No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LISA JO CHAMBERLIN, Petitioner

v.

MARSHALL L. FISHER, Respondent

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

PETITIONER'S APPENDIX

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United States Court of Appeals, Fifth Circuit.

Lisa Jo CHAMBERLIN, Petitioner–Appellee
v.
Marshall L. FISHER, Commissioner, Mississippi Department of Corrections, Respondent–Appellant

No. 15-70012
|
March 20, 2018

Synopsis

Background: Following affirmance of her state court conviction for two counts of capital murder, petitioner sought federal habeas relief. The United States District Court for the Southern District of Mississippi, Carlton W. Reeves, J., 2015 WL 1485901, granted petition and ordered state to give petitioner new trial, finding that the Mississippi Supreme Court erred when it concluded that the prosecution did not discriminate against black prospective jurors at the petitioner's jury selection. The Court of Appeals, Gregg Costa, Circuit Judge, 855 F.3d 657, affirmed.

Holdings: On rehearing en banc, the Court of Appeals held that:

[1] a state court is not required to sua sponte seek comparative juror analysis, and

[2] petitioner failed to establish that prosecution's race-neutral reasons for peremptory strike of prospective black jurors were pretextual.

Reversed.

Gregg Costa, Circuit Judge, filed separate dissenting opinion and was joined by Stewart, Chief Judge, Davis, Dennis, and Prado, Circuit Judges.

West Headnotes (15)

[1] **Habeas Corpus** Review de novo
Habeas Corpus Clear error

197Habeas Corpus
197IIIJurisdiction, Proceedings, and Relief
197III(D)Review
197III(D)2Scope and Standards of Review
197k842Review de novo
197Habeas Corpus
197IIIJurisdiction, Proceedings, and Relief
197III(D)Review
197III(D)2Scope and Standards of Review
197k846Clear error

In reviewing a grant of habeas relief, the Court of Appeals examines factual findings for clear error and issues of law de novo.

Cases that cite this headnote

[2] **Habeas Corpus** Federal Review of State or Territorial Cases

197Habeas Corpus
197IIGrounds for Relief; Illegality of Restraint
197II(A)Ground and Nature of Restraint
197k450Federal Review of State or Territorial Cases
197k450.1In general

Under Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant relief when a state court has misapplied a governing legal principle to a set of facts. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[3] **Habeas Corpus** Federal Review of State or Territorial Cases

197Habeas Corpus
197IIGrounds for Relief; Illegality of Restraint
197II(A)Ground and Nature of Restraint
197k450Federal Review of State or Territorial Cases
197k450.1In general

The question under Antiterrorism and Effective Death Penalty Act (AEDPA) is not

whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable, a substantially higher threshold. 28 U.S.C.A. § 2254(d)(1).

Cases that cite this headnote

[4] **Habeas Corpus** Federal Review of State or Territorial Cases

197Habeas Corpus
197IIGrounds for Relief; Illegality of Restraint
197II(A)Ground and Nature of Restraint
197k450Federal Review of State or Territorial Cases
197k450.1In general

To grant habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court must find the state-court conclusion an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C.A. § 2254(d)(2).

Cases that cite this headnote

[5] **Habeas Corpus** Presumptive accuracy of state determination, and rebuttal of presumption

197Habeas Corpus
197IIIJurisdiction, Proceedings, and Relief
197III(C)Proceedings
197III(C)4Conclusiveness of Prior Determinations
197k765State Determinations in Federal Court
197k768Presumptive accuracy of state determination, and rebuttal of presumption

Under Antiterrorism and Effective Death Penalty Act (AEDPA), state-court factual findings are presumed correct; the habeas petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[6] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

To establish that the prosecution engaged in invidious racial discrimination during jury selection: (1) the claimant must make a prima facie showing that the peremptory challenges have been exercised on the basis of race; (2) the burden then shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges; and (3) the trial court must determine whether the claimant has carried her burden of proving purposeful discrimination.

1 Cases that cite this headnote

[7] **Jury**Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

At second step of *Batson* analysis, unless a discriminatory intent is inherent in the prosecutor's explanation for its peremptory challenges, the reason offered should be deemed race-neutral.

1 Cases that cite this headnote

[8] **Jury**Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

At second step of *Batson* analysis, the prosecutor's proffered explanation for its peremptory challenges need not be persuasive, or even plausible; the issue is the facial

validity of the prosecutor's explanation.

Cases that cite this headnote

[9] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

On claim of discriminatory use of peremptory challenges, a state court is not required to, sua sponte, seek a comparative juror analysis between black jurors the prosecution struck and white jurors it accepted where the defendant has not sought such a comparison.

Cases that cite this headnote

[10] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

Defendant failed to establish that prosecution's race-neutral reasons for peremptory strike of two black prospective jurors in capital murder trial were pretextual, and thus she could not prevail on her *Batson* challenge; white prospective juror who prosecution kept gave response to question, on jury questionnaire, regarding his opinion on the death penalty, that materially differentiated him from the two black jurors who were struck and made him a more favorable juror for the prosecution, and prosecution kept a black juror who answered the question in the same manner as the white juror.

Cases that cite this headnote

[11] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

When analyzing *Batson* challenges, bare statistics are not the be-all and end-all; side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve can be more powerful.

Cases that cite this headnote

[12] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

Focus on contemporary reasons articulated for a prosecutor's decision to strike a prosecutive juror on a *Batson* challenge does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence.

1 Cases that cite this headnote

[13] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

On a *Batson* challenge, a prosecutor's timely expressed neutral reasons for striking prospective jurors are what must be tested for veracity by the trial court and later reviewing courts.

1 Cases that cite this headnote

[14] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

When a prosecutor gives a facially race-neutral reason for striking a black juror, on a *Batson* challenge, a reviewing court must assess the plausibility of that reason in light of all evidence with a bearing on it.

Cases that cite this headnote

[15] **Jury** Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

A prosecutor is permitted to explain why he accepted alleged non-black comparators at the time a comparative juror analysis is undertaken on a *Batson* challenge, but having already explained why certain jurors were struck, the prosecutor need not preemptively show why other, allegedly comparable jurors were not.

Cases that cite this headnote

***834** Appeal from the United States District Court for the Southern District of Mississippi

Attorneys and Law Firms

Elizabeth Unger Carlyle, Kansas City, MO, Michael James Bentley, Esq., Michael Leland Cowan, Alicia Kate Margolis, Esq., Attorney, Bradley Arant Boult Cummings, L.L.P., Jackson, MS, for Petitioner–Appellee.

Cameron Leigh Benton, Special Attorney to the Attorney General, Marvin Luther White, Jr., Esq., Assistant Attorney General, Office of the Attorney General for the State of Mississippi, Jackson, MS, for Respondent–Appellant.

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, HIGGINSON, and COSTA, Circuit Judges.[1]

Opinion

Lisa Jo Chamberlin participated in a heinous double murder in Mississippi. A jury convicted her of two counts of capital murder. She was sentenced to death. Chamberlin, who is white, appealed her conviction, arguing in part that the prosecution invidiously discriminated against ***835** black prospective jurors during jury selection at her trial in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Her appeal made its way through the Mississippi court system, where it was denied at every stage. She then turned to federal court, petitioning for a writ of habeas corpus. The district court granted Chamberlin's petition and ordered the State to give her a new trial, finding that the Mississippi Supreme Court erred when it concluded that the prosecution did not discriminate against black prospective jurors at Chamberlin's jury selection. Mississippi appealed to a panel of this court, which affirmed in a split decision. We agreed to hear the case en banc and now REVERSE the district court.

I

The gruesome details of Chamberlin's crimes have been laid out in detail several times—we need not reiterate them here. The evidence against her was substantial; she was duly convicted by a jury of her peers of two counts of capital murder. What is essential to this appeal is not what happened during the trial, however, but rather what took place before the trial began.

A. Jury Selection

Chamberlin's jury selection began with a pool of 42 qualified jurors, thirteen of whom—31%—were black. The prosecution and defense were each entitled to exercise up to fourteen peremptory strikes. The prosecution began by moving through a batch of prospective jurors, striking or keeping as it went. The defense then went through the jurors the prosecution had accepted, exercising its peremptory strikes as it wished. Any jurors that were accepted by both the prosecution and defense were put on the jury, and the prosecution then began again with a fresh batch. This procedure continued until twelve jurors and two alternates were selected. The prosecution exercised thirteen of its peremptory strikes throughout the process; the defense used all fourteen. Ultimately, Chamberlin's jury consisted of ten white jurors, two black jurors, and two white alternates.

Chamberlin's counsel objected to the prosecution's use of peremptory strikes against black prospective jurors throughout jury selection. The trial court expressed doubts that Chamberlin had established a prima facie case under the *Batson* framework, but asked the prosecution for its race-neutral reasons for the strikes in any case. The prosecution's race-neutral reasons for striking two specific prospective black jurors are pertinent here. When asked to explain its strikes of black prospective jurors Sturgis and Minor, the prosecution pointed to their answers to three questions on the jury questionnaire. Both answered questions 30, 34, and 35 in ways that indicated they were uneasy with the prospect of announcing a verdict of death and might hold the government to a higher burden of proof than the law requires. The defense responded to these proffered race-neutral reasons on general grounds, arguing that both Sturgis and Minor "could be ... fair-minded jurors on the question of the death penalty." Relevant to this appeal, at no point did Chamberlin's counsel seek a comparative juror analysis between black jurors the prosecution struck and white jurors it accepted, nor did the trial court conduct such a comparison *sua sponte*. The trial court rejected Chamberlin's *Batson* argument and the trial proceeded apace. Chamberlin was ultimately convicted and sentenced to death.

B. Mississippi Supreme Court

The Mississippi Supreme Court had two separate opportunities to review Chamberlin's ***836** *Batson* claim. It rejected her contentions both times. First was Chamberlin's direct appeal, where she argued that the trial court erred in denying her *Batson* challenge, focusing on the prosecution's strikes of seven black prospective jurors. *See Chamberlin v. State*, 989 So.2d 320, 336 (Miss. 2008). The court concluded that Chamberlin's argument as to four of the prospective jurors was procedurally barred. *See id.* at 339. As for the other three, the court concluded that "Chamberlin argued reasons why they would make good jurors but failed to rebut the specific reasons proffered by the State for striking them." *Id.* Accordingly, the court found that, "[c]onsidering the totality of the evidence, the trial court's ruling on Chamberlin's *Batson* challenge was neither clearly erroneous nor against the overwhelming weight of the evidence." *Id.* Just as in the trial court,

Chamberlin's counsel never sought a comparative juror analysis on direct appeal, nor did the Mississippi Supreme Court perform such an analysis *sua sponte*.

Chamberlin's *Batson* claim again came before the Mississippi Supreme Court two years later when she filed a motion for post-conviction relief, arguing in relevant part that her state trial counsel was ineffective because he failed to adequately argue her *Batson* challenge. This time Chamberlin specifically argued that her counsel "should have performed a comparative jury analysis, which would have demonstrated disparate treatment of the jurors, indicating that the State's strikes were pretextual." *Chamberlin v. State*, 55 So.3d 1046, 1051 (Miss. 2010). In response to this contention, the Mississippi Supreme Court conducted a "thorough review of the record ... including the jury questionnaires provided by Chamberlin," and concluded that each of the black jurors struck gave responses "in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the State." *Id.* at 1051–52. The court was therefore "unable to find disparate treatment of the struck jurors" and concluded that Chamberlin's *Batson* claim was "without merit." *Id.* at 1052.

C. Federal Habeas

Having failed to get the desired relief from the Mississippi courts, Chamberlin petitioned for a writ of habeas corpus in federal court. Her petition listed thirteen grounds for relief, among them that the Mississippi Supreme Court clearly erred in denying Chamberlin's *Batson* claims. *See Chamberlin v. Fisher* ("*Chamberlin I*"), No. 11CV72CWR, 2015 WL 1485901, at *12 n.3 (S.D. Miss. Mar. 31, 2015).

The district court granted Chamberlin's petition, finding that her *Batson* claim warranted federal relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). AEDPA provides two grounds upon which a federal court can grant habeas relief for claims decided in state court: if the state court decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The district court concluded that both grounds for relief applied in Chamberlin's case.

First, the district court interpreted the Supreme Court's decision in *Miller-El v. Dretke* ("*Miller-El II*"), 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), as requiring a state court to conduct a comparative juror analysis between black jurors who were struck by the prosecution and white jurors who were kept, even where the defendant had not sought any such comparison. *See* ***837** *Chamberlin I*, 2015 WL 1485901, at *17. Accordingly, the district court found that "the Mississippi Supreme Court's failure to conduct a comparative analysis was contrary to clearly

established federal law requiring that analysis, as announced in *Miller-El* [*II*]." *Id.*

The district court further held that the lack of comparative juror analysis rendered "the state court's conclusion that there was no showing of purposeful discrimination ... incomplete." *Id.* It concluded that the lack of comparative analysis "required by federal law" rendered the Mississippi Supreme Court's "factfinding procedures ... [in]adequate for reaching reasonably correct results." *Id.* (internal quotation marks omitted). The district court thus held that the Mississippi Supreme Court's factual findings were not entitled to AEDPA deference. *Id.*

In short, the district court concluded as a matter of law that a state court must conduct a comparative juror analysis in *Batson* cases *sua sponte*. It reasoned that because the Mississippi Supreme Court failed to do so, its decision on Chamberlin's *Batson* case was both unreasonable as a matter of law and so infirm as a factual matter so as to not be entitled to the substantial deference AEDPA would otherwise require.[2]

II

[1]"In reviewing a grant of habeas relief, the Court examines 'factual findings for clear error and issues of law de novo.' " *Richards v. Quarterman*, 566 F.3d 553, 561 (5th Cir. 2009) (quoting *Barrientes v. Johnson*, 221 F.3d 741, 750 (5th Cir. 2000)).

[2] [3] [4] [5]This case is governed by AEDPA. As noted above, AEDPA restricts a federal court's ability to grant habeas relief after an adjudication on the merits in state court to only two grounds. Under § 2254(d)(1), a federal court "may grant relief when a state court has misapplied a governing legal principle to a set of facts." *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). But "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). Under § 2254(d)(2), "a federal habeas court must find the state-court conclusion 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Richards*, 566 F.3d at 562 (quoting *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006)). Importantly for present purposes, "[s]tate-court factual findings ... are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence." *Id.* (internal quotation marks omitted).

[6] [7] [8]Chamberlin's only claim at issue in this appeal stems from the Supreme Court's decision in *Batson*. *Batson* set up a three-step burden-shifting framework for determining whether the

prosecution has engaged in invidious racial discrimination during jury selection. "First, the claimant must make a *prima facie* showing that the peremptory challenges have been exercised on the basis of race. ... [T]he burden [then] shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges. Finally, the trial court must determine ***838** whether the claimant has carried [her] burden of proving purposeful discrimination." *United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000). "At the second step, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered should be deemed race-neutral. The proffered explanation need not be persuasive, or even plausible .... The issue is the facial validity of the prosecutor's explanation." *Williams v. Davis*, 674 Fed.Appx. 359, 363 (5th Cir. 2017) (unpublished) (internal quotation marks and alterations omitted) (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). Throughout, "[t]he party making the claim of purposeful discrimination bears the ultimate burden of persuasion." *Montgomery*, 210 F.3d at 453.

Thus, Chamberlin's claim faces a formidable twofold hurdle: she must overcome both the burden placed on her by the *Batson* framework and the substantial deference AEDPA requires us to give the state court's factual findings.

III

We must decide whether either of the two grounds for granting habeas relief under AEDPA applies to Chamberlin's case. The district court concluded that both applied. We disagree on both fronts.

A. Clearly Established Federal Law

The district court's interpretation of *Miller-El II* compelled its conclusion that the state court's "failure to conduct a comparative analysis was contrary to clearly established federal law." *Chamberlin I*, 2015 WL 1485901, at *17. *Miller-El II* reiterated the three-step *Batson* framework for determining whether a party has purposefully discriminated on the basis of race in using its peremptory strikes of prospective jurors. 545 U.S. at 239, 125 S.Ct. 2317. This three-part inquiry derives from the burden-shifting formula used in Title VII cases; indeed, the Court cited a Title VII case when discussing the third step. *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). Notably, the Court demonstrated that this step requires the trial court to determine

whether, on the record as a whole, the prosecution's explanation for the juror strike is "unworthy of credence." *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317 (quoting *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 (2000)).

[9]The Supreme Court in *Miller-El II* found that the prosecution had invidiously discriminated in striking ten out of eleven prospective black jurors. *Miller-El II*, 545 U.S. at 265-66, 125 S.Ct. 2317. As one factor in considering the totality of the pretrial record, the Court employed a comparative juror analysis. The district court, however, took this approach to set up as "clearly established law" that *Miller-El II* "require[s]" a comparative juror analysis. *Chamberlin I*, 2015 WL 1485901, at *17. Consequently, the district court held that the Mississippi Supreme Court's decision not to conduct a comparative juror analysis violated this "clearly established law." *Id.* This holding is erroneous on two grounds.

First, *Miller-El II* did not clearly establish any *requirement* that a state court conduct a comparative juror analysis at all, let alone *sua sponte*. Judge Ikuta of the Ninth Circuit recently examined this issue in depth; we find her analysis compelling. *See McDaniels v. Kirkland*, 813 F.3d 770, 782–85 (9th Cir. 2015) (Ikuta, J., concurring). Judge Ikuta explained:

> Because *Miller-El II* considered only whether the state court made an unreasonable factual determination, the Supreme Court did not discuss, let alone squarely establish, a new procedural rule that state courts must conduct comparative juror analysis when evaluating ***839** a *Batson* claim. At no point did *Miller-El II* suggest that the state court in that case violated the petitioner's constitutional rights by failing to adhere to such a procedural rule. Accordingly, because *Miller-El II* does not provide a clear answer to the question whether a state court must conduct comparative juror analysis as part of its *Batson* inquiry, we cannot hold that a state court which fails to conduct comparative juror analysis violates clearly established Federal law, as determined by *Miller-El II*.

Id. at 783 (internal quotation marks and citation omitted). This is especially true where, as here, the defendant never sought a comparative juror analysis. Nowhere in *Miller-El II* did the Supreme Court imply—let alone clearly establish—that a state court *must* conduct a comparative juror analysis *sua sponte*. *Cf. United States v. Atkins*, 843 F.3d 625, 634 (6th Cir. 2016) ("To begin with, the government is correct that the district court's failure to conduct its own comparative juror analysis is not sufficient to require reversal.").

Second, regardless of whether it was required to do so, the Mississippi Supreme Court *did* conduct a comparative juror analysis in Chamberlin's case, albeit in a postconviction proceeding instead of on direct appeal. Chamberlin's *Batson* claim was inextricably intertwined with the ineffective assistance of counsel argument she raised at the postconviction proceeding. She argued in relevant part that her trial counsel was ineffective because he should have sought a comparative juror analysis in the trial court. In response to this contention, the Mississippi Supreme Court stated that

it *had* conducted a "thorough review of the record ... including the jury questionnaires provided by Chamberlin." *Chamberlin*, 55 So.3d at 1051–52. It found no evidence of "disparate treatment of the struck jurors," and concluded that the identical *Batson* claim that eventually came before the district court was "without merit." *Id.* at 1052.

The district court thus erred twice as it pertains to the "clearly established law" ground for habeas relief under AEDPA. First, it erred in concluding that clearly established federal law required the Mississippi Supreme Court to conduct a comparative juror analysis *sua sponte*. Second, it erred in failing to address the comparative juror analysis the Mississippi Supreme Court *did* conduct, albeit in the postconviction context.

B. Unreasonable Determination of the Facts

The district court further concluded that the state court's factual finding that the prosecution did not invidiously discriminate during jury selection was an unreasonable determination of the facts in light of the evidence presented. The district court rested its holding on a comparative juror analysis between Sturgis/Minor and Cooper alone.[3]

***840** Before reaching those arguments, however, it is important to stress that the district court did not grant proper deference to the Mississippi Supreme Court's factual findings at the postconviction proceeding. As noted above, the district court concluded it did not need to defer to the state court's factual findings under AEDPA because those findings did not include the requisite comparative juror analysis. We have already explained that conclusion was error because there is no *requirement* to conduct such a comparison, particularly *sua sponte*. But even if such a requirement did exist, the Mississippi Supreme Court's factual findings during the postconviction proceeding—findings made pursuant to a comparative juror analysis—would be entitled to AEDPA deference. We federal courts are required to defer to the Mississippi Supreme Court's factual finding that a comparative juror analysis in Chamberlin's case produced no evidence of disparate treatment of black prospective jurors.

[10]Even if we were not required to defer to the state court's factual findings, however, we would still hold that the district court erred in concluding that Chamberlin established that the prosecution's proffered race-neutral reasons were pretextual. To show why this is so, we turn to the comparative juror analysis.

[11]The Supreme Court has instructed that, when analyzing *Batson* challenges, "bare statistics" are not the be-all and end-all. *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317. "Side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" can be "[m]ore powerful." *Id.* The crux of the district court's ruling is its erroneous comparison of black

prospective jurors Sturgis and Minor, who were struck by the prosecution, to white juror Cooper, who was kept.

The district court's determination on this front can be boiled down in this way: (1) the prosecution said questions 30, 34, and 35 were the reasons Sturgis and Minor were struck; (2) Cooper answered those questions identically; therefore (3) questions 30, 34, and 35 could not have been the real reasons Sturgis and Minor were struck, else Cooper would have been struck as well. Accordingly, the prosecution's proffered race-neutral reasons for striking Sturgis and Minor must have been pretextual.

But questions 30, 34, and 35 were not the *only* questions Sturgis, Minor, and Cooper had to answer. They were rather three questions out of dozens on a pages-long jury questionnaire. And if Cooper in particular gave other responses that materially differentiated him from Sturgis and Minor and made him a more favorable juror for the prosecution, then the district court's ruling does not follow.

Consider, for example, question 53, which asked prospective jurors to circle the response that best matched their opinion on the death penalty. Sturgis and Minor circled "Generally Favor" and "No Opinion," respectively. Cooper, by contrast, circled "Strongly Favor," and then wrote in "for rape, murder, child abuse, [and] spousal abuse" by hand in the margin. Cooper clearly answered a key question in a way that materially distinguished ***841** him from Sturgis and Minor. Thus, the most logical explanation for the prosecution's not striking Cooper was not because he was white while Sturgis and Minor were black, but because Cooper was a more favorable juror based on his answers to other questions.

This conclusion is further confirmed by the existence of an additional black juror, Carter, who was accepted by the prosecution. Carter gave worse (from a prosecutor's perspective) answers to question 30 and 34 than did Sturgis and Minor, and gave the same answer as they did to question 35. But she answered question 53 in the same manner as Cooper: circling "Strongly Favor" and then writing in by hand additional crimes for which she felt the death penalty was appropriate. And again, Carter—a black prospective juror—was accepted by the prosecution.

Indeed, the district court conceded that the prosecution could reasonably have viewed Cooper as a more favorable juror than Sturgis and Minor in light of his answer to question 53. But it decisively concluded that it could *not* consider Cooper's answer to question 53, because question 53 was not one of the race-neutral reasons given by the prosecution for striking Sturgis and Minor. *See Chamberlin I*, 2015 WL 1485901, at *6 ("While [his response to question 53] might have made Cooper a slightly more desirable juror, it was not a rationale offered by the prosecutor."). The district court concluded, in other words, that to look at Cooper's other answers would be to allow the State to construct an impermissible post hoc explanation for its strikes of black jurors. This conclusion was erroneous for a number of reasons.

[12] [13]First, the district court took out of context the *Miller-El II* admonition that "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317. The Court was careful to limit its warning only to the prosecutor's "reason[s] for *striking [a] juror*" at the second prong of the *Batson* test. *Id.* at 251, 125 S.Ct. 2317 (emphasis added). This narrow focus is essential to maintaining the integrity of the *Batson* framework, which requires a focus on the actual, contemporary reasons articulated for the prosecutor's decision to strike a prospective juror. The timely expressed neutral reasons, after all, are what must be tested for veracity by the trial court and later reviewing courts. And this is what the Supreme Court meant in stating the "stand or fall" proposition: it criticized both the prosecutor and later reviewing courts for accepting either entirely different substituted reasons or post hoc reasons for strikes. The Court's rationale, however, does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence, especially if a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered comparisons to other prospective jurors. Nothing in the "stand or fall" statement means that the prosecutor would forfeit the opportunity to respond to such contentions.

[14]In addition, the Court specifically noted that when a prosecutor gives a facially race-neutral reason for striking a black juror, a reviewing court must "assess the plausibility of that reason *in light of all evidence with a bearing on it*." *Id.* at 251–52, 125 S.Ct. 2317 (emphasis added); *see also Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("We recognize that retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate ***842** court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable."). The Court thus drew a distinction between: (1) inventing a *new* reason for a strike after the fact (not allowed); and (2) reviewing the record to test the veracity of the prosecution's reasons *already given* in their proper time (required). Cooper's answer to question 53 is an example of the latter, because it goes directly to the key issue of whether Sturgis' and Minor's responses to questions 30, 34, and 35 were the real reasons they were struck.

There is, accordingly, a crucial difference between asserting a new reason for *striking* one juror and an explanation for *keeping* another. They are not two sides of the same coin, as the dissent asserts. In the former scenario, the prosecutor effectively concedes that his initial (race-neutral) reasons were insufficient bases for striking the juror. *Miller-El*'s "stand or fall" requirement applies to this situation, blocking such post hoc rationalizations. *See Miller-El II*, 545 U.S. at 250–52, 125 S.Ct. 2317. In the latter, the prosecutor's bases for the strike remain in full effect, so *Miller-El*'s requirement is not implicated. *See United States v. Wilkerson*, 556 Fed.Appx. 360, 365 (5th Cir. 2014) (unpublished) (noting that the prosecution should be afforded the opportunity to demonstrate "meaningful distinctions" between asserted comparators). Instead, the prosecutor is highlighting a crucial difference between the black and non-black jurors that prevented the non-black juror from being struck despite sharing strike-worthy characteristics with a black

counterpart that was struck.[4]

Second, to hold that the prosecution is not allowed to point to Cooper's other jury questionnaire responses is to engage in a bait-and-switch that vitiates the probative value of the jury comparison in the first place. At jury selection, the prosecution was asked to explain why it struck black jurors Sturgis and Minor, as *Batson* requires. It did so. Then, years later on federal habeas, the defense altered its approach, and the prosecution was now asked to explain why it *kept* white juror Cooper. And yet, despite the change in inquiry, the prosecution was not allowed to respond, even by pointing to record evidence it undeniably would have been able to identify had a timely objection been made—it was stuck with the answer it had given to an entirely different question during jury selection. Not only is this state of affairs manifestly unfair, it is inconsistent with the Supreme Court's directive regarding juror analysis in *Snyder*. If a court does not consider the entire context in which a white juror was accepted, then he/she cannot serve as a useful comparator.

