No. 17-6397

In the Supreme Court of the United States

MICHAEL BRANDON KELLEY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED (REPHRASED)

1. Whether this Court has jurisdiction over Kelley's *Batson* question when the Alabama Supreme Court denied certiorari review of that question and issued a certificate of judgment nearly two years before Kelley filed his petition.

2. Whether Kelley's *Batson* question, which poses the same procedural problem as *Floyd v. Alabama*, No. 16-9304 (Dec. 4, 2017) (mem.), is properly before this Court when he failed to raise a *Batson* claim in the trial court, raised his claim for the first time in the Court of Criminal Appeals, and that court reviewed his claim under Alabama's plain-error standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Michael Brandon Kelley physically abused, sexually tortured, and brutally murdered Emily Milling. As a result, Kelley was convicted of two counts of capital murder and one count of sexual torture, and the trial court sentenced him to death and life in prison, respectively. In his petition, Kelley complains that the Alabama Court of Criminal Appeals erred when it reviewed his *Batson* claim under Alabama's plain-error standard but found no *Batson* violation. But Kelley's petition is littered with complications.

First, it is unclear whether this Court has jurisdiction over Kelley's petition. Second, Kelley's *Batson* question poses the same procedural problem at issue in *Floyd v. Alabama*, No. 16-9304 (Dec. 4, 2017) (mem.); that is, because Kelley raised no *Batson* objection in the trial court, this Court cannot reach the question he presents. Third, in any event, Kelley's petition presents only a run-of-the-mill *Batson* claim that is fact-bound and meritless.

In short, Kelley's petition is not certworthy.

STATEMENT

A. The Murder and Investigation

In November 2008, Kelley persuaded Emily Milling to leave a nightclub with him. *Kelley v. State*, CR-10-0642, 2014 WL 4387848, *1 (Ala. Crim. App. Sept. 5, 2014) (opinion on application for rehearing). From there, Kelley took Emily to his mobile home where he spent the night physically abusing and sexually torturing her. *Id.* at *4. Kelley bruised Emily's face, neck, chest, back, legs, arms, wrists, vagina, anus, and rectum. *Id.* Kelley also damaged Emily's vagina and "her rectal lining"—damage "consistent with being caused by [a] toilet plunger[.]" *Id.* Sometime during that night, Kelley strangled Emily to death and then dumped her naked body in a wooded area. *Id.* at *2. The next morning, Kelley's cousin saw Kelley throw several garbage bags into a dumpster at Kelley's father's fabricating shop. *Id.*

The investigation into Emily's death led directly to Kelley. During the investigation, detectives searched Kelley's SUV and his mobile home. *Id.* at *3. In Kelley's SUV, detectives found bloodstains that matched DNA samples taken from Emily. *Id.* In Kelley's mobile home, detectives found bloodstains "in the hallway, the east wall, the bathroom, near the back door, the front door, the master bedroom, and the west wall." *Id.* Those bloodstains also matched DNA samples taken from Emily. *Id.* Detectives also conducted luminol testing in Kelley's mobile home, revealing "the outline of a body in the shower and

drag marks from the shower to the front door." *Id.* Later, detectives recovered the garbage bags Kelley had thrown away. Those bags contained Emily's clothes, her driver's license, a sleeping bag, and a toilet plunger. *Id.* Bloodstains on the sleeping bag and on the handle of the toilet plunger matched DNA samples taken from Emily. *Id.*

B. The Jury-Selection Process

The grand jury indicted Kelley for two counts of capital murder—murder during a first-degree kidnapping, *see* ALA. CODE § 13A-5-40(a)(1) (1975), and murder during a sexual abuse, *see* ALA. CODE § 13A-5-40(a)(8) (1975)—and one count of sexual torture, *see* ALA. CODE § 13A-6-65.1 (1975). Jury selection for Kelley's trial began with 115 veniremembers—8 of which were African American. C. 290-96. After the trial court excused veniremembers from service and removed veniremembers for cause, the venire was whittled down to 48 people—3 of which were African American.[1] C. 285.

During the striking process, the State used 3 of its 18 peremptory strikes to remove the African American veniremembers as follows:

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[1]At the time of trial, the population of St. Clair County was 88.21% White and 8.55% African American. CensusViewer, *Population of Saint Clair County, Alabama: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Graphs, Quick Facts*, available at http://censusviewer.com/county/AL/Saint%20Clair (last visited Dec. 15, 2017).

- The State used its sixth strike to remove Tyrone Cade, who explained that he would not recommend a death sentence unless the State presented "strong hard evidence." T. 123.

- The State used its ninth strike to remove Clara Jordan, who noted that she could not recommend the death penalty under any circumstance, C. 1st Supp. 524, but later contradicted that response. T. 193.

- The State used its sixteenth strike to remove Willie J. Adams, Jr., who revealed that he had been convicted of a crime of moral turpitude; that a close family member had either been arrested for or convicted of a crime; and that he did not want to serve because he needed to work. C. 1st Supp. 439-40.

