No. 04-52

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, Warden, et al., *Petitioners*,

v.

STEVEN MARTELL COLLINS, *Respondent.*

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

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

I. The Trial

Respondent Steven Collins ("Collins"), an African-American man, JA II 11,[1] was tried in the Los Angeles County Superior Court for possessing 0.10 grams of rock cocaine. PA 109-10. After a jury found Collins guilty and determined that he had been convicted of two prior felonies, PA 95-96, 109-10, the court sentenced Collins to a term of 25 years to life in prison under California's Three-Strikes Law. PA 96, 110.

Challenges for cause and hardship excuses left only three African-Americans on the panel. JA 36. After a judge-conducted voir dire, counsel were asked to exercise their peremptory challenges. JA 150. The prosecutor struck Juror 16, a female African-American juror. JA 168; JA II 3. Juror 16 stated during voir dire that she lived in Inglewood, was single, had no children, was employed as an automations clerk for the Federal Aviation Administration, and had no prior jury experience. JA 142. None of Juror 16's recorded responses to voir dire gave any reason to suspect she would be sympathetic toward the defense: She said that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to be a juror in this case; that she could decide the case solely on the evidence and instructions without regard to her personal feelings; that no one close to her had ever been accused of committing any crime that involved the use or possession of drugs or drug paraphernalia; that she thought the possession of rock cocaine

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[1] "JA" refers to Volume I of the Joint Appendix filed by the parties. "JA II" refers to Volume II of the Joint Appendix. "PA" refers to the appendix submitted with the petition for writ of certiorari.

ought to be against the law; and that neither she nor anyone close to her had ever had a problem with drug or alcohol abuse. JA 139-45.

The prosecutor used her next peremptory to challenge the only other black woman in the venire, Juror 19. JA 183; JA II 3. Juror 19 was single, lived in Inglewood, and was a retired nurse with seven grown children and five grandchildren. JA 156-58. She also responded to voir dire in a manner that, if viewed race-blind, should have raised no red flags for the prosecution. She stated that she had never had an experience with police officers that was "particularly positive or particularly negative." JA 157. Although her youngest daughter had previously had a problem with drugs,[2] she had been clean for two years, JA 158, she had not been arrested, and Juror 19 was adamant that nothing about her relationship with her daughter or what her daughter had gone through might affect her ability to be impartial in this type of case. JA 159.[3]

When the prosecutor used a peremptory to strike this second black juror, defense counsel made a *Batson* motion, explaining that "the last two jurors excused by the People [Jurors 16 and 19] have been African-Americans." JA II 3.[4] The prosecutor replied:

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[2]When asked what kind of drugs was involved, she initially said she had no idea, but then quickly stated she thought the drug was cocaine. When asked if the drug was rock cocaine, she said "no." JA 158.

[3]Juror 19 also stated that she could put her daughter's situation aside and be as objective as any other juror. JA 159.

[4]Collins made his objection pursuant to *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the California state law analogue to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 (9th Cir. 2003). This brief refers to Collins's jury discrimination challenge in state court as a *Batson* motion or claim.

> We have, it appears to me, two people of color, African-American type, left on the jury. I have excused two white people and two black people. I don't think there has been any particular people that have been excluded. . . . So it is not like I am picking on any certain minority. I don't think there has been a sufficient showing.

JA II 4. This comment neglected to address the fact that the prosecutor had struck two of the three African-Americans remaining on the panel. The judge ruled that a prima facie case had been made and asked the prosecutor for her explanations. JA II 4-5.

The prosecutor first asserted that both Juror 16 and Juror 19 were young (JA II 5) – a remarkably inaccurate contention with respect to Juror 19, who had described the occupations of five of her grown children and stated that she had five grandchildren. JA 156-58. The prosecutor then threw in another objection to Juror 16:

> Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court.

JA II 5.

Next the prosecutor appears to have confused the two black jurors with each other. Immediately after describing Juror 16's demeanor, the prosecutor stated: "She and Mr. 006

were both single, no ties." JA II 5. At this point, defense counsel evidenced confusion, asking "who is 006?" and the prosecutor replied,

> He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

JA II 5-6.

In response to the court's question whether she had additional justifications, the prosecutor introduced a new variable, gender, by asking: "Does the court need cases for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area?" JA II 8. When defense counsel objected to the consideration of gender, JA II 9, the court observed that "the United States Supreme Court say[s] that the use of peremptory challenges based on gender is improper." JA II 12-13. The court then admonished the prosecutor, "I don't see, Ms. Satriano, that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it." JA II 13. The prosecutor backtracked, and returned to reliance on youth, then backtracked again by admitting that she had not struck other young jurors:

> I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that

> is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

Id.

This ping-ponging among reasons did not deter the court from ruling for the prosecutor. With respect to Juror 19, that ruling was uncomplicated: "[B]eginning with [Juror 19], the court is satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being [Juror 19's] experiences with a family member who had a drug problem." JA II 14. With respect to Juror 16, the court began with candor and ended with charity:

> With regard to [Juror 16], the court, frankly, did not observe the demeanor of [Juror 16] that was complained of by the district attorney; however, [Juror 16] was a youthful person, as was [Juror 6]. And one or more prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to [Juror 16].

JA II 14-15.

The court then added that the denial was without prejudice to Collins's right to renew the motion, cautioning that "both parties are reminded that if the court does grant a [*Batson*] motion, the court is required to report its reasons to the State Bar of California." JA II 15.

After this warning, the prosecutor exercised her remaining peremptory challenge against a white juror, leaving one African-American man on the panel.[5]

II. The State Appeal

On appeal, Collins challenged the denial of his *Batson* motion as to Juror 16, but not as to Juror 19. PA 179.[6] Collins argued that the trial court denied the motion "solely based on the fact that [Juror 16] was young" (PA 191), and that the court failed to make a sincere and reasoned attempt to evaluate the prosecutor's explanations. PA 187.[7]

The California Court of Appeal affirmed the judgment. PA 109, 120. It held that youth was not a forbidden, cognizable class for the purposes of *Batson*, and stated that "peremptory challenges to youthful and/or immature prospective juror[s] repeatedly have been upheld as proper. [Citations omitted.] Thus, [it] f[ou]nd no merit to Collins's assertion [that] [Juror 16] was excluded from the jury based on her age." PA 115-16. The court further held:

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[5]Although the prosecutor suggested that two jurors were African-American (JA II 3), defense counsel clarified that although Juror 20 may be a woman of color, as the district attorney stated, "she is not African-American." JA II 11. Collins's traverse states that Juror 20 was Indian (Asian Indian), not African-American. *See* C.D. Cal. docket entry 42 at 6.

[6]Collins's federal petition similarly asserts a *Batson* claim solely with respect to Juror 16. Under *Batson,* the prosecutor's peremptory strike of Juror 19, and the reasons given therefore, are relevant evidence on the issue of her intent to discriminate in striking Juror 16. *See infra*, Argument § I.A.

[7]The State suggests that in his postconviction challenges, Collins did not claim that the strike of Juror 16 was impermissibly based on race until his Ninth Circuit appeal. Petitioner's Brief on the Merits ("Pet. Br.") at 7-8. This is incorrect. Collins argued on direct appeal and in district court that the strike was racially discriminatory. PA 193 (arguing in his state appeal brief that "the prosecutor's reasons for excusing prospective juror #16 were insufficient to show that racial animus did not exist"); PA 101.

> Additionally, even if the prosecutor's reliance on [Juror 16's] youth were improper, the prosecutor also stated the prospective juror had rolled her eyes and turned away from the trial court when the trial court spoke to the prospective juror. The trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt.
>
> Based on this evidence, the prosecutor's use of a peremptory challenge as to [Juror 16] was proper . . . . Because the prosecutor reasonably could have interpreted [Juror 16's] body language as indicative of hostility or disrespect, a peremptory challenge exercised on that basis was not improper.

PA 116.

The court rejected the claim that "the trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's justifications," PA 116, reasoning that "[b]ecause nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to [Juror 16's] demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." PA 116-17 (citation omitted). Collins filed a petition for review in the California Supreme Court, which was denied without comment. PA 96.

III. The Federal Habeas Action

Collins's petition for writ of habeas corpus in federal district court asserted that the prosecutor's peremptory challenge of Juror 16 violated *Batson*. Collins represented himself *pro se* throughout the district court action, and not surprisingly, presented no additional evidence in support of his *Batson* claim. Consequently, the district court adjudicated the claim solely on the basis of the state court record.