A hypothetical will help to illustrate the point:

> 1. Prosecutor decides, as a default position, to strike all jurors who express concerns about the legal burden of proof.
>
> 2. Prosecutor reviews juror questionnaires and notes that Jurors A, B (both ***843** black) and C (white) have expressed concerns about the legal burden of proof. Consequently, Prosecutor intends to strike all three by default.
>
> 3. Upon further review, Prosecutor notes that Juror C alone strongly favors the death penalty. Because this is a capital case, Prosecutor decides to make an exception to the default rule and retain Juror C because of his favorable death penalty views.
>
> 4. Prosecutor strikes Jurors A and B as planned. Responding to a *Batson* challenge, Prosecutor explains that A and B both expressed concerns about the legal burden of proof.
>
> 5. Prosecutor never mentions white Juror C because the law does not require Prosecutor to explain why he decided to keep any specific juror.

In this scenario, when Prosecutor strikes Jurors A and B for their position on the legal burden of proof, Prosecutor has concluded that their position on the legal burden of proof is a sufficiently strong basis to strike them. This implies that there are no other overriding reasons to *accept* A and B as jurors. Conversely, Juror C is not a comparator because his position on the legal burden of proof is *not* sufficiently strong to strike him; instead, his position on the legal burden of proof is redeemed by his stance on the death penalty, making him desirable as a juror.

If the defendant in such a case later raises a comparative jury analysis between Jurors A, B, and C as part of a *Batson* challenge, an accurate and honest assessment of the prosecutor's motives

must allow the prosecution to point to white Juror C's view of the death penalty as the reason he was kept. Otherwise the *Batson* analysis risks capturing too many false positives, precisely because Juror C is no longer an accurate comparator to Jurors A and B.

[15]Third, consider the related issue of the burden that would be placed on the prosecution at jury selection going forward if the district court's reasoning stands. In order to protect against future comparative juror analysis, the prosecution will not only have to explain why it struck black jurors—as *Batson* requires—but also why it *kept* white jurors. Indeed, the prosecution will have to explain why it kept *every* white juror, because it does not know which white jurors will be selected as comparators at some later date. In Chamberlin's case, for example, the only way the prosecution could have avoided the outcome dictated by the district court was by explaining why it *kept* Cooper. But the prosecution could not have known that Cooper would be the eventual comparator chosen and not some other juror, so it would have had to explain why it kept *every* white juror.[5] Such a requirement would make the jury selection process impractical, whereas considering the totality of the circumstances conforms with the Court's instruction in *Batson*, *Miller-El II*, and *Snyder*.[6]

***844** Fourth, the procedure for conducting a comparative juror analysis described by the district court creates perverse incentives for both the defense and the prosecution. For the defense it is better *not* to raise comparative juror analysis in the trial court and to wait until much later in the game to point to a white comparator, because the prosecution will be stuck with whatever reasons it gave for striking black jurors in the trial court and allowed no other explanation—no matter how compelling and/or how certain it is that it would have been raised had a timely objection been made. And for the prosecution, it might be deemed strategically advantageous to be *less* detailed when giving race-neutral reasons in the trial court, because the more general the answers, the harder it will be to conduct a formal side-by-side comparison down the line.

Our holding today does not eviscerate *Batson* protections: We simply allow a prosecutor the chance to respond whenever the court engages in a comparative juror analysis. Important limitations on that response remain. For one, the prosecutor is constrained by the voir dire record, which helps guard against the fabrication of new distinctions that did not motivate the initial decision. Moreover, even if the prosecutor provides a supported basis for keeping a non-black juror, the court must still determine whether that basis provides an adequately redeeming reason to override the strike-worthy characteristics the non-black juror shares with the black jurors who were struck. Perhaps most importantly, allowing this response does not permit the prosecutor to change his original reasons for striking black jurors. Such protections will guard against the rare cases in which a *Batson* violation is followed by an ongoing, planned concealment of that violation by the various prosecutors involved in each case.

Conversely, to hold that a reviewing court cannot look at the totality of the circumstances in order to determine an accurate comparator when conducting a comparative jury analysis *sua sponte* and belatedly on federal habeas is to invert the *Batson* framework, rendering it unjust, impractical, and

contrary to its original purpose.

* * *

The prosecution in Chamberlin's case did what it was supposed to do: it rejected some black prospective jurors and accepted others, accepted some white prospective jurors and rejected others. When asked why it struck individual black prospective jurors, it gave specific race-neutral reasons for the strikes. The Mississippi Supreme Court found on multiple occasions that the prosecution did not invidiously discriminate against black prospective jurors. Then, on federal habeas—where AEDPA deference is the rule—the prosecution was asked to explain years later why it *kept* a white juror. Yet, when it tried to answer that question with reference to record evidence it would have identified had the defense timely objected, the district court concluded it could not do so. No case—not *Batson*, *Miller-El II*, or any other—has ever suggested, let alone mandated, this distortion of the *Batson* regime.

IV

We find that neither statutory ground for granting federal habeas relief under AEDPA applies to Chamberlin's case. Accordingly, we REVERSE the district court's order granting Chamberlin's petition for a writ of habeas corpus, and VACATE the district court's order setting ***845** aside Chamberlin's conviction and sentence.

GREGG COSTA, Circuit Judge, dissenting, joined by STEWART, Chief Judge, DAVIS, DENNIS, and PRADO, Circuit Judges:

The jury—the voice of "We the People" in our justice system—was of such importance to the Founding generation that it is one of only two rights included in both the Constitution and Bill of Rights.[1] U.S. CONST. art. III; amends. VI, VII; *see also* THE FEDERALIST No. 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the [constitutional] convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury"). In the latter, it is the only right that is a focus of two amendments. As is the case for many of our finest institutions, the greatest obstacle to the jury system's achieving its full promise has been racial discrimination. From the earliest applications of the Equal Protection Clause to the present, that guarantee's most prominent role in the criminal justice system has been ferreting out such

discrimination in the composition of juries. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879); *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1880); *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (*Miller-El II*); *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); *Foster v. Chatman*, —— U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016). Unlike other trial rights, the one requiring a jury protects not just those charged with crimes, but all citizens whose service on the jury is essential to ensuring that a cross section of the community is making the important, in this case life-or-death, decisions our justice system confronts. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("Discrimination in jury selection ... causes harms to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."); *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) ("*Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.").

The problem of racial discrimination in the makeup of juries is now largely one about the exercise of peremptory strikes. It has been three decades since the Supreme Court recognized that discriminatory use of a strike violates the Constitution. *Batson*, 476 U.S. at 84, 106 S.Ct. 1712. Even though a high proportion of the recent cases in which the Supreme Court has found a *Batson* violation come from states in our circuit,[2] you can count on one hand the number of cases from this court finding ***846** the discriminatory use of a preemptory strike. It appears that only two of the hundreds of *Batson* decisions in our circuit have ever found that a strike was discriminatory (a few others vacated convictions based on procedural error in application of the *Batson* framework). *See Hayes v. Thaler*, 361 Fed.Appx. 563 (5th Cir. 2010); *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009). Yet the concern today is that a decision affirming the district court's finding of discriminatory strikes, which would put us at a once-a-decade rate of finding *Batson* violations, would impose too much of a "burden ... on the prosecution." Maj. Op. at 843.

The two cases in which we have found discrimination both relied in large part on comparative juror analysis. Today's opinion saps most of the force out of this one tool that has ever resulted in us finding a *Batson* violation. Despite the only reasons cited at trial for striking two black jurors applying equally to an accepted white juror, the majority rejects the direct conclusion to be drawn from this inconsistency that the proffered reasons could not have been the real reasons for the strikes. If this case in which the compared jurors are identical with respect to the reasons stated at trial is not enough (the standard only requires that they be similarly situated), it is difficult to see how comparative analysis will ever support a finding of discrimination.

What is even more troubling is that we have been down this road before. The way the majority opinion gets around the identical comparison is to differentiate the jurors based on reasons not cited during the *Batson* inquiry at trial. In *Miller-El II*, the Supreme Court found error in our

application of comparative juror analysis that did the same thing: "substitution of a reason" for the strike that was not offered at trial. *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317. The Court set forth the following rule in unmistakable terms:

> It is true that peremptories are often the subject of instinct and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Id. (citation omitted); *see also Reed*, 555 F.3d at 376 ("We must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors" (citing *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317)). Yet that is exactly what the majority opinion does: it uses the answers to questions not identified at trial as the basis for overturning the district court's finding that clear and convincing evidence of discrimination exists. As will be explored further, this approach used to avoid the clear import of a direct comparison of the reasons stated at trial is the same rejected analysis of our *Miller-El II* opinion and the Supreme Court dissent. It is one thing to make a mistake; it is quite another to not learn from it.[3]

***847** I.

Before getting to those critical errors in the majority opinion's comparative juror analysis, it is important to note the revealing pattern of discriminatory strikes. The majority opinion does not even mention the highly disproportionate strikes of black prospective jurors. Instead it breezily says the prosecution "rejected some black prospective jurors and accepted others, accepted some white prospective jurors and rejected others." Maj. Op. at 844. It is no wonder the majority opinion does not details those "some"s and "others"; they are nothing alike.

The prosecution struck seven of the first eight black venire members it considered, which included the challenged strikes of Sturgis and Minor. The inverse was true for the first eight white jurors the prosecution considered: it accepted seven of eight (and ended up accepting nine of the first ten whites). Only after defense counsel started raising *Batson* objections and the prosecution was running out of strikes did it accept the two black jurors who ended up on the jury, and the second

was only accepted in a moment of confusion when the prosecutor believed the juror had already been struck. *Cf. Miller-El II*, 545 U.S. at 249–50, 125 S.Ct. 2317 (finding unpersuasive that, towards the end of jury selection, the prosecution accepted a black juror, noting that most of the prosecution's challenges were gone and the prosecutor "had to exercise prudent restraint" at that point).

Even including those late, post-objection decisions, the overall numbers evince discrimination. The prosecution struck nearly two times as many black jurors as it accepted (eight strikes compared to five accepted, including one alternate), while accepting more than four times as many white jurors as it struck (five strikes compared to twenty-three accepted, including three alternates). It exercised 62% of its strikes on black jurors, despite black jurors making up only 31% of qualified prospective jurors.

This racial breakdown of the strikes is even more telling when compared with the results random strikes would predict. Given the demographics of the venire, the probability that random, race-neutral strikes would result in 8 of the 13 struck jurors being black was about 1 in a 100. *See generally* Joseph L. Gastwirth, *Statistical Testing of Peremptory Challenge Data for Possible Discrimination*, 69 VAND. L. REV. EN BANC 51, 59–62 (2016); Joseph L. Gastwirth, *Case Comment: Statistical Tests for the Analysis of Data on Peremptory Challenges*, 4 L. PROBABILITY & RISK 179, 182 (2005) (both showing how to complete this analysis). That probability of roughly 0.01 is "smaller than 0.05, the most frequently used probability level for determining statistical significance, which is equivalent to the two-standard deviation criterion" that the Supreme Court found to be the point at which the possibility of a race-neutral explanation was "suspect" in a case challenging exclusion of Hispanic grand jurors in south Texas. Gastwirth, *Statistical Testing of Peremptory Challenge Data*, at 60; *Castaneda v. Partida*, 430 U.S. 482, 496 n.17, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). Looking at the strikes in terms of odds rather than probability reveals another stark statistic: a black juror had more than *seven times* the odds of being struck that a white juror did. *Id*. at 66.[4]

***848** When the Supreme Court has considered statistical evidence of discrimination in jury selection, it has focused on this demographic breakdown of strikes. *Miller-El I*, 537 U.S. at 331, 123 S.Ct. 1029 ("African–Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were"). As to those strikes, the majority opinion cannot dispute that the prosecutor was far more likely to strike black potential jurors than white venire members. This assessment of a lawyer's overall strikes is not just part of the *prima facie* case that makes up the first stage of *Batson.* As common sense would dictate, disproportionate strike rates involving the entire venire are also relevant in considering the ultimate question whether a particular strike was discriminatory. *Miller–El II*, 545 U.S. at 265, 125 S.Ct. 2317 (considering statistics of overall strikes in concluding that discrimination existed); *Miller–El I*, 537 U.S. at 342, 123 S.Ct. 1029 ("[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors."); *Hayes*, 361 Fed.Appx. at 570 (recognizing that the prosecutor's using 8 of 11 strikes against black jurors is "indicative of discriminatory

intent"); *Fields v. Thaler*, 588 F.3d 270, 274 (5th Cir. 2009) (explaining that at the final *Batson* step "the defendant may rely on all relevant circumstances to raise an inference of purposeful discrimination"); *cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148-49, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (recognizing in the analogous burden shifting framework for employment discrimination cases that the "strength of the plaintiff's prima facie case" remains relevant to the ultimate question).

That two blacks ended up on the jury—one only because the prosecutor mistakenly though the juror had already been struck—does not overcome the strong inference to be drawn from the disproportionate strikes. Other courts of appeals have explained why this is the case:

> The final composition of the jury ... offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race. ... "[A] *Batson* inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain on the jury panel."

Holloway v. Horn, 355 F.3d 707, 728–29 (3d Cir. 2004) (quoting *United States v. Johnson*, 873 F.2d 1137, 1139 n.1 (8th Cir. 1989)). Commentators have also criticized looking at the final makeup of the jury rather than strikes, with one stating this is "not so much a method as an excuse" in that it "fails to address the primary purpose of the *Batson* rule—the protection of individual jurors." Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 475 (1996); *see also* Gastwirth, *supra*, at 56 (finding the approach unreasonable because it ignores the prosecutor's peremptory strikes). Indeed, academic authority—not just that of law professors, but also statisticians—recognizes that the rate at which the prosecutor struck black jurors as compared to nonblack jurors is the most probative metric in *Batson* cases. *See* David C. Baldus, et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges*, 97 IOWA L. REV. 1425, 1455 (2012) ("[T]he most probative measures are based ***849** on contrasts between the prosecutorial strike rates of black and nonblack venire members."); Gastwirth, *Statistical Testing of Peremptory Challenge Data*, at 60 (considering the comparative strike rates for black and nonblack jurors and the difference between the number of minorities struck by the prosecutor to the number expected if those challenged were a random sample).

In terms of those strikes, it is worth repeating that a black juror was more than seven times as likely to be struck as a white one and the random chance that so many blacks would be struck is a remote 1 in a 100. "Happenstance is unlikely to produce this disparity."[5] *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317 (quoting *Miller-El I*, 537 U.S. at 342, 123 S.Ct. 1029).

II.

A.

Comparative juror analysis is a tool that helps determine whether this disproportionate exclusion of black jurors was the extraordinary coincidence it would take to defy these odds. An understanding of probability is not needed to see the mistake the majority opinion's approach makes with this inquiry; the most routine judicial task of reading precedent reveals it.

The rationale for comparative juror analysis is this: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller–El II*, 545 U.S. at 241, 125 S.Ct. 2317. Such "side-by-side comparisons" can be "powerful" evidence of discrimination because they reveal that a lawyer's race-neutral reasons are pretext. *Miller–El II*, 545 U.S. at 241, 125 S.Ct. 2317. To put it in the practical context of jury selection, the idea is that if a lawyer is so troubled by a juror's views on certain issues that the concern leads to striking that juror, then one would expect to see the same concern with another juror expressing the same views. In a jury selection like this one involving written questionnaires, if the lawyer highlighted answers on one juror's form as troubling, the same answers on another juror's form should also be highlighted. If those highlighted answers are later cited by the lawyer in response to a *Batson* challenge for which the trial court has found *prima* ***850** *facie* support and thus requested an explanation, it should not be hard for the lawyer to see and consider all the questionnaires with that answer highlighted.

Miller-El II shows how this analysis can reveal pretext. The state struck a potential black juror purportedly because he "said that he could only give death if he thought a person could not be rehabilitated." 545 U.S. at 243, 125 S.Ct. 2317. If that were the real reason, the Court noted, the prosecutor "should have worried about a number of white panel members he accepted" who expressed similar views. *Id.* at 244–45, 125 S.Ct. 2317. Likewise, although the prosecutor's purported reason for striking another prospective juror (that he considered death "an easy way out") was reasonable on its face, "its plausibility [wa]s severely undercut by the prosecution's failure to object to other panel members who expressed views much like [his.]" *Id.* at 247–48, 125 S.Ct. 2317; *see also Foster*, 136 S.Ct. at 1751 (finding "otherwise legitimate reason[s]" for striking prospective black jurors "difficult to credit in light of the State's acceptance of" white jurors to whom those reasons also applied); *Snyder*, 552 U. S. at 483, 128 S.Ct. 1203 (same); *Reed*, 555 F.3d at 372–73 (same).

The *Miller-El II* comparison revealed the prosecutor's reasons to be pretextual and thus powerful evidence of discrimination even though other reasons the prosecutor gave for striking black jurors did not also apply to accepted white jurors. 545 U.S. at 247, 125 S.Ct. 2317. For example, the prosecutor gave an additional reason for striking two black jurors—that they had relatives who had been convicted of a crime—which did not apply to the white jurors to whom the Court compared them. *Miller-El II*, 545 U.S. at 246–47, 125 S.Ct. 2317; *id.* at 290–91, 125 S.Ct. 2317 (Thomas, J., dissenting). The Court nonetheless rejected the argument that pretext can be found only when an accepted white juror "match[es] all" of the reasons the prosecutor gave for striking a black juror. *Id.* at 247 n.6, 125 S.Ct. 2317 (quoting Thomas, J., dissenting). A rule that "no comparison is probative unless the situation of the individuals compared is identical in all respects" identified by the prosecutor would, it explained, "leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id.*

The jurors "identical in all respects" that *Miller-El II* thought unlikely exist here. Every reason the prosecutor identified for excluding Sturgis and Minor applied to Cooper, the white juror who was not struck.[6] All three said they were "not sure" if they were emotionally capable of announcing a verdict of death; were "not sure" if they would hold the State to a higher burden of proof than the law requires given that it was a death penalty case; and "yes," they would want to be one hundred percent certain of the defendant's guilt before finding her guilty. Comparative juror analysis thus shows that the prosecutor's reason for striking Sturgis and Minor could not have been their answers to questions 30, 34, and 35. Otherwise, he would not have accepted Cooper who had the same answers the prosecution did not like. The perfect match among the answers of these jurors means that even ***851** more than in the other cases that have found pretext based on a comparative juror analysis, "[t]he prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." *Miller-El II*, 545 U.S. at 265, 125 S.Ct. 2317; *Snyder*, 552 U.S. at 485, 128 S.Ct. 1203 ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent."); *Reed*, 555 F.3d at 380–81 ("[T]he comparative analysis demonstrates what was really going on: the prosecution used its peremptory challenges to ensure that African–Americans would not serve on Reed's jury.").

B.

How does the majority opinion try to avoid the implication of pretext that is stronger in this case than those in which the Supreme Court and our court have used comparative analysis to find *Batson* violations? It first does so by invoking AEDPA deference. That deference is substantial in

allowing a federal court to grant postconviction relief only if the state court's rejection of the claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). And a state court's factual findings are presumed to be sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"The standard is demanding but not insatiable; ... '[d]eference does not by definition preclude relief.' " *Miller-El II*, 545 U.S. at 240, 125 S.Ct. 2317 (quoting *Miller-El I*, 537 U.S. at 340, 123 S.Ct. 1029). And in *Miller-El II* and *Reed*, comparative juror analysis less compelling than the identical comparison in this case helped meet that standard. *See id.* at 240, 266, 125 S.Ct. 2317 (granting relief under section 2254(d)(2)); *Reed*, 555 F.3d at 372–73 (same). Indeed, courts have issued writs under AEDPA relying solely on comparative juror analysis to find a *Batson* violation. *Hayes*, 361 Fed.Appx. at 573; *see also Drain v. Woods*, 595 Fed.Appx. 558, 571–81 (6th Cir. 2014) (granting writ by finding a *Batson* violation relying only on a comparative juror analysis); *cf. United States v. Taylor*, 636 F.3d 901, 906 (7th Cir. 2011) (Sykes, J.) (relying on striking comparative juror analysis to find discrimination under the also deferential "clearly erroneous" standard that governs review of federal trial court rulings). Here the damning comparative juror analysis does not stand alone. It is reinforced by the pattern of overall strikes, which makes it highly unlikely as a statistical matter that the disproportionate striking of black jurors was "mere happenstance." *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317. There is also the absence of follow-up questions about the responses that supposedly motivated the prosecutor's strikes of Sturgis and Minor that one would expect if those were real concerns. *See, e.g., Miller-El II*, 545 U.S. at 246, 125 S.Ct. 2317 (citing *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000)); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 519 (Tex. 2008); *Jackson v. Stroud*, 539 S.W.3d 502, 510–11, 2017 WL 6519913, at *5 (Tex. App.—Houston [1st Dist.], Dec. 21, 2017) (all explaining that a "failure to engage in any meaningful *voir dire* examination on the issues that he claims concerned him suggests that his explanation on appeal is pretextual").

The majority opinion defers to findings of the state court in rejecting an ineffective assistance of counsel claim, rather than its findings on direct appeal rejecting the *Batson* claim. This is curious. The Mississippi Supreme Court's rejection of the *Batson* claim on direct appeal did not address comparative juror analysis (as will be discussed below, that makes it no different than most of the cases in which the ***852** Supreme Court or our court have conducted comparative juror analysis during federal habeas). *Chamberlin v. State*, 989 So.2d 320 336–39 (Miss. 2008). At the state postconviction stage, Chamberlin raised the ineffective assistance claim challenging her trial counsel's failure to conduct a comparative analysis during jury selection. *Chamberlin v. State*, 55 So.3d 1046, 1051–52 (Miss. 2010). If a claim of ineffective assistance of counsel that relates to an underlying *Batson* issue is the relevant state court ruling for AEDPA purposes on the direct *Batson* claim, then does a defendant who fails to bring a direct *Batson* claim in state court nonetheless exhaust that claim for purposes of federal review by bringing it on state habeas in the context of a *Strickland* claim? Can a habeas petitioner resuscitate a procedurally defaulted *Batson* claim by raising a *Strickland* claim in state court challenging the attorney's conduct during jury

selection? That would seem to be the implication given the majority opinion's treatment of the ruling on the Sixth Amendment claim as the direct *Batson* "claim" for purposes of AEDPA review. 28 U.S.C. § 2254(d) (granting deference to state court "adjudication of the claim").

In any event, reliance on the state habeas ruling only puts the error of the state court's and majority opinion's comparative juror analysis front and center:

> • This is what the Supreme Court of the United States has said cannot be done in comparing the jurors: "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317.
>
> • This is what the Supreme Court of Mississippi said in concluding that the comparison would not show discrimination: "[A] thorough review of the record in this case, including the jury questionnaires provided by Chamberlin, discloses that each of the African–American jurors struck had at least one response in his or her questionnaire that differentiated him or her from the white jurors who were accepted by the State." *Chamberlin*, 55 So.3d at 1051–52.

Conducting a "thorough review" of the entire record to identify as reasons for the strikes distinctions among the comparators that were not contemporaneously cited violates *Miller-El II*. As the stand-or-fall principle recognizes, such differences will just about always exist when every possible characteristic is fair game. The state habeas court's use of comparative juror analysis is thus "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in *Miller-El II*. 28 U.S.C. § 2254(d)(1). If the state habeas ruling on ineffective assistance is indeed the *Batson* decision we are reviewing, then its plain legal error makes this is an even easier case than I thought.

But regardless of whether the Mississippi court committed AEDPA legal error under section 2254(d)(1) and whether the state court must conduct a comparative juror analysis as the district court concluded, the Supreme Court has made clear that a federal habeas court can consider comparative juror analysis in its section 2254(d)(2) review of whether a state court *Batson* ruling was based on an "unreasonable determination of the facts."[7] *Miller-El II*, 545 U.S. at 240, 125 S.Ct. 2317. As will ***853** be discussed further, it can do so even when the defense made no comparison at any level in state court. *See id*. at 241 & n.2, 125 S.Ct. 2317; *Reed*, 555 F.3d at 372–73; *Woodward v. Epps*, 580 F.3d 318, 338 (5th Cir. 2009) (all conducting comparative analysis as part of the section 2254(d)(2) analysis even though no comparison was identified in state court).

C.

At least as a general matter, the majority opinion recognizes that a federal habeas court reviewing a *Batson* claim can consider comparative juror analysis not raised at trial because it engages in that inquiry. But in doing so, the majority opinion makes the same mistake as the Mississippi habeas court in relying on juror differences not identified at trial. It cannot contest the obvious: that on the questions the prosecutor cited during jury selection as his reasons for excluding black jurors Sturgis and Minor, accepted white juror Cooper gave the same responses. Instead, it argues that it should now be able to identify differences among those prospective jurors on their responses to other questions. The example is the three prospective jurors' differing answers to a separate question about the death penalty (question 53): Cooper was strongly in favor of the death penalty whereas Sturgis "generally favored" it and Minor had "no opinion." Maj. Op. at 840.

So how does the majority opinion get around *Miller-El II*'s command that a prosecutor has to "stand or fall on the plausibility of the reasons he gives"? 545 U.S. at 252, 125 S.Ct. 2317; *see also Reed*, 555 F.3d at 376 ("We must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors" (citing *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317)). It thinks the Supreme Court's emphatic prohibition on post-trial justifications can be overcome by repackaging the argument made by the State about the different answers to question 53. What the State candidly recognizes in its briefing is a new reason for striking the black jurors is now a new reason for keeping the white juror.

Of course, this is just the other side of the same coin. If the difference between the three was question 53, that would mean Sturgis and Minor were struck not only because of their answers to questions 30, 34, and 35, but also because of their more lukewarm support of the death penalty conveyed in response to question 53. As its name demonstrates, the inquiry is a comparative one that requires differentiating the answers of struck and accepted jurors. That means citing different answers to the same question as a reason for keeping one juror is the same as saying the difference was a reason for striking the other juror. *See, e.g.*, *United States v. Taylor*, 636 F.3d 901, 906 (7th Cir. 2011) (properly framing the key question as the reason "for striking [the black juror] but not [the white juror]," which recognizes that the reasons for striking a black juror and keeping a white one are inseparable). To use a simple example, assume a prosecutor struck Jurors A and B on the ground that they wore hats in the courtroom (this is sometimes cited as a reason for strikes on the ground that it shows a lack of respect for the process). But Juror C was also wearing a hat. When this is later pointed out, the reviewing court speculates that Juror C must have been kept in the panel despite the hat because she expressed greater support for the death penalty on a questionnaire than did Jurors A and B. If the court were able to read the prosecutor's mind and this were in fact the real reason for the disparate treatment, then that would mean the hat was not the deal breaker; it alone was not enough for a strike as shown by the acceptance of Juror C. Jurors A and B thus would have been struck, per the court's conjecture, because ***854** they wore a hat *and* were less supportive of the death penalty. And if that were in fact the case, *Miller-El II* says

the prosecutor had to cite both of those reasons.