Although the trial court gave him an opportunity to do so, Kelley neither objected to the State's use of its peremptory strikes, nor did he object to the composition of the jury. T. 276. The empaneled jury found Kelley guilty as charged, and then, by a vote of 10 to 2, recommended that the trial court sentence him to death. *Kelley*, 2014 WL 4387848, at *1. The trial court followed the jury's recommendation and sentenced Kelley to death. *Id*. The trial court also sentenced Kelley to life in prison for his sexual-torture conviction. *Id.*

C. The Direct Appeal

Kelley appealed his capital-murder convictions and death sentence to the Alabama Court of Criminal Appeals. Kelley did not, however, appeal his sexual-torture conviction. *Ex parte Kelley*, No. 1131451, 2015 WL 6828772, *4

(Ala. Nov. 6, 2015) (recognizing that Kelley did not include his sexual-torture conviction in his notice of appeal).

In his brief to the Court of Criminal Appeals, Kelley raised several issues, including asserting for the first time that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986). According to Kelley, the State violated *Batson* when it "used 3 of its 18 peremptory challenges to remove all qualified African-Americans from the jury"; when "the three African-American veniremembers struck by the State . . . were 'as heterogeneous as the community as a whole'"; and when "the State treated African-American veniremembers and white veniremembers differently." *Kelley*, 2014 WL 4387848, at *16. But, because he raised no *Batson* objection in the trial court, the Court of Criminal Appeals reviewed Kelley's *Batson* claim under Alabama's plain-error standard. *See* ALA. R. APP. P. 45A. Applying that standard, the court found that "the record does not raise an inference of racial discrimination." *Kelley*, 2014 WL 4387848, at *18.

Although the Court of Criminal Appeals noted that Kelley and Emily were white and that "the facts of the case do not indicate that the race of the jurors would be a concern," it did not end its analysis there. *Id.* Instead, it continued, finding that there was "no indication in the record that the prosecutor has a history of racial discrimination"; that the "record does not show a pattern in the manner in which the State struck African-Americans";

that there "were no apparent differences in the manner in which African-Americans and whites were questioned"; and that there "was no disparate examination of African-American veniremembers, and the State did not ask questions designed to provoke disqualifying responses from African-Americans." *Id.*

The Court of Criminal Appeals also found that the "record does not indicate that the three African-Americans struck by the State were heterogeneous as the community as a whole or were treated differently than whites." *Id.* The court then examined each of the African Americans the State struck and noted that each made remarks that set them apart from the jurors who served on Kelley's jury. Thus, the court held that Kelley's *Batson* claim "does not rise to the level of plain error or entitle Kelley to any relief." *Id.* at *19.

The Court of Criminal Appeals also rejected Kelley's remaining claims, affirmed his capital-murder convictions and death sentence, and, although Kelley did not appeal his sexual-torture conviction, affirmed Kelley's sexual-torture conviction. Kelley then applied for rehearing, which the Court of Criminal Appeals overruled. Kelley then filed a cert petition in the Alabama Supreme Court.

In that petition, Kelley raised several grounds, only two of which are relevant here. First, Kelley complained that the Court of Criminal Appeals

"had no authority to affirm" his sexual-torture conviction because the trial court did not properly sentence him for that conviction. Second, Kelley asserted his *Batson* claim. On February 24, 2015, the Alabama Supreme Court granted Kelley's cert petition on only one ground—his complaint that the Court of Criminal Appeals lacked jurisdiction over his sexual-torture conviction.

On November 6, 2015, the Alabama Supreme Court reversed only the part of the Court of Criminal Appeals' decision that affirmed Kelley's sexual-torture conviction. The Alabama Supreme Court explained that, because the trial court did not properly pronounce Kelley's sentence for his sexual-torture conviction, "Kelley could not have appealed his sexual-torture conviction." *Ex parte Kelley*, 2015 WL 6828772, at *4. The Alabama Supreme Court also noted that Kelley "did not attempt" to appeal his sexual-torture conviction because "Kelley did not include his sexual-torture conviction in his notice of appeal as a conviction as to which he was seeking appellate review." *Id.*

But the Alabama Supreme Court rejected Kelley's claim that the Court of Criminal Appeals' lack of jurisdiction over his sexual-torture conviction also divested that court of jurisdiction over his capital-murder convictions. The Alabama Supreme Court thus reversed only the part of the Court of Criminal Appeals' decision addressing Kelley's sexual-torture conviction, and remanded Kelley's case to the Court of Criminal Appeals to remedy that jurisdictional error.

By taking this approach, the Alabama Supreme Court separated Kelley's capital-murder convictions from his sexual-torture conviction, creating two appeals. *See Ex parte Kelley*, 2015 WL 6828772, at *7 (Murdock, J., dissenting in part and concurring in the result in part) (recognizing that the court had created "more than one appeal arising from the same criminal case").

On November 24, 2015, the Alabama Supreme Court issued a certificate of judgment, making its judgment final.

