No. 17-6382
CAPITAL CASE

In the
SUPREME COURT of the UNITED STATES

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MOHAMMAD SHARIFI,
Petitioner,
v.

STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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December 18, 2017

CAPITAL CASE
QUESTION PRESENTED
(Restated)

1. Whether a state court may require a state post-conviction petitioner who argues that his counsel was ineffective for failing to raise a *J.E.B.* claim at his trial to allege the key facts necessary for the state court to evaluate the *J.E.B.* claim that trial counsel allegedly failed to raise.

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STATEMENT OF THE CASE

In December of 1999, Mohammad Sharifi ("Sharifi") killed his estranged wife, Sarah Kay Smith, and her boyfriend, Derrick Brown and dumped their bodies in the Tennessee River. *Sharifi v. State*, 993 So. 2d 907, 912 (Ala. Crim. App. 2008). In 2005, he was convicted of capital murder pursuant to section § 13A–5–40(a)(10), Ala.Code 1975, for the murder of two or more persons pursuant to one scheme or course of conduct. *Id.* at 911. The jury recommended death by a vote of ten to two, and the trial court accepted the jury's recommendation and sentenced Sharifi to death. *Id.*

The Alabama Court of Criminal Appeals affirmed Sharifi's conviction and sentence. *Id*. at 950. Invoking Alabama's plain error rule[1], the ACCA reviewed Sharifi's direct appeal claim regarding *J.E.B. v. Alabama ex rel. T.B*., 511 U.S. 127 (1994) and *Batson v. Kentucky,* 476 U.S. 79, 96-98 (1986). *Sharifi*, 993 So. 2d at 928. The court noted that Sharifi: "fail[ed] to identify any specific jurors who were improperly struck. Indeed, this section of his brief identif[ied] no juror by name or juror number." *Sharifi*, 993 So. 2d at 928. Nonetheless, the court examined the

[1] Alabama's plain error doctrine is explained in Rule 45A of the Alabama Rules of Appellate Procedure: "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

record, including juror questionnaires, and found "no inference that the prosecutor was engaged in purposeful discrimination toward black or female prospective jurors." *Id.*

In May of 2009, Sharifi filed his first petition for postconviction relief, later amending his petition to add additional claims. *Sharifi v. State*, No. CR-14-1349, 2016 WL 4732867, at *1 (Ala. Crim. App. Sept. 9, 2016). In June 2015, the circuit court summarily dismissed Sharifi's petition including his claim that trial counsel rendered ineffective assistance under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), because trial counsel did not challenge the jury composition under *J.E.B. v. Alabama ex rel. T.B*., 511 U.S. 127 (1994). The Alabama Court of Criminal Appeals (hereinafter "ACCA") affirmed the dismissal of Sharifi's petition, including his *J.E.B.*-based ineffective assistance claim, on September 9, 2016. *Sharifi*, 2016 WL 4732867, at *2-5. In so doing, the ACCA relied in part on its earlier decision rejecting a similar ineffective assistance/*Batson* claim in *Carruth v. State*, 165 So. 3d 627, 638 (Ala. Crim. App. 2014).

REASONS FOR DENYING THE WRIT

Sharifi's petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. Sharifi's petition is splitless, heavily fact-bound, and he has not shown that any of the grounds for granting certiorari review set out in Rule 10 exist. His claims were rejected by the

ACCA after a thorough consideration of the facts and circumstances of this case, and Sharifi has shown no conflict between that decision and a decision of any state court of last resort, any decision of a United States court of appeals, or any decision of this Court, including *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Sup. Ct. R. 10. Additionally, Sharifi's failure to raise a *J.E.B.* claim at trial renders this case a poor vehicle to address the purported conflict between the ACCA's decision and the requirements of *J.E.B.*. For the reasons set forth below, Sharifi's petition is without merit and should be denied.

I. Deciding Sharifi's Claim of Ineffective Assistance of Counsel did not Require a the ACCA to Determine Whether the Underlying Claim was Actually Meritorious.

A. The ACCA was Reviewing a *Strickland* Claim, not the Underlying *J.E.B.* Claim.

Sharifi's sole argument for granting the writ in this matter is that "the Alabama courts have added an extra element to pleading a claim that defense counsel was ineffective for not making a *J.E.B.* claim in the trial court." (Pet. at 4.) However, Sharifi's argument represents his fundamental misunderstanding of both the procedural posture of this case and the nature of the claims that were before the ACCA.

What Sharifi fails to understand is that in both is case and in *Carruth*, ACCA *was not* addressing a substantive *Batson/J.E.B.* challenge. Instead, it was addressing an ineffective assistance of counsel (hereinafter "IAC") claim under

Strickland, supra.[2] The distinction between a *Strickland* claim, such as the one at issue here, and a *Batson/J.E.B.* claim is particularly important because Sharifi contends that the ACCA "added an extra element" to his *Strickland* claim. But in making this argument he relies on the elements of the underlying *J.E.B.* claim, not the elements of *Strickland*. (Pet. at 5.)

