

No. 25-6846

IN THE
SUPREME COURT OF THE UNITED STATES

TONY TERRELL CLARK, *Petitioner*,

v.

MISSISSIPPI, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

REPLY BRIEF FOR PETITIONER
CAPITAL CASE

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THIS IS A CAPITAL CASE

NO EXECUTION DATE SET

INTRODUCTION

Everyone knows of the magic trick where the magician hides a ball in one of a series of cups. No matter what cup the player chooses, they cannot find the ball. So is true here. In an abrupt turnabout, the State claims that the Mississippi Supreme Court does not require a showing that “the outcome of the trial would have been different” to demonstrate prejudice in the *Batson*¹ context. Opp. 8. This despite the State’s underlying brief claiming that in *Powers* the Mississippi Supreme Court “reaffirmed” this standard as “precedent.” State’s Response in Opp. p. 50, *citing Powers v. State*, 371 So. 3d 629, 682-90 (Miss. 2023). And this even though the lower court’s order cites the *Powers* decision when discussing the *Strickland*² standard. Pet. App. 9a. *The ball is not in that cup.*

In a way, this approach by the State mirrors the obfuscation in Clark’s cases by the lower court. On direct appeal, the Mississippi Supreme Court refused to conduct a comparative juror analysis of Clark’s *Batson* claims because his counsel did not request one at trial. *Clark*, 343 So. 3d 943, 961(2022). And the Court was clear that Clark’s *Batson* claims on appeal had no merit strictly “[b]ased on the evidence and the arguments presented to the trial court.” *Id.* at 971 (internal citations omitted) (emphasis added). But

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

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

in this collateral matter, the Mississippi Supreme Court takes the startling position that counsel was effective after all. Pet. App. 9a. *The ball is also not in this cup.*

The intersection of Mississippi's waiver doctrine and impossible standard for *Strickland* prejudice operates to ensure Clark can never find a vehicle to receive federal review of his *Batson* claim. Clark could not find the right cup because in Mississippi all cups are empty. This Court's intervention is necessary and warranted.

ARGUMENT

I. The Mississippi Supreme Court's Rulings Weaponize Attorney-Error to Preclude Federal Review of *Batson* Claims.

The State asks this Court to review the Mississippi Supreme Court's collateral opinion in isolation, arguing the lower court "ruled that he failed to show deficient performance." Opp. p. 8. But the Mississippi Supreme Court's post-conviction order demonstrates it intended the opinions to be construed together. Pet. App. 9a *citing Clark*, 343 So. 3d at 954-71 ("Counsel's arguments are set forth in detail in our opinion on direct appeal. *Clark*, 343 So. 3d at 954-71.").

In Clark's direct appeal, the lower court predictably found no *Batson* violations. *Clark v. State*, 343 So. 3d 943, 954-971 (Miss. 2022). But it did so because Clark "failed to present a comparative juror analysis or sufficient rebuttal evidence to the trial court," even though the "trial court preven[t]ed defense counsel from presenting sufficient rebuttal evidence." *Clark v. State*, 418 So. 3d 1226, 1236 (Miss. 2025) (King, P.J. concurring in part

and dissenting in part) *citing Clark v. State*, 343 So. 3d 943, 954-971 (Miss. 2022). Indeed, the Mississippi Supreme Court held that it could not conduct a comparative juror analysis ***because trial counsel failed to request one.*** *Clark*, 343 So. 3d at 961. Lest there be any doubt, the Mississippi Supreme Court clarified that its direct review was confined to the “evidence and the arguments presented to the trial court.” *Clark*, 343 So. 3d at 971 (internal citations omitted.)

Then on collateral review the lower court contradicted itself by claiming the “arguments [presented on post-conviction] do not show that counsel’s performance before the trial court was deficient.” Pet. App. 9a. This Court should be skeptical of the Mississippi Supreme Court’s pivot when it results in precluding federal review. Federal courts have granted relief in similar circumstances when state courts use attorney error to preclude review. *See, e.g., Davis v. Sec’y for Dep’t of Corr.*, 341 F.3d 1310, 1315 (11th Cir. 2003) (finding state court made an unreasonable application of the first prong of *Strickland* where trial counsel’s failure was not “to bring the *Batson* issue to the attention of the trial court,” but was “failure in his separate and distinct role of preserving error for appeal”); *French v. Warden, Wilcox State Prison*, 790 F.3d 1259, 1268–69 (11th Cir. 2015) (finding state habeas court made an unreasonable determination that counsel’s performance was effective where counsel “decided to introduce” some evidence yet failed to “follow the clearly-established state law procedures to preserve that evidence for appellate review.”).