On June 3, 2016, the Court of Criminal Appeals issued an opinion dismissing Kelley's appeal of his sexual-torture conviction. *See Kelley v. State*, CR-10-0642, 2016 WL 3148447 (Ala. Crim. App. June 3, 2017). Kelley then applied for rehearing, which the Court of Criminal Appeals overruled. Kelley then filed a second cert petition in the Alabama Supreme Court asserting only one ground—that the Court of Criminal Appeals "erroneously dismissed an appeal that was never taken." BIO App. A pp. 4-7.

On May 19, 2017, the Alabama Supreme Court denied Kelley's second cert petition. That same day the Court of Criminal Appeals issued a certificate of judgment.

REASONS FOR DENYING THE WRIT

Kelley's petition poses one question but faces three insurmountable hurdles:

- First, it appears that this Court lacks jurisdiction over Kelley's petition. Here, Kelley's capital-murder convictions and his *Batson* question became final nearly two years before he filed his petition.

- Second, just like in *Floyd v. Alabama*, No. 16-9304 (Dec. 4, 2017) (mem.), this Court likely cannot reach Kelley's *Batson* question because he aims it at jurors that he did not challenge in the trial court. Here, the Court of Criminal Appeals reviewed Kelley's *Batson* claim under Alabama's plain-error standard, which complicates this Court's review, raises a concern of whether any federal question exists for this Court to review, and makes Kelley's petition a poor vehicle to review his *Batson* question.

- Third, Kelley's petition presents only a run-of-the-mill *Batson* question that does not give this Court any compelling reason to grant the writ. Here, Kelley's claim is based on his mistaken belief that the Court of Criminal Appeals proceeded with its *Batson* analysis as if *Powers v. Ohio*, 499 U.S. 400 (1991) and *Trevino v. Texas*, 503 U.S. 562 (1992) (per curiam), did not exist, his claim is meritless, and his claim is only a request for fact-bound error correction of a properly stated rule of law.

In sum, Kelley's petition is either not properly here, an exceedingly poor vehicle to review his *Batson* question, or simply not certworthy.

I. Before this Court can reach Kelley's *Batson* question, it must first determine if it has jurisdiction over Kelley's petition.

In his petition, Kelley claims that the Alabama Supreme Court denied certiorari review of his *Batson* question on May 19, 2017, making both his request for an extension of time to file his petition and its later filing timely. Pet. 5, n.2. But Kelley is incorrect.

Under Alabama law, the Alabama Supreme Court denied certiorari review of Kelley's *Batson* question on February 24, 2015, when it granted review of Kelley's claim about the Court of Criminal Appeals' jurisdiction over Kelley's sexual-torture conviction. *See Ex parte Hinton*, 172 So. 3d 332, 337 (Ala. 2008) (recognizing that, when the Alabama Supreme Court grants certiorari review on one issue, it has denied certiorari review for all other issues raised in a cert petition) (Smith, J., concurring specially). Although the Alabama Supreme Court denied a second cert petition on May 19, 2017, that second petition concerned only the Court of Criminal Appeals' decision to dismiss Kelley's appeal of his sexual-torture conviction and was unrelated to either Kelley's capital-murder convictions or the *Batson* question he raises here. So, although Kelley's petition creates the appearance of being timely filed, Kelley's petition and his *Batson* question appear to have arrived at this Court too late.

For over 200 years, this Court has exercised its "appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.'" *Cox Broadcasting Corp. v. Chon*, 420 U.S. 469, 477 (1975) (quoting 28 U.S.C. § 1257). In the context of a criminal prosecution, finality is generally "defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989). When a criminal defendant seeks review "of a lower state court that is subject to discretionary review by the state court of last resort[,]" he or she must file a cert petition within 90 days of the highest state court's order denying certiorari review. SUP. CT. R. 13.1. Here, it appears that Kelley's capital-murder convictions and death sentence and the *Batson* question he poses in his petition became final nearly two years before he filed this petition.

After the Court of Criminal Appeals rejected Kelley's plain-error *Batson* claim, affirmed his convictions and sentences, and overruled his application for rehearing, Kelley filed a cert petition in the Alabama Supreme Court. In that petition, Kelley raised several grounds, including a challenge to the Court of Criminal Appeals' jurisdiction over Kelley's sexual-torture conviction, and a *Batson* claim. On February 24, 2015, the Alabama Supreme Court granted cert "solely to determine whether the Court of Criminal Appeals lacked jurisdiction

to review Kelley's sexual-torture conviction." *Ex parte Kelley*, 2015 WL 6828772, at *1.

In his brief to the Alabama Supreme Court, Kelley essentially raised two arguments (1) that the Court of Criminal Appeals lacked jurisdiction over his sexual-torture conviction because the trial court did not properly sentence him for that conviction, and (2) that, because the Court of Criminal Appeals lacked jurisdiction over his sexual-torture conviction, that court also lacked jurisdiction over his capital-murder convictions.