The view that courts may credit new reasons jurors were *kept* despite sharing the trait the prosecution claimed justified striking black jurors—a novel position as the en banc court cites no other example of a court doing this—would make meaningless *Miller-El II*'s bar on considering new reasons for strikes. Whether labelled as reasons for striking the black juror or ones for keeping the comparators, allowing new explanations years after trial turns the *Batson* inquiry into a "mere exercise in thinking up any rational basis" as there is no way to ensure the post-trial justification is what actually motivated the decisions made during jury selection. *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317. Today's decision demonstrates this as it does not even try to test the genuineness of the new explanation the state offers in its brief by, for example, requiring a hearing at which the prosecutor who selected the jury would testify. *See infra* Section IV.

Miller-El II shows why the distinction between reasons for striking and keeping comparators is empty. The new reason for striking the black juror our court offered that the Supreme Court rejected—his ambivalence about the death penalty—could just as easily have been treated as a reason for keeping the white jurors: their firmer support of the death penalty. 545 U.S. at 250–52, 125 S.Ct. 2317; *Miller-El v. Dretke*, 361 F.3d 849, 856–57 (5th Cir. 2004). Indeed, that is how the *Miller-El II* dissent characterized the difference: a white juror was likely kept because the juror "was adamant about the value of the death penalty for callous crimes." 545 U.S. at 294, 125 S.Ct. 2317 (Thomas, J., dissenting). As the dissent explained more fully:

> In explaining why veniremen Hearn, Witt, and Gutierrez were more favorable to the State than Fields, the majority faults me for 'focus[ing] on reasons the prosecution itself did not offer.' The majority's complaint is hard to understand. The State *accepted* Hearn, Witt, and Gutierrez. Although it is apparent from the *voir dire* transcript why the State wanted to seat these veniremen on the jury, it was never required to 'offer' its reasons for doing so.

Id. at 306 n.4, 125 S.Ct. 2317 (Thomas, J., dissenting) (emphasis in original). The Supreme Court majority rejected this attempt to offer never-before-cited reasons for keeping white jurors, viewing it as a violation of the stand-or-fall principle: "The dissent offers other reasons why these nonblack panel members who expressed views on rehabilitation similar to Field's were otherwise more acceptable to the prosecution than he was. In doing so, the dissent focuses on reasons the prosecution itself did not offer." *Id*. at 245 n.4, 125 S.Ct. 2317. Today's opinion is thus directly at odds with how *Miller-El II* treated new reasons, even those for "keeping white jurors": it did not consider them. The Supreme Court's refusal to consider new justifications, whether framed as a reason for excluding the black juror or in mirror-image terms as a reason for accepting nonblack jurors, binds us.

The majority also says we can look at answers to questions other than the three cited at trial because *Miller-El II* instructed courts to evaluate whether a prosecutors' stated reason is plausible "in light of all evidence with a bearing on it." 545 U.S. at 251–52, 125 S.Ct. 2317. But that should

not be read to provide an end run around the same opinion's emphatic prohibition on considering new reasons. And what matters most is what *Miller-El II* actually did: refuse to consider reasons for differential treatment not mentioned in the trial court. *Miller-El II* shows the way to reconcile these two principles. There is a difference ***855** between evidence bearing on the plausibility of the prosecutor's stated reason, which reviewing courts should consider, and new reasons, which they may not. In evaluating whether proffered reasons were plausible, *Miller-El II* looked to evidence of the prosecutor's veracity other than just the juror comparisons: did he rely on misrepresentations about stricken jurors' answers, probe jurors about the areas of concern, or give inconsistent explanations for strikes? *Id.* at 244–51, 125 S.Ct. 2317. All of these inquiries kept the focus on the reasons for the strikes asserted at trial.

In contrast, *Miller-El II* refused to consider a new reason this court had identified on appeal. *Id.* at 252, 125 S.Ct. 2317. The prosecutor initially had explained a strike by saying the potential juror thought the death penalty was "too easy on some defendants." *Id.* at 250, 125 S.Ct. 2317. When the defendant pointed out during federal habeas that the same reason applied to white jurors the state accepted, our court found the real reason for the strike must have been the struck black juror's "general ambivalence about the [death] penalty and his ability to impose it." *Id.* at 248–51, 125 S.Ct. 2317; *see Miller-El*, 361 F.3d at 856–57. *Miller-El II* rejected this approach, similar to that of today's opinion, because the "Court of Appeals's ... substitution of a reason ... does nothing to satisfy the prosecutors burden." 545 U.S. at 252, 125 S.Ct. 2317. If that new reason our court offered was just part of evaluating whether a prosecutor's stated reason was plausible "in light of all evidence," the Supreme Court would not have ruled it off limits.

Other circuits conducting comparative jury analysis have also read *Miller-El II* as requiring that the "validity of a strike challenged under *Batson* must 'stand or fall' on the plausibility of the explanation given for it at the time, not new post hoc justifications." *Taylor*, 636 F.3d at 902; *see also Love v. Cate*, 449 Fed.Appx. 570, 572 (9th Cir. 2011) (refusing to consider the State's post-trial explanation that white jurors it accepted "had non-racial characteristics that distinguished them from the black venire-member" the State struck because "the prosecutor never stated to the state trial court that he relied on these characteristics, even though *Batson* required him to articulate his reasons"); *McGahee v. Alabama Dep't Of Corr.*, 560 F.3d 1252, 1269 (11th Cir. 2009) (faulting the state appellate court for bolstering the prosecutor's reason with a new explanation when the "State never offered such a full explanation"). In *Taylor*, the only reason the prosecutor gave during jury selection for a strike was that the black juror was unwilling to impose the death penalty on a nonshooter, a position also taken by accepted white jurors. 636 F.3d at 903, 905. After a remand because comparative juror analysis raised concerns about the strike, the district court credited a different justification: it concluded that the comparators' differing views about the death penalty—which "the prosecutor did not say a word about" at trial—explained their disparate treatment. *Id.* at 905–06. Those after-the-fact explanations could be characterized as reasons for keeping the white jurors just as much as they could be treated as reasons for striking the black juror. Yet in the opinion reversing, Judge Sykes explained that it was clear error to accept "new, unrelated reasons extending well beyond the prosecutor's original

justification."[8] *Id.* at 906. So it is today.

***856** None of these others circuits or the Supreme Court has said that *Miller-El II*'s stand-or-fall rule applies only at the second step of *Batson* when the challenged lawyer must state race-neutral reasons. Maj. Op. at 841. The Supreme Court said just the opposite about the placement of the pretext inquiry: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s *third step*." *Miller-El II*, 545 U.S. at 240–41, 125 S.Ct. 2317 (emphasis added). The whole point of comparative juror analysis is to flush out pretext. As it is in the analogous framework for deciding summary judgment in employment discrimination cases, pretext is directly related to the ultimate question of discrimination. The second step requires nothing more than the assertion of a race-neutral reason; the third step tests the legitimacy of that offered reason with comparative analysis playing a key role. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712. Of course, the ease of manipulation via post-trial rationalizations that motivates the stand-or-fall principle could happen just as easily in any of the *Batson* steps. If it is just a "step 2" concern as the majority says, why didn't the Seventh Circuit in *Taylor* allow consideration of the comparators' differing death penalty views as part of "step 3"? Why didn't *Miller-El II* allow consideration at step 3 of the differences our court and Justice Thomas identified among the comparators? If prosecutors and courts had free reign at *Batson*'s third step to compare jurors as to characteristics not cited as a contemporaneous reason for the strike, one would expect to see cases allowing that. There are none.

D.

As no other court applying *Miller-El II* has relied on reasons beyond those given at trial when comparing jurors, the majority is forced to somehow show that this case is unique. It emphasizes that defense counsel did not identify the comparison at trial. The glaring problem with this is that the same was true in *Miller-El II*, as well as in most of the subsequent cases faithfully applying its stand-or-fall command. As there is nothing unusual about this procedural posture of the *Batson* challenge—indeed it is the norm—there is no basis for the majority opinion's new rule that says a prosecutor "is allowed to explain why he accepted non-black comparators at the time the analysis is [first] undertaken." Maj. Op. 843 n.6.

There was no invocation of comparative analysis at ***857** Miller-El's trial. 545 U.S. at 241 n.1, 125 S.Ct. 2317. He did not point out comparable white jurors until federal habeas review. *Id.* at 241 n.2, 125 S.Ct. 2317. This did not go unnoticed. Justice Thomas objected that in state court the

petitioner "did not even attempt to rebut the State's racially neutral reasons" and instead "presented no evidence and made no arguments" in response to the prosecutor's stated justifications. *Id.* at 278, 125 S.Ct. 2317 (Thomas, J. dissenting). He protested that the majority's reliance on "theories that Miller–El never argued to the state courts" and, like Mississippi and the majority opinion does here, argued that "AEDPA does not permit habeas petitioners to engage in this sort of sandbagging of state courts." *Id.* at 279, 125 S.Ct. 2317. But the *Miller-El II* majority rejected this position, holding that the "comparisons of black and nonblack venire panelists" was a "theor[y] about th[e] evidence" properly raised for the first time on federal habeas review to support the petitioner's preserved *Batson* claim. *Id.* at 241 n.2, 125 S.Ct. 2317. Importantly, although no objection put the prosecutor on notice that his reason applied equally to comparable white jurors, the *Miller-El II* court held the state to his reasons. *Id.* at 252, 125 S.Ct. 2317. The prosecutor gave specific reasons—for example a potential juror thought the death penalty was "too easy on some defendants," *id.* at 250, 125 S.Ct. 2317—so the state could not rely on other dissimilarities fixed in the record even though they related to the same general topic of views on the death penalty, *see id.* (not considering a juror's "general ambivalence about the [death] penalty"); *id.* at 290, 293–94, 125 S.Ct. 2317 (Thomas, J., dissenting) (noting the majority refused to consider that one comparable white juror "was adamant about the value of the death penalty for callous crimes").

Until today, we have likewise recognized that *Miller-El II*'s command that prosecutors are stuck with the reasons they cited during *voir dire* applies when the defense does not identify comparators at trial. *See Reed*, 555 F.3d at 372–73 (holding that under *Miller-El II* and *Snyder* the federal habeas court was required to consider the comparative analysis no matter that the petitioner did not identify comparators at trial); *see also Woodward*, 580 F.3d at 338 (holding a comparative analysis was not waived although not raised at trial and conducting such an analysis focused on justifications the prosecutor offered at trial); *United States v. Wilkerson*, 556 Fed.Appx. 360, 363–65 (5th Cir. 2014) (affirming this court "must consider only the [Government's] asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors" while noting the petitioner's failure to point to similarities at trial "robb[ed] the Government of the opportunity to demonstrate other meaningful distinctions"). In fact, when we have engaged in comparative juror analysis, more often than not the comparison was not raised at trial. *See, e.g.*, *Reed*, 555 F.3d at 369–75; *Woodward*, 580 F.3d at 338; *Smith v. Cain*, 708 F.3d 628, 638 (5th Cir. 2013); *Stevens v. Epps*, 618 F.3d 489, 497 (5th Cir. 2010); *Hayes*, 361 Fed.Appx. at 571; *Wade v. Cain*, 372 Fed.Appx. 549, 553 (5th Cir. 2010).[9] And as we observed in *Reed*, Texas appellate courts also routinely conduct comparative juror analyses when defendants did not contemporaneously identify comparators. *See, e.g.*, *Vargas v. State*, 838 S.W.2d 552, 556 (Tex. Crim. App. 1992) (en banc); ***858** *Blackman v. State*, 414 S.W.3d 757, 765, 765 n.31 (Tex. Crim. App. 2013); *Blanton v. State*, 2004 WL 3093219, at *10 (Tex. Crim. App. June 30, 2004); *Adair v. State*, 336 S.W.3d 680, 689 "(Tex. App.—Houston [1st. Dist.] 2010, pet. ref'd). Today's conclusion that *Miller-El II*'s stand-or-fall rule is inapplicable or weakened when a petitioner did not identify comparators during *voir dire* is unprecedented and contravenes that Supreme Court decision and federal and state cases applying it.

Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), also shows this error. In that case, Justice Thomas again voiced his view that comparative juror analysis should not be used to find a *Batson* violation when the defense "never mentioned [the inconsistent treatment] in the argument before the trial court." *Snyder*, 552 U.S. at 489, 128 S.Ct. 1203 (2008) (Thomas, J., dissenting). Over this objection, the Court found a *Batson* violation based on a comparative juror analysis never raised in state court, focusing only on the reasons the prosecutor contemporaneously gave. *Id*. at 485–86, 128 S.Ct. 1203.

The majority cites to *Snyder*'s cautioning "that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial" so "an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Id*. at 483, 128 S.Ct. 1203. But *Snyder* explains that the trial court had explored "the shared characteristic" that the prosecutor had stated was important—"concern about serving on the jury due to conflicting obligations"—with the relevant jurors, so the record enabled the appellate court to compare those jurors *as to that cited characteristic*. *Id.* The "cold appellate record" comment merely points out that how persuasive a comparative juror analysis is depends on how clear the record is about whether prospective jurors were similar *as to the prosecutor's stated justification*. *Id*. When the record is not clear about that similarity, a comparison is not helpful. *See, e.g.*, *Puckett v. Epps*, 641 F.3d 657, 664 (5th Cir. 2011) (relying on *Snyder* in refusing to find a *Batson* violation because the record did not reveal whether jurors who "arguably would have fallen" into categories identified by the prosecutor as problematic actually did so). Indeed, the Sixth Circuit recently explained the lesson to draw from *Snyder* is that conclusions can fairly be made from an appellate record when:

> (i) the government purportedly strikes a venireperson because of an answer to a question posed during *voir dire*; (ii) venirepersons relevant to the comparison were asked the same question during *voir dire*; (iii) the relevant venirepersons actually answered that question in similar depth; and (iv) the purpose of the analysis is to show that the government treated jurors with similar answers differently.

United States v. Atkins, 843 F.3d 625, 636 (6th Cir. 2016). That is this case.

The *Snyder* concern about an undeveloped record on "substantial similarity" analysis is not present here. Because the prosecutor relied exclusively on three specific answers to questions on juror questionnaires, we are able to fully compare the jurors as to the only characteristics the prosecutor identified as relevant, and they are identical. This case thus does not confront the issue that is often the focus of the "substantial similarity" analysis and that *Snyder*'s "cold record" comment was addressing. The explanation a lawyer offers for a strike is usually much more general than the identical answers to specific questions identified here. A prosecutor may, for

example, say a juror was ***859** struck because she "seemed to be anti-law enforcement." That explanation, and whether it applies equally to accepted jurors of a different race, likely does not just implicate answers to a single question. A host of matters in the jury selection record may inform whether the struck juror is similar to an accepted juror as to a general characterization like "anti-law enforcement." Relevant to that assessment might be answers to questions asking about one's views on criminal justice issues, as well as whether anyone in a person's family has been charged with a crime and the reaction to that experience, or whether a relative works in law enforcement. It is that situation in which *Snyder* raises a concern about being able to conduct a similarity inquiry on a cold record. As the D.C. Circuit has recognized, that concern is not present when prosecutors' stated reasons are narrow and specific as they are here. *See United States v. Gooch*, 665 F.3d 1318, 1330 (D.C. Cir. 2012). *Snyder* demonstrates this: "There was only one alleged shared characteristic at issue in *Snyder*—jurors' concerns over having to commit to jury duty in the face of conflicting obligations. It was easy for the Court to sort out this one shared characteristic even on a cold appellate record." *Id*. (citing *Snyder*, 552 U.S. at 483, 128 S.Ct. 1203). It is easy too for the three specific answers cited for striking Sturgis and Minor.[10]

The State and majority opinion further contend that *Miller-El II*'s rule against after-the-fact justifications creates an unfair asymmetry in which the prosecution is held to the reasons it offered at trial whereas the defendant can wait until the appeal to identify jurors like Cooper who have the same answers as people who were struck. Whatever the soundness of this complaint, it is rejected by the leading decisions applying comparative juror analysis. *See Miller-El II*, 545 U.S. at 240–41, 125 S.Ct. 2317 (conducting comparative analysis on habeas review despite no such analysis being presented to state courts); *see also Reed*, 555 F.3d at 372–75 (same); *Woodward*, 580 F.3d at 338 (same); *Smith*, 708 F.3d at 638 ("[A]lthough Smith did not point to specific jurors for comparative analysis, we have conducted an in-depth review of the record ...."). A fear that the prosecution will frequently have to explain "why it *kept* [a] white juror," Maj. Op. at 842, also ignores that the prosecutor only has to offer reasons of any type after a court has found a *prima facie* case of discrimination. At that stage, after the serious accusation of racial discrimination has been leveled and a preliminary case to support it recognized by the court, it does not seem too much to ask prosecutors to list all the reasons motivating their strikes. *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317 ("But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."). If a concern about a black juror was important enough to be cited as a reason for the challenged strike, a white juror with the same problematic characteristic should also be on the prosecutor's mind or, even more easily detectable when the *Batson* claim was raised in this case, subject to the prosecutor's highlighter.

* * *

To sum up the discussion of comparative juror analysis, every one of the grounds on which the majority opinion tries to avoid the inescapable conclusion of pretext that ***860** flows from a comparison properly limited to the reasons stated at trial was also true of *Miller-El II*. It was a

case involving AEDPA deference. It was a case in which the comparative juror analysis was not advanced by the defense at trial or on direct appeal. It was a case in which there were many differences between the struck and accepted jurors not cited at trial but that appellate judges could identify and speculate were reasons for either striking a comparator or for keeping another one. Yet the Supreme Court still found that our application of comparative juror analysis was in error. It is once again.

III.

Beyond its fundamental error of repeating our violation of *Miller-El II*'s stand-or-fall principle, the majority opinion does not even follow the new approach it creates. It says the prosecutor should be given a "chance to respond whenever the court engages in a comparative juror analysis." Maj. Op. 844. That opportunity can include providing a "supported basis for keeping a nonblack juror" that was not articulated at trial. *Id.*

But the prosecutor who exercised the challenged strikes at Chamberlin's trial has never responded to the comparison of the jurors who are identically situated as to the reason stated at trial. The majority opinion instead slams the door on the *Batson* claim based on speculative reasons offered in a brief by appellate attorneys who work in a different office than the trial lawyer who picked the jury. That is at odds with the majority opinion's explanation that a court would have to assess if the new, post-trial justification "provides an adequately redeeming reason to override the strike-worthy characteristics the non-black juror shares with the black jurors who were struck." *Id.* As with any inquiry into intent, that determination would seemingly have to include a credibility assessment of the new reasons the prosecutor cites for "keeping" the white juror. That evaluation of credibility has never happened in this case. Nor will it ever. The majority opinion does not remand for a hearing on the supposed reasons for "keeping" the white juror who gave identical answers to the struck black jurors on Questions 30, 34, and 35. It just accepts what is said in an appellate brief without the prosecutor who made the strikes ever having to provide an explanation or without any explanation ever having been tested in an adversarial process and then evaluated by a factfinder. As a result, there is nothing to ensure that the new, post-trial justification is anything more than an "afterthought." *Miller-El II*, 545 U.S. at 246, 125 S.Ct. 2317.

IV.

Chamberlin's crime was horrific. But for even the most gruesome of crimes with the most culpable of defendants, there are certain trial errors that so fundamentally infect the process ("structural error" is the legal term) that a new trial is required regardless of how strong the evidence against the defendant is. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Discrimination in jury selection is one. *Scott v. Hubert*, 610 Fed.Appx. 433, 434 (5th Cir. 2015) ("[A] *Batson* violation would be a structural error" (analogizing to *Vasquez v. Hillery*, 474 U.S. 254, 261–64, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986))). Eliminating discrimination from jury selection does even more than guarantee a fair trial as important as that goal is; it also promotes confidence in the criminal justice system by ensuring that people of all backgrounds have the role in our courts the Constitution gives them.

Comparative juror analysis plays a crucial role in rooting out this discrimination under the *Batson* framework, which the ***861** Supreme Court has recognized may not fully capture discrimination:

> Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain's* wide net, the net was not entirely consigned to history, for *Batson's* individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain.*

Miller-El II, 545 U.S. at 239–40, 125 S.Ct. 2317; *see also id.* at 270–71, 125 S.Ct. 2317 (Breyer, J., concurring) (citing numerous sources in concluding that "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before"). Comparative juror analysis is an attempt to rectify this weak link in the *Batson* framework: the risk that it "would become a 'mere exercise in thinking up any rational basis.' " *Davis*, 268 S.W.3d at 525 (Jefferson, C.J.) (quoting *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317). As mentioned at the outset, comparative juror analysis is the only tool that has ever enabled this court to find a *Batson* violation. It is largely neutered if an appellate court can come up with "any rational basis" that distinguishes jurors to undo a clear implication of pretext drawn from the reasons the lawyer provided at trial. With a precarious framework like *Batson*, any loosening of the reins can result in an empty harness.

More than mere loosening results from today's decision that defies precedent on the following important questions:

1. Whether the racial makeup of the overall strikes is relevant to the ultimate *Batson* discrimination inquiry concerning a particular strike.

2. Whether *Miller-El II's* stand-or-fall principle applies only at step 2 of *Batson* or also in making the final assessment of discriminatory intent.

3. Whether *Miller-El II*'s stand-or-fall principle only bars new post-trial reasons for striking a minority juror but allows new reasons for accepting white jurors.

4. Whether *Miller-El II*'s stand-or-fall principle applies only when defense counsel identified the comparison at trial.

Correction on these questions that are essential to the *Batson* framework is needed given the number of these claims raised in our circuit, often in capital cases.

In one of a series of criminal procedure cases the Supreme Court has recently decided that address discrimination in our justice system—three involving either jury selection or deliberations—it observed that "[t]he Nation must continue to make strides to overcome race-based discrimination." *Pena-Rodriguez v. Colorado*, —— U.S. ——, 137 S.Ct. 855, 871, 197 L.Ed.2d 107 (2017) (jury deliberations); *see also Tharpe v. Sellers*, —— U.S. ——, 138 S.Ct. 545, 199 L.Ed.2d 424 (2018) (same); *Buck v. Davis*, —— U.S. ——, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017) (racial testimony of an expert witness); *Foster v. Chatman*, —— U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016) (jury selection). Today's decision strides in a different direction.

All Citations

885 F.3d 832

Footnotes

1 Judge Jolly, now a Senior Judge of this court, participated in the consideration of this en banc case. Judge Graves is recused and did not participate in this decision. Judges Willett and Ho also did not participate in this decision.

2 It is worth noting also that at no point did the district court address the Mississippi Supreme Court's comparative juror analysis conducted in Chamberlin's postconviction proceeding. The district court's only reference to the Mississippi Supreme Court's postconviction decision was in passing at the very beginning of its opinion. *See Chamberlin I*, 2015 WL 1485901, at *1.

3 The district court did not, in other words, examine the prosecution's peremptory strike pattern for racial bias. Nevertheless, the dissent conducts such an investigation *sua sponte*. It then misleadingly argues that we, by contrast, "breezily" summarized the prosecution's use of strikes. Instead, we merely reviewed the analysis we received from the district court.
We note that, in any case, the dissent's analysis of this data is hardly illuminating. For one, the dissent makes much of the fact that, if the strikes were made at random, the probability that eight black jurors would be struck is low. All this proves, however, is that the jury strikes were *not* random. Since strikes are made by human choice (that is to say, for specific reasons), this is not a surprising revelation. It only seems so if one equates random selection with race-neutral selection. But random selection is neutral as to *any* potential reason for a strike—from race, to clothing, to (more importantly) positions on the death penalty. The dissent's alternative measure—noting that the odds of being struck were seven times greater for black jurors than for white jurors—fares no better. *See* Joseph L. Gastwirth, *Statistical Testing of Peremptory Challenge Data for Possible Discrimination*, 69 VAND. L. REV. EN BANC 51, 72–73 (2016) (finding no *Batson* violation in a case where the odds a black juror would be struck were nine times greater than those for a non-black juror). In addition, the dissent's suggestion that the prosecution might have acted on the assumption that blacks are more likely to oppose the death penalty is purely speculative.

4 The dissent finds support for its position from published case law in other circuits, but we see no conflict with this distinction in those cases. In *Taylor*, for example, the Seventh Circuit blocked the prosecution's effort to raise seven new reasons for striking a juror that had not been offered during voir dire. *United States v. Taylor*, 636 F.3d 901, 904–06 ("Accepting new, unrelated reasons extending well beyond the prosecutor's original justification *for striking [the juror]* amounts to clear error under the teaching of *Miller–El II*, and the government's reliance on these *additional* reasons raises the specter of pretext." (emphasis added)). Similarly, the Eleventh Circuit rejected the state court's attempt to more fully explain the state's reason for striking a juror that the state had "never offered" before. *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1269–70 (11th Cir. 2009).

5 At oral argument Chamberlin's counsel explicitly conceded that its argument would require prosecutors to explain their reasons for keeping white jurors: "I think what *Miller-El* [*II*] should have taught the prosecutor is, if I am excluding black jurors for reasons which apply identically to white jurors, I ought to think about adding to my explanation of why I'm excluding the black jurors—to explain that, because otherwise it's going to be possible, way down the line, for somebody to take a look at that. I don't think it's so hard to do."

6 The concern here is not, as the dissent seems to suggest, that no comparative juror analysis is permitted unless the defendant first raises such an argument at trial. We simply permit the prosecutor to explain why he accepted alleged non-black comparators at the time the analysis is undertaken. Having already explained why certain jurors were struck, the prosecutor need not preemptively show why other, allegedly comparable jurors were not. No precedent from the Supreme Court or this circuit has required such clairvoyance.

1 Venue for criminal trials is the other. U.S. CONST. art. III; amend. VI.

2 About a decade ago, a justice serving on the Supreme Court of Texas counted all the reported state cases addressing *Batson* and concluded that: "All these problems [associated with peremptory strikes]—discriminating against minorities, disrupting trial, and discarding perfectly good jurors—are particularly acute in Texas. Whether because of the state's diversity, the generous allowance of peremptory strikes, or something else, *Batson* challenges are far more frequent here than anywhere else." *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 531 (Tex. 2008) (Brister, J., conurring) (counting 1,364 Texas state cases addressing *Batson*, which was more than double the number in the state with the next highest number).

3 The Supreme Court reversed twice in the *Miller-El* litigation. Once after we found that the *Batson* claim was not even debatable among jurists of reason and thus denied a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 341, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*Miller-El I*). The second time after we rejected the merits of the claim after the first reversal. *Miller-El II*, 545 U.S. at 237, 125 S.Ct. 2317.

4 For each potential black juror the prosecutor considered, the odds of being struck by the prosecutor ended up being 8/5 (that is, 8 were struck, 5 were not). For each white juror, the odds of being struck by the prosecutor was 5/23 (5 were struck, 23 were not). The more direct comparison just involves the grade school technique of finding the least common denominator. The black jurors' odds of being struck were 184/115 and white jurors' were 25/115. Twenty-five goes into 184 seven times with a little left over it.