A United States Magistrate Judge issued a report recommending that the *Batson* claim be denied and the petition be dismissed with prejudice. PA 95, 105. Despite the fact that the trial judge neither commented on nor made a finding concerning the "sincerity" of the prosecutor's explanation, the Magistrate Judge ruled that "[a]lthough the trial judge did not personally observe the juror 'roll' her eyes, he made a finding that the prosecutor's proffered explanation was sincere and legitimate, and this Court must respect that finding unless it is rebutted by petitioner with clear and convincing evidence." PA 104. Ignoring the oscillations in the prosecutor's reasons, the Magistrate Judge also opined that "there is no indication in the record that the prosecution's age-related justification was a mere pretext for racial discrimination." *Id*. The district court adopted the report verbatim and dismissed the petition with prejudice. PA 91.

The Ninth Circuit Court of Appeals reversed the district court and granted relief, holding that the California Court of Appeal's decision represented an unreasonable determination of the facts and was an objectively unreasonable application of clearly established federal law. JA 35; 28 U.S.C. § 2254(d)(1), (2).

SUMMARY OF ARGUMENT

After the prosecutor used consecutive peremptory strikes to remove the only two African-American women remaining in the venire, Jurors 16 and 19, Collins made a *Batson* motion. The court found a prima facie case and asked the prosecutor to justify her strikes. Although the prosecutor initially asserted that both jurors were young (in fact, Juror 19 was a grandmother), she ultimately withdrew the rationale, saying that "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Upon questioning by the court, the prosecutor zigged and zagged from reason to reason, offering a litany of rationales that she claimed applied to both jurors, including youth, gender, "lack of ties in the community," and that they were "too tolerant" to serve in a drug case. In fact, aside from race, gender and where they lived, Jurors 16 and 19 were quite disparate. They differed in age (youthful v. grandmother); occupation status (employed v. retired); number of children (none v. seven); and friends and relatives with drug problems (none v. a daughter). The prosecutor also claimed that after a statement made by the judge, Juror 16 "rolled her eyes and turned away from the court." The trial court denied the *Batson* motion, stating that he had not observed the demeanor complained of, but that Juror 16 was "a youthful person," as were other prospective jurors, and "[t]he court is prepared to give the district attorney the benefit of the doubt as to [Juror 16]."

The rule that reviewing courts should defer to findings of fact by the trial court is based on the premise that the trial court is in the best position to observe matters that may not be as readily discerned from the written record, such as the demeanor of witnesses.

Application of the rule assumes that the trial court indeed assessed the relevant evidence and made a fact finding. Here, the trial court gave the prosecutor "the benefit of the doubt" that she was not discriminating and warned that any future *Batson* violations would be reported to the state bar. Assuming this even counts as a finding of no discrimination, it is far from clear, firm or persuasive. The trial judge also stated that he had not observed the demeanor alleged by the prosecutor; he affirmed, however, that Juror 16 was "a youthful person," as the prosecutor claimed, and gave the prosecutor "the benefit of the doubt" as to her strike of Juror 16 on that basis.

Standing the rule of deference to trial court factfinding on its head, the state appellate court "deferred" to a credibility determination the trial court never made. The court ruled that "[b]ecause nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to [Juror 16's] demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." Repeating the trial court's error, the appellate court also affirmed the denial of the motion on the basis of the withdrawn youth rationale. Neither ground of the state court decision is supported by the record.

In granting relief on the *Batson* claim, the Ninth Circuit faithfully applied this Court's teaching in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"). It reviewed "all relevant circumstances" to assess the credibility of the prosecutor's justifications, and it applied the "unreasonable determination" standard of 28 U.S.C. § 2254(d)(2) and the "presumption of correctness" standard of § 2254(e)(1). The court rightly held that the state

appellate decision represented an unreasonable determination of the facts because the record showed that the prosecutor failed to offer any credible justification for striking Juror 16. Instead, the record shows by clear and convincing evidence that, of the reasons given to strike Juror 16, one (gender) was illegal; a second (youth) was withdrawn and had not been applied to white panelists; a third ("too tolerant" to sit in a drug case) was contrary to the record and not applied to similarly situated white jurors; a fourth (single) was not applied to a similarly situated white juror; a fifth (lack of ties to the community) was unsupported by the record; and the sixth (demeanor) was uncorroborated by the trial judge and pretextual in light of all the relevant circumstances. The court also held that the state court unreasonably applied *Batson*. 28 U.S.C. § 2254(d)(1). This Court should affirm the Ninth Circuit judgment.

The State proposes a different, more deferential standard to apply to habeas claims than the one this Court applied in *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) ("*Miller-El II*"), last term, and which the Ninth Circuit applied here. The State claims that 28 U.S.C. § 2254(d)(2) and (e)(1) both should be read as containing the sufficiency of the evidence standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). Had Congress intended federal habeas courts to apply the *Jackson* standard, it would have included it in the habeas statute. Congress did not do that. The State's proposal is inconsistent with the plain language of the habeas statute and with this Court's cases construing the statute. The State has not cited one case in which a court has read (d)(2) or (e)(1) as prescribing a *Jackson* kind of review.

Contrary to the State's position, the structure and text of the habeas statute show that (d)(2) and (e)(1) are mutually exclusive provisions that do not apply to the same claim. Subsection (d)(2) applies to situations, as here, where the petitioner challenges state court fact determinations solely on the basis of the state court record. Subsection (e)(1) applies only when the petitioner presents new evidence in federal court in support of his claim. Thus, § 2254(e) contemplates that if a petitioner meets the standard for obtaining a federal evidentiary hearing, he can present new material to try to overcome the presumption of correctness by clear and convincing evidence. However, if the petitioner makes a challenge under (d)(2) based solely on the state court record, (e)(1)'s presumption of correctness and clear and convincing rule do not apply.

ARGUMENT

I. THE CALIFORNIA COURT OF APPEAL'S DENIAL OF THE *BATSON* CLAIM WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS

Collins filed his federal habeas corpus petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore AEDPA applies to his case. *Woodford v. Garceau*, 538 U.S. 202, 207 (2003). 28 U.S.C. § 2554(d), as amended by AEDPA, "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000). The first issue in a case in which AEDPA applies is whether the petitioner has established a constitutional violation and therefore a right to habeas relief. If he has not,

§ 2254(d)'s limitations on the power to grant relief never come into play. *Weeks v. Angelone*, 528 U.S. 225, 237 (2000) (when petitioner's constitutional claim fails, it follows *a fortiori* that the state court denial of the claim is neither contrary to nor an unreasonable application of federal law under (d)(1)).[8] If, however, the petitioner proves a constitutional violation, the issue then becomes whether § 2254(d) nevertheless precludes habeas relief. As shown below, Collins has established a *Batson* violation.

A. Applicable *Batson* Principles

Batson held that equal protection forbids prosecutors from using peremptory challenges on the basis of a juror's race. 476 U.S. at 89. *Batson* established a three-step test for evaluating claims that a prosecutor used a peremptory strike in violation of equal protection. *Miller-El I*, 537 U.S. at 328. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California*, 125 S. Ct. 2410, 2416 (2005).

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." *Johnson*, 125 S. Ct. at 2416. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). This step "does not demand an explanation that is persuasive, or even plausible." *Id*.

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[8]As explained in § III, *infra*, 28 U.S.C. § 2254(e)(1) is not applicable to this case because the federal habeas courts adjudicated Collins's *Batson* claim based solely on the state court record.

Third, if the state provides a race-neutral justification, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338-39. At step three, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768.

"In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" and consider all relevant circumstances. *Batson*, 476 U.S. at 93; *Miller-El II*, 125 S. Ct. at 2325; *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (pl. op.) ("[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts"). Thus, "*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El II*, 125 S. Ct. at 2331.

Here, the trial court found a prima facie case (step one), and the prosecutor gave a facially race-neutral justification (step two). The dispute centers on whether an examination of all of the relevant circumstances shows that the prosecutor engaged in purposeful discrimination in striking Juror 16 (step three) and, if so, whether § 2254(d) nevertheless precludes relief.