By making these arguments, Kelley gave the Alabama Supreme Court two choices—it could hold that the Court of Criminal Appeals lacked jurisdiction over Kelley's entire appeal, or it could divorce Kelley's sexual-torture conviction from his capital-murder convictions, which would leave Kelley's capital-murder convictions intact and create two separate appeals. The Alabama Supreme Court chose to divorce his convictions. *See Ex parte Kelley*, 2015 WL 6828772, at *7 (Murdock, J., dissenting in part and concurring in the result in part).

The Alabama Supreme Court thus reversed the Court of Criminal Appeals' decision only "insofar as it affirm[ed] Kelley's sexual-torture conviction" and remanded Kelley's case "for proceedings consistent with [the Alabama Supreme Court's] opinion." *Id.* at *7. The Alabama Supreme Court then issued a certificate of judgment on November 24, 2015. Then, instead of

seeking review of his capital-murder convictions and death sentence in this Court, Kelley waited.

Over six months after the Alabama Supreme Court issued its certificate of judgment, the Court of Criminal Appeals dismissed Kelley's appeal from his sexual-torture conviction. *See Kelley v. State*, CR-10-0642, 2016 WL 3148447 (Ala. Crim. App. June 3, 2016). Kelley then applied for rehearing, arguing that the Court of Criminal Appeals could not dismiss an appeal that he did not take.

The same day he filed his application for rehearing, Kelley also moved the Alabama Supreme Court to "address the remainder of his original petition for certiorari." BIO App. B ¶ 5. But, because the Alabama Supreme Court had denied Kelley's remaining cert grounds on February 24, 2015, the Alabama Supreme Court denied Kelley's motion.

On March 20, 2017, the Court of Criminal Appeals overruled Kelley's application for rehearing. Then, on March 29, 2017, Kelley filed a second cert petition in the Alabama Supreme Court. In his second petition, Kelley complained only that the Court of Criminal Appeals erred when it dismissed his appeal from his sexual-torture conviction. BIO App. A pp. 4-7. On May 19, 2017, the Alabama Supreme Court denied Kelley's second cert petition.

So, although Kelley contends that the Alabama Supreme Court denied certiorari review of his *Batson* question on May 19, 2017, the Alabama Supreme Court actually denied certiorari review of Kelley's *Batson* question

on February 24, 2015. And Kelley's capital-murder convictions and death sentence became final when the Alabama Supreme Court issued a certificate of judgment on November 24, 2015. At that point, Kelley had 90-days to file his petition in this Court. But Kelley failed to do so. Instead, Kelley waited nearly two years after his capital-murder convictions and death sentence became final to file his petition. So it appears Kelley's petition is untimely.

Even if there were a question about the finality of Kelley's capital-murder convictions and his *Batson* question, this Court should consider November 24, 2015, as the date his capital-murder convictions and *Batson* question became final.

This Court has encountered cases, such as this one, "in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477. This Court has recognized "at least four categories of . . . cases in which [it] has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* The first two categories concern those cases in which "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at

478. The second two categories concern cases in which "the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state-court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." *Id.* at 478-79. This case falls within the first two categories of cases.

Kelley presents this Court with one federal question—whether the Court of Criminal Appeals properly applied *Batson*—and the Alabama Supreme Court denied review of that question on February 24, 2015. Although the Alabama Supreme Court issued an opinion reversing the Court of Criminal Appeals, it did so on an issue unrelated to Kelley's capital-murder convictions and death sentence—whether the Court of Criminal Appeals had jurisdiction over Kelley's sexual-torture conviction.

Although the Alabama Supreme Court remanded Kelley's case to the Court of Criminal Appeals for that court to take more action, it did not remand Kelley's entire case. Instead, the Alabama Supreme Court remanded only Kelley's sexual-torture conviction to the Court of Criminal Appeals and ordered that court to correct the jurisdictional error involved with that conviction. On remand, the Court of Criminal Appeals dismissed Kelley's appeal from his sexual-torture conviction, returning Kelley's sexual-torture conviction to the trial court for that court to properly sentence Kelley—nothing more.

In short, although the Alabama Supreme Court's opinion created other proceedings, the proceedings in Kelley's sexual-torture conviction do not moot his *Baston* question, have little to no substance, the outcome is certain, and they are unrelated to Kelley's capital-murder convictions and *Batson* question. So, even if it were unclear that Kelley's capital-murder convictions and death sentence were final on November 24, 2015, everything related to those convictions and the *Batson* question he raises in this petition were complete as of that date. Thus, this Court should consider that date as the date from which Kelley should have sought review in this Court, making his petition untimely.

Finally, if Kelley's capital-murder convictions and death sentence were either not final as of November 24, 2015, or are not considered final as of that date, Kelley's petition is not properly here because it seeks review of a case that is still ongoing. That is, Kelley seeks review of a non-final judgment.

