IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

No. 17 - 9572

CURTIS GIOVANNI FLOWERS,

Petitioner,

-vs.-

STATE OF MISSISSIPPI,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Sheri Lynn Johnson*
Keir M. Weyble
Cornell Law School
158 Hughes Hall
Ithaca, NY 14853
607 255 3805
slj8@cornell.edu

Alison Steiner
Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St., Suite 604
Jackson, MS 39201
601 351 2490

Attorneys for Petitioner
*Counsel of Record

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Respondent's Brief in Opposition ("BIO") appears to advance three main claims aimed at avoiding further scrutiny following this Court's GVR in *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016): *First*, that prosecutor Doug Evans had no history of discrimination; *second*, that the Mississippi courts actually considered Evans' history of discrimination; and *third*, that the Mississippi courts were not obligated to consider his history of discrimination.[1] The record belies the first two claims, and the third is wrong as a matter of law.

Before turning to those three arguments, it is important to acknowledge what Respondent does *not* contest: In his first four prosecutions of Flowers, Evans literally could not have removed more qualified African American jurors than he did; he struck all ten (10) African Americans who came up for consideration at Flowers' first two trials, and he used all twenty-six (26) of his allotted strikes against African Americans at the third and fourth trials.[2]

I. DOUG EVANS HAD A PROXIMATE, ADJUDICATED HISTORY OF RACE DISCRIMINATION.

In a novel departure from its past arguments, Respondent now suggests Doug Evans did not

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[1] Respondent also asserts that Flowers failed to establish a *prima facie* case of discrimination. BIO 25-27. No reviewing court or judge has agreed with that assertion, which is plainly wrong. Flowers, who is African American, cited the fact that Evans had struck five out of six African American jurors. This does not prove purposeful discrimination, of course, but it constitutes a *prima facie* case.

[2] The jury at the fifth trial, for which strike information is not in the record, was hung by African American jurors. Respondent argues that the fact that accusations were made against these jurors (neglecting to note that charges against Juror Bibbs were subsequently dropped) is among the facts that somehow "significantly undermine, if not wholly discount, [Flowers'] *Batson* [*v. Kentucky*, 476 U.S. 79 (1986),] claim." BIO 21. Flowers is at a loss to understand how these facts-or his decision not to seek a change of venue at one of his trials, also cited as "undermining" his *Batson* claim, *id*.-have any bearing at all on the likelihood that Evans' stated reasons for striking African-American jurors at the sixth trial were pretextual.

actually discriminate when he used all fifteen (15) of his peremptory strikes against African Americans during his third prosecution of Flowers.[3] According to Respondent, the four dissenters in *Flowers III* were right-and the plurality opinion was merely the opinion of four judges who had a different view. *See* BIO 5. This assertion conveniently fails to report either the characterization of the violation by the plurality opinion, or the reasoning of the fifth justice, who concurred in the judgment reversing the conviction. In *Flowers III*, Justice Graves, "for the Court," *Flowers v. State*, 947 So.2d 910, 915 (Miss. 2007), declared that the jury selection record presented "as strong a *prima facie* case of racial discrimination as [it] ha[d] ever seen in the context of a Batson challenge." *Id*. at 935. His opinion went on to characterize Evans' conduct as "evinc[ing] an effort by the State to exclude African Americans from jury service," *id.* at 937. Justice Cobb, concurring in the judgment, without explanation stated that he thought the case was not "reversible on the Batson issue alone," but praised the plurality's "very thorough and instructive analysis of the Batson process, which should be useful, not only to the prosecutors who will be trying this case upon remand, but also to all prosecutors and defense attorneys alike, as they engage in future jury selection arguments." *Id.* at 939 (emphasis added). Notably, while the majority in *Flowers v. State*, 240 So.3d 1082 (Miss. 2017) (*Flowers VI(B)*) dismissed the import of the *Flowers III* holding that Evans discriminated in the exercise of his peremptory challenges, it did not dispute that *Flowers III* had so held. Thus, contrary to Respondent's assertion, a majority of the Mississippi Supreme Court did find that Evans had discriminated on the basis of race in the exercise of peremptory challenges in a prior prosecution of Flowers for the same offense.