B. A Consideration of All Relevant Circumstances Shows that the Prosecutor Purposefully Discriminated in Striking Juror 16

The California Court of Appeal ruled that the prosecutor gave two proper reasons for striking Juror 16: Juror 16's youth and her "eye-rolling" and "turning away." PA 115-16. The trial court found that the prosecutor gave one proper justification: youth. JA II 14-15. Collins addresses the youth justification first, then the demeanor rationale.

1. The Youth Justification Does Not Support the Strike

a. The Prosecutor Withdrew Youth as a Justification and Instead Equated Youth with Being "Too Tolerant" and "Lacking Ties in the Community"; Even if the Youth Rationale Was Not Withdrawn, It Was Pretextual

Although the prosecutor initially identified youth as a basis for challenging Jurors 16 and 19, upon questioning from the court she effectively abandoned that rationale. The record shows that the prosecutor equated youth with (1) being too tolerant to serve in a drug possession case and (2) lacking ties in the community, rationales the state trial and appellate courts never mentioned in their rulings as to Juror 16.

After the trial judge stated that a challenge based on gender was not "going to cut it," the prosecutor explained:

> I think I tied that into a lack of ties in the community with both of them [Jurors 16 and 19]; that that was one factor that I considered, that is, the manner in which I stated that they could – that their youth was important. It was not that I don't

> want any young people on the jury. There are, I believe, other young people on the jury.

JA II 13; *see also* JA II 5 ("Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case."). Since the prosecutor withdrew youth as a reason supporting her peremptory challenge, youth cannot be used as a basis to sustain the strike. *Miller-El II*, 125 S. Ct. at 2332 (A "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reason he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because the trial judge, or an appeals court, can imagine a reason that might not have shown up as false."); *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) (en banc) ("The inquiry required by *Batson* must be focused on the distinctions actually offered by the state in state court, not on all possible distinctions we can hypothesize.").

Even assuming youth was not withdrawn, by the prosecutor's own admission it does not explain the strike of Juror 16 (or 19): "It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Further, consideration of all of the relevant circumstances – including the reasons given for striking the only other Black female panelist, Juror 19 – shows that youth was a pretext for discrimination.

The trial judge described Juror 16 as "a youthful person," JA II 14, but the record shows that Juror 19 "was at least a middle-aged grandmother." JA 54.[9] Juror 19 stated in

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[9]Like the rest of the prospective jurors, Jurors 16 and 19 never gave their age or were asked to give their age. The judge never described Juror 19's appearance on the record.

voir dire that she was a retired nurse and had seven children (at lease five of whom were adults) and five grandchildren. The prosecutor's incorrect portrayal of Juror 19 as young is evidence that she used youth as a pretext for discrimination. *Miller-El II*, 125 S. Ct. at 2327 (finding discrimination where prosecutor mischaracterized struck juror's voir dire answers); *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998) (serious questions of pretext arise when facts in record are objectively contrary to prosecutor's justifications).

The State contends that the prosecutor merely misspoke when describing Juror 19 as young, accidentally referring to her "at one point" as Juror 6, a white man. Pet. Br. at 39-40. But the prosecutor's statement that "Ms. 016 as well as Ms. 019 were both young" was her immediate response to the Court's request that she justify her "peremptory challenges of Ms. 019 and Ms. 016," and came before any discussion of Juror 6. JA II 4-5. Later in this discussion, the prosecutor said that Juror 16 and "Mr. 006 were both single, no ties." JA II 5. When the court subsequently stated that strikes based on gender were not "going to cut it," the prosecutor again said "that their youth was important." JA II 13. She could only have been referring to Jurors 16 and 19, since they were the subject of Collins's motion and there was no claim Juror 6, a man, was struck because of his gender. The prosecutor's statements were implausible, but not accidental.

The State suggests that the prosecutor's strike of Juror 6, a young white man, shows that the prosecutor did not discriminate in striking Juror 16. Pet. Br. at 39. However, the record shows that Jurors 6 and 16 were not similarly situated. Juror 6, unlike Juror 16, was unemployed (indeed, had never been employed) and had an uncle who was a recovered

alcoholic (JA 108, 126), reasons for a strike that did not apply to Juror 16 and facts indicating the pretextual nature of the strike of Juror 16.

In addition to striking Jurors 6, 16 and 19, the prosecutor also struck Jurors 8 and 22. JA 150, 199-200.[10] In accepting the youth justification, the trial court noted that, in addition to Jurors 6 and 16, "one or more prospective jurors also" were youthful. JA II 14. The court did not explain whether it was referring to other prospective jurors who were struck by the prosecutor, and the record does not reflect the ages of any venire members. However, the record does show that even assuming that Jurors 8 and 22 were youthful, they were not otherwise similarly situated to Juror 16, and therefore their strikes do not legitimize the strike of Juror 16.

Juror 8 stated that she had served as a juror in a criminal case for driving under the influence that did not reach a verdict. JA 109. She had two friends with drug and/or alcohol problems; substance abuse was an ongoing problem with one friend, and she was not sure if it was ongoing with the other. JA 125. Juror 8 had doubts about her ability to be fair and impartial and had heard that drug dealing occurred in her neighborhood. JA 125, 128. Juror 22 stated that she had had both a particularly positive and a particularly negative experience with a police officer and had a brother and a cousin who had problems with alcohol. JA 169-70. Juror 16's voir dire answers on these topics are strikingly dissimilar from those given by Jurors 8 and 22, and even assuming Jurors 8 and 22 were youthful, the prosecutor's strikes

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[10]Jurors 6 and 8 were struck before the *Batson* hearing; Juror 22 was struck afterwards. JA 150, 160, 199-200.

against them do not show that youth was a persuasive, or even plausible, reason for striking Juror 16.

b. The Justifications of "Tolerance" and "Lacking Ties in the Community" Were Pretextual

Juror 16's voir dire answers show that she should have been an ideal juror in the prosecutor's eyes as far as her purported tolerance toward drug users. *Miller-El II*, 125 S. Ct. at 2329. Juror 16 stated that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to be a juror; that no one close to her had ever been accused of committing a crime that involved the possession of drugs or drug paraphernalia; that she thought the possession of rock cocaine ought to be against the law; and that neither she nor anyone close to her had ever had a problem with drug or alcohol abuse. There is no evidence in the record that remotely suggests that Juror 16 was tolerant of or sympathetic to persons involved with drugs, and the prosecutor did not try to solicit additional information from her on this topic. *Miller-El II*, 125 S. Ct. at 2327, 2330 n.8 (failure to ask questions on ground later used for strike "undermines the persuasiveness of the claimed concern"). The tolerance justification is implausible and contrary to the evidence in the record. *Id*. at 2329 ("the credibility of the reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy'").

A comparative analysis further highlights the pretextual nature of this rationale. If tolerance in a drug possession case is shown, at least in part, by having friends or relatives

who abused drugs or alcohol and/or had drug or alcohol-related arrests – as the prosecutor suggested with respect to Juror 19 – then at least three white jurors were tolerant, yet none was stricken by the prosecutor.[11] *Miller-El II*, 125 S. Ct. at 2330 ("The fact that [the prosecutor's] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.").[12]

The prosecutor also justified her strikes of Jurors 16 and 19 on the basis that they lacked ties in the community. JA II 5, 13. The prosecutor did not explain what she meant by "lacking ties in the community," and this rationale is not sufficiently clear and reasonably specific or "related to the particular case to be tried" to withstand scrutiny. *Miller-El II*, 125 S. Ct. at 2324; *Batson*, 476 U.S. at 98. Whatever it means, it is hard to see how a retired nurse with seven children and at least five grandchildren (Juror 19) can "lack ties to the community." And as far as the prosecutor knew, Juror 16 spent her entire life in the same community; the record does not show otherwise. Tellingly, the prosecutor did not strike Juror 15, a white juror who, like Juror 16, was a single, employed woman with no children, and who answered the court's questions the same way as Juror 16 did. JA 50, 113; *Miller-El*

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[11]JA 118-19 (Juror 4's father was arrested on a drug charge and had been a recovered alcoholic and drug addict for 30 years); JA 144 (Juror 17's oldest son "had a drunk driving years ago"); JA 197-98 (Juror 30's older son had a cocaine problem from his late teens until mid-20s, but has been clean since going into drug rehabilitation); *see also* JA 201-02 (Juror 31's wife was an emergency room nurse who discussed with Juror 31 her work with persons who had overdosed on drugs).

