

**CAPITAL CASE
No. 22-5667**

IN THE
Supreme Court of the United States

CHARLES STEVENS, PETITIONER

v.

RON DAVIS

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

REPLY BRIEF FOR THE PETITIONER

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This is no ordinary capital case. Considering whether the prosecutor unconstitutionally struck Black jurors during Petitioner Charles Stevens’s trial, the California Supreme Court utilized a standard so contrary to this Court’s clearly articulated touchstone that it has not been used by any court anywhere, other than the state court in this case and a California appellate court citing to Petitioner’s California Supreme Court case. The court of appeals allowed the deviation from this Court’s clearly established precedent to stand by ignoring the plain meaning of the words “striking similarity.”

Respondent mainly argues that this Court should not now address the error because it did not so when given the opportunity fifteen years ago. Respondent posits the additional strictures of 28 U.S.C. § 2254 further mandate the

outcome here. The opposite is so. Review subject to section 2254 is exactly why this Court must address the error.

The state court erred by imposing a “striking similarity” standard to its comparative juror analysis and the court of appeal explained it away by suggesting the state court did not mean what it said, but comity requires states be taken at their word, not what reviewing courts think the state court should have said or what they posit a court meant to say. Cf. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); Pet. 16, 19. This Court should grant certiorari and reverse because the failure to do so would make the AEDPA a sham, relegating it to a scheme to deny relief to prisoners based on the strict application of rules that are then malleable when benefitting the state. It would also create chaos, because allowing the ruling to stand would run afoul of legions of this Court’s cases on what constitutes clearly established law. Reversal is necessary when a federal court of appeals expands the clearly established law or applies it in a way that means it interpreted the state court to have said or done something it did not.

Respondent’s second argument in opposition to certiorari articulates a theory that would mean the prosecutor never provided step two support for the race-neutrality of his strike. Because of the unchallenged trial court finding that step one had been met, if the prosecutor never provided a race neutral justification for his strike of Black potential juror Larry Foster at step two, then the prosecution’s burden could not have been met, and reversal is required by *Batson v. Kentucky*, 476 U.S. 79 (1986).

A. The Court Of Appeals Failed To Give Due Respect To The AEDPA Principal That State Courts Strictly Adhere To This Court’s Precedents

Respondent asks why this Court should choose now, with the additional strictures of 28 U.S.C. § 2254, to review the California Supreme Court’s denial of Petitioner’s claims

pursuant to *Batson*, when it chose not to after his direct appeal fifteen years ago. Br. in Opp. 12–13. The denial of certiorari means nothing other than this Court chose not to review the case. See *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917–18 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n. 1 (1973) (reiterating that it is “well-settled” that a denial of certiorari imports no implication concerning the Court’s view of the merits).

After a federal court reviewed the merits, the district court expressed it would have granted relief based on the improper striking of juror Larry Foster, but for section 2254.¹ Likewise, one of the judges in the court of appeals made clear at oral argument that he did not believe the record supported the prosecutor’s step two justification for Foster’s strike. Thus, because section 2254 is what has prevented relief, the correct application of 2254 is paramount. The court of appeals turned 2254 on its head, reinterpreting the state court’s express verbiage denying relief.

¹ Respondent modifies the district court’s finding, saying that with respect to Foster, the “court did not believe that the transcript and questionnaire supported the prosecutor’s concerns.” (Br. in Opp. 8.) The district court was far more dismissive, saying the record belied the prosecutor’s statement regarding Foster, and that “all of Foster’s answers on voir dire confirmed his belief in the purpose of the death penalty and that he would render the verdict compelled by the relevant law and application of evidence to that law,” unequivocally determining that “[c]ontrary to the prosecutor’s assertions, Foster did not express an ambivalence about returning a death verdict.” *Id.* At argument in the court of appeals, one judge agreed. See Oral argument of July 19, 2021, at 31:51-32:19, *Stevens v. Davis*, No. 19-99004, <https://bit.ly/StevensOA>.

The court of appeals' reimagined articulation of what the state court meant is neither supported by the text, nor by the California Supreme Court's history. That court continues to employ a higher threshold in its comparative juror analyses than this Court set forth in *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"). See *People v. Winbush*, 387 P.3d 1187, 1220 (Cal. 2017) (Pretext is established "when 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)). Accordingly, Stevens's dire prediction in his 2007 petition for writ of certiorari that "the California Supreme Court has so distorted this Court's *Batson* standards as to render it a nullity," has been prescient.

Since then, the California Supreme Court found error in only one case, and has not found a *Batson* violation involving the peremptory challenge of a Black prospective juror in thirty-five years. That is not because trial courts have routinely gotten it right. The Ninth Circuit has had to grant relief based on *Batson* violations twenty-two times since 1993, despite the application of the AEDPA to almost all of those cases. Pet. 10; Pet. App. 475a.