The problem is that the ACCA did not have to reach the merits of his underlying *J.E.B.* claim. Because the claim presented to the state courts was a claim of ineffective assistance of counsel. Accordingly, the ACCA's duty was to "determine whether trial counsel were ineffective for failing to challenge the State's peremptory strikes." *Carruth*, 165 So. 3d at 638; *Sharifi*, 2016 WL 4732867, at *2 (applying *Strickland* to Sharifi's claim). Determining whether trial counsel rendered deficient performance did not require the ACCA to consider whether trial counsel would have ultimately prevailed in raising a *J.E.B.* claim.[3]

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[2] Sharifi's misunderstandings also extend to his statement of the relevant constitutional provision. Sharifi contends that the Fourteenth Amendment is at issue. (Pet. at 1.) It might have been, had his substantive *J.E.B.* claim been at issue. However, since it is not, and this matter concerns an IAC claim, the relevant constitutional provision is the Sixth Amendment right to counsel.

[3] In this regard, Sharifi's assertion that a *Batson/J.E.B* violation may be found when even single juror is struck on the basis of race, while correct, is inapposite. (Pet. at 5.) In *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008), this Court was addressing a substantive *Batson* claim on direct review, rather than on state collateral review as is the case here, and the sufficiency of the prosecutor's reasons for striking a black juror, *Batson*'s third prong, not the question of whether, under *Strickland*, trial counsel unreasonably

Instead, the Court's interest and analysis properly focused on whether trial counsel could have raised a *J.E.B.* claim *at all.* By finding that Sharifi failed to meet his burden of pleading under state postconviction rules, the ACCA was not adding an additional prong to the *Batson/J.E.B.* test. Rather, it was finding that Sharifi had simply failed to allege sufficient facts to show that he'd met the *first* prong of the *Strickland* test.

B. The Composition of the Jury was a Critical Fact to Determining Whether Trial Counsel Could Have Raised a *J.E.B.* Challenge.

The ACCA's first inquiry was whether Sharifi had shown that trial counsel could have established sufficient grounds to move beyond *J.E.B.*'s requirement that there be a prima facie case of discrimination[4]:

> [T]his Court must determine whether [the] petition contained sufficient facts that, if true, established an inference of racially discriminatory jury selection. Furthermore, the petition must contain

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failed to raise a *Batson* claim. As explained below, because Sharifi's argument that trial counsel could have made out a prima facie case relied entirely on the percentage of women struck by the State, the composition of the venire and jury was critical.

[4] In *Batson*, this Court laid out a tripartite procedure for making *contemporaneous* challenges to the striking of the jury: (1) the defense makes a prima facie showing, based on "all relevant circumstances," of racially motivated striking, (2) the prosecution proffers race-neutral reasons for the strikes, and (3) the trial court determines whether the defendant established purposeful discrimination. *Batson v. Kentucky,* 476 U.S. 79, 96-98 (1986). Although the "final step involves evaluating the persuasiveness of the justification proffered by the prosecutor … the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (internal quotation marks omitted). *See also J.E.B.*, 511 U.S. at 146.

> facts that, if true, established that counsel were deficient for failing to bring that to the attention of the trial court by raising a *Batson* challenge.

Carruth, 165 So. 3d at 638; *Sharifi*, 2016 WL 4732867, at *5. If, like Sharifi, a petitioner fails to present the court with sufficient facts to raise in inference of discrimination, then he has failed to show that trial counsel could have raised a *J.E.B.* challenge. *Id.*

It was this threshold test that Sharifi failed to meet. The ACCA reviewed Sharifi's petition and found that he had failed to meet his burden of pleading the full factual basis of his claim, pursuant to Rule 32.6(b), Ala.R.Crim.P. *Sharifi*, 2016 WL 4732867, at *4-5. The ACCA found that while Sharifi alleged that the State used 20 of its 25 strikes against women, he failed to show either the make-up of the venire or of the jury selected. *Id.*, *citing Carruth*, 165 So. 3d at 639. This is critical information for assessing whether trial counsel could have made out a prima facie case of discrimination.[5] The Third Circuit explained the significance of venire composition in *Lewis v. Horn*, 581 F.3d 92 (3d Cir. 2009), holding:

[5] Though the ACCA did not reach the question of whether trial counsel could have made a reasonable strategic choice not to raise a *J.E.B.* motion, it is worth noting that Sharifi also failed to plead that trial counsel's decision was not a reasonable strategic decision. *Sharifi*, 2016 WL 4732867, at *4-5; *see also Carruth*, 165 So. 3d at 639 ("Counsel could have been completely satisfied with the jury that was selected and not wished to potentially disturb its composition by making a *Batson* challenge.") It is readily apparent that the composition of the venire and jury would be of direct relevance to the question of whether trial counsel's decision not to challenge the state's strikes was reasonable. Considering *Strickland*'s presumption

> Additionally, Lewis acknowledges that the racial composition of the entire venire remains unknown and instead posits that "the venire likely was statistically similar to the overall population of Philadelphia." Without information about the number and racial composition of the entire venire, we cannot calculate the exclusion rate and we lack the "contextual markers" to analyze the significance of the strike rate. Thus, even if we were to accept as true Lewis's bald assertion that eight of the twelve venire members whom the prosecutor struck were African American, a strike rate of 66.67% is insufficient information to establish a prima facie case of racial discrimination in the exercise of peremptory strikes.