[12]The State suggests that the prosecutor may have had a sincere belief that all young people – apparently regardless of their stated attitudes – are tolerant of drugs. Pet. Br. at 42. If she did have such a belief, she did not act upon it in a race-neutral way, because she admitted she had not stricken all young jurors. Obviously, an assumption that all young African-American people are tolerant of drugs would be an impermissible basis for a strike, regardless of how sincere the belief.

II, 125 S. Ct. at 2325 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

2. The Demeanor Justification Does Not Support the Strike

a. The Trial Court Did Not Credit the Demeanor Rationale and Did Not Deny the Motion on that Basis

In upholding the denial of the *Batson* challenge on basis of Juror 16's purported demeanor, the California Court of Appeal denied Collins's claim on a ground on which the trial court did not affirmatively rely. The state appellate court held that:

> [t]he trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt. [¶] Based on this evidence, the prosecutor's use of a peremptory challenge as to prospective juror no. 016 was proper.

PA 116. The court further explained that "[b]ecause nothing in the present record, including *the trial court's decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor*, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." PA 116-17 (emphasis added) (citation omitted).

However, the record shows that the trial judge in fact made no findings on the demeanor allegation but denied the *Batson* challenge solely on the youth rationale. The trial court stated:

> With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney; *however*, Ms. 016 was a youthful person, as was 006. And one or more prospective jurors also. [¶] The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016.

JA II 14-15 (emphasis added).

The record thus plainly shows the trial judge's failure to observe the alleged demeanor and his willingness, *however*, to give "the district attorney the benefit of the doubt as to [Juror 16]" because she was "a youthful person," as the prosecutor had claimed. Contrary to the state appellate court's opinion, the record does not reflect that the trial court made a "decision to give the prosecutor the benefit of the doubt *as to prospective juror no. 016's demeanor*." PA 117 (emphasis added). The appellate court did not defer to a conclusion on which trial courts are entitled to great deference, as it purported to do. Rather, it denied Collins's claim on the basis of a credibility determination the trial judge never made.[13] The appellate court did not purport to make its own credibility determination on the

[13]The Magistrate Judge repeated this error. *See supra* at 8.

demeanor justification, and it was in no better position to do so than the federal habeas courts.

b. The Demeanor Justification Is Not Credible, and the Prosecutor Failed To Offer Any Credible Reason To Strike Juror 16

The prosecutor's reliance on demeanor was uncorroborated, and there is no trial court finding on demeanor to which this Court can or must defer. The State's argument that federal habeas courts must defer to a state trial court's credibility determination assumes that the trial court in fact made such a determination. Here, the record shows that the trial court did not. Deference is unwarranted where, as here, the record shows the trial court never made a credibility determination at all, much less a determination resulting from the sincere and reasoned analysis that *Batson* requires.

The State suggests that a demeanor justification is so talismanic that its invocation ends the *Batson* inquiry, rendering irrelevant all other evidence of disingenuity. But *Batson* and its progeny compel a state court to treat assertions of problematic demeanor in the same way any other purported justification is treated – by examining its persuasiveness, in light of all the relevant circumstances. The Ninth Circuit conducted the examination the state courts failed to undertake, and it properly concluded that all of the relevant circumstances show that the demeanor justification is implausible and pretextual.

There is nothing in the trial court record, except the prosecutor's representation, that indicates Juror 16 answered any question by saying "uh-huh" or that she rolled her eyes and turned away from the judge. The fact that the trial judge did not see the alleged demeanor

is itself suspicious in this case; because the judge was conducting the voir dire, Juror 16 would have been facing him, not the lawyers, so the judge would have been in a better position to observe Juror 16. *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) (trial court's "observations are particularly crucial" when prosecutor strikes jurors on demeanor grounds; "[d]etermining who is and is not attentive requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson*").[14]

The persuasiveness of the demeanor rationale is further undercut by examining the prosecutor's use of peremptory challenges as a whole. *Miller-El II*, 125 S. Ct. at 2332 ("The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light"); *Riley*, 277 F.3d at 283 ("each piece of evidence should not be reviewed in isolation"; "[a] reviewing court's level of suspicion may . . . be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts."). Here, as in *Miller-El II*, the prosecutor's "chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion . . . ." 125 S. Ct. at 2339.

The record shows that the prosecutor:

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[14]This case is thus unlike those where courts uphold peremptory strikes on demeanor grounds because the trial judge corroborated assertions regarding a juror's purported demeanor. *See, e.g., Williams v. Rhoades*, 354 F.3d 1101, 1106, 1108-09 (9th Cir.), *cert. denied*, 125 S. Ct. 345 (2004); *United States v. Walton*, 217 F.3d 443, 448 (7th Cir. 2000); *Stubbs v. Gomez*, 189 F.3d 1099, 1102, 1107 (9th Cir. 1999).

• Offered a patently discriminatory reason to strike Jurors 16 and 19 – gender[15] – and then abandoned it after the court informed her that this Court had forbidden peremptory challenges on that basis.[16]

• Stated that she sought to strike Juror 19 because she was young and lacked ties to the community, when in fact Juror 19 was a grandmother and retired nurse with seven children (at least five grown) and five grandchildren.

• Asserted that she sought to exclude Jurors 16 and 19 because they were too tolerant to sit in a drug case, when she kept at least three whites on the jury who had friends or relatives who abused drugs or alcohol and/or had related arrests.

• Claimed that she struck Juror 16 because she was single but did not strike Juror 15, a single white woman whose voir dire answers were the same as Juror 16's.[17]

• Claimed that she struck Juror 19 because her responses regarding her daughter's past drug use showed she "was not sufficiently educated in some areas to decide a case like this" and that "it is beyond any of her experience." JA II 6. This claim may have some force in a complex antitrust case, but it is an absurd rationale to offer in a simple drug possession case. Further, Juror 19 was a retired nurse, making it

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[15]*J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994).

[16]Crediting the prosecutor's statement that gender motivated her strikes is tantamount to finding that she purposefully discriminated in striking Juror 16; discrediting the statement is tantamount to finding that she lied to the trial court regarding her reasons for striking Juror 16.

[17]Viewed on its own terms, the "single" rationale is not reasonably "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and the prosecutor never tried to explain how it was. The record also fails to show how it would bear on Juror 16's ability to serve as a juror in the case at bar. *Walker v. Girdich*, 410 F.3d 120, 123 (2nd Cir. 2005) (granting habeas relief on *Batson* claim where prosecutor struck juror because the juror "was a Black man with no kids and no family").

implausible that, compared to other jurors, she was not "sufficiently educated" or "experienced" to decide a drug case. The prosecutor failed to strike a white juror who gave similar responses.[18]

• Lumped Jurors 16 and 19 together even though they did not have much in common besides race, gender and where they lived: Jurors 16 and 19 differed in age (youthful v. grandmother); occupation status (employed v. retired); number of children (none v. seven); and friends and relatives with drug problems (none v. a daughter). *Garrett v. Morris,* 815 F.2d 509, 514 (8th Cir. 1987).

3. Collins Has Established a *Batson* Violation

The Ninth Circuit properly held that Collins established a *Batson* violation. As shown above, one of the reasons given by the prosecutor for striking Juror 16 (gender) is illegal, and none of other reasons – age, tolerance, lack of ties to the community, marital status or demeanor – is credible. Significantly, here, as in *Miller-El II*, the prosecutor shifted from rationale to rationale; if one was not playing well, she trotted out another. Thus, when the court advised that a gender-based strike was not "going to cut it," she shifted back to a youth rationale, and then abandoned that in favor of "lack of ties to the community." These new reasons "reek[] of afterthought" and are "difficult to credit." *Miller-El II*, 125 S. Ct. at 2328.

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[18]Juror 17 stated: "I think my oldest son had a drunk driving years ago," but Juror 17 never discussed this incident with his son. JA 144.

Jurors 16 and 19 shared few characteristics, except for race and gender. They were differently situated in terms of age, occupation, experience raising children, and experience dealing with close relatives with substance abuse problems. The prosecutor did not treat them as individuals, but instead claimed they were both disqualified from jury service because they were young, too tolerant and lacked ties to the community. That these reasons, pretextual on their own terms, were asserted against disparate black women further highlights that between the State's "explanation, and [Collins's] racial one, race is much the better" explanation for the strike of Juror 16. *Miller-El II*, 125 S. Ct. at 2337.