5 As other courts have noted, discriminatory strikes need not be the product of "racial animosity." *Davis*, 268 S.W.3d at 525 (Jefferson, C.J.). A lawyer of any race "will seek jurors favorably inclined to his client's position, and race may even serve as a rough proxy for partiality." *Id.* (citing *Batson*, 476 U.S. at 139, 106 S.Ct. 1712 (Rehnquist, J., dissenting)); *see also Miller-El II*, 545 U.S. at 270–71, 125 S.Ct. 2317 (Breyer, J. concurring) (citing materials from jury consultants and lawyers recommending that lawyers consider race and gender among the demographic factors that can be useful in predicting a prospective juror's favorability to one side). The impulse to rely on that proxy is likely to be particularly strong in capital cases as the racial breakdown of views on the death penalty is well known. *See, e.g.*, Andrew Dugan, *Solid Majority Continue to Support Death Penalty*, GALLUP NEWS, (October 15, 2015), http://news.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx (finding 68% of white Americans supported the death penalty, while only 39% of African–Americans did); *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, (September 28, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ft_16-09-30_deathpenalty2/ (finding 57% of white Americans favored the death penalty, while only 29% of African-Americans did); Mark Peffley and Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1002 (2007).

6 The identical responses are a product of written questionnaires with multiple choice responses, as opposed to the oral in-court responses considered in *Miller-El II* that produce more variety. This makes the comparative juror analysis more compelling evidence of discrimination than in *Miller-El II*. Unlike oral responses of numerous jurors that a prosecutor may forget when later exercising strikes, the written answers memorialize the responses. The prosecutor had all prospective jurors' answers in front of him when deciding whom to strike, a decision he had a night to consider as the parties exercised peremptory strikes the day after they finished questioning potential jurors.

7 There is some ambiguity in the district court opinion about whether it applied the deference to factual findings that section 2254(d)(2) requires. That does not warrant reversal, however, because the appropriately deferential factual review of the *Batson* claim reveals AEDPA error, as it did in *Miller-El II*, *Reed*, and *Hayes.*

8 The full analysis of Judge Sykes is worth quoting because it speaks to the same error the majority opinion makes:

> [W]hen the *Batson* challenge was made, the *only* reason offered by the prosecutor to justify striking Watson was [that Watson said she was not able to impose the death penalty on a non-shooter]. As such, on remand the court should have limited its inquiry and analysis to exploring that very question. But the remand hearing went much further. The government compared Watson to jurors Nowak, Evans, and Wills against the backdrop of seven new reasons unrelated to the jurors' willingness to impose the death penalty on a non-shooter. And the district court factored several of these new reasons into its analysis. For instance, the court accepted the government's explanation for striking Watson while keeping Nowak and Evans in the pool by closely examining the written responses of all three jurors to death-penalty questions on their juror questionnaires. But at the time the *Batson* challenge was made, the prosecutor did not say a word about striking Watson because of her answers on her juror questionnaire. Similarly, in crediting the government's explanation for striking Watson but not Wills, the court looked beyond their responses to the non-shooter question and analyzed their attitudes toward gun control and how they might evaluate the defendants' backgrounds when deciding whether to recommend the death penalty. But when the *Batson* challenge was made, the prosecutor never tried to justify striking Watson based on her views of either of these issues.

Taylor, 636 F.3d at 905–06 (emphasis in original).

9 In contrast, a search of the term "comparative juror analysis" in Fifth Circuit caselaw turns up only two cases in which it appears the comparison was identified in the trial court. *See United States v. Brown*, 553 F.3d 768, 793 (5th Cir. 2008); *Simmons v. Thaler*, 440 Fed.Appx. 237, 238 (5th Cir. 2011).

10 It may be that *Snyder*'s observation creates an incentive for lawyers facing *Batson* challenges to give vague and broad reasons to justify a strike. But ease of evasion, a common critique of the *Batson* framework, does not support ignoring discriminatory strikes when the record reveals them.

End of Document

855 F.3d 657
United States Court of Appeals,
Fifth Circuit.

Lisa Jo CHAMBERLIN, Petitioner-Appellee
v.
Marshall L. FISHER, Commissioner, Mississippi Department of Corrections, Respondent-Appellant

No. 15-70012
|
Filed April 27, 2017

Synopsis

Background: After defendant's Mississippi capital murder conviction was affirmed on appeal, 989 So.2d 320, the United States District Court for the Southern District of Mississippi, Carlton W. Reeves, J., 2015 WL 1485901, granted her petition for writ of habeas corpus. The state appealed.

[Holding:] The Court of Appeals, Gregg Costa, Circuit Judge, held that state court's rejection of defendant's *Batson* claim was based on unreasonable determination of the facts.

Affirmed.

Edith Brown Clement, Circuit Judge, filed dissenting opinion.

West Headnotes (15)

[1] **Criminal Law** Prejudice to rights of party as ground of review

110Criminal Law

110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1162Prejudice to rights of party as ground of review

Even for the most horrific of crimes with the most culpable of defendants, there are certain trial errors that are deemed structural and require automatic reversal.

Cases that cite this headnote

[2] **Constitutional Law**Juries

92Constitutional Law
92XXVIEqual Protection
92XXVI(G)Juries
92k3830In general

Discrimination in jury selection in violation of equal protection causes harms to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. U.S. Const. Amend. 14.

Cases that cite this headnote

[3] **Constitutional Law**Juries

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3306In general

Because a violation of equal protection in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt, a defendant may challenge the exclusion of jurors of a different race. U.S. Const. Amend. 14.

Cases that cite this headnote

[4] **Constitutional Law**Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges

On a claim of racial discrimination in the jury selection process in violation of equal protection, the question is not what the defense thought about a particular juror, but whether the state was concerned about the stated reason for the strike when the juror was not black. U.S. Const. Amend. 14.

Cases that cite this headnote

[5] **Habeas Corpus**Federal Review of State or Territorial Cases

197Habeas Corpus
197IIGrounds for Relief; Illegality of Restraint
197II(A)Ground and Nature of Restraint
197k450Federal Review of State or Territorial Cases
197k450.1In general

A court may habeas grant relief for a factual error when it concludes that the state court's decision was unreasonable or that the factual premise was incorrect. 28 U.S.C.A. § 2254(d)(2).

Cases that cite this headnote

[6] **Habeas Corpus**Presumptive accuracy of state determination, and rebuttal of presumption

197Habeas Corpus
197IIIJurisdiction, Proceedings, and Relief
197III(C)Proceedings
197III(C)4Conclusiveness of Prior Determinations
197k765State Determinations in Federal Court
197k768Presumptive accuracy of state determination, and rebuttal of presumption

The standard for habeas relief based on a factual error, under which the state court's factual findings are presumed to be sound unless the petitioner rebuts that presumption with clear

and convincing evidence, is demanding but not insatiable; deference does not by definition preclude relief. 28 U.S.C.A. §§ 2254(d)(2), 2254(e)(1).

Cases that cite this headnote

[7] **Criminal Law** Theory and Grounds of Decision in Lower Court

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)5Theory and Grounds of Decision in Lower Court
110k1134.60In general

The Court of Appeals can affirm on any ground supported by the record below.

Cases that cite this headnote

[8] **Habeas Corpus** Jury

197Habeas Corpus
197IIGrounds for Relief; Illegality of Restraint
197II(B)Particular Defects and Authority for Detention in General
197k496Jury

State court's rejection of capital murder defendant's *Batson* claim that prosecutor used peremptory strikes to discriminate against blacks in violation of equal protection was based on unreasonable determination of facts, and thus defendant was entitled to habeas relief; prosecutor struck nearly twice as many black jurors as he accepted, accepted more than four times as many white jurors as he struck, exercised 62% of strikes on black jurors making up only 31% of qualified prospective jurors, used most early strikes against black jurors, and only later accepted two black jurors after defense counsel's repeated objections, and reasons for excluding two black jurors, including statement that they were "not sure" if they were emotionally capable of supporting death, applied to white juror. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(2).

Cases that cite this headnote

[9] **Constitutional Law**🔑Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges

On a *Batson* claim that a prosecutor used a peremptory strike in a racially discriminatory manner in violation of equal protection, the defendant must first make a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race, and in response, the prosecutor must articulate a race-neutral reason for striking the juror in question; that requires the court to then make the ultimate determination whether the defendant carried her burden of proving purposeful discrimination. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[10] **Constitutional Law**🔑Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges

When the *Batson* inquiry reaches the final step in which the court must make the ultimate determination of whether the defendant carried her burden of proving purposeful racial discrimination in the jury selection process in violation of equal protection, the defendant may rely on all relevant circumstances to raise an inference of purposeful discrimination. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[11] **Constitutional Law**🔑Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(G)Juries
92k3832Peremptory challenges

Just as *Batson* does not guarantee a representative jury, a representative jury does not excuse discrimination against individual jurors in violation of equal protection when revealed through highly disproportionate strikes and discredited reasons for striking those jurors. U.S. Const. Amend. 14.

Cases that cite this headnote

[12] **Constitutional Law** Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges

The critical question in determining whether a prisoner has proved purposeful discrimination in the jury selection in violation of equal protection is the persuasiveness of the prosecutor's justification for his peremptory strike; to determine whether a prosecutor's reason is persuasive, courts consider whether it was applied in a race-neutral way, and if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination. U.S. Const. Amend. 14.

Cases that cite this headnote

[13] **Constitutional Law** Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges

On a *Batson* equal protection challenge to the jury selection process, side-by-side comparisons of people of different races, also common in employment discrimination cases, are often more powerful than bare statistics. U.S. Const. Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**🔑Peremptory challenges
Jury🔑Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges
230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

Prosecutor's post-trial justification for keeping white juror who was strongly in favor of death penalty, while striking black prospective juror who "generally favored" it and another who had "no opinion," could not support peremptory challenges consistent with equal protection rights under *Batson*, where prosecutor offered different reasons during jury selection for striking black prospective jurors based on answers to questions about being capable of announcing verdict, holding state to greater burden, and needing certainty. U.S. Const. Amend. 14.

Cases that cite this headnote

[15] **Constitutional Law**🔑Peremptory challenges

92Constitutional Law
92XXVIEqual Protection
92XXVI(B)Particular Classes
92XXVI(B)8Race, National Origin, or Ethnicity
92k3305Juries
92k3309Peremptory challenges

Two peremptory strikes on the basis of race are two more than the Constitution allows under the equal protection clause. U.S. Const. Amend. 14.

Cases that cite this headnote

***659** Appeal from the United States District Court for the Southern District of Mississippi, Carlton W. Reeves, U.S. District Judge

Attorneys and Law Firms

Elizabeth Unger Carlyle, Kansas City, MO, Michael James Bentley, Esq., Michael Leland Cowan, Alicia Kate Margolis, Esq., Attorney, Bradley Arant Boult Cummings, L.L.P., Jackson, MS, for Petitioner-Appellee.

Cameron Leigh Benton, Special Attorney to the Attorney General, Marvin Luther White, Jr., Esq., Assistant Attorney General, Office of the Attorney General for the State of Mississippi, for Respondent-Appellant.

Before DAVIS, CLEMENT, and COSTA, Circuit Judges.

Opinion

GREGG COSTA, Circuit Judge:

A Mississippi jury convicted Lisa Jo Chamberlin of two counts of capital murder and sentenced her to death. The district court granted Chamberlin's petition for writ of habeas corpus on the ground that the state court erred in finding that there was no racial exclusion of jurors at her trial. We affirm.

I.

Even by the standards of capital cases, the double murder in this case was gruesome. It occurred in Hattiesburg, Mississippi, where Chamberlin and her then boyfriend, Roger Gillett, had recently moved in with Gillett's cousin, Vernon Hulett, and Hulett's girlfriend, Linda Heintzelman. After an argument, Hulett and Heintzelman told Chamberlin and Gillett to move out. Unwilling to leave, Gillett began beating Hulett and Heintzelman and demanded that Hulett tell him the combination to a safe in Hulett's bedroom. Although Hulett eventually disclosed a combination, no one was able to open the safe. In an escalating rage, Gillett continued to physically assault Hulett, and he and Chamberlin physically and sexually assaulted Heintzelman.

Eventually, Chamberlin told Gillett they should murder Hulett and Heintzelman and flee. Gillett struck Hulett in the head with a hammer and slashed his throat. Chamberlin attempted to strangle Heintzelman but was not strong enough to suffocate her, so Gillett stabbed Heintzelman. Chamberlin and Gillett left the home to dispose of the knife and hammer. When they returned, Heintzelman was lying on the floor, still breathing. After leaving her there for most of the day, the couple finally decided to suffocate her. They bound her hands with duct tape and put plastic bags over her head until she stopped breathing.

The couple put both bodies in Hulett's freezer, and, taking with them the freezer and all the evidence they could collect, they left Mississippi. They ended up in Kansas, where Gillett had family. Almost immediately, Kansas authorities took them into custody on drug charges and obtained a search warrant for a farm where authorities suspected the couple was manufacturing crystal meth. During the search, sheriff's ***660** deputies found the bodies in the freezer.

Back in Mississippi, Gillett and Chamberlin were tried separately. Both trials resulted in death sentences, though Gillett's sentence was vacated on state postconviction review.

II.

[1] [2] [3]Even for the most horrific of crimes with the most culpable of defendants, there are certain trial errors that are deemed structural and require automatic reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The ground on which the district court granted Chamberlin relief, exclusion of jurors on racial grounds, is one example. "Discrimination in jury selection ... causes harms to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Going all the way back to one of its first cases finding a violation of the Equal Protection Clause (*Strauder v. West Virginia*, 100 U.S. 303, 312, 10 Otto 303, 25 L.Ed. 664 (1880)), the Supreme Court thus "has followed an automatic reversal rule once a violation of equal protection in the selection of jurors has been proven." *Winston v. Boatwright*, 649 F.3d 618, 627 (7th Cir. 2011); *see also Scott v. Hubert*, 610 Fed.Appx. 433, 434 (5th Cir. 2015) ("[D]iscrimination on the basis of race in the selection of ... jurors is a form of structural error that voids a conviction.").[1] And because such error "casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt," a defendant may challenge the exclusion of jurors of a different race. *Powers v. Ohio*, 499 U.S. 400, 406–11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (internal citations omitted).

Chamberlin, a white defendant, invokes that rule to challenge the exclusion of black jurors. After the trial judge narrowed an initial pool of several hundred prospective jurors to 42 qualified jurors, 31% of whom were black, both sides exercised peremptory strikes. The prosecutor first went through the list of qualified prospective jurors in order, striking and accepting jurors as he went, until the State proffered a prospective jury of twelve. The defense then had an opportunity to strike or accept the proffered jurors.

The prosecutor struck two of the first three black jurors and accepted eleven of the first twelve white jurors, proffering an initial proposed jury of eleven white jurors and one black juror. After defense counsel struck several of those jurors, the State continued in the same manner, striking the next five black jurors (including Thomas Sturgis and David Minor who will become important), before accepting two black jurors. Even this low number is more than the State planned to accept. The prosecutor believed the second black juror had been struck for cause prior to the peremptory phase.

Ultimately, the prosecutor used eight of his thirteen strikes,[2] or 62%, against black ***661** jurors. Ten white jurors and two black jurors sat on the jury; both alternates were white.

Chamberlin objected to the strikes, arguing they constituted a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which established a framework for determining if peremptory strikes are racially motivated. Applying *Batson*, the court asked the prosecutor if he had race-neutral reasons for the strikes. For the jurors relevant to this appeal, Sturgis and Minor, the prosecutor pointed to their answers to three questions on written questionnaires the jurors had completed before trial. The prosecutor claimed he struck them because of the answers they checked in response to questions 30, 34, and 35, in which both stated: (1) they were "not sure" if they were emotionally capable of announcing a verdict of death; (2) they were "not sure," because it was a capital case, if they would hold the State to a higher burden of proof than the law requires; and (3) "yes," because the defendant faced the death penalty, they would want to be one hundred percent certain before finding the defendant guilty.[3]

The trial court accepted these race-neutral reasons. Defense counsel responded by noting that Sturgis generally favored the death penalty and that Minor had no opinion on the death penalty, and, like other jurors the prosecutor had accepted, Minor had a relative in law enforcement. Based on "the totality of their questionnaire[s]," defense counsel argued, "it appears that they could be absolutely open- and fair-minded jurors on the question of the death penalty." Defense counsel also pointed out that the State had not sought to question Sturgis or Minor individually to follow up on their questionnaires. Without commenting on the defense's arguments, the trial court rejected the *Batson* claim.

[4]The court did not conduct a "comparative juror analysis": an analysis of whether reasons given by the prosecutor for striking black jurors apply equally to white jurors the prosecutor accepted. *See Reed v. Quarterman*, 555 F.3d 364, 369 (5th Cir. 2009). Chamberlin did not point out, and

the court did not consider, that a white juror the prosecutor had accepted, Brannon Cooper, gave the same answers as Sturgis and Minor to questions 30, 34, and 35. Like Sturgis and Minor, Cooper was "not sure" if he was "emotionally capable of standing up in court and announcing [a] verdict as to the defendant being put to death." Like them, he was "not sure" if he would "hold the state to a greater burden of proof than the law requires because this case is one in which the death penalty may be imposed." And, "because this case involves the death penalty," he would "want to be 100% certain" of guilt before returning a guilty verdict. Despite the three men giving the same answers, the prosecutor accepted Cooper ***662** yet struck Sturgis and Minor.[4]

On direct appeal, Chamberlin claimed she was entitled to relief on six grounds, including *Batson*. *Chamberlin v. State*, 989 So.2d 320 (Miss. 2008). Chamberlin again did not compare Sturgis and Minor to Cooper. Without conducting a comparative juror analysis, the Supreme Court of Mississippi denied relief, finding with regards to Sturgis and Minor that "the defense did not meet its burden to show that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose." *Id.* at 339.[5]

In her federal petition, Chamberlin asserted she was entitled to relief on thirteen grounds, including that the state court clearly erred when it found there was no *Batson* violation. *Chamberlin v. Fisher*, 2015 WL 1485901, at *12 n.3 (S.D. Miss. Mar. 31, 2015). The district court agreed: a *Batson* violation had occurred which warranted vacating Chamberlin's conviction and sentence. *Id.* at *21–23. The State appeals.

III.

The district court granted the writ in a proceeding governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). It found that Chamberlin's *Batson* claim warranted federal relief under either of the two grounds on which a federal court can grant a writ based on a claim that was decided in state court. Those are when the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see Wiggins v. Smith*, 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The district court held that the legal error subsection (d)(1) describes existed because the Supreme Court of Mississippi did not conduct the comparative juror analysis used in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (*Miller-El II*). It also held that the factual error subsection (d)(2) describes existed because, after using comparative juror analysis, it concluded that the state court's finding of race-neutral strikes for Sturgis and Minor was unreasonable.

We need not reach the section 2254(d)(1) question whether the state court contravened *Miller-El II* in failing to conduct a ***663** comparative juror analysis. *Compare McDaniels v. Kirkland*, 813 F.3d 770, 777 (9th Cir. 2015) (en banc) (not deciding whether *Miller-El II* requires state courts to conduct comparative juror analysis when reviewing *Batson* claims), *with id.* at 782 (Ikuta, J., concurring) (arguing that "*Miller-El II* could not and did not establish any such rule" *requiring* state courts to conduct such analysis, though recognizing that comparative juror analysis may be used in conducting the section 2254(d)(2) inquiry). That is because we affirm the judgment on the ground that the Mississippi court's decision was based on an unreasonable determination of the facts under section 2254(d)(2). *See Miller-El II*, 545 U.S. at 240, 266, 125 S.Ct. 2317 (granting relief under section 2254(d)(2)). In conducting that factual review, both the Supreme Court and this court have used the comparative juror analysis even when state courts rejecting the *Batson* claim never did. *See id.* at 241, 241 n.2, 125 S.Ct. 2317 (conducting comparative analysis on habeas review despite no such analysis being presented to state courts); *Reed*, 555 F.3d at 372–73 (same); *Woodward v. Epps*, 580 F.3d 318, 338 (5th Cir. 2009) (same).

[5] [6]A court may grant relief for the factual error section 2254(d)(2) captures when it concludes that the state court's "decision was unreasonable or that the factual premise was incorrect." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*Miller-El I*). The state court's factual findings are presumed to be sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The standard is demanding but not insatiable; ... '[d]eference does not by definition preclude relief.' " *Miller-El II*, 545 U.S. at 240, 125 S.Ct. 2317 (quoting *Miller-El I*, 537 U.S. at 340, 123 S.Ct. 1029).

[7] [8]We recognize some ambiguity in the district court's opinion about whether it applied the deference that section 2254(d)(2) requires. It first states that because of the legal error it found under section (d)(1), no AEDPA deference to factual findings was required. In the next breath, however, it recognizes that Chamberlin "must demonstrate that the state court's factual findings were unreasonable in light of the evidence presented" and cited *Miller-El II*'s use of the demanding "clear and convincing" standard required to overcome state court findings.[6] We need not resolve this ambiguity because we can affirm on any ground supported by the record below. *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013). Applying AEDPA's deferential standard, we conclude that the state court's rejection of the *Batson* claim was based on an unreasonable determination of the facts.

[9]The Supreme Court and this court have both granted writs based on findings that state courts

had made unreasonable factual determinations in rejecting *Batson* claims. *Miller-El II*, 545 U.S. at 266, 125 S.Ct. 2317; *Reed*, 555 F.3d at 382. In doing so, those cases relied heavily on comparative juror analysis. That analysis comes into play in the final stage of the *Batson* inquiry for determining whether a prosecutor used a peremptory strike in a racially ***664** discriminatory manner. Before that point, the defendant must have first made a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race; in response, the prosecutor must have articulated a race-neutral reason for striking the juror in question. *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712. That requires the court to then make the ultimate determination whether the defendant carried her burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712; *see Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

[10]"When the process reaches this step, the defendant may rely on all relevant circumstances to raise an inference of purposeful discrimination." *Fields v. Thaler*, 588 F.3d 270, 274 (5th Cir. 2009) (quoting *Miller–El II*, 545 U.S. at 240, 125 S.Ct. 2317) (internal quotation marks omitted). The pattern of strikes here, while not dispositive, is compelling evidence of intentional discrimination. *See Miller-El I*, 537 U.S. at 342, 123 S.Ct. 1029; *Hayes v. Thaler*, 361 Fed.Appx. 563, 570 (5th Cir. 2010). The State struck nearly two times as many black jurors as it accepted (eight strikes compared to five accepted, including one alternate), while accepting more than four times as many white jurors as it struck (five strikes compared to twenty-three accepted, including three alternates). It exercised 62% of its strikes on black jurors, despite black jurors making up only 31% of qualified prospective jurors.

In other words, black jurors were more than three times more likely to be struck by the prosecutor than white jurors. "Happenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317 (quoting *Miller-El I*, at 342, 123 S.Ct. 1029); *Batson*, 476 U.S. at 93, 106 S.Ct. 1712 (noting that "seriously disproportionate exclusion" of black jurors "is itself such an 'unequal application of the law ... as to show intentional discrimination' ").

[11]The dissent disagrees with the conclusion we draw from these statistics, but does not call into question the fundamental point that the prosecutor was far more likely to strike black potential jurors than whites.[7] To distract from that disparity, the dissent compares the number of black jurors the prosecutor accepted to the number of spots on the jury.[8] This is not ***665** an illuminating comparison. To determine the prosecutor's pattern of strikes, it is most probative to compare apples to apples: the number of black jurors the prosecutor accepted to the total number of jurors he accepted. He did not accept twelve total jurors. He accepted twenty-four, less than 17% of whom were black. The mismatch between the metrics the dissent compares is apparent when applied to white prospective jurors. The government accepted twenty white jurors during jury selection, enough to compose a nonsensical 167% of the jury.

The sequence of the strikes is also telling. The State used the vast majority of its early strikes against black jurors (seven of its first nine, including its sixth against Sturgis and its eighth against Minor) and only later—after defense counsel's repeated objections and when it was running out

of strikes—accepted the two black jurors who ended up on the jury (the second in a moment of confusion when the prosecutor believed the juror had already been struck). *See Miller-El II*, 545 U.S. at 249–50, 125 S.Ct. 2317 (finding unpersuasive that, towards the end of jury selection, the prosecution accepted a black juror, noting that most of the prosecution's challenges were gone and the prosecutor "had to exercise prudent restraint" at that point).

[12] [13]But "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338–39, 123 S.Ct. 1029. To determine whether a prosecutor's reason is persuasive, courts consider whether it was applied in a race-neutral way: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller–El II*, 545 U.S. at 240–41, 125 S.Ct. 2317. Such "side-by-side comparisons," also common in employment discrimination cases,[9] are often "[m]ore powerful" than bare statistics. *Miller–El II*, 545 U.S. at 241, 125 S.Ct. 2317.

This is the comparative juror analysis we have mentioned. It was used in *Miller-El II*, in which the state struck a potential black juror purportedly because he "said that he could only give death if he thought a person could not be rehabilitated." 545 U.S. at 243, 125 S.Ct. 2317. If that were the real reason, the Court noted, the prosecutor "should have worried about a number of white panel members he accepted" who expressed similar views. *Id.* at 244–45, 125 S.Ct. 2317. Likewise, although the prosecutor's purported reason for striking another prospective juror (that he considered death "an easy way out") was reasonable on its face, "its plausibility [wa]s severely undercut by the prosecution's failure to object to other panel members who expressed views much like [his.]" *Id.* at 247–48, 125 S.Ct. 2317; *see also Foster v. Chatman*, —— U.S. ——, 136 S.Ct. 1737, 1751, 195 L.Ed.2d 1 (2016) (finding "otherwise legitimate reason[s]" for striking prospective black jurors "difficult to credit in light of the State's acceptance of" white jurors to whom those reasons also applied); ***666** *Snyder v. La.*, 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (same); *Reed*, 555 F.3d at 372–73 (same).

In *Miller-El II*, the Court found the prosecutor's reasons to be pretextual and thus powerful evidence of discrimination, even though other reasons the prosecutor gave for striking black jurors did not also apply to accepted white jurors. 545 U.S. at 247, 125 S.Ct. 2317. For example, the prosecutor gave an additional reason for striking two black jurors—that they had relatives who had been convicted of a crime—which did not apply to the white jurors to whom the Court compared them. *Miller-El II*, 545 U.S. at 246–47, 125 S.Ct. 2317; *id.* at 290–91, 125 S.Ct. 2317 (Thomas, J., dissenting). The Court nonetheless rejected the argument that pretext can be found only when an accepted white juror "match[es] all" of the reasons the prosecutor gave for striking a black juror. *Id.* at 247 n.6, 125 S.Ct. 2317 (quoting Thomas, J., dissenting). A rule that "no comparison is probative unless the situation of the individuals compared is identical in all respects" identified by the prosecutor would, it explained, "leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[10] *Id.*

The jurors "identical in all respects" that *Miller-El II* thought unlikely exist here. Every reason the prosecutor identified for excluding Sturgis and Minor applied to Cooper, the white juror who was not struck.[11] All three said they were "not sure" if they were emotionally capable of announcing a verdict of death; were "not sure" if they would hold the State to a higher burden of proof than the law requires given that it was a death penalty case; and "yes," they would want to be one hundred percent certain of the defendant's guilt before finding her guilty. Comparative juror analysis thus shows that the prosecutor's reason for striking Sturgis and Minor could not have been their answers to questions 30, 34, and 35. Otherwise, he would not have accepted Cooper who had the same answers the prosecution did not like. The perfect match among the answers of these jurors means that even more than in the other cases that have found pretext based on a comparative juror analysis, "[t]he prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." *Miller-El II*, 545 U.S. at 265, 125 S.Ct. 2317; *Snyder*, 552 U.S. at 485, 128 S.Ct. 1203 ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent."); *Reed*, 555 F.3d at 380–81 ("[T]he comparative analysis demonstrates what was really going on: the prosecution used its peremptory challenges to ensure that African–Americans would not serve.").