Equally importantly, Respondent completely omits the additional fact that *Flowers III* was

[3] Respondent did not make this argument in response to Flowers' first petition for certiorari.

not the only time a court adjudicated Doug Evans to have purposefully discriminated on the basis of race. The trial judge in *Flowers II*—who was not the same judge who presided over subsequent retrials—had previously found Evans to have discriminated in that trial, and responded by seating one of the African American jurors Evans had struck. While the Mississippi Supreme Court majority acknowledged that fact in *Flowers VI(B)*—albeit without affording it necessary weight in the *Batson* analysis-Respondent's BIO simply obscures it behind a misquotation of the majority's opinion.[4] Thus, Evans was not once but twice adjudicated to have discriminated in the use of his peremptory challenges.

Evans' history of discrimination was extraordinarily proximate and consequently, probative; both instances occurred in trials of the same defendant for the same offense. Importantly, as *Flowers III* makes plain, Evans did not abjure racial motivation after the first adjudication of discrimination. True, as Respondent points out, *Flowers VI* occurred many years after *Flowers III*, but nothing in the interim suggests that Evans had reformed. He tried Flowers twice between trials three and six, in the fourth using all his peremptory challenges against African Americans. In the fifth, the record on appeal does not reflect the racial distribution of his strikes, but does reflect that the two African Americans who made it onto the jury caused the jury to hang; such an outcome would not justify discrimination, of course, but it certainly would enhance the motive to discriminate for one who was-as Evans had demonstrated himself to be-willing to discriminate. Evans has never expressed remorse for his prior unconstitutional conduct and mendacity, and never has claimed to have changed

[4] Respondent's BIO misquotes the *Flowers VI(B)* majority opinion, omitting a critical "s" and leaving the impression that the majority acknowledged prior discrimination at only one "trial." BIO 19. The relevant portion of the majority opinion actually reads: "[T]he trial court certainly considered circumstances surrounding the previous trials as evidenced by its response to Flowers' *Batson* claim[.]" *Flowers VI(B)*, 240 So.3d at 1123 (emphasis added).

his ways. In short, there is no reason to believe Evans' willingness both to discriminate and to mask his discrimination with pretextual explanations disappeared sometime between *Flowers III* and *Flowers VI.*

II. NEITHER THE TRIAL COURT NOR THE MISSISSIPPI SUPREME COURT EVALUATED THE CREDIBILITY OF EVANS' PROFFERED RACE-NEUTRAL REASONS IN LIGHT OF HIS HISTORY OF DISCRIMINATION.

Respondent's insistence that both the trial court and the Mississippi Supreme Court majority did consider Evans' history is belied by the record and the ordinary meaning ascribed to the word "consider."

A. The trial court's failure to consider Evans' history.

The BIO contains a curious statement: "Respondent submits the record on appeal, as evidenced by the majority opinion in *Flowers VI*, is replete with instances where the trial court heard, considered, and rejected Petitioner's argument that the prosecutor's history must be considered under the totality of the circumstances." BIO 19. Read literally, this sentence seems to concede the very point Flowers' petition presses: That the trial court rejected the argument that Evans' history "must be considered." Perhaps this is an error, and what Respondent meant to say is that the record is "replete with instances where the trial court" did consider that history, as Flowers had urged. But if that is what Respondent meant to say, its statement lacks any support in the record.