Although the absolute numbers of jurors considered and peremptory strikes used were smaller than in a capital case like *Miller-El*, the statistical evidence regarding the prosecution's use of peremptories points in favor of a finding of discrimination. *Miller-El II*, 125 S. Ct. at 2325. Of the 23 prospective jurors who were considered in voir dire, three were African-American. The prosecutor used her peremptories to remove two of them, including both black women. She thus used 40% of her peremptories against African-Americans and removed 67% of the black prospective jurors. By contrast, the prosecutor struck only two of the 20 nonblacks (10%). *Miller-El II*, 125 S. Ct. at 2340 (finding discrimination where prosecutors struck 12% of nonblacks but 91% of blacks).

"[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987). Thus, it is of no moment that Collins challenges the exclusion of one

juror, as opposed to several, and that one African-American served on his jury. *Holloway v. Horn*, 355 F.3d 707, 722 (3rd Cir.) (granting claim where three African-Americans sat on jury); *cert. denied sub nom. Beard v. Holloway*, 125 S. Ct. 410 (2004); *Miller-El II*, 125 S. Ct. at 2325, 2330 (granting claim where one black served on jury).

C. Relief Is Proper Under 28 U.S.C. § 2254(d)(2)

The Ninth Circuit correctly concluded that the state appellate court's decision was an unreasonable determination of the facts under (d)(2) because the prosecutor failed to offer any credible justification for striking Juror 16. JA 58.

The state appellate court decision is based on, and misconstrues, the trial judge's ruling, which in turn never firmly resolved the question whether the prosecutor purposefully discriminated in striking Juror 16. After stating that he had not seen the demeanor complained of by the prosecutor, and affirming that Juror 16 was "a youthful person," the trial judge denied Collins's *Batson* motion by stating that it was "prepared to give the district attorney the benefit of the doubt as to" her strike of Juror 16. The judge said the denial was without prejudice and warned that a future *Batson* violation would be reported to the state bar. Giving the prosecutor "the benefit of the doubt" and issuing a warning against future misconduct is not the same as finding as a matter of fact that the prosecutor did not intend to discriminate; at least, it is not a clear or firm finding.

The state appellate court gave two reasons for affirming the denial of the *Batson* motion. First, the court held that the youth justification was proper. In doing so, the court repeated the trial court's error and ignored the fact that the prosecutor had withdrawn the

youth justification. Second, the court held that the demeanor justification was proper, stating that the trial judge properly gave the prosecutor the benefit of the doubt as to Juror 16's demeanor. This holding misstates the record, which shows that the judge did not see the demeanor alleged by the prosecutor and did not deny Collins's motion on the basis of demeanor. Rather, the judge gave the district attorney "the benefit of the doubt" and denied the motion on the basis of the withdrawn youth rationale. On the demeanor ground, then, the state appellate court deferred to a credibility determination that the trial judge never made. Neither justification relied upon by the appellate court to deny the claim is supported by the record. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.) (misapprehension of record can result in unreasonable determination of facts), *cert. denied*, 125 S. Ct. 809 (2004); *Yung v. Walker*, 341 F.3d 104, 111 (2nd Cir. 2003) ("the focus of § 2254(d)(2)" is "on whether the [state] court's factual findings are supported by sufficient evidence").

Even assuming the trial judge can be viewed as having accepted the demeanor rationale, the record shows by clear and convincing evidence that the rationale was not credible, and that the court should not have accepted it in light of the prosecutor's other implausible justifications. The record further shows by clear and convincing evidence that not one credible reason was given to strike Juror 16. *See supra*, § I.B.; JA 58.

As the Ninth Circuit properly concluded, "[t]he fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that 'nothing in the present record indicates the trial court did not approach its task appropriately' highlights the objective unreasonableness

of its assessment of the record." JA 58; *Miller-El II*, 125 S. Ct. at 2333 (finding unreasonable determination of facts where "the state court . . . had before it, and apparently ignored, testimony demonstrating that" the prosecutor's office had used a "jury shuffle" procedure to manipulate the racial composition of the jury); *Wiggins v. Smith*, 539 U.S. 510, 529 (2003) (state court's "assumption that counsel learned of a major aspect of Wiggins' background, i.e., the sexual abuse, from [social service] records was clearly erroneous" and "reflects 'an unreasonable determination of the facts'"); *id.* at 528 (state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision"); *Simmons v. Luebbers*, 299 F.3d 929, 937 (8th Cir. 2002) (granting relief under (d)(2); "[i]t eludes us how the Missouri Supreme Court could have" reached the factual conclusion on which its denial of relief rested given that "independent review of the record" reveals that the state court's characterization of what was presented at the petitioner's first trial was "completely inaccurate"); *Alexander v. Cockrell*, 294 F.3d 626, 630-31 (5th Cir. 2002) (per curiam) (relief proper under (d)(2) because a "close review of the record persuades that the state trial court erred in reading" affidavit that formed the basis of the dispositive finding).

Collins is entitled to relief even under the interpretations of (d)(2) and (e)(1) proffered by the State. The conclusion that the prosecutor did not discriminate is not "supported by 'any substantial evidence' that would allow 'any rational trier of fact' to decide the facts as the state court did." Pet. Br. at 12.

II. THE CALIFORNIA COURT OF APPEAL'S DENIAL OF THE *BATSON* CLAIM INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The Ninth Circuit held that habeas relief was proper under § 2254(d)(1) because the California Court of Appeal's decision involved an unreasonable application of clearly established federal law. JA 35. The State does not meaningfully address this holding, much less explain why it is incorrect.

The California Court of Appeal unreasonably applied the third step of *Batson* in concluding that the trial court had fulfilled its duty to determine whether the prosecutor engaged in purposeful discrimination. The court concluded that "nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor, indicates the trial court did not approach its task appropriately . . . ." PA 116-17. In fact, as shown above, there is plenty in the record to demonstrate that the trial court did not approach its task appropriately. The trial judge did not recognize that the prosecutor had effectively withdrawn her youth justification, and he denied the *Batson* motion solely on the basis of that justification. Although the judge engaged in a partial comparative analysis of the youth rationale by comparing Juror 16 to Juror 6, he overlooked both the decisive dissimilarities between the two jurors and the fact that the prosecutor had also asserted youth as a reason to strike a grandmother (Juror 19). The judge did not recognize that the prosecutor had equated youth with tolerance and lack of ties to the community, and he failed to assess the persuasiveness of those rationales as to Juror 16, or the claim that Juror 16 was struck because she was single. The judge's ruling

did not mention that the prosecutor had asserted an illegal basis for striking Jurors 16 and 19 (gender), or that many of the reasons for striking Juror 19 – youth, lack of ties to the community, lack of knowledge and experience – were facially implausible. Finally, the judge expressly noted that he had not observed the demeanor alleged by the prosecutor.

In cases involving claims of the failure to investigate and present mitigating evidence at the penalty phase of a capital trial, this Court has held that state courts unreasonably apply federal law by failing to evaluate the totality of the available mitigating evidence, as this Court's precedents require. *Williams*, 529 U.S. at 397; *Rompilla v. Beard*, 125 S. Ct. 2456, 2467 (2005). In *Wiggins*, the Court held that state court's "application of *Strickland*'s[19] governing legal principles was objectively unreasonable" because "the court did not conduct an assessment of whether the decision to cease all investigation . . . actually demonstrated reasonable professional judgment." 539 U.S. at 527.

Similarly, in a *Batson* case, the state court is required to "conduct an assessment" of all relevant circumstances bearing on the plausibility of the prosecutor's proffered reasons for striking a juror. The record here shows that the trial court failed to evaluate the totality of the available evidence and that the state appellate court was objectively unreasonable in concluding that the trial court had fulfilled its duty. *Walker*, 410 F.3d at 123-24 (state court unreasonably applied *Batson* where prosecutor's justification for striking black juror was not race-neutral); *Lewis*, 321 F.3d at 834-35 (state court unreasonably applied *Batson* where "the

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[19] *Strickland v. Washington*, 466 U.S. 668 (1984).

trial court did not conduct a meaningful step three analysis" and "the appellate court did not attempt to rectify the trial court's failure").