[14]The State does not contest the obvious—that on the questions the prosecutor ***667** cited during jury selection as his reasons for excluding Sturgis and Minor, Cooper gave the same responses. Instead, it argues that it should now be able to identify differences among those prospective jurors on their responses to other questions. One example is the three prospective jurors' differing answers to a different question about the death penalty (question 53): Cooper was strongly in favor of the death penalty whereas Sturgis "generally favored" it and Minor had "no opinion." The State and dissent urge us to accept this justification. The problem is that *Miller-El II* rejected prosecutors' ability to justify their strikes based on reasons not offered during jury selection and appellate courts' ability to come up with new rationales on prosecutors' behalf:

> It is true that peremptories are often the subject of instinct and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are an issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

545 U.S. at 252, 125 S.Ct. 2317; *see also Reed*, 555 F.3d at 376 ("We must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors" (citing *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317)).

Despite this unequivocal command, the dissent argues we can nonetheless consider the jurors' views on questions not cited by the prosecutor after he was asked to justify the strikes. It first says we should do so because *Miller-El II* instructed courts to evaluate whether a prosecutors' stated reason is plausible "in light of all evidence with a bearing on it." 545 U.S. at 251–52, 125 S.Ct. 2317. But that should not be read to provide an end run around the prohibition on considering new reasons set forth in the same opinion. *Miller-El II* shows the difference between evidence bearing on plausibility, which reviewing courts should consider, and new reasons, which they may not. In evaluating whether proffered reasons were plausible, *Miller-El II* looked to evidence of the prosecutor's veracity: did he rely on misrepresentations about stricken jurors' answers, accept jurors with similar answers to stricken jurors, or give inconsistent explanations for strikes? *Id.* at 244–51, 125 S.Ct. 2317.

In contrast, *Miller-El II* would not consider a new reason this court identified on appeal. *Id.* at 252, 125 S.Ct. 2317. The prosecutor initially had explained a strike by saying the potential juror thought the death penalty was "too easy on some defendants." *Id.* at 250, 125 S.Ct. 2317. When the defendant pointed out during federal habeas that the same reason applied to white jurors the state accepted, this court found the real reason for the strike must have been the struck black juror's "general ambivalence about the [death] penalty and his ability to impose it." *Id.* at 248–51, 125 S.Ct. 2317. *Miller-El II* rejected this approach, similar to that of the dissent, because the "Court of Appeals's ... substitution of a reason ... does nothing to satisfy the prosecutor's burden." *Id.* at 252, 125 S.Ct. 2317.

Other circuits conducting comparative jury analysis have also read *Miller-El II* as requiring that the "validity of a strike challenged under *Batson* must 'stand or fall' on the plausibility of the explanation given for it at the time, not new post hoc ***668** justifications." *United States v. Taylor*, 636 F.3d 901 (7th Cir. 2011); *see also Love v. Cate*, 449 Fed.Appx. 570, 572 (9th Cir. 2011) (refusing to consider the State's post-trial explanation that white jurors it accepted "had non-racial characteristics that distinguished them from the black venire-member" the State struck because "the prosecutor never stated to the state trial court that he relied on these characteristics, even though *Batson* required him to articulate his reasons"); *McGahee v. Alabama Dep't Of Corr.*, 560 F.3d 1252, 1269 (11th Cir. 2009) (faulting the state appellate court for bolstering the prosecutor's reason with a new explanation when the "State never offered such a full explanation"). In *Taylor*, the only reason the prosecutor gave during jury selection for a strike was that the black juror was unwilling to impose the death penalty on a non-shooter, a position also taken by accepted white jurors. 636 F.3d at 903, 905. After a remand because of concerns about the strike, the district court credited a different justification: the jurors' differing views about the death penalty—which "the prosecutor did not say a word about" at trial—explained their disparate treatment. *Id.* at 905–06. In the opinion reversing, Judge Sykes explained that it was clear error to accept "new, unrelated reasons extending well beyond the prosecutor's original justification." *Id.* at 906.

The dissent thinks this prohibition on post-trial justifications can be overcome by repackaging the argument made by the State about the different answers to question 53. What the State candidly

recognized is a new reason for striking the black jurors is now a new reason for keeping the white juror. The dissent presumes the prosecution kept Cooper because of his answer to question 53, as it "might have alleviated the prosecution's concerns regarding his answers to questions 30, 34, and 35" that were identical to those of the struck black jurors. Dissent at 672. Of course, this is just the other side of the same coin. If the difference between the three was question 53, that would mean Sturgis and Minor were struck not only because of their answers to questions 30, 34, and 35, but also because of their more lukewarm support of the death penalty conveyed in response to question 53. As the "comparative juror analysis" name indicates, the inquiry is a comparative one that requires differentiating the answers of struck and accepted jurors. That means citing different answers to the same question as a reason for keeping one juror is the same as saying the difference was a reason for striking the other juror. To use a simple example, assume a prosecutor struck Jurors A and B on the ground that they wore hats in the courtroom. But Juror C was also wearing a hat. When this is later pointed out, the court speculates that Juror C must have been kept in the panel despite the hat because she expressed greater support for the death penalty on a questionnaire than did Jurors A and B. That would mean that the hat was not the dealbreaker; it alone was not enough for a strike as shown by the acceptance of Juror C. Jurors A and B thus would have been struck, per the court's conjecture, because they wore a hat and were less supportive of the death penalty. And if that were the case, *Miller-El II* says the prosecutor should have cited both of those reasons.

The dissent's position that courts may credit new reasons jurors were *kept* despite sharing the trait the prosecution claimed justified striking black jurors—a position for which it cites no authority—would make *Miller-El II*' s bar on considering new reasons for strikes meaningless. Take *Miller-El II* itself. The new reason for striking the black juror our court offered that the Supreme Court rejected—his ambivalence about the death penalty— ***669** could just as easily have been treated as a reason for keeping the white jurors: their firmer support of the death penalty. 545 U.S. at 250–52, 125 S.Ct. 2317. Indeed, that is how the *Miller-El II* dissent characterized the difference. *Id*. at 289, 125 S.Ct. 2317 (Thomas, J., dissenting). The *Miller-El II* majority's refusal to consider that new justification, whether framed as a reason for excluding the black juror or in opposite terms as a reason for keeping the white jurors, binds us.

The State argues that *Miller-El II*'s rule against after-the-fact justifications creates an unfair asymmetry in which it is held to the reasons it offered at trial whereas the defendant can wait until the appeal to identify jurors like Cooper who have the same answers as people who were struck. Whatever the soundness of this complaint, it again is rejected by the leading decisions employing comparative juror analysis. *See Miller-El II*, 545 U.S. at 240, 125 S.Ct. 2317 (conducting comparative analysis on habeas review despite no such analysis being presented to state courts); *Reed*, 555 F.3d at 372–73 (same); *Woodward*, 580 F.3d at 338 (same); *see also Smith v. Cain*, 708 F.3d 628, 638 (5th Cir. 2013) ("[A]lthough Smith did not point to specific jurors for comparative analysis, we have conducted an in-depth review of the record...."). That Chamberlin's counsel did not rebut the reasons presented by the prosecutor during jury selection is also beside the point. *See Woodward*, 580 F.3d at 338 (holding in a section 2254 review that a comparative analysis is

appropriate even when defense counsel did not rebut the prosecutor's stated reasons for striking jurors at trial) (citing *Reed*, 555 F.3d at 364))). These and the other arguments the State makes challenging the impact of comparative juror analysis also ignore that the approach is utilized only at the final stage of the *Batson* inquiry, which a trial court need not reach if it has properly found that the defendant did not establish a prima facie case of discrimination. And at that final stage, after the serious accusation of racial discrimination has been leveled and a prima facie case to support it found,[12] it does not seem too much to ask prosecutors to list all the reasons justifying their strikes.

Although *Miller-El II* and *Reed* focus on comparative juror analysis in holding that the state courts' factual finding of no *Batson* violation met AEDPA's threshold of unreasonableness, those opinions also cite other evidence that supported that conclusion. In *Miller-El II*, the prosecutor had requested multiple jury shuffles, questioned jurors of different races inconsistently, and the Dallas district attorney's office had a history of racial discrimination. *Id.* at 255–66, 125 S.Ct. 2317. *Reed* involved the same district attorney's office and cited its history. 555 F.3d at 381–82; *see also Foster*, 136 S.Ct. at 1754 (stating that in addition to a comparative juror analysis "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file" were evidence of discriminatory motive).

***670** But both our court (in an unpublished case) and another circuit have issued writs under AEDPA relying solely on comparative juror analysis to find a *Batson* violation. *Hayes*, 361 Fed.Appx. at 573; *see also Drain v. Woods*, 595 Fed.Appx. 558, 571–81 (6th Cir. 2014) (granting writ by finding a *Batson* violation relying only on a comparative juror analysis).[13] That is not surprising as we have recognized since the early years of addressing *Batson* claims that the "decisive question will normally be whether a proffered race-neutral reason should be believed" because "there will seldom be any evidence that the claimant can introduce—beyond arguing that the explanations are not believable or pointing out that similar claims can be made about non-excluded jurors who are not minorities." *United States v. Bentley-Smith*, 2 F.3d 1368, 1373–74 (5th Cir. 1993); *cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (explaining that general principles of evidence law allow a factfinder to "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"). When all of a prosecutor's reasons are shown to be pretextual, it is hard to see how a court could reasonably find those reasons credible. *See Miller-El I*, 537 U.S. at 338–39, 123 S.Ct. 1029 (deeming *Batson*'s "critical question" the credibility of the prosecutor's reason).

In any event, there is more here than just the discrediting of the prosecutor's explanation that comparative juror analysis compels us to find. Jury selection involved a definitive pattern of the prosecution striking black jurors, resulting in a stark disparity in the percentage of blacks struck as opposed to whites. And because a seated white juror gave identical answers to those cited in excluding the two black venire members, there is an absence of any nonpretextual justification for the strikes. *Contrast Miller-El II*, 545 U.S. at 246–47, 247 n.6, 125 S.Ct. 2317 (finding *Batson*

violation even though the struck black venire member gave answers about rehabilitation and his brother's criminal history that were not also provided by the accepted white jurors). Clear and convincing evidence, including more damning comparative juror analysis than existed in *Miller-El II* or *Reed*, thus rebuts the state court's finding of no discrimination. It was unreasonable not to conclude that the strikes of Sturgis and Minor were "motivated in substantial part by discriminatory intent." *Snyder*, 552 U.S. at 478, 485, 128 S.Ct. 1203.

The dissent argues that we are creating a system that allows adept prosecutors to avoid comparative juror analysis by giving vague and broad reasons for their strikes. But in response to such reasons, *Batson* obligates the trial judge to require that the prosecutor give a "clear and reasonably specific" explanation for a challenge. 476 U.S. at 98 n.20, 106 S.Ct. 1712. More fundamentally, ease of evasion is not just a criticism of *Miller-El II*'s comparative juror analysis, it has been a basis for attacking the *Batson* framework from the beginning. *See Batson*, 476 U.S. at 106, 106 S.Ct. 1712 (Marshall, J., concurring); *Rice v. Collins*, 546 U.S. 333, 343, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (Breyer, J., concurring). It would only exacerbate that problem to ignore *Batson* violations when the record reveals them.

* * *

[15] ***671** "Two peremptory strikes on the basis of race are two more than the Constitution allows." *Foster*, 136 S.Ct. at 1755. Chamberlin is entitled to a new trial before a jury selected without regard to race. The judgment of the district court is AFFIRMED

EDITH BROWN CLEMENT, Circuit Judge, dissenting:

A mixed-race jury convicts a defendant of a heinous capital crime, and through its questionable characterization of certain essential facts, disregarding of others, and misreading of binding precedent, the majority finds invidious racial discrimination against black prospective jurors where none existed. The result not only unfairly tarnishes an individual prosecutor's reputation, it also puts an impossible burden on all prosecutors and makes application of the *Batson* test more difficult going forward. I respectfully dissent.

A. Makeup of the Jury

The majority makes much of the fact that, within a very small sample space, the prosecution struck a higher percentage of prospective black jurors from the venire than white jurors. The majority is not mistaken as a mathematical matter, but it does paint a misleading picture by ignoring those statistical facts that do not support its conclusions. The majority notes, for example, that black jurors made up "31% of qualified prospective jurors," but downplays the essential fact that the prosecution ultimately tendered four black jurors which—had all four been accepted by the defense—would have constituted 28.5% of the jury (including the two alternates). Thus, the jury eventually tendered by the prosecution was a near-perfect representation of the racial makeup of the venire from which it was chosen.

In attempting to waive off this inconvenient statistical truth, the majority states in a footnote that, because the fourth black juror was tendered by the prosecution after eleven jurors had been seated, that fourth juror would not have been considered were it not for the defense itself striking two black jurors tendered by the prosecution. But the defense *did* strike the black jurors, and the prosecution *did* tender four black prospective jurors. The majority attempts to avoid these facts by referencing a footnote in *Miller El II* to conclude "that the defense str[iking] some black jurors is not relevant to the prosecutor's pattern of discriminatory strikes." But the cited footnote in *Miller-El II* explains that whether the defense strikes a *white* juror has no bearing on the question of whether the prosecution discriminated in its use of strikes against *black* jurors. *See Miller-El II*, 545 U.S. 231, 244–45 n.4, 125 S.Ct. 2317 (2005) (explaining that the defense striking white juror Witt was "not relevant" to the question of whether the prosecution's proffered race-neutral reasons for striking a black juror were pretextual). Here, by contrast, the defense striking some *black* jurors who had been tendered by the prosecution is relevant to the particular question of how many black jurors were ultimately tendered by the prosecution in total, because the defense's strikes clearly impacted the way the prosecution went about exercising its strikes going forward.

And, in any case, even if the fourth black juror is not counted, the prosecution still tendered a jury that was 25% black. To believe the majority, then, is to believe that the prosecution decided to racially discriminate against black jurors—but only to the extent necessary to reduce proportional representation on the jury from 31% to 25%. Tepid invidious discrimination ***672** indeed.[1]

B. Side-By-Side Comparison

More egregious errors of law and fact permeate the majority's discussion of the district court's side-by-side comparison of jurors Sturgis and Minor (black) with Cooper (white).

When asked to give race-neutral reasons for striking Sturgis and Minor, the prosecution pointed

to their answers to questions 30, 34, and 35 on the juror questionnaire. Both Sturgis and Minor answered all three questions in ways that indicated they might be uncomfortable rendering a guilty verdict resulting in the death penalty, or hold the prosecution to a higher burden of proof than is legally required. The majority cannot—and does not—dispute that the prosecution's proffered explanations are plausible and race-neutral on their face. Instead, the majority turns to the questionnaire of a white juror, Cooper, who answered questions 30, 34, and 35 in the same way as Sturgis and Minor but who was not struck by the prosecution. From this fact alone the majority concludes "that the prosecutor's reason for striking Sturgis and Minor could not have been their answers to [the three questions]. Otherwise, he would not have accepted Cooper who has the same answers the prosecution did not like."

But if Cooper gave answers to *other* questions that might have alleviated the prosecution's concerns regarding his answers to questions 30, 34, and 35, then the majority's conclusion simply does not follow. And that is precisely what happened here. Cooper answered question 53, which asked jurors to circle the response that best matched their opinion on the death penalty, by circling "Strongly Favor" and then writing in by hand "for rape, murder, child abuse, [and] spousal abuse." Sturgis and Minor, by contrast, circled "Generally Favor" and "No Opinion," respectively. Reviewing the record in its totality, then, shows that the most logical explanation for the prosecution's not striking Cooper was not because he was white while Sturgis and Minor were black, but because Cooper was a more favorable juror based on his answers to other questions on the questionnaire.

Indeed, the district court acknowledged that Cooper was a more desirable juror for the prosecution, yet refused to consider that fact in its analysis of the prosecution's supposedly discriminatory intent because Cooper's answer to question 53 "was not a rationale offered by the prosecutor." The majority agrees with the district court on this point, citing to *Miller-El II* for the proposition that prosecutors may not "justify their strikes based on reasons not offered during jury selection." On this point, the majority simply misreads the Supreme Court's directive in *Miller-El II*.

It is true that, as the majority emphasizes, the Court explained in *Miller-El II* ***673** that a "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317. But that does not mean that a reviewing court is prohibited from looking through the record to decide whether the proffered explanations are, in fact, plausible. Indeed, as the Court also explained, when a prosecutor gives a reason for striking a black juror, a reviewing court must "assess the plausibility of that reason *in light of all evidence with a bearing on it*." *Id.* at 251–52, 125 S.Ct. 2317 (emphasis added). That makes perfect sense—it would be quite strange to suggest that a court must decide the plausibility of a given race-neutral explanation, but is not allowed to study the record evidence necessary to make that determination.

In Chamberlin's case, Cooper's answer to question 53 is not a new post-facto explanation invented

by the prosecution. It is rather evidence "bearing on" the essential question here: whether or not Sturgis and Minor's answers to 30, 34, and 35 could plausibly have been the reason why they were struck. That Cooper offered answers to other questions which logically could have assuaged any concerns the prosecution may have had regarding his answers to those specific three questions undermines the majority's conclusion that the prosecution's proffered race-neutral explanations were pretextual. This is precisely the type of evidence courts should consider in making that determination.

The majority argues that "citing different answers to the same question as a reason for keeping one juror is the same as saying the difference was a reason for striking the other juror." The majority is mistaken. Consider this hypothetical, which closely tracks the scenario before us here:

> 1. Prosecutor decides, as a default position, to strike all jurors who express concerns about the legal burden of proof.
>
> 2. Prosecutor reviews juror questionnaires and notes that Jurors A, B (both black) and C (white) have expressed concerns about the legal burden of proof. Consequently, Prosecutor intends to strike all three by default.
>
> 3. Upon further review, Prosecutor notes that Juror C alone strongly favors the death penalty. Because this is a capital case, Prosecutor decides to make an exception to the default rule and retain Juror C because of his favorable death penalty views.
>
> 4. Prosecutor strikes Jurors A and B as planned. Responding to a *Batson* challenge, Prosecutor explains that A and B both expressed concerns about the legal burden of proof.
>
> 5. Prosecutor never mentions white Juror C because the law does not require Prosecutor to explain why he decided to keep any specific juror.

Applying the majority's reasoning, *Juror C*'s answer to an entirely separate question must count as a reason why *Jurors A and B* were struck. The majority would therefore require our hypothetical Prosecutor to explain to the trial court his reasons for *keeping* white Juror C, or else be vulnerable to the accusation that he invidiously discriminated against Jurors A and B because they were black. That is not what *Miller-El II* requires.

Furthermore, although the majority stresses one passage in *Miller-El II*, it does not properly consider the rest of that opinion. The *Miller-El II* Court admittedly acknowledged that side-by-side comparisons can provide useful "evidence tending to prove purposeful discrimination," but it ***674** emphatically did not rely exclusively or even primarily on strict side-by-side comparisons in concluding that the prosecution had discriminated against black prospective jurors. *Id.* at 241, 125 S.Ct. 2317. The Court emphasized that the prosecution in *Miller-El II* had: (1) intentionally "mischaracterized" the testimony of a black juror who would otherwise have been an "ideal juror in the eyes of a prosecutor seeking a death sentence" to exercise a strike against him, *id.* at 244,

247, 125 S.Ct. 2317; (2) used a "jury shuffle" to move black jurors to the end of the voir dire line, *see id.* at 253, 125 S.Ct. 2317; (3) used differently-worded questions for black jurors designed to elicit responses indicating a negative feeling towards the death penalty, *see id.* at 255–60, 125 S.Ct. 2317; (4) in some cases used what the Court itself called "trickery" in asking questions designed to create cause to strike black jurors, *see id.* at 261–63, 125 S.Ct. 2317; and (5) had "for decades" prior to the case "systematically exclude[d] blacks from juries." *Id.* at 263, 125 S.Ct. 2317.

Absolutely none of these other indicators of discriminatory intent that the *Miller-El II* Court relied on are present in Chamberlin's case. Indeed, so far as I can tell, the *entirety* of the majority's conclusion rests on (1) a tendentious statistical account of a tiny sample space, and (2) comparing the answers to three questions out of dozens in a questionnaire by three jurors out of a pool of 42. It is unlikely that such evidence would be sufficient on *de novo* review; to suggest that it constitutes *clear and convincing* evidence that the state court's factual determination was unreasonable is to render entirely meaningless that standard of review.

The practical import of the majority's holding for future prosecutors seeking to avoid charges of racial discrimination reveals the untenability of the majority's ruling. The majority refuses to listen to any argument from the prosecution as to why it *did not* strike Cooper because such evidence was not raised during jury selection. But, as I noted above, there was *no reason* for the prosecution to provide detailed reasons for why it decided not to strike him—because Cooper was not a black juror who was being struck.[2] In other words, to avoid the result reached by the majority here, during jury selection the prosecution would not only have had to explain why it struck specific black jurors—as it did—but also why it did *not* strike all white prospective jurors as well. There is nothing in *Batson*, *Miller-El II*, or any other case that compels anything of the sort.

Even worse, the majority's opinion has the perverse effect of incentivizing prosecutors to be *less* detailed when giving their race-neutral reasons for striking black jurors. What if the prosecution in Chamberlin's case had not honestly pointed to the specific answers on Sturgis's and Minor's questionnaires which gave the government pause? Imagine instead that the prosecution simply stated that Sturgis's and Minor's "answers to the jury questionnaire as a whole" had led the prosecution to believe "that they were likely to apply an incorrect standard of review and were uncomfortable with the death penalty." In such a case, the formalistic side-by-side comparison ***675** the majority engages in here would be impossible. To insulate themselves from accusations of racism, savvy prosecutors will recognize that the more general their proffered race-neutral reasons are, the harder it will be for an overzealous reviewing court to poke holes in them later.

* * *

To be told by a court of law that you have engaged in invidious racial discrimination is no small thing. To be told that you may not offer essential evidence to defend against the charge is even worse. With its opinion, the majority sends a stern message indeed to future prosecutors: be sure

to explain out loud not just every peremptory strike but also every non-strike at jury selection, or else be labelled a racist by the very courts to which you have devoted your career.[3] I would strongly urge my colleagues to reconsider whether that is truly the message we want to send.

All Citations

855 F.3d 657

Footnotes

1 The Supreme Court recently held that the Ninth Circuit erred by failing to give appropriate deference when applying harmless error analysis on collateral review. *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2193, 192 L.Ed.2d 323 (2015) (applying the Antiterrorism and Effective Death Penalty Act and *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). *Ayala* involved *procedures* the trial court used in connection with a *Batson* challenge and distinguished cases involving structural errors which "require[ ] automatic reversal." *Id.* at 2197.

2 Each side had twelve strikes and two additional strikes for alternates. The State only exercised one strike when selecting alternates.

3 The prosecutor offered the following reasons for striking Sturgis, juror 104:

> Prosecutor: No. 104. Answer to question 30, "Are you emotionally capable of standing up in court and announcing your verdict?" Not sure. "Would you hold the state to a greater burden," on question 34. Not sure. Question No. 35, "Would you want to be a hundred percent certain?" Yes. I believe that's it on that one.

The prosecutor provided the same reasons for striking Minor, juror 106:

> Prosecutor: No. 106 ... 106 to question 30, not sure [he's] capable emotionally of rendering a verdict. Not sure. That [he] would hold the state to a greater burden ... No. 34, not sure whether they would hold us to a greater burden. Question No. 35, would require a hundred percent certainty. I believe that's it on that one.

4 The defense later struck Cooper. This is "not relevant." *Miller-El v. Dretke*, 545 U.S. 231, 245 n.4, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (*Miller-El II*). The "question is not what the defense thought about [Cooper] but whether the State was concerned about [the stated reason for the strike] when the juror was not black." *Id.*

5 That state court decision rejecting the *Batson* claim on direct appeal is what is being reviewed in this federal petition for postconviction relief. We note, however, that the issue came up indirectly in the state postconviction proceeding as Chamberlin contended that her counsel was ineffective for failing to offer a comparative juror analysis in support of her *Batson* challenges. The Supreme Court of Mississippi rejected the claim, stating:

> [A] thorough review of the record in this case, including the jury questionnaires provided by Chamberlin, discloses that each of the African-American jurors struck had at least one response in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the State. Therefore, we are unable to find disparate treatment of the struck jurors.

Chamberlin v. State, 55 So.3d 1046, 1051–52 (Miss. 2010).

6 The district court elsewhere further recognized the deference to factual findings AEDPA requires, noting that "[f]actual findings are presumed to be correct, and the reviewing court defers to the state court's factual determinations," yet "[a] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Chamberlin v. Fisher*, 2015 WL 1485901, at *11 (S.D. Miss. Mar. 31, 2015) (quoting *Miller-El I*, 537 U.S. at 340, 123 S.Ct. 1029).

7 The dissent takes issue with the sample size. But the sample size in this case is the same as the one used to identify statistical disparities in *Miller-El*: 42 qualified jurors. *Miller-El I*, 537 U.S. at 331, 123 S.Ct. 1029; *Miller-El II*, 545 U.S. at 240, 125 S.Ct. 2317.

8 The State chose not to strike four black jurors, two of whom were struck by the defense. If all had been accepted by the defense, the dissent contends, the percentage of black jurors on the jury would have reflected the percentage of black jurors on the panel. This does not account for the jury selection procedure used by the trial court. Given that procedure, and the high rate at which the prosecutor accepted white potential jurors, there was never a possibility of all four black jurors accepted by the prosecutor being on

the jury. For example, the prosecutor only proffered the fourth black juror after eleven jurors (including nine white jurors) had already been seated, so, had the defense accepted the first three proffered black jurors, the jury would have been full.
Even if the dissent's hypothetical jury could have existed, proportionate representation on a jury does not preclude a *Batson* challenge. Just as *Batson* does not guarantee a representative jury, a representative jury does not excuse discrimination against individual jurors when revealed through highly disproportionate strikes and discredited reasons for striking those jurors.
Further, that the defense struck two black jurors does not disprove the prosecutor's pattern of discriminatory strikes. *See Miller-El II*, 545 U.S. at 245 n.4, 125 S.Ct. 2317 (emphasizing that *Batson* is concerned with the prosecutor's intent, determined without regard to "what the defense thought" about a juror the prosecutor accepted). Had the defense struck every black juror tendered that would not reduce the probative force of the prosecutor's disproportionate strikes.