The record definitely is not "replete with instances" where the trial court *in fact* considered Evans' history; indeed, it lacks even a single instance of such consideration. Respondent recites the *Flowers VI(B)* majority's assertions that "Flowers' counsel ensured that the trial court consider [sic] the totality of the circumstances, including historical evidence of racial discrimination by the district attorney," and that "the trial court certainly considered circumstances surrounding the previous

trial[s]." *Flowers VI(B)*, 240 So.3d at 1123; BIO 19. However, as detailed in Flowers' petition, the majority's only purported support for this claim was four *arguments made by defense counsel* that address the prior history of discrimination; the two quoted trial court responses to those arguments reflect absolutely no "consideration" of that history. *See* Pet. for Cert. at 17-18.[5]

Thus, neither the *Flowers VI(B)* majority nor Respondent cite any evidence that the trial court, when assessing the credibility of Evans' proffered reasons, in any way considered his history as a repeat offender of *Batson*'s commands. Respondent's assertion that "Petitioner made certain that the trial court considered the prosecutor's history," tortures the meaning of "consider," for nothing in the trial judge's statements during the *Batson* hearing plausibly can be read either as weighing the history of discrimination, or as considering other evidence of discrimination in light of that history. Clearly the trial judge was *presented* with that history, but there is zero evidence that

[5] Respondent claims to correct Flowers' assertion that, with respect to one of the purported "responses" by the trial judge quoted by the majority, "the trial court's statement was actually made before the argument was." Pet. for Cert. at 18. But in fact, Respondent is incorrect in asserting that language quoted by the state court majority "responded" to the language it quoted from trial counsel's argument during the *Batson* hearing regarding the relevance of Evans' history. As is clearly evident from the transcript's pagination and headings, the state court majority quoted the responses that defense counsel made during the *Batson* hearing, and then cited as the trial court's "response," remarks made by the trial court during the prior hearing on challenges for cause. *Compare Flowers IV(B)*, 240 So.3d at 1123 (quoting defense counsel at Tr. 1764-65; Tr. 1766-67; Tr. 1788-89) with *Flowers IV(B)*, 240 So.3d at 1123-24 (quoting the trial judge at Tr. 1738-39). Respondent, rather than quoting the language quoted by the court, obfuscated this issue by quoting a *different* statement made by trial counsel; this argument (unlike the one quoted by the *Flowers VI(B)* majority) was indeed made before the trial court's comments, but it was not made during the course of the *Batson* hearing; rather, as the transcript heading indicates, during the hearing on "Challenges for Cause." (Tr. 1733-34). This manufactured tempest in a teapot about timing obscures what the BIO does not address: Neither the *Flowers VI(B)* majority nor Respondent could find *anything* in the trial court's statements that reflects its own consideration of the probative value of Evans' prior discrimination in assessing the credibility of his proffered reasons.

he was willing to, or did, *consider* it.[6]

B. The Mississippi Supreme Court majority's dismissal of Evans' history.

When first evaluating the evidence that Evans discriminated in selecting the jurors who would serve in Flowers' sixth trial, the Mississippi Supreme Court completely ignored Evans' prior record. *Flowers v. State*, 158 So.3d 1009 (Miss. 2014) (*Flowers VI(A)*). Despite Flowers' briefing of the *Batson* issue, which addressed "the very proximate history of discrimination" as the first indicium of discrimination to be considered, and despite the three dissenters' specific protest that the majority's failure to take account of history in this case was contrary to Batson's direction that "all relevant circumstances" must be considered, *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted), the majority failed to dispute the charge that it had disregarded probative history, failed to even mention the adjudicated racial discrimination in its discussion of Flowers' *Batson* claim, and even omitted prior history of discrimination in its recitation of the factors this Court had instructed were relevant in evaluating pretext. *Flowers VI(B)*, 240 So.3d 1121 (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1047 (internal citations omitted). When this Court GVRed the decision in *Flowers VI(A)* for "reconsideration in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016)," one member of the *Flowers VI(A)* majority, Chief Justice Waller, did reconsider his