III. THE INTERPLAY OF 28 U.S.C. § 2254(D)(2) AND (E)(1)

In light of the State's claims as to the proper reading of 28 U.S.C. § 2254(d)(2) and (e)(1), Collins discusses here how and when (d)(2) and (e)(1) apply to a particular claim. In sections IV and V below, Collins addresses the flaws in the State's interpretation of the provisions.

As a general matter, sections 2254(d)(2) and (e)(1) are each concerned with state court factual findings and their effects in federal habeas corpus proceedings. That both provisions – housed in different subsections and prescribing different standards and approaches – speak to how a federal court is required to handle state court factual determinations creates a tension on the surface. On the one hand, subsection (e)(1), speaking in apparently mandatory terms, says state court factual findings "shall be presumed to be correct" absent a showing to the contrary by "clear and convincing evidence." On the other hand, subsection (d)(2) commands federal courts to assess the reasonableness of state court factual determinations "in light of the evidence presented in the State court proceeding" – that is, to look *beneath* the state court's factual *conclusions* (the same conclusions subsection (e)(1) would presume correct) to determine whether those conclusions are reasonable in light of the evidence that was before the state court.

This begs the question: How can a federal court *presume* a state court's *conclusion* to be correct ((e)(1)), while simultaneously looking *beneath* that conclusion to assess the

reasonableness of the state court's work in *reaching* that conclusion to begin with ((d)(2))? As described below, the solution to this inconsistency lies not in forcing two facially incompatible (or, at best, redundant) provisions together, but in recognizing the individual roles each was designed to play in the overall scheme of habeas review. Section 2254(e) is addressed to questions that arise in the context of fact-development in federal court, and it operates to presume state court factual findings correct unless the petitioner demonstrates the ability, both procedurally ((e)(2)) and substantively ((e)(1)), to rebut that presumption with evidence presented for the first time in federal court. Section 2254(d), by contrast, operates to limit a federal court's ability to grant habeas relief once it has found a constitutional violation, and allows such relief only where the federal court has identified a statutorily significant problem with the state court's treatment of the petitioner's claim. Within this framework, (d)(2) directs the federal court to scrutinize what the state court did *with the evidence before it*, and permits a grant of habeas relief only where the state court's erroneous denial of relief resulted from an objectively "unreasonable determination of the facts . . . ."

A. 28 U.S.C. § 2254(d)(2) and (e)(1) Are Mutually Exclusive Provisions That Do Not Apply to the Same Claim

The structure and text of § 2254(d) and (e) indicate that (d)(2) and (e)(1) are mutually exclusive provisions that do not apply to the same factual matter, but instead – as their placement in different subdivisions of § 2254 suggests – operate to address different situations and accomplish different tasks.[20]

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[20]Perhaps because of the confusion inherent in trying to apply both (d)(2) and (e)(1) to the same factual issue, the lower federal courts have said remarkably little about the relationship between these

Because federal habeas courts typically assess the state of the factual record early in the adjudicative process, we begin with § 2254(e). On its face, § 2254(e) is crafted to serve two finite and closely related purposes: limiting the circumstances under which habeas petitioners are permitted to present evidence to a federal court in the first instance; and defining the standard of proof that must be met when a petitioner is permitted to present evidence and seeks to use that evidence to challenge a factual determination made by a state court. The first of these purposes was recognized by this Court in (*Michael*) *Williams v. Taylor*, 529 U.S. 420 (2000) (construing § 2254(e)(2)). The second is plain from the language of § 2254(e)(1), which provides, in relevant part, that "a determination of a factual issue made by a State court shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Read together, subdivisions (1) and (2) of § 2254(e) thus have a discrete function: to prescribe when an evidentiary hearing is permitted, what stature pre-existing state court factual findings will have at such a hearing, and what a petitioner must produce at the federal hearing in order justify the setting aside of the state court's findings.[21]

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provisions during the more than nine years since AEDPA took effect. Recently, however, a handful of courts have analyzed that relationship, and although their results contain relatively minor variations, they have generally settled on approaches consistent with the argument petitioner presents here. *See generally Lambert v. Blackwell*, 387 F.3d 210, 235-237 (3rd Cir. 2004), *cert. denied*, 125 S. Ct. 2516 (2005); *Taylor,* 366 F.3d at 999-1008. As described *infra*, the State can claim no such support for the *Jackson v. Virginia*-based theory it seeks to advance.

[21]The history of the habeas statute further supports this reading. In drafting AEDPA, Congress moved the presumption of correctness contained in former § 2254(d) to § 2254(e)(1), and placed it next to the newly drafted (e)(2). Under the former § 2254(d)(8), the requirement that the petitioner rebut the presumption of correctness by convincing evidence applied only when there had been "an evidentiary hearing in the proceeding in the Federal court." Although this language does not appear in (e)(1), neither does language stating that the burden of rebutting the presumption by clear and convincing evidence applies

Where there is no federal evidentiary hearing – either because the petitioner cannot meet the demanding requirements of § 2254(e)(2) or because the factual record that emerged from the state court is complete with regard to the claim under consideration – § 2254(e) is best read as having no role to play in the federal habeas court's analysis. Although the language of (e)(1) is broad enough on its face to touch every instance of a federal court's consideration of a state court's factual determination – as evidenced by this Court's brief statements to that effect in *Wiggins* and *Miller-El II* – such a reading is neither consistent with the canon that a "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *Market Co. v. Hoffman,* 101 U.S. 112, 115-16 (1879) (citation omitted) (quoted in *Duncan v. Walker*, 533 U.S. 167, 174 (2001)), nor necessary to the overarching AEDPA objective of maintaining respect for state court judgments.

Section 2254(e)(1) should not and need not be read to apply beyond the scenario in which a petitioner is permitted to present new evidence in federal court for the simple reason that (d)(2), by its plain language and position in the statutory scheme, is tailor-made, and better suited, to the task. Unlike (e)(1) – which is situated in the same subdivision as the

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in all cases regardless of whether a federal evidentiary hearing is held. It cannot be assumed that Congress intended to repudiate this history, and (e)(1)'s placement next to the evidentiary hearing standard in (e)(2) suggests that it did not. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the . . . incorporated law, at least insofar as it affects the new statute"); Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. Pub. Int. L.J. 135, 139 (1996) ("[T]he omission of the former § 2254(d)'s reference to the petitioner's burden 'in' a federal hearing is easily explained. This new provision is considerably shorter than its predecessor and may only reaffirm prior law in a more concise way.").

provision governing the availability of new fact development in federal court – (d)(2) is part of AEDPA's mechanism for limiting a federal court's power to remedy a constitutional violation. (*Terry*) *Williams*, 529 U.S. at 412 (§ 2254(d) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court"); *Wiggins*, 539 U.S. at 534 ("The requirements for habeas relief established by 28 U.S.C. § 2254(d) are thus satisfied."). As such, § 2254(d)(2) is concerned not with whether evidence presented for the first time in federal court establishes a constitutional violation,[22] but with whether the state court's denial of relief on a claim the federal court has found meritorious under § 2254(a) is attributable to the state court having unreasonably determined the facts from the evidence it had before it.

That it is best to read (d)(2) as occupying the "field" where a federal habeas court adjudicates a constitutional claim using only the record that was before the state court is clear when one considers the alternative. If (e)(1) were part of the equation, then the federal court would be required to apply two different standards – one a standard of proof ((e)(1)'s "clear and convincing" requirement), and the other an assessment of past performance by another court ((d)(2)'s "reasonableness" requirement) – to the same factual issue. This makes no sense as a practical matter, especially in view of the fact that (e)(1) speaks to evidence that

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[22]As this Court recognized in *Holland v. Jackson*, 124 S.Ct. 2736, 2738 (2004) (per curiam), "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer." *See Monroe v. Angelone*, 323 F.3d 286, 297-99 & n.19 (4th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003); *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001); *Rojem v. Gibson*, 245 F.3d 1130, 1140 (10th Cir. 2001).

was not before the state courts, while (d)(2) is expressly restricted to evidence that was before the state courts. Moreover, the confusion and excess work brought about by using both standards yields no appreciable benefit in the form of added protection for state court decisions. After all, as this Court explained in (*Terry*) *Williams*, Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect" in § 2254(d), such that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision [was] . . . erroneous[] or incorrect[]. Rather, that [decision] must also be unreasonable." 529 U.S. at 411.