This is not an isolated instance of the Mississippi Supreme Court refusing to review claims of constitutional violations on direct appeal by blaming attorney error only to reject the claim in post-conviction. In *Hodges v. Epps*, No. 1:07CV66-MPM, 2010 WL 3655851, at *1 (N.D. Miss. Sept. 13, 2010), *aff'd in part*, 648 F.3d 283 (5th Cir. 2011), federal courts had to step in to protect Quintez Hodges' constitutional rights. Hodges was convicted of capital murder and sentenced to death when the State engaged in improper cross-examination and "seemingly unconcerned with the accuracy of the testimony [] provided the jury with false information." *Id.* at *14. On direct appeal, the Mississippi Supreme Court refused to consider the issue of prosecutorial misconduct and declined to consider a transcript as it was not part of the trial record. *Id.* at *11, *citing Hodges v. State*, 912 So. 2d 730, 749-51 (Miss. 2005). This even though Hodges made a motion to expand the record to include the transcript which directly proved the prosecutorial misconduct. *Id.* It ultimately found the issue was barred, as no objections were made by defense counsel during the cross-examination of the witnesses. *Id.*

Then on post-conviction, with the transcript front and center, the Mississippi Supreme Court found the res judicata doctrine barred Hodges from raising the prosecutorial misconduct claim. *Hodges v. State*, 949 So. 2d 706, 714 (Miss. 2006). And it held that trial counsel was not ineffective after all. *Id.* at 722.

This trend continues in Clark's case. The Mississippi Supreme Court claimed attorney-error precluded its federal review of a *Batson* violation on direct appeal only to find

the attorney was effective in post-conviction. In these cases, the attorneys are not ineffective in isolation. The lower courts play a role in making the attorneys ineffective (refusing to grant the amendment to the record in *Hodges*; and refusing to allow Clark’s counsel to put forth evidence of rebuttal by the trial court/refusing to conduct a comparative juror analysis/review the rebuttal evidence on appeal).

Rather than viewing the lower court’s collateral opinion in isolation, as urged by the State, this Court should view the *Clark* opinions together. And together they demonstrate that Black petitioners like Clark cannot look to the Mississippi Supreme Court when their *Batson* right are violated. *See Clark v. State*, No. 2024-M-00201-SCT, 2024 WL 3731217, at *1, n.2 (Miss. Aug. 2, 2024)(King, P.J., Objecting to Order with Separate Written Statement) (Noting the Mississippi Supreme Court “has a long history of refusing to apply *Batson* protections to Black jurors, while going out of its way to vociferously apply *Batson* protections to white jurors.”)

Review is warranted.

II. The State Concedes Requiring a *Batson* Claimant to Show the Violation Changed the Outcome of the Trial Does Not Comply with *Strickland* Prejudice.

By now claiming the Mississippi Supreme Court did not apply the standard previously urged by the State, it effectively concedes that the *Powers* standard does not comply with *Strickland*’s requirements. Opp. 8. Specifically, the State claims that the lower court’s opinion “did not announce the [Powers] prejudice standard” but instead made a

statement that “comports with *Strickland*.” *Id.* The reason the State concedes this point is obvious. The *Powers* outcome-determinative standard for trial is not consistent with this Court’s rulings—so thus the State seeks to fashion the lower court’s prejudice requirement as something other than what it deems “precedent” in Mississippi.

Indeed, applying an outcome determinative requirement to the trial makes no sense in this context. Clark’s counsel raised the objection but then waived his rebuttal arguments for review. In this sense it is equivalent to a failure to preserve claim, because here, Clark’s counsel made the *Batson* objection, but he failed to “preserve” a comparative juror analysis/rebuttal argument for appeal. And “[u]nder no readily conceivable circumstance will a simple failure to preserve a claim—as opposed to a failure to raise that claim in the first instance—have any bearing on a trial’s outcome.” *Davis*, 341 F.3d at 1315–16. Applying the outcome to the *Batson* challenge (instead of the trial) is also consistent with this Court’s jurisprudence that prejudice is presumed “when counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.” *Garza v. Idaho*, 586 U.S. 232, 237 (2019) (internal citations omitted). Since the State has conceded that Mississippi precedent runs afoul of this Court’s ruling in *Strickland*, there is no barrier to this Court granting review.

III. The State’s Attempts to Justify the Prosecutor’s Pretextual Reasons Expose the Racial Bias Behind the Strikes.

The State argues that the Madison County criminal case lists do not support petitioner’s *Batson* objections. Opp. 9. (“There is no reasonable probability that

petitioner's *Batson* objections would have prevailed had his counsel made arguments using those lists.”). In support of its position, the State claims the prosecutors simply forgot the names of the white persons they prosecuted but not the names of Black persons. Opp. 10 (“At worst, the State was mistaken about which potential jurors’ names matched that of numerous convicts, but that does not show that its reasons were pretextual.”). This makes no sense. If prosecutors only see fit to memorize the last names of Black defendants for use in future jury selection, this *proves* racial bias, not racial neutrality. And while a true mistake in an explanation may not be racial discrimination, *Flowers* establishes that a pattern of mistakes can be. *Flowers v. Mississippi*, 588 U.S. 284, 314 (2019) (“The State’s pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury.”). Here, the pattern is clear. The State investigated the last names of only Black jurors. This evidence of pretext undermines, rather than buffers, the credibility of the prosecutor in proffering facially race-neutral explanations for their strikes.

This Court should grant certiorari, as the Mississippi Supreme Court violated the due process clause of the Fourteenth Amendment by holding trial counsel waived Clark’s *Batson* rebuttal arguments, rendering him ineffective, but then refused to review Clark’s ineffective assistance claim on post-conviction. U.S. Const. amend, XIV, § 1. Further, the question of whether a post-conviction petitioner must prove a successful *Batson* challenge

would change the outcome of the trial to show *Strickland* prejudice easily satisfies this Court's certiorari criteria.

CONCLUSION

The Petition for Certiorari should be granted.

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