[6] A distinction between what an advocate presents and what a decisionmaker considers is not novel. *See*, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversing death sentence where defense proffered numerous mitigating factors and sentencer refused to consider all but one of the proffered factors). Nor is the distinction one-sided. *Compare Witherspoon v. Illinois*, 391 U.S. 510 (1968) (although state may not exclude all jurors who are opposed to the death penalty, it may exclude those who are unwilling to consider state's argument for imposing it in a particular case) *with Morgan v. Illinois*, 504 U.S. 719 (1992) (state may not seat a juror who will not consider mitigating evidence, but will automatically vote for death).

prior decision, and in *Flowers VI(B)* joined Justice King's dissent. The majority, however, rather than reconsidering, instead chose to defend their decision not to do so.

Respondent asserts that the majority did reconsider its decision, but the only language from the majority's opinion that it cites is evidence to the contrary. Respondent claims that the Mississippi Supreme Court reviewed the record for evidence of "exceptional circumstances" and failed to find such circumstances. BIO 20. However, at no point did the majority opinion discuss the presence or absence of exceptional circumstances. Moreover, as discussed in the Petition, the majority presented arguments that *Foster* was not relevant to its decision, which hardly suggests receptivity to reconsideration. Respondent quotes the majority's claim that they "do not ignore the historical evidence of racial discrimination in previous trials in our consideration of [Flowers'] arguments." BIO 20. That sounds well and good, but in the very next sentence, the majority immediately makes clear that while they are no longer "ignor[ing]" that evidence, neither are they willing to consider it: "However, the historical evidence of past discrimination presented to the trial court *does not alter our analysis as set out in Flowers VI*[*(A)*]." *FlowersVI(B)*, 240 So. 3d at 1124 (emphasis added). Respondent makes no attempt to explain how this sentence can be squared with willingness to "consider" Evans' recidivist history of discrimination. And if the quoted sentence leaves any doubt at all that the *Flowers VI(B)* majority was not going to consider the evidence as it bore on Evans' credibility, that doubt is resolved by the ensuing analysis of the evidence of discrimination, which is a nearly *verbatim* copy of the *Flowers VI(A)* opinion containing not a single mention of Evans' history. Respondent makes no attempt to explain how a court willing to reconsider its prior decision in light Evans' history would repeat its prior analysis word for word, when that analysis contained no mention of history.

Thus, nowhere in the trial court's opinion, the *Flowers VI(B)* majority opinion, or the BIO is there an evaluation of the likelihood that Evans would do what he had done-at least twice-before, nor is there any consideration of the other evidence of discrimination in light of what Evans had shown himself willing to do.

III. *BATSON* AND *MILLER-EL*, AS WELL AS THIS COURT'S GVR IN LIGHT OF *FOSTER*, REQUIRE CONSIDERATION OF EVANS' HISTORY OF DISCRIMINATION.

Respondent's rewording of the question presented ("Whether the Mississippi Supreme Court committed reversible error in considering a prosecutor's history of adjudication . . .") implies that the lower court *did* consider the prosecutor's history of discrimination, but, as discussed above, the majority's opinion does not reflect any such consideration. Perhaps recognizing the lack of support in the record for its assertions that the Mississippi Supreme Court majority had considered Evans' history, Respondents also present an odd collection of arguments-all demonstrably wrong-that it *should not* have done so.

A. Respondent's false dichotomy.

Respondent claims that Flowers "asks this Court to assume the prosecutor violated *Batson* in this case because the prosecutor was found . . . to have violated *Batson* in *Flowers III*." BIO 20. Flowers is asking no such thing.[7] Respondent even posited Flowers' petition implies that a

[7] Flowers' Petition explicitly disavowed that extreme, and obviously erroneous, argument:

> As the dissenters carefully noted, "On its own, [Evans' prior history of discrimination] is not dispositive of a finding of racial discrimination." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted).