Again, Kelley's petition stems from the Alabama Supreme Court's May 19, 2017, denial of his second cert petition. But that cert petition challenged only the Court of Criminal Appeals' decision to dismiss Kelley's appeal from his sexual-torture conviction. And that decision returned Kelley's sexual-torture conviction to the trial court. Currently, Kelley's sexual-torture conviction is before the Court of Criminal Appeals. BIO App. C. So, if Kelley's capital-murder convictions and *Batson* question were not final on November

24, 2015, Kelley's petition seeks review of a non-final judgment and is not properly here.

Because Kelley's petition either seeks review of his capital-murder convictions and a death sentence that became final on November 24, 2015, or seeks review of a non-final judgment, this Court lacks jurisdiction to entertain Kelley's petition. Thus, this Court should dismiss Kelley's petition.

II. Even if this Court has jurisdiction over Kelley's petition, this Court likely cannot reach the question presented because Kelley raised no *Batson* objection in the trial court.

Kelley complains that the Court of Criminal Appeals erred when it did not "find a prima facie case of race discrimination under *Batson*." Pet. 6. But Kelley's *Batson* question presents the same procedural problem at issue in *Floyd v. Alabama*, No. 16-9304 (Dec. 4, 2017) (mem.)—it is aimed at jurors that Kelley did not challenge in the trial court. This Court likely cannot reach Kelley's *Batson* question for three reasons.

First, because Kelley raised no *Batson* objection in the trial court and, instead, initiated that claim in his direct appeal, the Court of Criminal Appeals reviewed his claim under Alabama's plain-error standard. *See Kelley*, 2014 WL 4387848, at *16. That standard requires Alabama's appellate courts to review all claims in death-penalty cases even if the appellant waived the claim in the trial court. *See* ALA. R. APP. P. 45A. Because Alabama's appellate courts use plain error to correct only those "particularly egregious errors" that "seriously

affect the fairness, integrity or public reputation of judicial proceedings," and apply it only "in those circumstances in which a miscarriage of justice would otherwise result," *Hooks v. State*, 534 So. 2d 329, 351-52 (Ala. Crim. App. 1987) (quotations omitted), establishing a *Batson* violation under Alabama's plain-error standard is a difficult task, which complicates, if not precludes, this Court's review.

Second, because the Court of Criminal Appeals reviewed Kelley's *Batson* question under Alabama's plain-error standard, it is unclear whether there is a federal question for this Court to review. In his petition, Kelley raises a substantive *Batson* question. But the Court of Criminal Appeals "did not decide a *Batson* claim at all; rather, it decided a state law claim bearing the *Batson* label." *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1258 (11th Cir. 2013) (Tjoflat, J., dissenting). So, although Kelley's petition purports to raise a substantive *Batson* question, his petition complains that the Court of Criminal Appeals did not properly apply Alabama's plain-error standard to find a *Batson* violation when Kelley waived that claim in the trial court. Because nothing in *Batson* contemplates the problem Kelley presented to the Court of Criminal Appeals, this Court likely cannot reach Kelley's *Batson* question.[2]

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[2]This Court recently denied a cert petition that raised a gender based jury selection claim when Alabama's appellate courts reviewed that claim under Alabama's plain-error standard. *See Luong v. Alabama*, 136 S. Ct. 1494 (2016).

Third, the Court of Criminal Appeals has heavily scrutinized its practice of reviewing *Batson* claims for plain error, and may have recently remedied the problem Kelley presented to that court. Since 2012, members of Alabama's appellate courts have called for authoritatively ending the practice of reviewing *Batson* claims for plain error, recognizing, in part, that proper appellate review of *Batson* claims requires a timely and contemporaneous objection. *See, e.g.*, *Scheuing v. State*, 161 So. 3d 245, 298-305 (Ala. Crim. App. 2013) (Windom, P.J., concurring specially); *Sharp v. State*, 151 So. 3d 342, 371 (Ala. Crim. App. 2010) (Joiner, J., concurring specially); and *Ex parte Floyd*, 190 So. 3d 972, 978-84 (Ala. 2012) (Murdock, J., concurring in the result).

Seizing on these concerns, the Court of Criminal Appeals recently signaled a possible end to its plain-error review of *Batson* claims when it "questioned whether [a plain error *Batson*] issue [was] properly before [it,]" recognized that "caselaw indicates that both federal and state courts have consistently held that the failure to make a timely [*Batson* or *J.E.B.*] objection effectively waives any arguments based on improprieties in the jury selection which the defendant might urge pursuant to *Batson*[,]" and held that, because the appellant "failed to raise his *Batson* objection at trial[,]" the issue did "not

appear to be properly before this Court for review."[3] *Russell v. State*, CR-13-0513, 2017 WL 3947892, *11 (Ala. Crim. App. Sept. 8, 2017) (quotations omitted).

Further, the Alabama Supreme Court could soon follow the Court of Criminal Appeals' example as it recently granted certiorari review in a death-penalty case on several grounds, including a plain-error *Batson* question. In its brief to the Alabama Supreme Court, the State has asked the court to end plain-error review of *Batson* claims and hold "that a *Batson* claim is forfeited if the defendant does not object to the jury before trial." *Brief for Appellee*, *Phillips v. State*, No. 1160403, 2017 WL 3622966, at *51.