In light of the confusion and unnecessary doubling of analyses that would be inherent in reading both (e)(1) and (d)(2) to apply to the same factual issues, and in light of the cues to be taken from each provision's placement in different parts of the statutory scheme, they should be given "independent meaning." (*Terry*) *Williams*, 529 U.S. at 404. Where a petitioner is permitted to present new evidence to a federal habeas court for the purpose of challenging an existing state court factual finding, (e)(1) sets the bar the petitioner must surmount. But where the evidence before the federal habeas court is the same as the evidence that was before the state court, and the federal habeas court has concluded that a constitutional violation has been shown, habeas relief is permitted where the petitioner can further demonstrate that the state court's failure to find error is attributable to unreasonableness in its determination of a fact material to the resolution of the claim. This approach is workable and clearly understandable, avoids the unwieldiness of applying two

different inquiries to the same issue, assigns discrete but important roles each provision, and results in no derogation of AEDPA's core purposes.

IV. THE STATE'S ARGUMENT THAT § 2254(D)(2) INCORPORATES A "REASONABLE FACTFINDER" STANDARD SHOULD BE REJECTED BECAUSE IT IS INCONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND THIS COURT'S CASES CONSTRUING THE STATUTE

The State contends that § 2254(d)(2) incorporates the sufficiency of the evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Pet. Br. at 25-27. It argues that "[u]nder the (d)(2) standard, the habeas corpus court must defer to state-court findings of fact if supported by 'any substantial evidence' that would allow 'any rational trier of fact' to decide the facts as the state court did." *Id*. at 12. The State is wrong.

A. The State's Position Is Inconsistent with the Statute's Plain Language

The State never comes to terms with the fact that (d)(2) speaks in terms of "reasonableness," not "rationality." Throughout its brief, the State conflates the two terms. Pet. Br. at 27 ("[r]eview for reasonableness or rationality inquires whether any 'substantial evidence' supported the trier of fact's determination"); *id*. at 25 ((d)(2) "points to *Jackson v. Virginia*-like review for rationality or reasonableness"). As a general matter, the terms may or may not be synonymous depending on how they are used in a particular legal rule. For example, under the "rational basis" test for equal protection claims, classifications are upheld if they are "reasonable." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). Here, however, the State seeks to apply the specific rationality test of *Jackson*, which provides "sharply limited" review of sufficiency of the evidence claims. *Wright v. West*, 505

U.S. 277, 296 (1992) (pl. op.). *Jackson*'s rationality test cannot be confused with the reasonableness standard of (d)(2).

The *Jackson* standard is based on the premise that once a defendant has been found guilty of the crime charged, the role of the factfinder (often a jury) as the weigher of all of the evidence is not to be disturbed except as necessary to guarantee due process. *Jackson*, 443 U.S. at 319. It requires reviewing courts to consider all of the evidence in the light most favorable to the prosecution. *Id.* If the record supports conflicting inferences, reviewing courts "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id*. at 326. "[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957-58 (9th Cir. 2004). *Jackson* "does not require scrutiny of the reasoning process actually used by the factfinder, if known." *Jackson*, 443 U.S. at 319 n.13. This brief review of the *Jackson* standard shows both why the State would like to import it into § 2254(d)(2), and why it would be inappropriate to do so.

The plain terms of § 2254 (d)(2) require federal habeas courts to examine (1) the state court's "determination of the facts" (2) "in light of the evidence presented in the State court proceeding," and (3) then decide whether the determination was "unreasonable." Congress specifically used these terms and not the terms suggested by the State. (*Terry*) *Williams*, 529 U.S. at 411 (in analyzing the "unreasonable application" prong of § 2254(d)(1), emphasizing that "Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or

'incorrect'"); *Arkansas v. Farm Credit Services*, 520 U.S. 821, 827 (1997) (statutory language is to be enforced according to its terms). If Congress had intended to incorporate the *Jackson* standard – enunciated a decade and a half before AEDPA was enacted – into (d)(2), it would have used the terms of that standard. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts assume that Congress is aware of existing law when it passes legislation). But Congress did not use those terms, and this Court should decline the State's invitation to rewrite the statute to implement its proposal. *Bates v. United States*, 522 U.S. 23, 29 (1997) (courts ordinarily resist reading words into a statute that do not appear on its face).

The State's argument is also rebutted by the terms used in other parts of the statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (courts are to consider the statute in all of its parts when construing any one part). Section 2254(f) addresses challenges to "the sufficiency of the evidence." Thus, Congress was aware of insufficiency claims in enacting AEDPA; had it intended to adopt an insufficiency standard in (d)(2), it would have done so. Section 2254(d)(1), the neighboring provision in the part of the statute containing the limitations on the power to grant habeas relief, uses the same modifier as (d)(2) in requiring that an application of law be "unreasonable" (not "irrational") in order for relief to be granted.

B. The State's Position Is Inconsistent with this Court's Cases Construing 28 U.S.C. § 2254(d)

The State's argument is also contrary to this Court's precedents interpreting and applying (d)(2). The State concedes that the *Wiggins* and *Miller-El* decisions "indicate that this Court under AEDPA has engaged in a greater level of scrutiny of state-court fact determinations than the *Jackson v. Virginia* type of rationality standard would permit." Pet. Br. at 31. The State also admits that "in the context of a discussion regarding § 2254(d)(2) and (e)(1)," *Miller-El I* "indeed stated that '[d]eference does not imply abandonment or abdication of judicial review' and that a "federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id*. Yet the State asserts that "neither these statements, nor the results in *Wiggins* and *Miller-El v. Dretke*, are inconsistent with the State's argument." *Id*. But the State's argument *is* inconsistent with this Court's caselaw, and the State cannot explain how it is not.

In *Lindh*, this Court explained that § 2254(d) "deal[s] with, among other things, the adequacy of state factual determinations as bearing on a right to federal relief . . . ." 521 U.S. at 332. In *Wiggins*, the Court examined the adequacy of state court factfinding, and concluded that the state decision resulted in an unreasonable determination of the facts because it was based, in part, on a "clear factual error": it assumed that defense counsel had learned from social service records that their capital client had been sexually abused, when the records in fact did not mention any such abuse. 539 U.S. at 528.

In *Miller-El II*, the Court concluded that the state court's *Batson* decision resulted in an unreasonable determination of the facts where the state court ignored testimony of past manipulation of the racial composition of juries by the same district attorneys' office that prosecuted the habeas petitioner. 125 S. Ct. at 2333. The Court disagreed with the state court's credibility determination that the prosecutor did not discriminate, and concluded that the state court finding was unreasonable. *Compare Tibbs v. Florida*, 457 U.S. 31, 37 (1982) (*Jackson* standard does not "draw[] the appellate court into questions of credibility"). Relief was appropriate under (d)(2) even though "at some points the significance of [the habeas petitioner's] evidence" of discrimination was "open to judgment calls." *Miller-El II*, 125 S. Ct. at 2339.

Consistent with the terms of the statute and this Court's jurisprudence, the lower federal courts have held that (d)(2) requires federal habeas courts to examine the adequacy of state court factual determinations. *See, e.g., Taylor*, 366 F.3d at 999-1000 ((d)(2) requires federal habeas courts to review state court's fact-finding processes); *Lambert*, 387 F.3d at 239 ("the procedures a state court applies when adjudicating a petitioner's claims . . . may well affect whether a state court's factual determination was 'reasonable'" under (d)(2) "or whether the petitioner has adequately rebutted a presumption that the state court's determination is correct"); *compare Jackson*, 443 U.S. at 319 n.13 (under reasonable factfinder standard, reviewing court does not consider reasoning process actually used by trier of fact).

The State's argument is also inconsistent with this Court's interpretation of the "unreasonable application" clause of § 2254(d)(1). In *Williams*, the Court rejected the interpretation that a state court decision involves an unreasonable application of federal law "only if the state court has applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" 529 U.S. at 409. The Court ruled that an "'all reasonable jurists' standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one." *Id*. at 410. "The placement of this additional overlay on the 'unreasonable application' clause was erroneous." *Id*. at 409; *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) (cited by the State) (under *Williams*, "it is not enough that a single reasonable jurist may agree with the application" of federal law by the state court) (footnote omitted).