Pet. for Cert. at 21.

prosecutor with a history of discrimination would be disqualified from participating in jury selection. It does not.[8] Respondent claims that Flowers' arguments are inconsistent with this Court's *Batson* jurisprudence because that jurisprudence recognizes that the "burden of persuasion rests with, and never shifts from, the opponent of the strike." BIO 20-21 (citing *Johnson v. California*, 545 U.S. 162, 171 (2005)). Flowers, however, has never disputed that the burden of persuasion always rests with the opponent of the strike. Ultimately, Respondent caricatures Flowers' arguments, posing a false dichotomy: Either Evans' prior history of discrimination is dispositive or it may be completely disregarded.

Respondent's concentration only on these extremes obscures the obvious middle course compelled by this Court's *Batson* jurisprudence and basic principles of credibility-assessment. If a prosecutor offers facially race neutral reasons for his or her strikes, *Batson*'s third step requires a reviewing court to determine whether to credit those reasons, or to deem them pretextual. And in making that credibility determination, this Court has held that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) ("*Miller-El II*")). Among the factors this Court has found to "bear upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El II*, 545 U.S. at 240; "side-by-side comparisons of some black venire panelists who

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[8] On the contrary, Flowers' Petition maintains:

> Evans could have—and *should* have—learned the constitutional mandate of racial neutrality from the Mississippi Supreme Court's rebuke in *Flowers III*, even though he clearly had not learned it from the trial court's finding of discrimination in *Flowers II.* Another prosecutor might have. But Evans did not.

Id.

were struck and white panelists allowed to serve," *id*. at 541; "contrasting voir dire questions posed respectively to black and nonblack panel members," *id*. at 255; and mischaracterization of the evidence, *id*. at 244; and a history of racial discrimination by the prosecuting office, *id*. at 266.

Respondent argues that Flowers "does not explain how the prosecutor's history of adjudicated *Batson* violations constitute [sic] substantial case-specific evidence that demonstrates any of the prosecution strikes against the prospective African American jurors should not be credited." BIO 21. If Respondent means that the history alone does not discredit all possible strikes, Flowers has not offered an explanation of how that is true-but also does not *claim* that it is true. Rather, Flowers has insisted that Evans' history must be *considered* in evaluating his *credibility*, and that his history weighs against crediting his stated reasons. For that modest proposition, Flowers offered ample explanation in his Petition. Pet. for Cert. at 10-11; 29-30.

The shortest explanation of the relevance of Evans' history was offered by the three dissenters below: "If the history of discrimination by a district attorney's office is a permissible consideration under *Batson*, surely the history of the *same prosecutor in the retrial of the same case* is a legitimate consideration." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted) (emphasis in original); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted). Flowers also provided a more expanded explanation, Pet. for Cert. at 10-11; 29-30, which may be summarized as follows: The object of step three's multi-factor inquiry is to determine whether the prosecutor's proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). Both law and life teach that in determining the likelihood of disputed honesty, a history of dishonesty on a closely related issue is highly probative. *See*, *e.g.*, Fed. R. Evid. 609(a)(2) (mandating admissibility of evidence of a prior conviction for use in

"attacking a witness's character for truthfulness" where the "elements of the crime required proving . . . a dishonest act or false statement").

B. Respondent's distinction of *Miller-El* and *Foster*.

The *Flowers VI(B)* majority opinion attempts to distinguish both *Foster* and *Miller-El*, the former on the grounds that "Foster in no way involved a particular prosecutor's history of adjudicated *Batson* violations," *Flowers VI(B)*, 240 So.3d at 1118, and that "[t]he prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." *Flowers VI(B)*, 240 So.3d at 1124. As Flowers' petition points out, there is no apparent reason to find the jury selection file in *Foster* more morally despicable than an adjudicated history of repetitive, actual race discrimination. Similarly, the *Flowers VI(B)* majority addresses Flowers' contention that *Miller-El II*, compelled consideration of Evans' history, but rejected the comparison, stating: "The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." *Flowers VI(B)*, 240 So.3d at 1124 (citing *Miller-El II*, 545 U.S. at 266). But again, as both Flowers' petition and the dissenting opinion point out, the majority opinion offers no explanation for why the policy of an *office*—adopted when that policy had not yet been declared unconstitutional—would be more probative of willingness to lie and/or willingness to violate the Constitution than would be the prior adjudicated, repeated, unconstitutional discrimination of the *individual* whose credibility was at stake. Pet. For Cert. at 18-19; *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted) (emphasis in original); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted); *see also*, *Currie v. McDowell*, 825 F.3d 603, 610-11, 613 (9th Cir. 2016) (holding that the prosecutor's history of