Because Kelley, just like *Floyd*, aims his *Batson* question at jurors that he did not challenge in the trial court, his petition is littered with complications that make it unlikely that this Court could reach the question presented and this Court should deny the writ.

III. Kelley's *Batson* question does not merit certiorari review.

In his petition, Kelley gives this Court two reasons why it should grant the writ. First, Kelley claims that the Court of Criminal Appeals erred when it "rel[ied] on the fact that Kelley is white and the crime was not racially divisive

[3]The Court of Criminal Appeals alternatively held that "[e]ven if . . . a *Bastson* issue is subject to plain-error review, Russell is not entitled to any relief." *Russell*, 2017 WL 3947892, at *11.

to deny a prima facie case under *Batson*[,]" and "proceeded as though *Powers* and *Trevino* were never decided[.]" Pet. 6, 8. Second, Kelley claims that, because the Court of Criminal Appeals found that "the race of the defendant rendered the race of the jurors of no concern, the Alabama appellate court's analysis of Kelley's *Batson* argument was infected by error from the start[,]" which is "demonstrated by the court's failure to find a prima facie case, even though every single qualified black juror was struck by the prosecution." Pet. 9. Kelley's claims are not certworthy for three reasons.

First, Kelley bases his reasons for granting cert on his belief that the Court of Criminal Appeals "proceeded as though *Powers* and *Trevino* were never decided" when it rejected his plain-error *Batson* claim. But this belief is mistaken because it misreads the court's decision, is illogical, disregards the court's previous reliance on *Powers* in other cases, and assumes that the court ignored *Powers* in this case.

Second, even if the Court of Criminal Appeals had discussed *Powers* and *Trevino*, Kelley's *Batson* claim would not have come out any differently, as he did not establish a prima facie case of discrimination under Alabama's plain-error standard.

Third, Kelley only asks this Court to disagree with the Court of Criminal Appeals' findings of fact and how the court applied those findings to a properly stated rule of law.

a. Kelley bases his reasons for granting cert on his mistaken belief that the Court of Criminal Appeals "proceeded as though *Powers* and *Trevino* were never decided" when it rejected his plain-error *Batson* claim.

In his petition, Kelley claims that, because the Court of Criminal Appeals noted Kelley's and Emily's race when it addressed his plain-error *Batson* claim, the court "proceeded as though *Powers* and *Trevino* were never decided[.]" Pet. 8. According to Kelley, the Court of Criminal Appeals "reasoned that [he] did not establish a prima facie case because he and the victim were white and the facts did not indicate that race would be a concern." Pet. 8. At its root, Kelley's argument hangs on his belief that the Court of Criminal Appeals decided his *Batson* question while disregarding both *Powers* and *Trevino*. That belief is mistaken for four reasons.

First, Kelley's belief misreads the Court of Criminal Appeals' decision. Although the court noted that both Kelley and Emily were white and that "the facts of the case do not indicate that the race of the jurors would be a concern," *Kelley*, 2014 WL 4387848, at *18, that statement was, at most, a passing reference. It certainly was not, as Kelley contends, the basis for rejecting his plain-error *Batson* claim. Instead, the court rejected Kelley's *Batson* claim

because (1) there was "no indication in the record that the prosecutor has a history of racial discrimination"; (2) the "record [did] not show a pattern in the manner in which the State struck African-Americans"; (3) there "were no apparent differences in the manner in which African-Americans and whites were questioned"; (4) there "was no disparate examination of African-American veniremembers, and the State did not ask questions designed to provoke disqualifying responses from African-Americans"; and (5) the record did "not indicate that the three African-Americans struck by the State were heterogeneous as the community as a whole or were treated differently than whites." *Id.* at *18-19.

Second, Kelley's belief is illogical. The Court of Criminal Appeals cannot both "proceed as if *Powers* and *Trevino* were never decided" and engage in a *Batson* analysis. Indeed, the *Powers* Court extended *Batson* to allow criminal defendants to "object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races." *Powers*, 499 U.S. at 402. Before *Powers*, the Court of Criminal Appeals did not engage in a *Batson* analysis when a white criminal defendant challenged the State's decision to strike African American veniremembers. *See, e.g.*, *Bankhead v. State*, 585 So. 2d 97, 101 (Ala. Crim. App. 1989) (holding that white criminal defendant lacks standing "to challenge the removal of blacks from his jury"). Because the Court of Criminal Appeals

engaged in a *Batson* analysis here, the Court of Criminal Appeals did not proceed as if *Powers* had never been decided. If it had, the Court of Criminal Appeals would have held that Kelley lacked standing to raise a *Batson* claim.

Third, Kelley's belief ignores the Court of Criminal Appeals' previous reliance on *Powers* in other cases. The Court of Criminal Appeals has recognized, cited, and applied *Powers* in at least 157 published opinions.[4] Those opinions both predate and postdate Kelley's. So the Court of Criminal Appeals was aware of *Powers* when it rejected Kelley's plain-error *Batson* claim.