9 *See, e.g.*, *Vaughn v. Woodforest Bank*, 665 F.3d 632, 637 (5th Cir. 2011) ("Disparate treatment occurs where an employer treats one employee more harshly than other 'similarly situated' employees for 'nearly identical' conduct.").

10 Similarly, *Reed* held that "the black and white jurors that we compare need not be exactly the same for us to conclude that the prosecution's proffered reasons for striking the black prospective jurors were pretexts for discrimination." 555 F.3d at 380.

11 The identical responses are a product of written questionnaires with multiple choice responses, as opposed to the oral in-court responses considered in *Miller-El II* that produce more variety. This makes the comparative juror analysis more compelling evidence of discrimination than in *Miller-El II*. Unlike oral responses of numerous jurors that a prosecutor may forget when later exercising strikes, the written answers memorialize the responses. The prosecutor had all prospective jurors' answers in front of him when deciding whom to strike, a decision he had a night to consider, as the parties exercised peremptory strikes the day after they finished questioning potential jurors.

12 Though no doubt a grave matter, concluding that prosecutors intentionally excluded jurors because of their race is not tantamount to a finding that they are racist as the dissent asserts. There is a body of literature and jury consultants focused on using demographics to predict juror behavior. *See Miller-El II*, 545 U.S. at 270–71, 125 S.Ct. 2317 (Breyer, J., concurring) (citing such sources in concluding that "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before"). Of course, this more "benign" motive of trying to obtain a strategic advantage still results in a constitutional violation if jurors are excluded because they are part of a protected demographic group. *Id*. at 271, 125 S.Ct. 2317.

13 Both *Hayes* and *Drain* granted habeas relief under section (d)(1) because the trial courts in those cases conducted comparative juror analysis but failed to follow the Supreme Court's clearly established protocol for doing so. *Hayes*, 361 Fed.Appx. at 570–73; *Drain*, 595 Fed.Appx. at 580.

1 The majority argues that these numbers are irrelevant and that the more useful method is to divide the number of black jurors proffered by the total number of jurors proffered. Of course, this calculation suffers from precisely the same malady the majority claims to identify in my calculation: there is no such thing as a twenty-four person jury, so the total number of jurors proffered is not relevant. Had the defense accepted all of the prosecution's proffered jurors, applying the trial court's jury selection method, the jury including alternates would have included four black members, or 28.5% of the total. And, even accepting *dubitante* the majority's premise, the prosecution ultimately proffered a jury pool of twenty-four that was 16.67% black (4/24). Thus, granting the majority's strained reasoning, the prosecution evidently was motivated by racial animus to the extent necessary to reduce black representation in the jury pool from 31% to 16.67%. I reiterate: tepid invidious discrimination indeed.

2 The district court's suggestion that the prosecution could have "augment[ed] the record" to explain why it wanted to keep Cooper is absurd as a practical matter. Such a rule would compel the prosecution to reveal to the defense key parts of its trial strategy by forcing the prosecution to explain why it favored certain jurors for the case. Furthermore, there is nothing in any precedent from the Supreme Court or this court suggesting that the *Batson* burden-shifting scheme puts any responsibility on the prosecution to explain why it did not strike white jurors.

3 The majority suggests in a footnote that being accused of striking jurors on the basis of their race is not the same as being called a racist, because a prosecutor may simply be trying to "us[e] demographics to predict juror behavior." This distinction is facile: the premise underlying the use of race to predict juror behavior—that the color of one's skin can be relied upon to predict how one will view a given piece of evidence or evaluate certain testimony—is itself fundamentally racist. To be told as a Prosecutor that you have engaged in such shenanigans is, again, no small thing.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

LISA JO CHAMBERLIN **PETITIONER**

VS. **CIVIL ACTION NO.: 2:11CV72CWR**

MARSHALL L. FISHER, Commissioner, Department of Corrections, and JIM HOOD, Attorney General **RESPONDENTS**

MEMORANDUM OPINION AND ORDER

Lisa Jo Chamberlin was convicted of two counts of capital murder, with the underlying offense of robbery, in the Circuit Court of Forrest County. The victims were Vernon Hulitt and Linda Heintzelman, who lived in Hattiesburg and were killed on or about March 20, 2004. Chamberlin's trial began on July 31, 2006, and, on August 4, 2006, she was found guilty on both counts of capital murder and sentenced to death. Chamberlin appealed the verdict and sentence, both of which were affirmed by the Mississippi Supreme Court. *Chamberlin v. State*, 989 So. 2d 320 (Miss. 2008). She then filed a petition for post-conviction relief, which was also denied. *Chamberlin v. State*, 55 So. 3d 1046 (Miss. 2011). Chamberlin timely filed a Petition for a Writ of Habeas Corpus in this Court on July 18, 2011.

STATEMENT OF FACTS

Lisa Jo Chamberlin was born and raised in Oregon, which is where she met Roger Gillett. Chamberlin and Gillett soon moved in together, and they lived in Oregon for several months. Gillett had family in Russell, Kansas, and he and Chamberlin moved there for some period of time. During that time, Kansas law enforcement became aware that the couple might be manufacturing crystal meth, and an investigation began. Around the beginning of March 2004,

however, before any warrants could be served, Gillett and Chamberlin moved to Hattiesburg, Mississippi.

Near the end of March, Kansas authorities learned that Chamberlin and Gillett were back in Russell, and the Sheriff's Department set up surveillance on a farm about sixteen miles out of town that belonged to one of Gillett's relatives. On March 29, Gillett and Chamberlin were taken into custody on drug charges. Chamberlin was questioned later that day, and she originally said that she thought she should ask for an attorney. While discussing that issue with the officer, she agreed to talk, and she gave him some identification information. She signed a form acknowledging her rights, but then she declined to answer questions.

As part of the drug investigation, deputies obtained a search warrant for the farm. In addition to drug-related material or equipment, they were looking for a stolen white pickup, similar to one that a neighbor had reported seeing on the property. During their search, deputies found a white pickup truck with Mississippi tags inside a metal building. The deputies also entered a wooden granary, where they found a freezer that was plugged in and taped shut. Fearing that the freezer contained dangerous material for making meth, deputies backed out of the granary and waited for other agents to arrive.

When those other agents arrived and opened the freezer, they found something far worse than expected - - a male body wrapped in a brown blanket. Immediately, they obtained another warrant to search the farm for evidence of a homicide. The body was pulled out of the freezer, and a female body was discovered underneath. The female body was frozen in fluid at the bottom of the freezer, and that fluid had to be thawed before the body could be removed. The bodies were ultimately identified as Vernon Hulett and Linda Heintzelman. Hulett had been decapitated and his arms had been severed at the shoulders. Heintzelman had duct tape wrapped

around her mouth and head. A plastic bag was affixed to her head by duct tape wrapped around her neck. Her hands were secured at the small of her back with duct tape.

Following this discovery, officers interviewed Chamberlin again. This interview was not videotaped; however, Special Agent Delbert Hawell made a report of the interrogation. Later, officers interviewed Chamberlin once more to clear up some inconsistencies between her statement and the evidence, and a report was also made of that interview. Two additional videotaped interviews followed. In the first of these two, Chamberlin told how she and Gillett got to Hattiesburg, but, when she began to relate the events of the evening of the murders, she was overcome by emotion and could not give any more information. In the second, she gave a full statement of the events that culminated in the deaths of Hulett and Heintzelman. In each interview, Chamberlin was progressively more forthcoming about her own involvement in those events, and from those interviews, as well as evidence and testimony presented at trial, the Court has ascertained the facts that follow.[1]

Chamberlin and Gillett moved to Hattiesburg in early March 2004 to live with Gillett's cousin, Vernon Hulett, and Vernon's girlfriend, Linda Heintzelman. Hulett worked for the City of Hattiesburg's Sanitation Department. Gillett obtained "day jobs" through a job center. Neither Heintzelman nor Chamberlin worked. A few days after Gillett and Chamberlin arrived, the two couples were driving to the Gulf Coast in their separate vehicles when Heintzelman suddenly changed lanes in front of them, causing Gillett to run into her. Gillett and Chamberlin's car was severely damaged and could not safely be driven. Heintzelman's pickup sustained only minor damage. Heintzelman told Gillett and Chamberlin that she would submit the accident as a claim on her insurance and give them part of the money to fix their vehicle.

[1] The details are gory, but they paint a necessary picture of the depravity and havoc Chamberlain and her co-defendant created.

Apparently, the claim was never made, and it became a matter of contention between the couples.

After some time in Hattiesburg, the relationship between the couples soured. One day, after all four of them had been drinking, Hulett and Heintzelman suggested that Gillett and Chamberlin move out. The tension caused Chamberlin and Gillett to argue, and, finally, Chamberlin left the house, intending to hitchhike to Oregon. She got a ride to a truck stop one to two hours away. Unable to find another ride, Chamberlin began walking back toward Hattiesburg, and she ultimately got a ride back. When she entered the house, everyone was arguing. Hulett was accusing Gillett of hitting Chamberlin in his house, although Chamberlin said that was not the case.

Chamberlin wanted to load their things into their car and leave, but Gillett wanted to stay the night. Chamberlin went into the kitchen and got two beers from the refrigerator, but Hulett grabbed her and told her that she could not have them. At that point, Gillett picked up Heintzelman and slammed her onto the kitchen counter. Gillett instructed Chamberlin to get his gun from under the mattress in the bedroom, which she did. Gillett then fired the gun into the floor, and, during the commotion, got the keys to the pickup from Heintzelman. Chamberlin went outside to pull the telephone wires from the house, so that Hulett could not call police, but Gillett had already cut them. Chamberlin took the gun outside and fired a shot at the truck tires, but Gillett came outside and told her not to shoot out the tires of their "getaway car." She brought the gun back into the house with one bullet in it.

Gillett then began to beat Hulett, trying to get the combination to a safe that Hulett kept in his closet. Hulett refused to reveal the combination, so Gillett instructed Chamberlin to go into the bedroom with Heintzelman and retrieve the safe. At that point, Chamberlin wanted to

burn the house down and leave, so she lit the gas heater in the bedroom, but Gillett came in and turned it off. Heintzelman could not remember the combination to the safe, and said that only Vernon's mother knew it. Hulett ultimately told them the combination, although they were never able to open the safe using it. In a rage over the damage to her car, Chamberlin went through the house, turning over dressers and the refrigerator.

Gillett continued to beat Hulett until Hulett finally went to his bedroom, saying that he had worked hard that day and was tired. At around 1:30 a.m., Chamberlin took Heintzelman's truck to buy beer before the 2:00 a.m. cut-off. She was unsuccessful in that attempt and returned to the house about an hour later. Hulett was still in bed, and Heintzelman was bent over the safe with her pants off. Gillett had a couple of beers he had found under the refrigerator. Chamberlin asked him whether he had sex with Heintzelman, and he said that he had made her undress in order to "break" her, and that he had penetrated her with a beer bottle. Chamberlin went to the kitchen and got a piece of chicken. After she ate it, she told Heintzelman to insert the chicken bone into her anus, which Heintzelman did.

Hulett came back out of his bedroom and told Heintzelman not to open the safe, but they all sat in the dark while Heintzelman tried to pick the lock. Finally, Chamberlin told Gillett that they should "kill them and get this over with and get the fuck out of here." At Gillett's request, Chamberlin retrieved a box knife from Hulett's tool room; however, when Hulett sat down in his chair, Gillett hit him in the head with a hammer. Heintzelman still would not open the safe, so Gillett instructed Chamberlin to strangle her. She grabbed Heintzelman's windpipe, but Heintzelman was too strong for Chamberlin to choke her. Chamberlin got a knife from the kitchen so Gillett could stab Heintzelman, and Gillett told Chamberlin to wait out in the truck while he did it. When she went back in the house, she saw that Hulett was bloody and that

Heintzelman was lying on the floor. Both of them were still breathing. Chamberlin then tried to open the safe, but was unsuccessful. Frustrated, she asked Gillett, "Are you going to kill them or not?" Gillett indicated that he would. While Chamberlin was loading their belongings into the pickup truck, Gillett slashed Hulett's throat.

Gillett told Chamberlin, "It's done," and they left in the pickup truck, with Chamberlin driving. Gillett threw the hammer and the knife out of the truck onto the highway. After driving for an hour or two, at around daybreak, they returned to the house to "finish what we started." When they returned, Hulett appeared to be dead in the chair, but Heintzelman was on the floor, still breathing. Gillett said, "I'm glad we came back." He showed Chamberlin Hulett's slashed throat, then they covered both of them with blankets and went in their bedroom to sleep. Chamberlin could not stay in the house and went to sleep in her car around 6:30 or 7:30 a.m. After about three hours, Chamberlin went back in the house to find Gillett on the sofa and Heintzelman on the floor, still breathing. Chamberlin and Gillett went out into the front yard, where they spent most of the day.

Heintzelman was clinging to life, so Chamberlin suggested to Gillett that they strangle or smother her. When Gillett asked how they would do it, Chamberlin suggested putting a bag over Heintzelman's head. She gathered some plastic bags from around the house, and, when Heintzelman began to struggle, they bound her hands behind her back with duct tape. Gillett asked Chamberlin whether she'd rather hold Heintzelman's head or put the bag over it, and Chamberlin said she would put the bag on. Then Gillett lifted Heintzelman's head, so that Chamberlin could put the bag over it. He told Chamberlin, "I can't do this by myself," but, at that point, Chamberlin said she could not help him. Gillett put the first bag over Heintzelman's head, and Chamberlin helped with the other two bags. Heintzelman began making noises and

they were afraid a neighbor would hear her, so Gillett put a pillow over Heintzelman's head and smothered her. Chamberlin went outside for a short time, and, when she came back, she heard Heintzelman take her last breath.

Nonchalantly, Gillett and Chamberlin decided that they would spend one more day in Hattiesburg with Hulett's mother and nephews, then cut up the bodies, bury them, and burn the house down. By that time it was mid-afternoon, and Hulett's nephew, Michael Hester, who was seventeen, and Michael's thirteen-year-old brother, Mitchell, stopped by after school, as they customarily did. Michael and Mitchell lived with Caroline Hester, who was their grandmother and Hulett's mother. Gillett and Chamberlin told them that Hulett and Heintzelman had left town with friends, and, to avert suspicion, they went with the boys to the zoo, to play basketball, and to Caroline's house to eat. When they returned that evening, they decided to clean up the house. They stripped the carpet off the living room floor and took the bodies into the bathroom. Chamberlin took some sleeping pills, then she and Gillett went to bed and slept through the night.

The next day was Monday, and one of the boys skipped school and stopped by the house. Chamberlin and Gillett said they would meet him at Caroline's house, and, on the way there, Gillett suggested that they put the bodies in Hulett's deep freezer and take them to Kansas. They spent some time at Hulett's mother's house, then went home to prepare the bodies for the freezer. Although the original plan was to cut the heads and hands off both bodies, they did not dismember Heintzelman's. While Chamberlin watched for cars and then held the garbage bags, Gillett cut off Hulett's head and arms with a pruning saw and put the body parts into the bags. They turned Hulett's deep freezer on its side, loaded Heintzelman's and Hulett's bodies into it, and taped the freezer shut with electrical and duct tape. Then they went through the house and

gathered up six or seven garbage bags full of evidence. They loaded the freezer and the garbage bags into the truck and left for Kansas the next morning, with a plan to return at some point and burn Hulett's house down. In her statement to law enforcement, Chamberlin said that they left Mississippi on March 22 and arrived in Kansas on March 23. She thought that the fight occurred on March 19.

After returning to Kansas, Chamberlin and Gillett left the freezer at a relative's farm in the country. They tried to drive the pickup truck as little as possible, in case it had been reported stolen, and they stayed with some of Gillett's relatives. Though they had no money, Chamberlin and Gillett had a burning desire to earn some. Of course, they would not choose legal means to earn money. In fact, they had brought with them supplies for setting up a meth lab. They were offered an opportunity to produce a batch of meth for a meager $500.00, so they took the pickup, along with the necessary supplies, out to the farm and produced the batch. A relative left with the drugs to sell. Chamberlin and Gillett were arrested in Russell the next day.

Following her confession, Chamberlin took officers to Russell's city dump to retrieve the evidence that had been discarded there. After Chamberlin directed them to the location where the garbage had been left, officers recovered seven trash bags. The bags contained, among other things, Hulett's work clothes and driver's license, Heintzelman's purse, a bloody pillow, and a Hattiesburg phone book.

Hattiesburg police were alerted that a pickup truck with a Mississippi tag had been found in Kansas, along with two bodies. Local law enforcement officers ran a check on the tag and found that it belonged to Linda Heintzelman. They went to Hulett's and Heintzelman's home to do a welfare check, where they found a car with Kansas tags and front end damage. The house was locked, and they saw a ceiling fan running. Officers knocked at the door, but no one

answered. After Kansas authorities notified the Hattiesburg officers of Chamberlin's confession, the Hattiesburg officers went back to the house to process it as a crime scene. The house was neat, but there was no carpet in the living area. Additionally, the officers found blood on the floor and the furniture, and the mattress in one of the bedrooms was soaked with blood. They also found a safe with pry marks on it.

Dr. Donald Pojman, the pathologist who performed the autopsy on Heintzelman and Hulett, reported numerous injuries to each of them. Specifically, Heintzelman had twelve separate blunt-force injuries to her head that caused lacerations – primarily on the back of her head. Those injuries were consistent with being struck with a hammer. She had a large cut on the front of her right thigh, and there were two additional cuts in the hip region on the right side. There were several cuts on her neck and abdomen, and a scrape under her left eye. Some of the cuts on her neck were relatively superficial; others went through the skin to the muscle, but did not strike any major blood vessels. The cuts on the abdomen went through the skin to the underlying fat tissue. Heintzelman had several stab wounds and long cuts on her back. There were cuts on her hands that were consistent with defensive injuries.

The pathologist concluded that Heintzelman died from multiple injuries. "She died from the sharp-force injuries of the torso and the neck. She also died from blunt-force injuries of the head and from asphyxiation, which would be the blockage of air or blood vessels getting to the lung such as strangulation or putting something over a person's mouth."

Dr. Pojman testified on cross-examination that none of the injuries alone would have killed Heintzelman. While the cuts could have caused significant blood loss over a long period of time, they did not involve any major blood vessels. The blows to the head, while causing fractures, did not cause actual brain damage. Therefore, while she might have been unconscious

right after she was hit, she would not have died immediately from the blows. The tape over her mouth would not have prevented her breathing through her nose, although a fracture to her neck might have interfered with her breathing. Because she could have survived that injury for some period of time, Dr. Pojman believed that it was the combination of injuries that likely caused Heitzelman's death.

Hulett had several superficial cuts and abrasions on his face, head, and neck. The more significant injuries were to his head, above his left ear. There, the autopsy revealed five semi-circular lacerations that went through the skin. The lacerations resulted in a large fracture of the skull, approximately four by three inches, where the skull was actually pushed into the brain, resulting in brain injury. The injuries were consistent with being hit with a hammer. Hulett also had minor wounds to his arm. According to Dr. Pojman, Hulett died from the blunt-force injuries to the left side of his head.

Martha Petrofsky, who was an inmate at the Forrest County Jail at the same time as Chamberlin, testified about statements that Chamberlin made to her about the crime. According to Petrofsky, Chamberlin and Gillett came to Mississippi to sell drugs and use the money to go elsewhere. Chamberlin told her that the couples had a "blowup" over the damage done to Chamberlin's vehicle, and Chamberlin was physically involved to the extent of hitting Heintzelman in the head with some object and kicking her in the side. Chamberlin also held Heintzelman's head up while Gillett slapped Heintzelman and told her that he was going to "break" her if she did not give them the combination to the safe. Petrofsky said that Chamberlin told Gillett, "Well, you're going to have to get a little rougher than that." It was Petrofsky's impression that Chamberlin egged Gillett on. Chamberlin told her that they had sex after the murders. Chamberlin also said that she "was caught up in the moment of it, but she regretted

getting caught because there was too many other ways they could have gotten rid of those bodies without being caught with them." Another inmate, Vanessa Stringfellow, testified that she heard Chamberlin tell other inmates, "After we cut his throat, we propped him up on the couch, and his head was hanging to one side, and we proceeded to have sex in front of the corpse, and it was the greatest sex that [we] ever had and it was an extreme adrenaline rush."

After the jury found Chamberlin guilty of capital murder, three witnesses testified on her behalf during the sentencing phase. Sherry Norris was in jail with Chamberlin, and she testified that Chamberlin gave her food and a blanket and comforted her. She saw Chamberlin shortly after Chamberlin talked to her son, Gabriel, and she said that Chamberlin was crying because Gabriel had gotten into some trouble. Carla DiBenetto was also in jail with Chamberlin, and she developed a friendship with her that had continued after DiBenetto's release. DiBenetto said that Chamberlin gave her good advice, and she thought that Chamberlin could do the same for other people. She testified that Chamberlin loved her children dearly. Both Norris and DiBenetto asked the jury to spare Chamberlin's life.

Chamberlin's primary mitigation witness was Dr. Beverly Smallwood, a psychologist. Dr. Smallwood spent over twenty hours interviewing Chamberlin and performing psychological testing. She also interviewed persons who knew Chamberlin to learn more about Chamberlin's background and history. Among those interviewed were Chamberlin's aunt, Loma Wagner; her mother, Twila Speer; a childhood friend; and the son of an elderly woman who was cared for by Chamberlin.

After talking to Chamberlin and these witnesses, it was apparent that abuse and neglect were a central part of Chamberlin's life. As a small child she saw and experienced abuse: verbal, physical and sexual, something which Chamberlin described as "normal." The abuse came from

men and women, family members and non-family members alike. The abuse continued into adulthood. Dr. Smallwood's assessment of Chamberlin's early life follows:

> In Lisa's childhood she was abused in multiple ways. Her biological father was physically abusive to her. He was also physically abusive to her mother. Her parents divorced when she was about three or four. But he had abused her severely.
>
> Lisa's mother was bipolar, had bipolar disorder, and she was also a severe alcoholic. She also physically abused Lisa Jo. And she acknowledged this to me herself as well as other family members with whom I talked.
>
> Lisa was physically and sexually abused by her brother. It's actually a half brother. And this occurred when her mother would be out doing what she did in terms of being with men and bringing home men. I also did mention that Lisa's mother also verbally abused her according to Lisa's friend, Veronica, in whom Lisa confided during those early years. And she also heard this herself. Lisa's mother would call her a slut and a whore and, "You're going to grow up to be just like me." So this was the kind of prophesies that she had over her life.
>
> Additionally, then her mother got remarried and she had a stepfather. And that stepfather also physically abused Lisa. He also physically abused his own daughter, which was Lisa's stepsister.
>
> Additionally, in the fourth grade, a fourth grade teacher sexually abused Lisa. Not only her but some other girls in the process, and this did come to light and definitely impacted her school performance at that time. There apparently was a significant change in her involvement and engagement in school at that point in time.

Dr. Smallwood was asked how this history would have impacted Chamberlin's relationships with men. She gave the following answer:

> I was so struck as Lisa told me about some of these abusive experiences with men early in her life, particularly her stepfather. In one breath she would say it was a good relationship, and in the next breath she would talk about being beaten and strangled. And then she would say, and it was a good relationship. I was his favorite.
>
> And what happened through those times was that Lisa came to expect abuse to be the normal thing. That was just the way it was. So she continued to become engaged in abusive relationships with men and really kind of saw those as normal.

> Also, even though she had been sexually abused, she also devalued herself to the point that she did act out sexually and had not just ongoing relationships with certain men but casual sexual relationships. And these were I believe direct outgrowths of the kind of learning that she had as a very young child about her own worth and about just whether she had the right to have anything else happen in her life.

According to Smallwood, Chamberlin had three children – two sons and a daughter – by three different men. The father of her second child was extremely abusive to Chamberlin, and it was through him that she met Gillett, who had been in jail with him. Her relationship with Gillett was stormy; Chamberlin told Dr. Smallwood that he had once tried to drown her. Despite this abuse, Chamberlin stayed in the relationship.

Based on her research, testing, and expertise, Dr. Smallwood offered the following psychological assessment of Chamberlin:

> Lisa had – from the traumatic experiences in her past as well as the things which you're very aware, Lisa experienced some symptoms of posttraumatic stress disorder. Additionally, she had severe methamphetamine addiction. Lisa started drinking when she was about twelve years old. She started using meth at thirteen to get out of the abusive household. She said it was easier to come back in and experience what that household was like if she was stoned. She maintained that meth addiction until she was incarcerated.
>
> Additionally, she meets the criteria for receptance of borderline personality disorder, which is a severe personality disorder that's often seen in people who have been through abusive backgrounds.

Based on this information and her expertise, Dr. Smallwood offered this explanation of how Chamberlin's psychological state affected her actions during the murders of Hulett and Heintzelman:

> I guess the way I would sum it up is as an accumulative effect and growing mental and emotional disturbance on the day that these crimes were committed and the days thereafter. This isn't a very clinical term, but I'll just say it this way and I think we'll all understand it. Lisa was a psychological mess. And it had grown starting in her early childhood with things that she couldn't help but then choices that she made over time and not having the tools, having never had role models or a support system and having not taken some of the opportunities that

> she did have. When she got to that day, the day that these crimes were committed, she was a life spun out of control.

When asked whether Chamberlin was an antisocial person or a psychopath, Dr. Smallwood answered:

> Lisa has certainly lived an irresponsible lifestyle. She has made some very poor decisions in her life, so there are elements of the diagnosis of antisocial personality disorder that she does fit the criteria. Due to that irresponsibility – I've already mentioned to you that she was a meth addict for basically twenty years. If you've ever been around or had someone in your family who had a drug addiction, you know that when a person is living that lifestyle they are extremely irresponsible and the addiction to a drug often takes precedence even over people that they love.
>
> So she does have many of those characteristics in that she's made some very poor choices. However, when it comes to the element of interpersonal callousness we sometimes think of with someone who is a true psychopath so that the person really doesn't have a conscience or they really have no remorse or they aren't connected with people even though – I mean you've been sitting in this courtroom and you've been horrified by the evidence just as I was when I had to wade through all of the discovery. So there was certainly some horrible and callous behavior that went on.

After nearly three hours of deliberation, the jury sentenced Chamberlin to death for each murder. After the sentence was announced, Chamberlin made the following statement:

> I just want to apologize to the families of the victims. I'm very sorry. I know that you won't get to spend Christmas or Thanksgiving with your children and my family will. I don't have any hate towards any of you for what my sentencing is. I feel that I deserve it, and I just want to say I'm sorry.

The court held a hearing on Chamberlin's motion for a new trial, at which she argued that her statements were coerced and that the trial judge erred by refusing her proffered mercy instruction. The motion was denied.