Batson violations supports a finding of pretext because "[i]n this instance, it is not only the same office, but the same prosecutor, who brings a history of *Batson* violations with him"); *McNair v. Campbell*, 416 F.3d 1291, 1312 (11th Cir. 2005) (noting that a history of discrimination in the district attorney's office was insufficient to prove a *Batson* violation because the defendant "failed to connect any conduct criticized in the cited cases to [the defendant's] own prosecutor, much less his conduct in this case.").

Respondent repeats these purported distinctions without providing the missing explanation for either the strange moral comparison between the evidence in *Foster* and the evidence of Evans' repeated, adjudicated discrimination, or the counter-intuitive probativeness comparison between the historical evidence in *Miller-El* and the historical evidence presented by Flowers. The absence of that explanation is no accident.

Respondent also offers another distinction, equally unfounded. According to Respondent, *Miller-El* and *Foster* are distinguishable because both, unlike *Flowers VI*, were post-conviction cases. This third factual difference, like the two relied upon by the Mississippi Supreme Court majority, has no bearing on the necessity of considering the history of discrimination. According to Respondents, "*Foster*, like *Miller-El II*, is a collateral review case, which permits evidence outside the record on appeal to be considered, unlike this case." BIO 23; see also, id. at. 17 ("*Foster* involves evidence that was developed after trial . . . ."). This is a true statement, but an irrelevant one. Flowers does not and need not rely on evidence "outside the record on appeal." Evidence of Evans' history of discrimination is contained in the record on appeal. The fact that Evans' behavior occurred prior to the trial in *Flowers VI* is no less relevant on direct appeal than it would be on collateral review. Evidence *discovered* after trial is not cognizable on direct appeal, but Flowers

does not rely on such evidence. Neither the trial court nor the Mississippi Supreme Court has ever suggested that Flowers failed to comply with Mississippi procedural requirements in his reliance on Evans' history. It would be remarkable to disfavor presentation of available evidence of discriminatory purpose at the earliest opportunity, and Respondent cites nothing in *Miller-El* or *Foster* that supports disregarding evidence that was presented to the factfinder.

C. Respondent's failure to offer a plausible alternative explanation for the GVR in this case.

Like the *Flowers VI(B)* majority, Respondent provides a lengthy description of *Foster*'s facts. Citing Justice Alito's dissent, Respondent further claims that *Foster* "did not change the applicable principles for analyzing a *Batson* claim," BIO 16, apparently in service of its argument that the GVR required nothing of the Mississippi Supreme Court. However, Respondent has offered no theory of why this Court GVRed this case for reconsideration in light of *Foster* (or for that matter, why the opinion of a Justice dissenting from a GVR should be the touchstone of the duty the GVR places upon the lower court).