Finally, because the Court of Criminal Appeals is aware of *Powers*, Kelley's belief assumes that the court ignored *Powers* when it noted Kelley's race and rejected his plain-error *Batson* claim. But, other than Kelley's speculative assertion that the Court of Criminal Appeals "proceeded as though *Powers* and *Trevino* were never decided," nothing supports the idea that the court ignored *Powers* and *Trevino* here. Although the Court of Criminal Appeals did note Kelley's race before it addressed his plain-error *Batson* claim, that court has done the same in other cases.

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[4]Alabama cases that cite *Powers v. Ohio*, WESTLAW, http://www.westlaw.com (navigate to *Powers v. Ohio*, 499 U.S. 400 (1991); then open the "Citing References" tab; and, once opened, use the "Narrow" field to limit the jurisdiction to "State" > "Alabama" > "Ala. Crim. App.").

For example, in 2011, the Court of Criminal Appeals analyzed a *Batson*/*J.E.B.* claim by first noting that the defendant was "a Caucasian male," who was arguing that the State had "used its peremptory challenges to exclude female prospective jurors[.]" *Stanley v. State*, 143 So. 3d 230, 252 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court). The Court of Criminal Appeals also correctly noted that, in *Powers*, "the court extended its decision in *Batson* to apply also to white defendants." *Id.* at 253 (quotation omitted). The court then rejected Stanley's *Batson* claim.

Three years later, the Court of Criminal Appeals again noted that the defendant was "white" and had argued that the State used its peremptory strikes to remove "black prospective jurors." *Shaw v. State*, 207 So. 2d 79, 92 (Ala. Crim. App. 2014). And, like in *Stanley*, the court noted that *Powers* extended *Batson* to white defendants and rejected Shaw's *Batson* claim. *Id.*

Although, here, the Court of Criminal Appeals cited neither *Powers* nor *Trevino* after it noted Kelley's race, the idea that the Court of Criminal Appeals singled Kelley out from the other 157 criminal defendants that have presented claims that implicate *Powers* as the one criminal defendant for whom the court would ignore *Powers* strains both credulity and common sense.

Because the Court of Criminal Appeals did, in fact, proceed as if *Powers* and *Trevino* had been decided, was aware of *Powers* when it rejected Kelley's

Batson claim, and nothing supports the assertion that the court ignored *Powers*, the premise underlying Kelley's *Batson* question fails. Thus, this Court should deny cert.

b. The Court of Criminal Appeals correctly determined that Kelley failed to establish a prima facie case of discrimination.

Kelley contends that the Court of Criminal Appeals erred when it failed to find a prima facie case of discrimination under *Batson*. According to Kelley, the court proceeded "from the faulty premise that the race of the defendant rendered the race of the jurors of no concern[; thus,] the [Court of Criminal Appeals'] analysis of Kelley's *Batson* argument was infected by error from the start." Pet. 9. But, even if the Court of Criminal Appeals had discussed *Powers* and *Trevino* before it rejected Kelley's plain-error *Batson* claim, Kelley's claim would not have turned out any differently. In short, the Court of Criminal Appeals correctly applied *Batson* to Kelley's case and properly found that Kelley had not established a prima facie case of discrimination.

The *Batson* Court created a three-step process to ferret out racial discrimination in the jury-selection process. The first step—the step at issue here—requires the defendant to establish a prima facie case of discrimination in the jury-selection process. *Batson*, 476 U.S. at 96. The *Batson* Court explained that, to determine "whether the defendant has made the requisite

showing [of a prima facie case of discrimination], the trial court should consider all relevant circumstances." 476 U.S. at 96. Soon after, the Alabama Supreme Court set out a "illustrative" list of nine factors that a defendant could use "to raise the inference of discrimination."[5] *Ex parte Branch*, 526 So. 2d 609, 622 (Ala. 1987).

Here, after the Court of Criminal Appeals recognized that Kelley raised no *Batson* objection in the trial court, set out the *Batson* standard, and explained what it takes to show a prima facie case of discrimination, it rejected Kelley's plain-error *Batson* claim. *Kelley*, 2014 WL 4387848, at *16-18. The court concluded that there was "no indication in the record that the prosecutor has a history of racial discrimination"; that the "record does not show a pattern in the manner in which the State struck African-Americans"; that there "were no apparent differences in the manner in which African-Americans and whites were questioned"; and that there "was no disparate examination of African-American veniremembers, and the State did not ask questions designed to provoke disqualifying responses from African-Americans." *Id.* at *18. The court further found that the "record does not indicate that the three African-

[5]Although the Alabama Supreme Court listed nine factors, that list is not exhaustive. *See Mines v. State*, 671 So. 2d 121, 122 (Ala. Crim. App. 1995).

