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Flowers*, 139 S. Ct. at 2248. Referring to it as a "step," rather than simply evidence, this Court has further indicated that *Batson* requires such comparisons. Accordingly, the state court's failure to appropriately conduct a thorough comparative juror analysis in Stevens's case—which postdated *Miller-El II*—was contrary to, or involved an unreasonable application of, clearly established federal law pursuant to § 2254(d)(1). The court of appeals held erroneously otherwise.

**C. The Ninth Circuit’s Failure To Yet Again Properly Apply § 2254(d), In Accordance With This Court’s Repeated Precedent, Admonitions, And Reversals For The Failure To Do So, Is Material Because A Black Prospective Juror Was Improperly Stricken By The Prosecution**

If no Black juror had been unconstitutionally removed by the prosecution, it would not matter whether the court of appeals properly decided the § 2254(d) issue or not. But the district court conclusively found that Black juror Larry Foster was improperly struck (App., *infra*, 67a), and the court of appeals did not counter the district court’s finding, affirming the denial of relief based on Stevens’s failure to overcome § 2254(d). App., *infra*, 25a.

As noted by the district court, the prosecutor’s articulated reasons for striking Foster were belied by the record. App., *infra*, 67a; see also App., *infra*, 313a–335a. In *Snyder*, the prosecutor expressed what this Court deemed “highly speculative” concerns about a Black juror minimizing the hours of work they might miss during jury service, by finding Snyder guilty of a lesser included offense to obviate the need for a penalty phase proceeding. *Id.*, 552 U.S. at 480–485. But this Court found numerous other jurors to whom that belief could also be ascribed, leading the Court to find that the “prosecution’s proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent.” *Snyder*, 552 U.S. at 485. In Stevens’s case, the prosecutor made an even more egregious misrepresentation, claiming that Foster had made a statement that he never did (App., *infra*, 399a), while at the same time accepting white jurors Virginia Watkins and Edward Prodder, who said what Foster had not. App., *infra*, 295a, 393a, 430a, 431a.

Defending his strike of Foster, the prosecutor told the trial court in part that Foster

said, 'well, I'll follow the law with regard to whatever the judge tells me.' And when you put it in terms that, well, the law doesn't mandate that you have to impose the death penalty, that's something that's up to you. He indicated, again, just an ambivalence in his ability and showed a lack of commitment in the ability to impose the death penalty.

App., *infra*, 399a.

But the prosecutor's statement defending his strike of Foster is inaccurate. Foster did not say that he would follow whatever the judge told him. He said,

At one time I thought that way, I really don't -- I didn't like the death penalty. But I find I can follow -- if the law says that's what it is, I can follow the law. I'd do what the law says and if it -- if -- if the law says this man gets the death penalty, this man doesn't, I could do that.

App., *infra*, 322a.

Saying that he would follow the law, Foster was merely parroting what the judge had told him he must do. App., *infra*, 320a. When told that the law does not specifically order jurors to vote for death and that the penalty was up to the jurors, Foster responded, "I believe that if the evidence and whatever was presented to me says that he should have the death penalty, I can determine and I can give what I think it is that's necessary." App., *infra*, 323a. He also affirmed that he could be the twelfth vote for death. App., *infra*, 324a.

The court of appeals eliminated from its comparative juror analysis the fact that it was actually seated juror Watkins who stated that she could make a final decision as to the penalty after she had heard all the evidence "assuming also that the judge tells us where the law lies and which way to go as far as the law is concerned." App., *infra*, 349a.

Thus, the very statement that supposedly disqualified Foster was actually said by a white juror who was seated.<sup>13</sup> However, when she said that, the prosecutor did not clarify that the law does not tell the jurors how to vote or seek clarification, he simply said “okay.” *Id.*

The court of appeals rejected Stevens’s argument that the prosecutor misquoted Foster, holding that “[w]hile the prosecutor did not give a direct quote, the prosecutor’s paraphrase was materially the same, and to the extent the quotation was inaccurate, it did nothing to change the basis for the strike.” App., *infra*, 20a (cleaned up). In doing so, the court of appeals bypassed the prosecutor’s misrepresentation in regards to Foster and disregarded this Court’s mandate that “a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.” *Miller-El II*, 545 U.S. at 252.