Here, the California Supreme Court utilized a "striking similarity" standard, rather than the "similarly situated" standard this Court established in *Miller-El II*. 545 U.S. at 247. While claiming the state court did not use such a standard, Respondent felt it necessary to repeatedly change the state court's conclusion that the handful of jurors it reviewed did not "demonstrate such a striking similarity in ambivalence regarding the death penalty that a finding of pretext is warranted" (Pet. App. 114a), to a finding that "the answers given by the stricken and seated jurors about the death penalty were not sufficiently similar to warrant a finding of pretext." Br. in Opp. 5. Respondent

twice argues “sufficient similarity” (Br. in Opp. 5, 9), implicitly recognizing the problem with a “striking similarity” standard. “Striking similarity” established the bottom line of what the California Supreme Court articulated needed to be shown. Any modifier attached to that standard is simply confirmation that in the court’s view that high threshold has not been met.

Respondent points to *Woodford v. Visciotti*, 537 U.S. 19, 23–24 (2002) as support for the argument that premising “habeas relief on the California Supreme Court’s use of a single word in its balancing of the factors described by this Court would be inconsistent with the requirements of Section 2254(d).” Br. in Opp. 19–20. *Visciotti* supports Stevens. In *Visciotti*, this Court recognized that the California Supreme Court’s opinion “painstakingly describe[d] the *Strickland*² standard” and that its “occasional shorthand reference to that standard by use of the term ‘probable’ without the modifier may perhaps be imprecise,” but was not “a repudiation of the standard.” *Visciotti*, 537 U.S. at 23–24. The problem in *Visciotti* was that the court of appeals made “no effort to reconcile the state court’s use of the term ‘probable’ with its use, elsewhere, of *Strickland*’s term ‘reasonably probable,’ nor did it even acknowledge, much less discuss, the California Supreme Court’s proper framing of the question as whether the evidence ‘undermines confidence’ in the outcome.” *Id.*, 537 U.S. at 24. This Court declared that the “readiness to attribute error” was “inconsistent with the presumption that state courts know and follow the law.” *Id.*

Citing *Visciotti* might be meaningful had the California Supreme Court correctly expressed the “similarly situated” standard this Court established in *Miller-El II*, but it did not.

² *Strickland v. Washington*, 466 U.S. 668 (1984).

The only discussion of *Miller-El II* by the California Supreme Court was where that court said Stevens acknowledged the court had historically disapproved of comparative juror analyses for the first time on appeal, but that *People v. Johnson*, 767 P.2d 1047, 1057 (Cal. 1989) (overruled in part by *People v. Gutierrez*, 395 P.3d 186, 202 (Cal. 2017)), where the court had expressed its disapproval, “may have been called into question” by *Miller-El II*. Pet. App. 113a–114a. The court then engaged in an abbreviated comparative juror analysis.

The California Supreme Court never articulated or recognized within its opinion the correct standard of “similarly situated.” Instead, it twice used a “striking similarity” standard. See Pet. App. 114a, 116a (“nothing in these jurors’ questionnaire or voir dire answers indicates such striking similarity to the challenged prospective jurors’ responses that pretext is evident”). Thus, unlike in *Visciotti*, the state court never articulated the proper standard elsewhere. This was not imprecise verbiage; it was the standard the state court utilized.

The presumption that the state court knew and followed the law is not just rebutted by the failure to cite the correct standard anywhere in its opinion, but also by the state court’s express statement that its decision in “*Johnson* may have been called into question by *Miller-El II*.” Pet. App. 113a–114a. Scarcely a year later, the same court recognized that, “as to claims of error at [] *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) (citation omitted). Until *Lenix*, the California Supreme Court did not properly recognize and follow *Miller-El II*. See *Lenix*, 187 P.3d at 966 (recognizing and articulating “similarly situated” as the appropriate standard).

Respondent's use of *Davis v. Ayala*, 576 U.S. 257, 273–274 (2015) is equally misplaced. Respondent, who argued before the court of appeals that appellate courts must always defer to the trial court's step three determination, now seeks to undermine the "striking similarity" standard by reframing it as nothing more than a simple acknowledgment "that the strength of that evidence depends on the degree and nature of the similarities." Br. in Opp. 19. It was anything but such. Using *Ayala*, Respondent quotes factors this Court discussed in relation to counsel's determinations regarding where to use peremptories, as factors for the trial court's assessment. Beyond the incorrect recitation of what this Court said, Respondent's call to defer to the trial court's "sensitive assessment of jurors' demeanor," is misplaced because the trial court herein focused on the prosecutor's demeanor, but not the demeanor of the jurors.³

B. The Brief In Opposition Is Not Responsive To The Petition

Respondent repeatedly justifies the prosecutor's striking of Black jurors Larry Foster, Jean Clemons, and Henry Hill, but Clemons and Hill are not at issue here. In the court of appeals, Stevens focused on the prosecutor's strikes of a few Black jurors, but predominately Foster and Walter Simpson. Pet. C.A. Br. 89–97. Here, however, Stevens only briefed Foster, because at least two federal judges have articulated their belief that he was wrongfully struck, and this Court has said, "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many."

³ Likewise, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), cited by Respondent to rebut Stevens's argument that the state court had an obligation to do a thorough comparative juror analysis, is not dispositive. Beyond the fact that Respondent's argument would cause petitioners to make arguments necessitating *Strickland* review of appellate counsel's comparative juror analysis, this Court went well beyond what counsel briefed in *Miller-El II*. See Pet. 22.

Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019). See also *Foster v. Chatman*, 578 U.S. 488, 499 (2016) (“The ‘Constitution forbids striking even a single prospective juror for a discriminatory purpose.’”) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)).

Respondent argues the court of appeals ruled correctly because Foster’s “own statements could reasonably be interpreted as supporting the conclusion that the prosecutor’s strikes were motivated by a desire to avoid ambivalent jurors, rather than by racial discrimination” (Br. in Opp. 15), but tellingly provides only a single example. *Id.* (citing Pet. App. 19a, “noting Foster’s response that he ‘honestly [did not] know’ how he would vote if given the chance to abolish California’s death penalty at the ballot box”). Respondent omits the very next sentence from the court of appeals, which noted that, “[d]uring voir dire, when asked if he would vote for the death penalty on the ballot, Foster stated ‘Yes . . . I believe it’s a deterrent.’” Pet. App. 19a. Thus, the admission that supposedly supported the prosecutor’s proffered reason was definitively refuted by Foster on voir dire.

At the same time Respondent diluted the focus on Foster by pointing to other struck Black jurors who are not being challenged herein (Br. in Opp. 15, 17), he glossed over the white jurors Stevens highlighted in his petition to this Court. Jurors Edward Prodger, who made virtually the same statement that was wrongfully attributed to Foster, and Mary Domenichelli, who the court of appeals noted, “evinced an ambivalence toward the death penalty and a conditional willingness to vote for that penalty which were fairly similar to Foster’s” (Pet. App. 24a), were not substantively discussed by Respondent. Neither Prodger nor Domenichelli were put forward by Stevens on direct appeal; therefore, under the California Supreme Court’s too limited

parameters, neither were considered as part of the comparative juror analysis. The court of appeals conceded that it was questionable “whether Foster expressed greater ambivalence regarding the death penalty than Domenichelli,” but held the California Supreme Court’s conclusion that *Batson* was not violated was not objectively unreasonable. Pet. App. 25a. Whether the California Supreme Court utilized the wrong standard in its comparative juror analysis and whether it considered all of the jurors that it should have, are significant questions this Court should review.

The one white juror Respondent brushed on in a footnote, Virginia Watkins, was far more ambivalent than Respondent leads this Court to believe. Respondent relegated her to a footnote, seeking to downplay her significance by arguing “the transposition of one juror’s words into another juror’s mouth would be far more indicative of an honest mistake than an intent to discriminate” (Br. in Opp. 16 n.8), but that misses the point. Watkins’s statement reflected ambivalence and showed Watkins to be the more ambivalent potential juror, but more than that, if the prosecutor mistakenly “mixed up Foster’s words with [Watkins’s]” (*id.*), then the prosecutor did not provide support for the race-neutrality of his strike at step two. That failure is fatal to Respondent’s defense. Respondent’s argument is a concession that step two was not met.

Moreover, Stevens had already made a *prima facie* showing at step one. Accepting the transposition as an unintended mistake would have the effect of shifting the burden back to Petitioner. The determination of whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor’s justification for his peremptory strike. If the prosecutor’s justification was made in error and did not apply to Foster, then his burden at step two could not have been met and *Batson* requires reversal. *Batson* requires only that the prosecutor’s

reason for striking a juror not be the juror's race, but Respondent argued that the prosecutor's reason for not striking Foster was not about Foster. That leaves Foster's race as the unchallenged reason for the strike.

Watkins was asked by the prosecutor whether she could give the "evidence serious consideration and make [her] final decision as to what the penalty is after [she] heard all the evidence. Can you do that?" Pet. App. 349a. It is of particular importance that she qualified her affirmative answer and that she may have had difficulty answering the question, saying "[y]es, I -- assuming also that the judge tells us where the law lies and which way to go as far as the law is concerned." ⁴ *Id.* As the prosecutor stated when justifying his striking of Foster, "the law doesn't mandate that you have to impose the death penalty, that's something that's up to [the juror]." Pet. App. 399a. The prosecutor believed that such abdication of responsibility indicated "an ambivalence in [] ability and showed a lack of commitment in the ability to impose the death penalty." *Id.* Therefore, Watkins's answer indicates ambivalence. To the degree that ambivalence was a real concern for the prosecutor, Watkins should not have been empaneled, but she sat as juror seven.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted

⁴ Respondent's quotation of Watkins's response mistakenly includes an em dash rather than two hyphens. Whereas an em dash may be used in place of commas or parentheses to emphasize or draw attention to parenthetical or amplifying material, two dashes in a transcript are frequently indicative of an interruption or false start. As the Ninth Circuit recognized in *Kesser v. Cambra*, 465 F.3d 351, 364 (9th Cir. 2006) (en banc), dashes, interruptions, or false starts indicate the speaker may have had difficulty answering the question.

and the decision below summarily reversed in a per curium opinion. Alternatively, this Court should grant plenary review.

Respectfully submitted,

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