Despite *Williams*, the State argues that the standard under (d)(2) is "whether all reasonable decision-makers would have been compelled to agree with the habeas corpus petitioner," a standard that "equates with the habeas corpus 'any rational trier of fact' standard described in *Jackson v. Virginia* . . . ." Pet. Br. at 26-27. Elsewhere the State argues that "[i]n light of the identical use of the term 'unreasonable,' the 'unreasonable determination of the facts' standard in (d)(2) also involves the same kind of appraisal of 'unreasonableness' as is provided in (d)(1)." Pet. Br. at 26. This latter argument, coupled with the Court's interpretation of (d)(1) in *Williams*, is fatal to the State's claim.

Not only is the State's position inconsistent with this Court's caselaw, it is unsupported by any authority. The federal courts have been applying and construing AEDPA

for over nine years now, but tellingly, the State has not cited a single case in which a court has read (d)(2) as prescribing a *Jackson v. Virginia* type of review.[23]

The State's attempt to ratchet down the level of federal habeas scrutiny is particularly ill-considered in the *Batson* setting, where the courts are charged with protecting the equal protection right to jury selection free of racial discrimination; some prosecutors are taught how to discriminate and evade detection under *Batson*;[24] discriminatory intent can be difficult to prove even in the strongest of cases;[25] a violation constitutes a rare structural error requiring a new trial without a showing of prejudice; and a deferential standard of review is already built into the substantive standard of the underlying constitutional claim.

V. THE STATE'S PROPOSAL TO READ A "RATIONAL FACTFINDER" STANDARD INTO § 2254(E)(1) SHOULD ALSO BE REJECTED

The State contends that just like (d)(2), (e)(1) must be read as containing the *Jackson* standard. The State asserts that (e)(1)'s "presumption, when attacked solely on the state record, cannot properly be said to be defeated by 'clear and convincing evidence' if the state record contains 'any substantial evidence' upon which 'any rational trier of fact' could have found the facts as the state court did under the applicable burden of proof." Pet. Br. at 30.

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[23] *Jackson*'s highly deferential standard is also premised on a justification that is not present in the vast majority of habeas cases: Obtaining relief under *Jackson* signifies the rejection of the core findings of a jury and precludes a retrial.

[24] *See*, *e.g.*, *Wilson v. Beard*, No. 04-2461, 2005 WL 2559716 (3d Cir. Oct. 13, 2005) (discussing videotaped training session advising Philadelphia prosecutors to avoid "young black women" as jurors and instructing on "the best way to avoid any problems" under *Batson*).

[25] *Miller-El II*, 125 S. Ct. at 2340 (Breyer, J., conc.). "[T]he discriminatory use of peremptory challenges remains a problem," and "the use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before." *Id*. at 2341-42.

This argument is untenable for the same reasons as its (d)(1) claim fails: it is inconsistent with the statute's plain language and this Court's caselaw.

The State tries to bootstrap (e)(1) to its (d)(2) argument. It contends that if (d)(2) is read as containing the *Jackson* standard, then (e)(1) must be read the same way, too. "Applying any more instrusive standard [under (e)(1)] would risk treating § 2254(e)(1) anomalously as a relaxation rather than a tightening of the availability of the writ." Pet. Br. at 30. The State also lumps the two provisions together. *Id.* at 15 ("Separately and together, these provisions prohibit habeas corpus relief for challenges based on disputes about the facts arising solely from a state court record that rationally supported the state court's findings."). Although the State acknowledges this Court's explanation that (d)(2) and (e)(1) represent "independent requirements," Pet. Br. at 28, it ignores this teaching.

Miller-El I explained that (d)(2) "contains the unreasonable requirement and applies to the granting of habeas relief . . . ." 537 U.S. at 341-42. By contrast, "[t]he clear and convincing evidence standard is found in § 2254(e)(1) . . . [and] pertains only to state-court determinations of factual issues, rather than decisions." *Id*. *Miller-El I* held that the provisions cannot be merged together to require habeas petitioners to prove that a factual determination is unreasonable by clear and convincing evidence. *Id.* at 341.

Regardless of the burden of proof for rebutting particular factual determinations, the requirements for granting the writ are contained in § 2254(d). Because (d)(2) and (e)(1) are independent provisions designed to serve different purposes, there is no "anomaly," as the State claims, in their containing different standards. The State's argument renders the

provisions superfluous and fails to give them independent meaning. (*Terry*) *Williams*, 529 U.S. at 404 (it is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute").

The State's argument is undercut by the language used in the provision immediately succeeding (e)(1). Section 2254(e)(2)(B), drafted as part of AEDPA, precludes a federal evidentiary hearing when the petitioner "has failed to develop the factual basis of the claim in State court proceedings" unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Thus, had Congress intended to add a "factfinder" standard to the "clear and convincing" test of (e)(1), it would have done so.

The State never persuasively explains why *Wiggins* and *Miller-El* render its proposed reading of (e)(1) anything other than a dead letter. The State's response to these cases is to characterize the Court's (e)(1) (and (d)(2)) analysis in *Wiggins* as dicta, because it followed the Court's finding of (d)(1) error; to claim that *Wiggins* did not really mean what it said when it deemed a determination of fact unreasonable because it was based, in part, on a "clear factual error"; and to assert that *Miller-El* "indicates that this Court had determined that no rational fact-finder could have rejected the inference of race discrimination in that case." Pet. Br. at 32, 33. The State cannot wipe the slate clean by ignoring (*Wiggins*) or rewriting (*Miller-El*) the Court's key cases on (d)(2) and (e)(1).

In support of its argument, the State claims that "the (e)(1) presumption of correctness is now unconditional; AEDPA entirely deleted what had been eight enumerated conditions or exceptions to the presumption's operation" that were contained in the former § 2254(d). Pet. Br. at 22; *id*. at 28. According to the State, "Congress' deletion of conditions or exceptions to the presumption . . . illuminates the direction in which Congress meant to move in § 2254(e)(1)." Pet. Br. at 29. The deletion may suggest a directional tilt, but it does not hint at the direction proposed by the State.

The State's argument proves too much. Among the conditions deleted are the requirements that the state court have had jurisdiction, afforded defendant due process, and actually resolved the merits of the factual dispute. Former 28 U.S.C. § 2254(d)(1), (4), (7). "Read literally," AEDPA thus "eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard to the process from which it was generated." Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.). "A regime of that kind may, of course, raise serious due process questions – at least in some cases." *Id*. (footnote omitted); *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."). This Court has never suggested that AEDPA so radically altered the pre-existing habeas regime.

Wiggins and *Miller-El II* demonstrate that this Court has declined to read (e)(1) or (d)(2) to require federal habeas courts to rubber-stamp state court findings of fact regardless

of how they were made or whether they are supported by the record. *See also Taylor*, 366 F.3d at 999-1000; *Lambert*, 387 F.3d at 238-39; Yackle, *Federal Hearings Under the New Habeas Corpus Statute*, 6 B.U. Pub. Int. L. J. 135, 141 (1996) ((e)(1) does not "dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record"; (e)(1) "departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards").

The State argues that "[t]he burden now always devolves upon the prisoner to rebut the presumption not just with 'convincing' evidence as in former § 2254(d) but with 'clear and convincing evidence.' This is an extremely heavy burden." Pet. Br. at 28. So does the State contend that there was formally a category of "unclear but convincing evidence" that would have rebutted the presumption? "Convincing" is, and was, the key term, and the addition of the word "clear" does not increase the petitioner's burden. Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.).

The State's fallback argument is that under (e)(1), the "clear error" standard should apply, as it does on appeal of factfindings under *Batson*. Pet. Br. at 35. Collins agrees that this is a reasonable construction of the statute. It is the language used in *Wiggins* and *Miller-El II*, and in Fed. R. Civ. P. 52(a) for reviewing findings of fact by district courts. It is a deferential standard – allowing reversal only when the reviewing court is left with a "definite

and firm conviction that a mistake has been committed" – and one federal courts are used to applying.

The State's *Jackson* proposal, by contrast, would allow relief only when the state court acted "irrationally." As the State concedes, it would be a rare case when one could say that the trial judge acted irrationally in finding facts. But judges do make serious, material mistakes of fact short of acting irrationally. Subsection (e)(1) is designed to allow habeas petitioners to overcome defective findings of fact by clear and convincing evidence, a "demanding but not insatiable" standard. *Miller-El II*, 125 S. Ct. at 2325.

CONCLUSION

For all of the above reasons, this Court should affirm the judgment of the Ninth Circuit.

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