Id. at 104; *see also Carruth*, 165 So. 3d at 639.[6] When a petitioner depends on an alleged pattern of discriminatory strikes to make out his prima facie case, as Sharifi contends trial counsel should have, it is incumbent on him to support his claim with adequate information. *Id.* This Sharifi failed to do.

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that trial counsel acted reasonably, Sharifi's failure to plead that trial counsel lacked any strategic reason for not challenging the jury's composition is yet another reason why this case is a poor vehicle for reviewing the purported conflict Sharifi presents.

[6] *see also Sorto v. Herbert*, 497 F.3d 163, 171 (2d Cir. 2007) ("When, as here, a Batson prima facie case depends on a pattern of strikes, a petitioner cannot establish that the state court unreasonably concluded that the pattern was not sufficiently suspicious unless the petitioner can adduce a record of the baseline factual circumstances attending the *Batson* challenge."); *Scott v. Gelb*, 810 F.3d 94, 102 (1st Cir. 2016) (state court was not unreasonable in finding no prima facie case where petitioner failed to support claim with "demographic information about the composition of the venire" and "the jurors seated"); *United States v. Brandon*, 636 F. App'x 542, 545 (11th Cir.), *cert. denied*, 136 S. Ct. 2423, 195 L. Ed. 2d 791 (2016) (Appellant "failed to provide the necessary context that would give rise to an inference of discrimination," noting that composition of the jury is relevant to finding prima facie violation).

Sharifi's implicit argument that trial counsel could have proved a prima facie case by "alleging that the prosecution struck 80% of the women from the venire" (Pet. at 7) appears to based on his misapprehension of the allegations actually raised in his postconviction petition. As the ACCA noted, Sharifi's post-conviction petition alleged that the State used 20 of 25 (or 80%) of its *strikes* against women. *Sharifi*, 2016 WL 4732867, at *3. Further, the "80%" figure is meaningless when divorced from any "contextual markers," including the composition of the venire and jury. *Lewis*, 581 F.3d at 104. The composition of the venire and the final jury is critical because there is no way to evaluate the significance of the 80% figure without knowing the size of the venire or the percentages of men and women in it. In the present case, Sharifi failed to present the Alabama courts with *any* information to show the significance of his "bald assertion" regarding the State's use of its strikes.

At bottom, Sharifi's petition is seeking fact-bound error correction of the ACCA's determination that his pleaded facts to not show that trial counsel could have shown a prima facie case of sex discrimination. Perhaps recognizing that this would be a poor basis for seeking certiorari review[7], Sharifi tries to shoehorn his claim into a better vehicle by attempting to create a conflict where none exists.

[7] Notably, Sharifi offers no cognizable argument, much less legal authority, to suggest that these contextual markers are not a proper consideration in determining whether a prima facie case of discrimination has been made.

Because Sharifi seeks nothing more than error correction, and on a meritless claim besides, this Court should deny certiorari review.

C. Sharifi's Petition is a Poor Vehicle to Address the Alleged Conflict Because Other Avenues for Relief Exist.

Finally, as shown above, Sharifi's petition does not present any legitimate conflict between the ACCA's rejection of his *Strickland* claim and any decision of this Court. However, to the extent that Sharifi contends that the ACCA's decision rejecting his claim of ineffective assistance of counsel amounts to an unreasonable application of federal law, an avenue for the error correction he seeks exists in the form of a habeas corpus petition. Sharifi's claim was dismissed for failure to comply with the full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P. The Eleventh Circuit has held that dismissals under Rule 32.6(b) amount to a decision on the merits of the claim and may be addressed in habeas. *Boyd v. Comm'r, Alabama Dep't of Corr.*, 697 F.3d 1320, 1331 (11th Cir. 2012) (Dismissal under 32.6(b) was ruling on the merits and "[a]ccordingly, the district court was not barred from considering the merits of the relevant claim.") Indeed, has filed a habeas petition in the federal district court for the Northern District of Alabama, demonstrating that Sharifi has a viable avenue for seeking relief on his claim. Consequently, the present petition is a poor vehicle for the error correction he seeks. Sup. Ct. R 10.

CONCLUSION

For the foregoing reasons, this Court should deny Sharifi's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of December, 2017, I did hereby serve a copy of the foregoing on the attorney for the Petitioner by electronic mail addressed as follows:

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