Americans struck by the State were heterogeneous as the community as a whole or were treated differently than whites." *Id.*

In his petition, Kelley attacks the Court of Criminal Appeals' judgment in three respects: First, Kelley contends that, although the Court of Criminal Appeals found that the "record does not show a pattern in the manner in which the State struck African-Americans," "the pattern could not be more pronounced" as the State struck "every single qualified black juror." Pet. 9. According to Kelley, the Court of Criminal Appeals, "did not even consider the fact that the prosecution struck every qualified black juror." Pet. 10. The Court of Criminal Appeals' decision, however, refutes Kelley's claim because that court started its analysis by noting that "Kelley argues that the State used 3 of its 18 peremptory strikes to remove *all* qualified African-Americans from the jury." *Kelley*, 2014 WL 4387848, at *16 (emphasis added).

Even so, "the prima facie case of discrimination is not to be based on numbers alone but is to be made in light of the totality of the circumstances." *United States v. Hill*, 643 F.3d 807, 839 (11th Cir. 2011) (citing *Johnson v. California*, 545 U.S. 162, 168 (2005)). Because, as explained below, the other circumstances Kelley cites as evidence of discrimination in the jury-selection process do not establish that the State excluded any African American veniremember based on race, Kelley's reliance on the number of African American veniremembers struck by the State is "not sufficient to establish or

negate a prima facie case." *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir. 1990).

Second, Kelley complains that the Court of Criminal Appeals erred when it "claimed that there was no disparate treatment of the stricken black veniremembers and that they were not similarly situated to other jurors who served on Kelley's jury" because, he says, "the court supplied its own hypotheses for why the prosecution might have struck the prospective black jurors." Pet. 10. Kelley, however, misreads the Court of Criminal Appeals' decision. Indeed, the court did not supply "its own hypotheses" for the State's strikes. Instead, the court answered the precise question Kelley raised: Were "the three African-Americans struck by the State . . . heterogeneous as the community as a whole or were [they] treated differently than whites[?]" *Kelley*, 2014 WL 4387847, at *18. The Court of Criminal Appeals could not answer Kelley's question without examining the responses of the three struck African Americans and comparing those responses to white jurors.

In its opinion, the Court of Criminal Appeals found that veniremember Willie J. Adams, Jr., "indicated that he had been convicted of theft, a crime of moral turpitude" and "[n]o one who served on Kelley's jury had been convicted of a crime of moral turpitude"; that veniremember Tyrone Cade "informed the court that that he would not recommend a sentence of death unless the State produced 'strong hard evidence'" and "[n]o one who served on Kelley's jury

indicated that they would require 'strong hard evidence' before they could recommend a death sentence"; and that veniremember Clara Jordan "indicated on her juror questionnaire that she would not recommend a sentence of death under any circumstance" and contradicted that response in voir dire and "[n]o one who served on Kelley's jury had vacillated on whether they could impose a sentence of death." *Kelley*, 2015 WL 4387848, at *18-19. The court did not offend *Batson* by examining the jurors in this way.

Third, Kelley contends that the Court of Criminal Appeals' finding that there was no history of racial discrimination was based on an "inquiry [that] was too narrow." Pet. 12. Specifically, Kelley contends that the Court of Criminal Appeals should have broadened its review of this factor to include the Eleventh Circuit's decision in *Adkins*, 710 F.3d 1241. But Kelley forgets that the Court of Criminal Appeals reviewed his *Batson* claim under Alabama's plain-error standard.

To prevail on a plain-error *Batson* claim, "the court must find that the *record* raises an inference of purposeful discrimination by the State in the exercise of peremptory challenges." *Saunders v. State*, 10 So. 3d 53, 78 (Ala. Crim. App. 2007) (emphasis added). Even going outside the record, *Adkins* shows no *history* of racial discrimination, as the Eleventh Circuit decided that case 3 years after Kelley's trial and the jury selection at issue in *Adkins* occurred 20 years before Kelley's trial. *Adkins*, 710 F.3d at 1244. Moreover,

Kelley does not allege that *Adkins* involved the same people who struck his jury; instead, he notes only that both he and *Adkins* were "prosecuted by the Office of the St. Clair County District Attorney." Pet. 12.

Although Kelley complains that the Court of Criminal Appeals' failure to note *Powers* and *Trevino* infected its *Batson* analysis, Kelley's claim would not have turned out any differently if that Court had discussed *Powers* and *Trevino*. Because the Court of Criminal Appeals correctly applied *Batson* to Kelley's case and properly found that Kelley had not established a prima facie case of discrimination under Alabama's plain-error standard, this Court should deny cert.

c. In any event, Kelley's fact-bound *Batson* claim only asks this Court to apply well-established precedent to the facts of his case.

This Court should also deny Kelley's cert petition because he presents a run-of-the-mill *Batson* claim that asks this Court to second-guess the Court of Criminal Appeals' findings of fact about whether Kelley proved a prima facie case of discrimination. And Kelley's *Batson* question, at best, asks this Court to disagree with how the Court of Criminal Appeals applied its findings of fact to a properly stated rule of law. *See* SUP. CT. R. 10.

CONCLUSION

This Court should deny Kelley's petition.

Respectfully submitted,

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