STANDARD OF REVIEW

English courts have had the authority to issue a writ of habeas corpus to test the legality of a prisoner's detention by the sovereign since the Middle Ages. *McNally v. Hill*, 293 U.S. 131,

136 (1934); William Blackstone, 1 *Commentaries* *131 (tracing the law to the reign of Edward I). The thirteen original colonies modeled their habeas statutes after that common law, as well as the Habeas Corpus Act of 1679. *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). When the United States was formed, the right to habeas corpus was indirectly guaranteed by the Constitution, which directed that the writ "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. 1, § 9, cl. 2. Federal judges were ultimately empowered to issue the writ by the Judiciary Act of 1789, but their authority was limited to the release of federal prisoners. *Fay v. Noia*, 372 U.S. 391, 415, 428 (1963).

The later-conceived expansion of federal authority to review *state court* judgments has been controversial since its inception in the Force Act of March 2, 1833. *Id.* at 401 n.9. The writ in this country "has a history bound up in the expansion of federal supervision over the States and the genesis of modern civil rights, and in particular the movement toward racial equality." *Burdine v. Johnson*, 262 F.3d 336, 350 (5th Cir. 2001) (Higginbotham, J., concurring). Historically, the writ was used to release persons who had been imprisoned without a trial. *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring). In *Brown*, however, the Supreme Court expanded the writ to empower a federal court to grant habeas relief to free a prisoner who had been tried in state court, but whose conviction was based on constitutional error. *Id.* at 458. The practical effect of *Brown*, according to Judge Higginbotham in *Burdine*, was to "replace[] direct review in the Supreme Court of state convictions by enlisting the lower federal courts in the task of reviewing claims of constitutional deprivation ensuing from state criminal convictions." 262 F.3d at 351.[2]

[2] In his concurring opinion in *Brown*, Justice Jackson reported that the expansion of the writ had already resulted in "floods of stale, frivolous and repetitious petitions." 344 U.S. at 536. In support of that statement, he noted that the

In 1988, Chief Justice William Rehnquist asked Justice Lewis Powell, who had recently retired from the Court, to head an Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. In a Commentary published in the Harvard Law Review the next year, Justice Powell noted that the number of habeas petitions filed in federal district courts had risen at a pace that even Justice Jackson could not have foreseen – from 127 in the judicial term beginning in 1940 to 9,542 in 1987. Lewis F. Powell, Jr., *Capital Punishment*, 102 Harv. L. Rev. 1035, 1039 (1989). Describing the process by which a death-sentenced inmate could seek state and federal review, Justice Powell concluded that an inmate could have as many as seven or eight judicial examinations of his case. *Id*. Even after that, intrepid counsel could find new arguments and advance plausible reasons for failing to raise those arguments earlier, thereby further prolonging the process. *Id*. at 1039-40. Compounding the problem was the frequency with which the courts permitted last-minute stay applications, which, in his opinion, "imposes additional burdens on the courts, and often prevents the mature and thoughtful consideration our system expects." *Id*. at 1040. As of August 1, 1988, this cumbersome process had resulted in a nationwide death row population of 2,110, with only 100 executions taking place in the sixteen years since the decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *Capital Punishment*, at 1038. Additionally, the time between the murder and the execution averaged close to 10 years in one state. *Id*.

The Ad Hoc Committee made several recommendations for overhauling federal habeas law. Congress reviewed the Committee's findings, held hearings both in the House and in the Senate, and passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254 (2006)); *Baze v. Rees*, 553 U.S. 35,

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number of habeas petitions challenging state court convictions had risen in the federal district courts from 127 in 1941 to 541 in 1952. *Id.* at 536 n.8.

69 (2008) (Alito, J., concurring) (stating that AEDPA "was designed to address this problem."). According to the Conference Committee Report that attended the passage of the bill:

> This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court. It provides for the exhaustion of state remedies and requires deference to the determinations of state courts that are neither "contrary to," nor an "unreasonable application of," clearly established federal law.

H.R. Rep. No. 104-518, at 111 (1996) (Conf. Rep.).

The standard of review referenced in the Report is codified at 28 U.S.C. § 2254, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254. Under this statute, where the state court adjudicates the petitioner's claim on the merits, this court reviews questions of fact under § 2254(d)(2), while questions of law or mixed questions of law and fact are reviewed under § 2254(d)(1). Factual findings are presumed to be correct, and the reviewing court defers to the state court's factual determinations. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The court reviews questions of law and mixed

questions of law and fact to determine whether the state court's decision was either "contrary to" or an "unreasonable application of" federal law. *Williams v. Taylor*, 529 U.S. 362, 407-13 (2000).

"Even in the context of federal habeas," however, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.*

AEDPA "work[ed] substantial changes" to the law on habeas corpus in federal courts. *Felker v. Turpin*, 518 U.S. 651, 654 (1996). In 2000, the Supreme Court, in a plurality opinion, addressed and explained the meaning of AEDPA's standard of review. *Williams*, 529 U.S. at 402-13. Justice O'Connor authored the portion of the opinion that explained the appropriate standard of review under AEDPA, and she emphasized that "federal law" for purposes of AEDPA is limited to the holdings of the Supreme Court of the United States. *Id*. at 412. *Clearly established* federal law is that which exists at "the time of the relevant state-court decision" on the merits of the claim. *Id*.; *Greene v. Fisher*, 132 S. Ct. 38, 44-45 (2011). A state court's adjudication of a claim is *contrary to* clearly established federal law "if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court has] on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state court's application of the correct legal precedent to the particular facts of a petitioner's case will be an *unreasonable application* of the law if it identifies the correct federal law but unreasonably applies it to the facts, unreasonably extends the correct legal principle "to a new context where it should not apply[,] or unreasonably refuses

to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 40 (citation omitted). The term "unreasonable" was distinguished in *Williams* from "erroneous" or "incorrect"; thus, a state court's incorrect application of the law may be permitted to stand if it is, nonetheless, "reasonable." *Id*. at 410-11.

Recent decisions have reaffirmed this interpretation of AEDPA, noting that the appropriate standard of review is much more rigorous in a habeas case than on direct review. *Renico v. Lett*, 559 U.S. 766, 773 (2010). As the Court has explained, "If this standard is difficult to meet, that is because it was meant to be. . . . It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther." *Richter*, 562 U.S. at 102. Due to the intrusive effect of the writ of habeas corpus on state court decisions, the Court reasoned:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 103.

Three months after issuing its opinion in *Richter*, the Court limited the scope of habeas review of the facts in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). There, the Court held that habeas review conducted under § 2254(d)(1) must be limited to the record that was considered in state court. *Id*. at 1398-1400. The basis for the ruling was "Congress' intent to channel prisoners' claims first to the state courts." *Id*. at 1398-99 (citation omitted). A district court may still conduct hearings, under § 2254(e)(2), where a petitioner has failed to develop the factual basis of his claim in state court, but the circumstances under which such a claim may be raised are severely limited. *Id*. at 1400-01.

The Supreme Court's interpretation of federal habeas law compels this Court to undertake a rigorous examination of habeas claims, with an eye to protecting the state court's judgment from federal interference. That review must be based solely on the record before the state court and must give the state court's decision the benefit of the doubt, unless it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. This is the standard with which this Court has reviewed Chamberlin's claims. Based on this standard, and for the reasons that follow, Chamberlin is entitled to habeas relief on one issue.

ANALYSIS

GROUND TWO[3]: Ms. Chamberlin was denied her right to due process of law when the prosecutor exercised peremptory challenges against African-Americans in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

Chamberlin claims that the prosecutor improperly struck black veniremen from her jury, in contravention of the well-recognized principles of *Batson v. Kentucky*. At issue are strikes against the following black jurors: Emma Roberts (Juror Number 5), Geralline Wilkerson (38), Brittany Burks (81), Katrina Carpenter (92), Thomas Sturgis (104), David Minor (106), and Gloria Broome (117).

A. Procedural History

Prior to trial, counsel had jointly sent a questionnaire to all of the potential jurors. At the end of voir dire, as soon as the State exercised its peremptory challenges on Roberts and Wilkerson, defense counsel objected that they were struck because of their race. The trial judge said, "I don't know that two strikes is going to – I don't believe two strikes establishes a pattern." The prosecutor immediately responded to the objection, stating, "It was the questions on the

[3] Chamberlin presents thirteen grounds for the court to consider. Because she is entitled to relief on her second ground, the Court declines to consider the remaining grounds.

questionnaire of Emma Roberts, questions 24, 25, 28, 30, 34, 35, and finally 54. And as a matter of fact, that was one of the people we asked the Court to strike for cause, and it's in the record all the questions that we objected to." Defense counsel disagreed that there was a challenge for cause on Roberts and added, "Right now we've got a pattern. The State has exercised two strikes . . . ." The trial judge interrupted: "Wait stop. Like I said, I don't think two strikes is a pattern. I'm going to go forward, and we'll come back to this. I think you're premature at this time."

Later in the process, the State struck Brittany Burks. Defense counsel again objected, "Your Honor, at what point do you want to deal with this, Your Honor? I'm going to make a record as we go. This is a black female, and the record should so reflect. At the appropriate time, we'll come back and visit it." The trial judge responded, "Okay." When the State struck Katrina Carpenter, defense counsel noted, "S-5 is another black female, Your Honor. So now four out of five strikes are going to African Americans." Without further comment from the trial judge, the prosecutor used his next strike on Thomas Sturgis. Defense counsel argued, "Your Honor, at this point, this is a black male. At this point the State has exercised six strikes, and five of those strikes have been against African Americans, and I submit there's clearly a pattern here." The trial judge replied, "Okay. And we'll come back to that." Shortly thereafter, the State struck David Minor and Gloria Broome, and defense counsel noted that they were both black.

After the jury selection process had been completed, defense counsel renewed his objection to the State's peremptory strikes of black jurors. The prosecutor responded with his reasons for striking Roberts, all of which related to her answers to questions specifically involving the death penalty. At that point, the trial judge observed that the defendant was white,

and there were two African Americans on the jury. He then asked defense counsel whether he was "going to try to make your prima facie case to meet your burden before we even go to the excuses?" That attorney responded, "My prima facie case is that seven out of twelve constitutes a pattern, and particularly – I mean of those that were available of the first, I believe seven of the first eight strikes went to African American jurors. I submit that constitutes a pattern with an inference of discrimination." The prosecutor countered that he had struck seven black jurors and five white ones, which was close to 50/50, demonstrating no pattern. He added that defense counsel had also struck black jurors, which defense counsel admitted. Without specifically ruling on whether a prima facie case had been established, the trial judge said, "All right. Let me hear your race neutral reasons. You've already explained for Juror No. 5 [Roberts]."

To justify striking Wilkerson, the prosecutor argued that her questionnaire responses on the death penalty justified the strike. He then advanced reasons for striking Burks, which were based on her responses to the death penalty questions, as well as her having a family member with a drug charge. The strikes of Carpenter, Sturgis, Minor, Broome, and an alternate juror were also based on their responses to death penalty questions. The trial judge ruled:

> Due to the make-up of the panel, I'm not confident that the defense has made the prima facie case, has met your initial burden; however – and it is probably moot because our Supreme Court says if I don't find that you have met that initial burden that it is not necessary and it will be moot any [sic] race neutral reasons expressed by the State only to be considered by the Court. Hesitation, requiring the State to meet a higher burden than is required by law, the inability to – or hesitancy to announce that is their verdict, all of the reasons expressed by the State this Court does find to be race neutral.

Defense counsel responded that a prima facie case had been established and that some of the reasons advanced by the prosecution were pretextual. He explained:

> As to the reasons which the State has given, there's a couple of jurors I specifically would like to address. 104 in particular is a man whose name is Thomas Sturgis, African American. He was an administrator at Alcorn State

> University. In his questionnaire he stated that he generally favors the death penalty.
>
> And in a comment in response to question No. 56 he said, "I am fair and open-minded and have the ability to assimilate information and reach – or form a conclusion or an opinion." So we would submit that this is a man who, when I first read these questionnaires, struck me as being someone who would be a very appropriate juror.
>
> And we would submit as to Juror No. 104 the reasons submitted by the State do not overcome the inference of prejudice.
>
> No. 106. Also, we would note the State struck number 106, Mr. David Minor, someone who we'd point out has a nephew with the highway patrol. The State accepted other jurors with law enforcement connections. His opinion on the death penalty was he had no opinion. And, also, he's worked for the Vicksburg fire department for twenty-eight years.
>
> As to number 117, Gloria Broome, she stated in her questionnaire she has no opinion as to the death penalty.
>
> As to Juror No. 229, the alternate juror that was struck, Audrey Brown, she also stated that she has no opinion.
>
> We would submit, Your Honor, on those last four that I read, Mr. Sturgis, Mr. Minor, Gloria Broome, and Audrey Brown, that if you look at the totality of their questionnaire, it appears that they could be absolutely open- and fair-minded jurors on the question of the death penalty.

After the trial court refused to change its ruling, defense counsel added:

> One more point I'd make for the record, Your Honor. When the State asked for individual voir dire of the jurors on the issues of those who were strongly imposed on the Witherspoon case, they did not individually voir dire No. 38 [Wilkerson], No. 81 [Burks]. . . . No. 92 [Carpenter] they did not. 104 [Sturgis] they did not. 106 [Minor] they did not. And 117 [Broome] they did not. I just wanted to make the record complete.

This issue was raised in Chamberlin's direct appeal and rejected by the Mississippi Supreme Court. In denying relief, the court recited the reasons given by the prosecutor for striking each of the jurors. Then it addressed Chamberlin's contention that the trial court erred "by not making a clear determination that Chamberlin had established a prima facie case of

discrimination by showing that the State had exercised seven of its twelve peremptory challenges to strike black jurors from the regular panel." *Chamberlin*, 989 So. 2d at 338-39. The court held that the argument was "moot since all three steps of the *Batson* analysis were completed." *Id.* at 339 (citing *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). It went on to hold that, since Chamberlin had offered no rebuttal to the State's explanation of the first four strikes, she was procedurally barred from arguing on appeal that the reasons were pretextual. *Id.* For the remaining three jurors, the court held that Chamberlin had "failed to offer any proof that the State's reasons were pretextual . . . ." *Id.* The court concluded:

> The State exercised seven out of twelve peremptory strikes against blacks and five against venire persons who were not black. The State tendered a total of four potential black jurors, two of whom the defendant struck. The resulting jury included two black veniremen. The State offered reasons for the strikes that the trial court considered race-neutral, and the defense failed to rebut those reasons. Therefore, the defense did not meet its burden to show "that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose." Considering the totality of the evidence, the trial court's ruling on Chamberlin's *Batson* challenge was neither clearly erroneous nor against the overwhelming weight of the evidence.

Id.

Chamberlin takes issue with the Mississippi Supreme Court's ruling, arguing that it misapplies *Batson*.

B. Substantive Law

In *Batson*, the United States Supreme Court adopted a case-specific, three-part test by which a defendant could establish that discrimination had occurred in the jury selection in his case. As a preliminary matter, the defendant must show that the prosecutor's use of peremptory challenges raised an inference that the prosecutor was purposefully excluding members of the defendant's race from serving on the jury. 476 U.S. at 96. (This holding has since been extended to members of any race, *Powers v. Ohio*, 499 U.S. 400 (1991), and gender, *J.E.B. v.*

Alabama ex rel. T.B., 511 U.S. 127 (1994)). The defendant "may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) [hereinafter *Miller-El II*].

The defendant must show that discriminatory intent motivated the strike; it is not enough to show that the strike disproportionately impacted jurors of one race. *Hernandez*, 500 U.S. at 359-60. Yet, "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent." *Id*. at 362. Establishing a pattern or practice of strikes against black jurors is one means of establishing a prima facie case, but it is not the only way in which it may be established; showing that jurors of different races were questioned differently may also infer a discriminatory motive. *Batson*, 476 U.S. at 97.

Once the defendant establishes a prima facie case of discrimination, the prosecutor must come forward with a race-neutral explanation for his strike. *Id.* Because the burden is always on the defendant to prove discrimination, the prosecutor's explanation need not be persuasive; it must only be based on some factor other than the juror's race. *Hernandez*, 500 U.S. at 360. The prosecutor must, however, do more than simply deny that he had a discriminatory motive. *Batson*, 476 U.S. at 98. If the prosecutor offers an explanation before the trial judge determines that the defendant has established an inference of discrimination, then that showing becomes moot, and the judge should rule on the ultimate issue. *Hernandez*, 500 U.S. at 359. Even if the prosecutor's reasons are "frivolous or utterly nonsensical," the analysis does not end, but merely proceeds to the third step. *Johnson v. California*, 545 U.S. 162, 171 (2005) (citation omitted).

At the third step, the trial court must determine whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98. "This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but 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) (quotation marks and citation omitted). "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *see also Miller-El II*, 545 U.S. at 241 (holding that when a party's proffered reason for striking a prospective juror of one race applies just as well to an otherwise similar juror of different race who is permitted to serve, that is evidence tending to prove purposeful discrimination).

Once the trial court has made its determination with respect to discriminatory intent, that determination is a finding of fact that is entitled to a presumption of correctness. *Hernandez*, 500 U.S. at 364. When a *Batson* challenge is considered in the context of habeas review, the federal court cannot ordinarily reject the state court's determination unless it was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Rice*, 546 U.S. at 338 (quoting 28 U.S.C. § 2254(d)(2)). If the findings are made by a state appellate court, rather than the trial court, they are equally entitled to the presumption of correctness. *Sumner v. Mata*, 455 U.S. 591, 592-93 (1982); *Moody v. Quarterman*, 476 F.3d 260, 268 (5th Cir. 2007). However, a finding of non-discrimination must be based on the actual reason(s) proffered by the prosecutor; neither the trial judge nor a reviewing court may substitute a better reason for the strike. *Miller-El II*, 545 U.S. at 252.[4]

A single discriminatory act in jury selection is sufficient to establish a *Batson* violation. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."). In *Batson*, the Supreme Court "declined to

[4] "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252. Put simply, "*Miller-El II* instructs that when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact." *United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011) (quoting *Miller-El II*, 545 U.S. at 246-52).

require proof of a pattern or practice [of discrimination] because a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Johnson*, 545 U.S. at 169 n.5 (quotation marks, citation, and brackets omitted).

C. Comparative Juror Analysis

Chamberlin first takes issue with the state court's determination that, under Mississippi law, she had waived her right to a comparative juror analysis by failing to rebut the reasons given by the prosecutor for the strikes of certain jurors. Such an analysis takes the reasons given for striking black jurors and sees whether those reasons could be equally applied to the white jurors who were accepted by the prosecution. *Reed v. Quarterman*, 555 F.3d 364, 369 (5th Cir. 2009). The Mississippi Supreme Court held, "Because Chamberlin failed to offer any proof that the State's reasons were pretextual, the State's reasons for the challenges were the only considerations before the trial judge." 989 So. 2d at 339 (citing *Thomas v. State*, 818 So. 2d 335, 345 (Miss. 2002)). Respondents have not directly countered this argument, but instead contend that a comparative analysis of the jurors' questionnaire answers does not support a claim of pretext.

This Court need not labor long over this issue, since the Fifth Circuit, relying heavily on the Supreme Court's opinion in *Miller-El II*, has held that, in a death penalty case, a comparative analysis of jurors is appropriate even where defense counsel did not rebut the prosecutor's stated reasons for striking black jurors. *Woodward v. Epps*, 580 F.3d 318, 338 (5th Cir. 2009). The Fifth Circuit's review of the law "suggests that waiver does not apply in capital cases." *Id.* (citing *Reed*, 555 F.3d at 364).

Accordingly, the Mississippi Supreme Court's failure to conduct a comparative analysis was contrary to clearly established federal law requiring that analysis, as announced in *Miller-El*, which the state court failed to identify as controlling precedent. *See Bell*, 535 U.S. at 694. That means the state court's conclusion that there was no showing of purposeful discrimination was incomplete. *See Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013); *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).[5] Where the state court's factual findings of no discrimination were made without recourse to the comparative analysis required by federal law, "the factfinding procedures upon which the court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Panetti*, 551 U.S. at 954 (quoting *Ford v. Wainwright*, 477 U.S. 399, 423-24 (1986)). AEDPA deference to those factual findings is not required. *Id.*

Chamberlin "nonetheless must carry [her] burden of proving purposeful discrimination, and for purposes of our review, [s]he must demonstrate that the state court's factual findings were unreasonable in light of the evidence presented." *Woodward*, 580 F.3d at 338; *e.g.*, *Miller-El II*, 545 U.S. at 266 ("The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous.").

With these principles in mind, this Court will review the evidence presented by Chamberlin in state court regarding discriminatory intent in striking black jurors at her trial. In conducting a comparative analysis, the Fifth Circuit has provided the following instruction:

[5] Ultimately, the Mississippi Supreme Court took a backward look at the jury. It noted that the State exercised twelve peremptory strikes; seven against blacks and five against whites. *Chamberlin*, 989 So. 2d at 339. The State tendered four potential black jurors to the defense, who struck two of them. And, because the resulting jury was composed of two black jurors, the totality of circumstances, in the view of the Mississippi Supreme Court, suggested that there was no discrimination in the jury selection process. *Id*. The error was the failure to acknowledge that striking even a single juror on the basis of race violates the constitution. *See Snyder*, 552 U.S. at 478; *Miller-El II*, 545 U.S. at 247; *Batson*, 476 U.S. at 97; *see also Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) ("Jury competence is an individual rather than a group or class matter.").

> "If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination." [quoting *Reed*, 555 F.3d at 376] In addition, "if the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination." *Id.* Lastly, "we must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors." *Id.*

Smith v. Cain, 708 F.3d 628, 636 (5th Cir. 2013). Jurors need not be identical to be included in a comparative analysis. *Miller-El II*, 545 U.S. at 247 n.6. If the reasons for striking a black juror apply equally as well to a white juror who was retained, that is evidence of pretext. Such evidence does not amount to *proof* of pretext, however, where the black juror was also struck for other, race-neutral reasons. *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009).

1. Emma Roberts

African-American jurors Emma Roberts, Geralline Wilkerson, Brittany Burks, Thomas Sturgis, and David Minor were struck for answering "Not sure" to Question 30. Chamberlin argues that they should be compared to the following white jurors: Patricia Mullen (28), Brannon Cooper (46), Patricia Adcock (187), Laura Peyton (216), and Rebecca Vantrease (234), who also answered "Not sure" to Question 30.

Chamberlin has picked out one reason among the several offered by the prosecutor for striking Emma Roberts, and she seeks to show pretext based only on that reason. However, in response to Questions 34 and 35, Roberts said that she was not sure whether she would hold the state to a higher burden or required 100% proof before she could convict. Neither Mullen, Adcock, Peyton, nor Vantrease would hold the state to a higher burden. Vantrease would not require 100% proof for conviction.

Other questions are also relevant to Roberts' being stricken. Question 53 asked for the juror's opinion of the death penalty, giving five choices: 1. Strongly Favor; 2. Generally Favor; 3. No Opinion; 4. Generally Opposed; 5. Strongly Opposed. Question 54 asked the juror to describe his or her opinion in further detail. Roberts's response to Question 53 was, "Generally Opposed." Her response to Question 54 was, "The VI Commandment - Thou shalt not kill." In contrast, the comparative white jurors' response to Question 53 (and 54) were: Mullen: "Strongly Favor." (No detailed response); Cooper: "Strongly Favor." ("For rape, murder, child abuse, spousal abuse"); Adcock: "Generally Favor." ("I believe in the death penalty when a person does a crime that is intentional and takes the life of someone else."); Peyton: "Generally Favor." ("It would all depend on the case, the crime, the facts of the case."); and Vantrease: "Generally Favor." ("Depending on the nature of the crime and circumstances, I believe there are crimes that deserve the death penalty.").

Where the prosecutor offers several reasons for the strikes, and where some of them do not apply equally to each comparative juror, then those reasons, if they are facially valid, militate against a finding of pretext. *Fields*, 588 F.3d at 277. Here, Chamberlin seeks to compare Roberts to other jurors based solely on their answers to Question 30, despite the fact that this was not the only question that the prosecutor offered for the strike. In the Court's opinion, based on the totality of the circumstances surrounding Roberts' removal, the reasons offered by the prosecutor were not a pretext for racial discrimination.

2. Geralline Wilkerson

Chamberlin makes the same comparison between Geralline Wilkerson and the five white jurors named above. In striking Wilkerson, the prosecutor said that she answered "Not sure" to Questions 30, 34, and 35. "And she basically said she was of no opinion and she ranked low in

our ranks." As stated above, Mullen, Adcock, Peyton, and Vantrease all answered "No" to Question 34, and Vantrease also answered "No" to Question 35. Thus, the only white juror giving the same answers as Wilkerson to Questions 30 and 34 was Cooper, who also answered "Yes" when asked if he would require 100% proof. However, as noted by the prosecutor, Wilkerson answered "No opinion" to Question 53, with no further explanation. Cooper, in contrast, answered "Strongly Favor" when asked about the death penalty, and explained, "For rape, murder, child abuse, spousal abuse." Again, substantive differences between the responses of Wilkerson and the white jurors in response to a question relied upon by the prosecutor preclude a finding of pretext.

Chamberlin also asserts that, when compared to the answers given by Brian Loden, a white juror, the strike of Wilkerson appears to be racially motivated. She admits, however, that the two jurors gave different answers to Question 30 – whether they were emotionally capable of standing up in court and announcing their verdict. Wilkerson said, "Not sure," and Loden said, "Yes." On their feelings about the death penalty, Wilkerson responded, "No Opinion," without further explanation. Loden also responded, "No Opinion," but added, "I don't believe the death penalty should be used that often, but if the crime is bad enough and they are proved 100% guilty, *then I have no problem with it*." (Emphasis added.) Thus, their responses were different in two significant aspects, and the reasons offered by the prosecutor do not amount to proof of pretext.

3. Brittany Burks

When striking Brittany Burks, the prosecutor recited her answers to Questions 30 ("Not sure); 31 (asking whether she could decide the case according to the law, despite any personal opposition to the death penalty, to which she answered "Not sure"); 34 ("Yes"); 35 ("Yes"); 36

(asking whether she would be less likely to find someone guilty if death was a possible sentence, to which she answered "Yes"); and 54 (opinion on the death penalty, "I really don't care."). Additionally, Burks had a family member with a drug charge in Warren County. Again, Mullen, Adcock, Peyton, and Vantrease, while also answering "Not sure" to Question 30, all answered "No" to Question 35. Each of these jurors, as well as Cooper, had opinions on the death penalty that were substantially more favorable to the State than Burks, whose answer to Question 53 was "No opinion." On Question 36, where Burks indicated that she would be less likely to find a defendant in a capital case guilty, Adcock, Cooper, Mullen, Peyton, and Vantrease all answered "No." The circumstances surrounding the strike of Burks do not support a finding of pretext.