Instead of presenting its own view of what the GVR required, Respondent invented and attributed to Flowers a position it could then attack. According to Respondent, Flowers' Petition insists that "to comply with the GVR" requires suspension of all deference to a trial court's determination. BIO 15-16. This assertion, however, sets up yet another straw man; Flowers' Petition nowhere claims that the GVR in light of *Foster* precluded according any deference to the trial court's determination. Rather, Flowers' Petition claims that the relevance of *Foster* lies in its statement that the third step of *Batson*—determination of whether facially neutral reasons are pretextual-"turns on factual determinations, *and in the absence of exceptional circumstances*, '[a

reviewing court should] defer to state court factual findings unless [it] conclude[s] that they are clearly erroneous.'" *Foster*, 136 S.Ct. at 1747 (citing Snyder, 552 U.S. at 477) (emphasis added). Therefore, upon remand the Mississippi Supreme Court was obliged to focus on Evans' extraordinary history, the only "exceptional circumstance" that could have prompted this Court to GVR the case, and to reconsider the question of pretext in light of those circumstances to avoid a "clearly erroneous" result.

It is not that no deference is due the trial court's determination, but that the presence of exceptional circumstances lessens the deference due the trial court. Why would a history of discrimination in the exercise of a prosecutor's peremptory challenge constitute an exceptional circumstance? Because ordinarily, demeanor is extremely probative of credibility, more probative than a cold review of the record; consequently, in ordinary circumstances, only where a trial judge's credibility determination is "clearly erroneous" should it be overturned. But it is not always the case that demeanor is the best evidence of credibility. Evans' prior history of at least twice discriminating in the exercise of his peremptory challenges confirmed not only his willingness to violate the law, but equally importantly, his willingness to offer pretextual race-neutral reasons to cover his violations. *That* willingness was at least as probative of the credibility of subsequent facially race-neutral reasons as was Evans' demeanor. Indeed, given the prior finding in *Flowers III* that the trial judge had erroneously assessed Evans' demeanor, crediting his stated reasons when they were in fact pretextual, Evans' demeanor seems to have been a decidedly poor indicator of pretext. Under these exceptional circumstances, lesser deference was due to the trial judge's determination, and consideration of the other evidence of discrimination in light of Evans' prior history was required.

IV. THE LOWER COURT'S DISMISSAL OF THE PROSECUTOR'S HISTORY OF DISCRIMINATION WAS OUTCOME-DETERMINATIVE.

The *Flowers VI(B)* majority opinion fails to lessen the deference due to trial court credibility determinations under ordinary circumstances, fails to evaluate the likelihood that Evans would do what he had done—at least twice—before, and fails to consider the other evidence of discrimination in light of what Evans had shown himself willing to do and say. Its assertion that "[t]he prior adjudications of the violation of *Batson do not undermine* Evans' race neutral reasons," *Flowers VI(B)*, 240 So.3d at 1124 (emphasis added), is simply wrong. Dispute over *how much* those adjudications undermine his reasons is possible, but this Court's precedents leave open no dispute over *whether* they weigh against the credibility of his stated reasons.

Respondent's BIO, like the *Flowers VI(B)* majority opinion, runs through Evans' stated reasons with no consideration of his history. It resolves all doubtful questions in favor of Evans, and ignores other evidence suggesting pretext, including disparate questioning, the strength of the *prima facie* case, comparative juror analysis, several mischaracterizations of the record, and a highly unusual out-of-court investigation of a juror's answers. Flowers' Petition examines in detail the evidence that points toward discriminatory purpose, looking at that evidence in light of Evans' prior willingness to discriminate and his prior willingness to dissemble regarding his discriminatory intent. As the Petition also sets forth, the three dissenters do the same, and conclude, considering the totality of the circumstances, that Flowers' evidence meets the burden of establishing pretext. It is telling that both the majority below and Respondent here refuse to undertake that consideration.

CONCLUSION

WHEREFORE, for these additional reasons, this Court should grant certiorari.

Respectfully submitted,

Sheri Lynn Johnson*
Keir M. Weyble
Cornell Law School
158 Hughes Hall
Ithaca, NY 14853
607 255 3805
slj8@cornell.edu

Alison Steiner
Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St., Suite 604
Jackson, MS 39201
601 351 2490

BY: /s/ Sheri Lynn Johnson
Counsel for Petitioner

*Counsel of Record

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