Evading the critical comparison between Watkins and Foster rendered the court of appeals’ comparative juror analysis illusory. That pivotal disparity could not have been missed, as it was repeatedly highlighted to the court: once in the opening brief (Pet. C.A. Br. 24–25), twice in the reply brief (Pet. C.A. Rep. 44–45, 53), and read aloud to the

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<sup>13</sup> Watkins was not the only potential juror to say that. Edward Prodger, whose answers were not considered by the California Supreme Court, made virtually the same statement that was wrongfully attributed to Foster. When the court asked Prodger if he would consider both sentences “after having heard all the evidence,” he responded, “[w]ell, I think it would depend on, like you say, circumstances, and you know, what the law perscribes [sic] as far as you, yourself, as judge would say what is legal or what is -- should be done by law, you know.” App., *infra*, 295a. It also took five pages of questioning before Prodger agreed that he could even impose the death penalty, expressing hesitation a number of times first. App., *infra*, 301a–305a. Nonetheless, despite both the hesitation and the delegation of responsibility to the court, Prodger, who was white, was accepted by the prosecutor. App., *infra*, 430a.

court by counsel during oral argument. See Oral argument of July 19, 2021, at 58:46–59:59, *Stevens v. Davis*, No. 19-99004, <https://bit.ly/StevensOA>. Yet, it was not addressed in the opinion below.

While the sheer volume of the court of appeals’ lengthy comparative juror analysis suggests an exhaustive review, the court failed to address numerous key facts brought to its attention. *Miller-El II* required the court to have compared the entire record. Not having done so, the court of appeals’ decision is unreliable and inaccurate. Had the court of appeals actually performed the full comparative analysis it was required to conduct, it would have had to find § 2254(d)’s limitations on relief have been overcome, and that habeas relief must be granted because of the *Batson* violation. Likewise, had this Court employed the court of appeals’ abridged comparative juror analysis below when considering *Miller-El II*, Miller-El would have lost. The same is true with regard to *Flowers*.

As described above, the court of appeals also conceded that it was questionable “whether Foster expressed greater ambivalence regarding the death penalty than [white empaneled alternate juror] Domenichelli,” but held that the California Supreme Court’s conclusion that *Batson* was not violated was not objectively unreasonable. App., *infra*, 25a. Thus, while the court of appeals failed to address the most crucial proof of the prosecution’s use of pretext to strike Foster (i.e., the misrepresentation and Watkins’s statement), after comparing him to Domenichelli, the court of appeals saw yet a different problem with Foster’s strike.

In *Flowers*, this Court provided examples of six factors defendants may present to courts evaluating whether the prosecutor’s peremptory strikes were made on the basis of race, and whether racial discrimination occurred. *Flowers*, 139 S. Ct. at 2243. All of those weigh towards a finding of discrimination in Stevens’s case, but two in particular:

side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were accepted by the prosecutor, and the prosecutor's misrepresentations of the record when defending his strikes, make the prosecutor's impermissible motive clear. See *id.* ("a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing" are a factor courts should consider). It is clear that the prosecutor misrepresented the record when it came to Foster, who the district court said "did not express an ambivalence about returning a death verdict," contrary to the prosecutor's assertions. App., *infra*, 67a. The record further belied another of the prosecutor's statements, that Foster said something that in fact he never did. App., *infra*, 322a, 399a. Based on these alone, relief should have been granted, but was denied purely because of an erroneous application of § 2254(d). App., *infra*, 68a.

The court of appeals' improper sustainment of the wrong standards caused Stevens to lose despite the prosecution's unconstitutional striking of at least one Black juror based on his race.

### CONCLUSION

In an all too often repeated situation, the court of appeals disregarded this Court's § 2254(d) precedent and flaunted this Court's authority. This Court should not allow the Ninth Circuit's action to stand. As it has done in the many cases in which this Court summarily reversed for the failure to abide by this Court's decisions interpreting and applying § 2254(d), this Court should grant certiorari and summarily reverse in a per curiam opinion. Alternatively, this Court should grant plenary review.

Respectfully submitted,

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