Chamberlin also attacks the strike of Burks because she responded on Question 50 that she had a family member who had been charged with a drug crime in 2005, while the prosecutor accepted two white jurors (Jarvis Moseley and Alice Hudson) who indicated that a family member was charged with drug possession. As stated earlier, however, the prosecutor struck Burks because of her answers to Questions 30 ("Not sure); 31 (asking whether she could decide the case according to the law, despite any personal opposition to the death penalty, to which she answered "Not sure"); 34 ("Yes"); 35 ("Yes"); 36 (asking whether she would be less likely to find someone guilty if death was a possible sentence, to which she answered "Yes"); and 54 (opinion on the death penalty, "I really don't care."). Mosely and Hudson gave markedly different responses than Burks. Each of them answered, "Yes" to Question 30, on whether they could stand up and announce their verdict. They both answered that they could put aside their feelings about the death penalty and decide the case based on the law. Moseley would not hold the State to a greater burden of proof, nor would he need 100% certainty to return a guilty verdict. Neither of them would be less likely to return a guilty verdict because it is a capital

case. Finally, with respect to their opinion on the death penalty, Mosely answered, "Strongly favor," and Hudson answered, "Generally favor." Thus, although these jurors had an answer to one question in common, the totality of the circumstances surrounding the strikes do not give rise to a finding of pretext.

4. Gloria Broome

Gloria Broome was struck, according to the prosecutor, because of her answers to Questions 31, 34, and 35. Mullen, Adcock, Peyton, and Vantrease all answered Question 34 in a manner more favorable to the State. Broome answered Question 31, asking whether she could put aside her feelings about the death penalty and decide the case on the law, "No." Adcock, Cooper, Mullen, Peyton, and Vantrease all answered that question "Yes." The Court is satisfied that these facts fail to establish pretext.

5. Katrina Carpenter

The prosecution struck Carpenter, in part, due to her response to Question 41 that her sisters were attorneys. According to the prosecutor, "we always look at lawyers or anybody close to lawyers." Chamberlin contends, however, that the prosecutor accepted five white jurors who indicated, in response to the same question, that they had a close family member or close friend who had studied law: Emily Hall, Edward Buelow, Jr., Charles Langford, Jarvis Moseley, and Anthony Crist. Chamberlin argues that this difference in treatment is proof of pretext.

Carpenter was also struck, though, because of her answer to Question 54, explaining her view on the death penalty, "I would have a problem seeking a verdict of death without concrete evidence." Additionally, the prosecutor struck her for her answer to Question 56, which asked for any other information about her as a potential juror. She responded, "I would not feel comfortable as a juror in a case seeking the death penalty because of fear of retaliation against

self or family." In explaining that strike, the prosecutor noted, "That's a very strong reason." In contrast, Hall explained her view of the death penalty as, "If a person has been convicted of a very serious crime involving the loss of life to another person, and is considered a serious risk to society, I would be in favor of the death penalty." Buelow wrote, "I believe the death penalty is appropriate in some cases but under current law is not administered properly." Crist said, "If someone willfully and knowingly kills someone else for personal gain with no remorse at that time, then they should be put to death." Moseley said he strongly favored the death penalty, adding, "The punishment should fit the crime." Finally, Langford's opinion was, "Let the punishment fit the deed/crime." Thus, although these jurors answered one question similarly, their answers to other questions were completely at odds, and these facts do not establish that the reasons for Carpenter's strike were a pretext for racial discrimination.

6. Thomas Sturgis and David Minor

The strikes of Sturgis and Minor are much more problematic. The prosecutor claimed he struck Sturgis and Minor because of their answers to Questions 30, 34, and 35. Each of the comparative white jurors gave more prosecution-favorable answers to 34 and 35, except for Cooper, who gave the same answers as Sturgis and Minor. In fact, Cooper's responses mirror Sturgis and Minor's.

Responses to questions other than 30, 34, and 35 cannot be considered, as they were not given as justification by the prosecution. *Miller-El II*, 545 U.S. at 252. In any event, a perusal of some of the other responses would not help the prosecution's case. They showed that Sturgis had a relative who worked as a correctional officer and Minor had a relative in law enforcement. But Cooper had no such ties. Although neither Sturgis nor Minor had an arrest record, Cooper

had been arrested for DUI.[6] Sturgis and Minor reported no contact with the District Attorney's office, but Cooper had an experience where his ex-wife threatened his current wife.

As far as their opinions on the death penalty, Sturgis answered "Generally favor," with no more detail; Minor answered "No opinion," without further explanation; and Cooper answered "Strongly favor," and added "for rape, murder, child abuse, spousal abuse." While this might have made Cooper a slightly more desirable juror, it was not a rationale offered by the prosecutor, despite the fact that he had several chances to augment the record on that score. *See id.*; *Smith*, 708 F.3d at 636. He ended his discussion on both Sturgis and Minor with the phrase, "I believe that's it on that one." After defense counsel had argued that the reasons given to strike Sturgis and Minor appeared to be racially motivated, the trial court asked for further argument, and the prosecutor responded, "None other than what we made . . . ."

Clearly, then, Cooper was permitted to remain on the jury even though his answers to the three questions given as the basis for striking Sturgis and Minor were identical. Other questionnaire responses, although not given as justification by the prosecution, also support a finding of pretext.[7] *See Miller El II*, 545 U.S. at 252 (noting the "pretextual significance" when prosecutors' "stated reason does not hold up"). In *Miller-El II*, the Supreme Court reversed a conviction because the reasons for striking two of ten potential black jurors strongly supported a finding of pretext, even though the justifications for striking the remaining eight were "closer calls." *Id.* at 252 n.11; *see also Reed*, 555 F.3d at 381 n.12. The fact that only a couple of the

[6] It appears Cooper wrote "DUI" but it could be "DWI." The difference between the two does not matter because he informed the parties and the court that he had been arrested.

[7] It is remarkable just how similar these three jurors were in their experiences: each obtained education beyond high school; each was employed; neither had any military experience; each read the Vicksburg Post daily; each watched television regularly; and fishing was among their hobbies. Cooper and Sturgis were married and each had served on a jury before, while Minor answered "NO" to those questions. Finally, the court notes that Cooper said he had health concerns which he felt would "hinder or prevent [him] from serving as a juror." *See* Question No. 55. He added, "Rheumatoid arthritis cannot sit for long periods of time." Neither Minor or Sturgis expressed any such limitations. As among these three jurors, there is little doubt that a prosecutor would not want a juror to serve who believed that he or she would be hindered or prevented from serving because of a health condition.

strikes were discriminatory was enough; as the Supreme Court has held, "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478 (citations and brackets omitted). The fact that two of the black veniremen in this case were struck for reasons not applied to a white juror is, therefore, sufficient proof of pretext to conclude that a *Batson* violation occurred.

CONCLUSION

Citizens of this great nation engage in public service in a multitude of ways. Voting and jury service are among the most valuable and important kinds of service. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. It is also an opportunity open to a broad portion of the population. One needs no special skill or training to be the most powerful person in a courtroom.

Voting and jury service reflect the most fundamental of American principles: that our fate lies in the hands of our peers. It is because we cherish this principle that juries can make life or death decisions. In this case, the jury's decision meant death.

Some may wonder why constitutional error in the jury's selection necessitates a new trial, especially given the horrific murders committed in this case. But the Supreme Court has many times explained that a discriminatory jury selection process unforgivably taints a guilty verdict. Discrimination in picking a jury "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B.*, 511 U.S. at 140.

Since *Batson*, the Court has repeatedly affirmed that individual jurors have the right to be free from stereotypes, discrimination, and discriminatory classifications. *Id.* at 140-41 (citing

Powers, 499 U.S. at 412). It has written that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution." *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); *see also Georgia v. McCollum*, 505 U.S. 42, 58-59 (1992). Being excluded from jury service on account of one's race obviously harms that individual juror.

But there are consequences to our system of justice, too. "A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings." *Powers*, 499 U.S. at 412. If such conduct – occurring underneath the American flag and with the appearance of approval by the court itself – goes unchecked, the court and the judiciary become willing participants in that discrimination. *See Edmonson*, 500 U.S. at 628 ("Racial bias mars the integrity of the judicial system . . . .").

These values were well-stated in the Supreme Court's decision in *J.E.B.*, which guaranteed that women could not be excluded from jury service on account of their gender.

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law – that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

J.E.B., 511 U.S. at 145-46 (citation omitted).

At heart, Americans will not have confidence in a system of justice which allows individuals to be denied participation in this critical part of our democracy. *See Powers*, 499 U.S. at 413 ("The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset."). And the judiciary cannot acquiesce to misplaced beliefs that would ultimately undermine public confidence in the system, or "invite[] cynicism respecting the

jury's neutrality and its obligation to adhere to the law." *Id.* at 412. In order for our nation to remain strong, its people must have faith in the fairness of the jury system.

In this case, these words have special resonance:

> For some, jury service is their first experience with the legal system. Jury service teaches them about courts, procedures, and the law. For others, jury duty has particular significance because it is a badge of full citizenship. Voting and jury service are the two opportunities for citizens to participate in the democratic process. For women and African-Americans, who fought for these badges of citizenship, jury service has added meaning. For all jurors, jury duty provides an opportunity to see the law in action. The verdict that the jury reaches affects the parties directly in front of them. The immediacy and importance of the jury's work is strongly felt by all present in the courtroom. . . .
>
> Nowhere is the jury's function . . . more critical than in death penalty cases. When the life or death of the defendant is at stake the jury must display the utmost vigilance.

Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1721-22, 1725 (2006).

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Because the jury selection process violated the Supreme Court's teachings in *Batson*, the Court finds that habeas relief is appropriate, and Chamberlin's Petition for Writ of Habeas Corpus will be granted. Having reached that conclusion, discussion of the other issues raised in the Petition is unnecessary.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Habeas Corpus filed by Lisa Jo Chamberlin is hereby **granted** as to her claim that the jury selection process in her case impermissibly discriminated against African-American jurors. A separate judgment will be entered this day in accordance with Federal Rule of Civil Procedure 58.

IT IS FURTHER ORDERED that Chamberlin's conviction and sentence are hereby set aside, and she shall be released from custody unless the State of Mississippi grants her a new trial within 120 days of the entry of this Order.

IT IS SO ORDERED this the 31st day of March, 2015.

s/Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

Supreme Court of Mississippi.
Lisa Jo **CHAMBERLIN**
v.
STATE of Mississippi.
No. 2006-DP-01489-SCT.

July 17, 2008.
Rehearing Denied Sept. 11, 2008.

Background: Defendant was convicted in the Circuit Court, Forrest County, Robert B. Helfrich, J., of capital murder, and she appealed.

Holdings: The Supreme Court, Lamar, J., en banc, held that:
(1) defendant successfully invoked her right to silence, but not her right to counsel at end of first interrogation;
(2) officer's initiation of the second interrogation did not violate defendant's *Miranda* rights;
(3) since there was no Fifth-Amendment self-incrimination violation, the "fruit of the poisonous tree" doctrine was inapplicable;
(4) trial court's ruling denying defendant's *Batson* challenge was neither clearly erroneous nor against the overwhelming weight of the evidence;
(5) photographs which were taken during the autopsies were admissible;
(6) defendant was not entitled to mercy instructions at sentencing; and
(7) defendant's death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor.

Affirmed.

Diaz, P.J., concurred in result only.

West Headnotes

[1] Sentencing and Punishment 350H 1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of Review. Most Cited Cases

The thoroughness and intensity of review are heightened in cases in which the death penalty has been imposed, and what may be harmless error in a case with a lesser sentence becomes reversible error when the penalty is death, and under this standard of review, all doubts are to be resolved in favor of the accused.

[2] Criminal Law 110 1158.13

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.13 k. Admission, Statements, and Confessions. Most Cited Cases
Findings by a trial judge that a defendant confessed voluntarily, and that such confession is admissible are findings of fact, and as long as the trial judge applies the correct legal standards, his decision will not be reversed on appeal unless it is manifestly in error, or is contrary to the overwhelming weight of the evidence.

[3] Constitutional Law 92 3855

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3855 k. Fifth Amendment. Most Cited Cases
The Fourteenth Amendment incorporates the Fifth-Amendment privilege against self-incrimination. U.S.C.A. Const.Amends. 5, 14.

[4] Criminal Law 110 412.2(3)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(3) k. Informing Accused as to His Rights. Most Cited Cases
Miranda warning requires that, before subjecting a person in police custody to interrogation, law enforcement officers must inform the person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. U.S.C.A. Const.Amend. 5.

[5] Criminal Law 110 412.1(4)

110 Criminal Law

110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Once *Miranda* warning has been given, if the person in custody indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease, and any statement taken after such an indication is the product of compulsion. U.S.C.A. Const.Amend. 5.

[6] Criminal Law 110 412.2(3)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(3) k. Informing Accused as to His Rights. Most Cited Cases

Criminal Law 110 412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
The administration of the *Miranda* warnings and a waiver, or a fully effective equivalent, constitute the prerequisites to the admissibility of any statement made by a defendant.

[7] Criminal Law 110 531(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Preliminary Evidence as to Voluntary Character
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases
The State has the burden of proving all facts prerequisite to admissibility of defendant's confession beyond a reasonable doubt.

[8] Criminal Law 110 412.2(4)

110 Criminal Law

110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
In determining whether a defendant's right to counsel has been violated, appellate court must determine whether the defendant actually invoked his right to counsel, and if the defendant invoked this right, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. U.S.C.A. Const.Amend. 6.

[10] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
A defendant's request for counsel must be interpreted broadly whether the defendant's request is explicit or equivocal. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Determining whether a defendant invoked his right to counsel is an objective inquiry. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
To invoke his right to counsel, defendant must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases

Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Defendant's indication that she did not want to answer questions constituted successful invocation

of her right to silence, but not of her right to counsel; during interrogation, defendant blurted out unintelligible statement regarding attorney, officer then asked defendant questions pertaining to whether she wanted attorney, and eventually, defendant said she would talk, and after the clarifying questions and defendant's response that she would talk, officer advised defendant of her *Miranda* rights, and when officer asked defendant if she was willing to answer questions, defendant shook her head "no" and officer ceased asking questions. U.S.C.A. Const.Amends. 5, 6.

[15] Criminal Law 110 412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
The admissibility of statements obtained after the person in custody has decided to remain silent depends, under *Miranda*, on whether his right to cut off questioning was scrupulously honored.

[16] Criminal Law 110 412.2(3)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(3) k. Informing Accused as to His Rights. Most Cited Cases
The government may use statements which are given voluntarily by the defendant after he receives full disclosure of the rights offered by *Miranda*.

[17] Criminal Law 110 517.2(2)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.2 Absence or Denial of Counsel; Inadequate Representation
110k517.2(2) k. Failure to Request Counsel; Waiver. Most Cited Cases

Criminal Law 110 519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General

110k519(1) k. What Confessions Are Voluntary. Most Cited Cases
When a defendant alleges a violation of her privilege against self-incrimination, the trial court must determine, in consideration of the totality of the circumstances, whether or not the confession was made voluntarily, and whether there was a knowing and voluntary waiver of the accused's privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

[18] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Invocation of the right to counsel is a rigid, prophylactic rule which prohibits further questioning until an attorney is made available or the defendant knowingly and voluntarily waives his right. U.S.C.A. Const.Amend. 6.

[19] Criminal Law 110 412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Invocation of the right to silence concerns whether an officer scrupulously honors a defendant's right to cease questioning for a reasonable time, after which questioning may resume if the defendant knowingly and voluntarily waives this right. U.S.C.A. Const.Amend. 5.

[20] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Officer's initiation of the second interrogation did not violate defendant's *Miranda* rights when a significant period of time had passed from the first interrogation (about sixteen hours), new *Miranda* warnings were administered and a waiver signed, and the interrogation was restricted to murders which had not been a subject of the first interrogation.

[21] Criminal Law 110 412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
Any revocation of defendant's waiver of his privilege against self-incrimination and his right to counsel must be scrupulously honored. U.S.C.A. Const.Amends. 5, 6.

[22] Criminal Law 110 412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
Where, following the revocation of defendant's waiver of his privilege against self-incrimination and his right to counsel, defendant is re-advised of his *Miranda* rights, if he thereafter knowingly, intelligently and voluntarily re-waives those rights, any subsequent inculpatory statement may be received in evidence against him. U.S.C.A. Const.Amends. 5, 6.

[23] Criminal Law 110 412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
Since defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights at the beginning of the interrogation, the initiation of the interrogation by officers was proper, and defendant's subsequent inculpatory statements were admissible in evidence against her.

[24] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution

110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Defendant initiated police interview by sending a message through the jailer that she wished to speak to the authorities, and as such, defendant's statements made during this interview were admissible.

[25] Criminal Law 110 531(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Preliminary Evidence as to Voluntary Character
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases
Since defendant did not testify at the suppression hearing or provide any evidence, the State was not required to rebut her testimony by calling all the officers present at the questioning or signing of the confession.

[26] Criminal Law 110 1153.6

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.6 k. Competency of Evidence. Most Cited Cases
The standard of review for the suppression of evidence is abuse of discretion.

[27] Criminal Law 110 393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In General. Most Cited Cases
The *Miranda* rule is employed to protect against violations of the Fifth-Amendment self-incrimination clause. U.S.C.A. Const.Amend. 5.

[28] Criminal Law 110 394.1(3)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.1 In General
110k394.1(3) k. Effect of Illegal Conduct on Other Evidence. Most Cited Cases

The exclusionary prohibition against "fruit of the poisonous tree" applies to violations of the Fifth-Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

[29] Criminal Law 110 394.1(3)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.1 In General
110k394.1(3) k. Effect of Illegal Conduct on Other Evidence. Most Cited Cases
Since there was no Fifth-Amendment self-incrimination violation in the taking of murder defendant's confession, the "fruit of the poisonous tree" doctrine was inapplicable, such that consequently seized evidence was admissible. U.S.C.A. Const.Amend. 5.

[30] Criminal Law 110 1158.17

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.17 k. Jury Selection. Most Cited Cases
Appellate court gives great deference to a trial court's determination under *Batson* because it is based largely on credibility.

[31] Criminal Law 110 1158.17

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.17 k. Jury Selection. Most Cited Cases
Appellate court will not overrule a trial court's *Batson* ruling absent finding the ruling was clearly erroneous or against the overwhelming weight of the evidence.

[32] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Under *Batson*, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race.

[33] Constitutional Law 92 ⚿3309

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3305 Juries
92k3309 k. Peremptory Challenges. Most Cited Cases
Inequality under *Batson* draws from the general equal protection principle that the invidious quality of governmental action claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. U.S.C.A. Const.Amend. 14.

[34] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
In order to establish a prima facie case under *Batson*, defendant must show that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose, and in deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.

[35] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
The "*Batson* doctrine" is not concerned with racial, gender, or ethnic balance on petit juries, and it does not hold that a party is entitled to a jury composed of or including members of a cognizable group; rather, it is concerned exclusively with discriminatory intent on the part of the lawyer against whose use of his peremptory strikes the objection is interposed.

[36] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury

230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
The sheer number of peremptory strikes exercised against a cognizable group of jurors is not, in itself, dispositive of discrimination under *Batson*.

[37] Jury 230 🔑33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Once a prima facie case has been made under *Batson*, the prosecutor must present race-neutral reasons for the peremptory strikes; the reasons need not be persuasive, or even plausible, and so long as the reasons are not inherently discriminatory, they will be deemed race-neutral.

[38] Jury 230 🔑33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Once the prosecutor proffers his explanation for peremptory strike of juror, and the court determines that it is race-neutral and satisfies the prosecution's step-two burden of articulating a nondiscriminatory reason for the strike, the inquiry should proceed to step three, where the trial court determines whether the prosecutor was motivated by discriminatory intent.

[39] Criminal Law 110 🔑1035(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(5) k. Competency of Jurors and Challenges. Most Cited Cases
Murder defendant was procedurally barred from arguing, on appeal, pretext as to the challenged jurors for whom she did not argue pretext to the trial court.

[40] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
If the defendant offers no rebuttal to State's race-neutral reasons for exercising peremptory challenges, the trial court is forced to examine only the reasons given by the State.

[41] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Under *Batson*, trial court must evaluate the persuasiveness of the justification for peremptory strikes proffered by the prosecutor, while keeping in mind that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

[42] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
The defense did not meet its burden to show that the facts and circumstances gave rise to the inference that the prosecutor exercised the peremptory challenges against African American venire members with a discriminatory purpose, and considering the totality of the evidence, the trial court's ruling denying defendant's *Batson* challenge was neither clearly erroneous nor against the overwhelming weight of the evidence; State exercised 7 out of 12 peremptory strikes against African Americans and 5 against venire persons who were not African American, and State tendered total of four potential African American jurors, two of whom defendant struck, and State offered reasons for strikes that trial court considered race-neutral, and defense failed to rebut those reasons.

[43] Criminal Law 110 438(6)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies
110k438(6) k. Purpose of Admission. Most Cited Cases
Photographs which depicted the bodies as they were found at murder scene, showing victim's body in the top of the freezer and the body after its removal from the freezer, and photographs which were taken during the autopsies were admissible since the photographs had probative value and aided in describing the circumstances of the killings, the location of the bodies and cause of death; photographs aided officer in explaining what he saw at crime scene, and each autopsy photograph was either necessary or would aid doctor in explaining to the jury the injuries he found.

[44] Criminal Law 110 1153.11

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.11 k. Documentary Evidence. Most Cited Cases
Admission of photographs by the trial court is reviewed for abuse of discretion.

[45] Criminal Law 110 1153.11

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.11 k. Documentary Evidence. Most Cited Cases
A decision favoring admissibility of photographs will not be disturbed absent a clear abuse of judicial discretion.

[46] Criminal Law 110 438(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(1) k. In General. Most Cited Cases

Criminal Law 110 438(7)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) k. Photographs Arousing Passion or Prejudice; Gruesomeness. Most Cited Cases
The discretion of the trial judge in admitting photographs is almost unlimited, regardless of the gruesomeness, repetitiveness, and the extenuation of probative value.

[47] Criminal Law 110 438(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(1) k. In General. Most Cited Cases
Some probative value is the only requirement needed in order to support a trial judge's decision to admit photographs into evidence.

[48] Criminal Law 110 438(7)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) k. Photographs Arousing Passion or Prejudice; Gruesomeness. Most Cited Cases
So long as a photograph has probative value and its introduction serves a meaningful evidentiary purpose, it may still be admissible despite being gruesome, grisly, unpleasant, or even inflammatory.

[49] Criminal Law 110 438(6)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies

110k438(6) k. Purpose of Admission. Most Cited Cases
A photograph of murder victim's body has a meaningful evidentiary purpose when it: (1) aids in describing the circumstances of the killing; (2) describes the location of the body or cause of death; or (3) supplements or clarifies witness testimony.

[50] Criminal Law 110 438(5.1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies
110k438(5.1) k. In General. Most Cited Cases
Autopsy photographs are admissible only if they possess probative value.

[51] Criminal Law 110 769

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k769 k. Duty of Judge in General. Most Cited Cases
Whether to give a jury instruction is within the sound discretion of the trial court.

[52] Sentencing and Punishment 350H 1646

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1646 k. Sympathy and Mercy. Most Cited Cases
At sentencing, capital murder defendant was not entitled to instruction stating that appropriateness of the exercise of mercy could itself be a mitigating factor jury could consider in determining whether State proved that the death penalty was warranted, or instruction stating that, even if jury concluded that death was an appropriate sentence, jury could still show mercy and sentence defendant to life in prison; capital defendant was not entitled to a mercy instruction, and defendant was not entitled to an instruction that the jury could return a life sentence even if the aggravating circumstances outweighed the mitigating circumstances.

[53] Sentencing and Punishment 350H 1646

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General

350Hk1646 k. Sympathy and Mercy. Most Cited Cases
States are free to determine the manner in which a jury may consider mitigating evidence at capital sentencing, i.e., whether the evidence should be viewed through the lens of mercy.

[54] Criminal Law 110 1045

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1045 k. Necessity of Ruling on Objection or Motion. Most Cited Cases
The burden is on the movant to obtain a ruling on a pre-trial motion, and failure to do so constitutes a procedural bar on appeal. Uniform Circuit and County Court Rule 2.04.

[55] Sentencing and Punishment 350H 1789(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Defendant's claim that the trial court erroneously denied her motion for payment of travel and related expenses for her aunt and childhood best friend, who were to testify during the sentencing phase of capital murder trial, was procedurally barred because defendant did not present this motion to the trial court.

[56] Costs 102 302.2(1)

102 Costs
102XIV In Criminal Prosecutions
102k301.1 Security for Payment; Proceedings in Forma Pauperis
102k302.2 Production of Witnesses or Evidence
102k302.2(1) k. In General. Most Cited Cases
Defendant failed to meet her duty to provide sufficient information to the trial court in order for court to grant defendant's motion for payment of travel and related expenses for her aunt and childhood best friend, who were to testify during the sentencing phase of capital murder trial; defendant's motion consisted only of the statements that defendant was a pauper, the two witnesses for which funds were requested did not have adequate funds for lodging or travel, and that these witnesses were vital to the defense.

[57] Sentencing and Punishment 350H 1682

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1682 k. Escape or Other Obstruction of Justice. Most Cited Cases

Sentencing and Punishment 350H 1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
Defendant's death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor, and evidence was more than sufficient to support jury's finding of statutory aggravating circumstances; jury unanimously found as to the murders that the aggravating circumstances were that capital offense was committed while defendant was engaged in or was an accomplice in the commission of or an attempt of flight after committing a robbery, capital offense was committed for purpose of avoiding or preventing lawful arrest, and capital offense was especially heinous, atrocious, or cruel, and in comparison with other cases, the sentences of death were neither excessive nor disproportionate. West's A.M.C. §§ 99-19-101(5)(e, h), 99-19-105(3).

***326** Michael Adelman, Hattiesburg, Gay Polk-Payton, attorneys for appellant.
Office of The Attorney General by Pat McNamara, Marvin L. White, Jr., attorneys for appellee.

EN BANC.

LAMAR, Justice, for the Court.
¶ 1. Lisa Jo Chamberlin was convicted and sentenced to die by lethal injection for the capital murders of Linda Heintzelman and Vernon Hullett during the commission of a robbery. Chamberlin appeals her convictions and sentence.

FACTS

¶ 2. The investigation into this gruesome double murder began when Kansas authorities received a report that the defendant Lisa Jo Chamberlin and her boyfriend and co-defendant, Roger Gillett, were in possession of a stolen vehicle and were manufacturing methamphetamine at the Gillett farm in Russell County, Kansas.

¶ 3. Based on the information received, Kansas Bureau of Investigation (KBI) Officer Matthew Lyon obtained two search warrants. One warrant authorized the search of 606 North Ash, where Gillett and Chamberlin were staying, and the second warrant authorized the search of the Gillett farm.

¶ 4. On March 29, 2004, at 3:45 p.m., officers began a search at 606 North Ash. Lyon and other KBI officers participated in the search. The search was completed at 5:05 p.m. KBI officers found Gillett and Chamberlin, as well as methamphetamine and other drug paraphernalia, at 606 North Ash. KBI officers arrested Gillett and Chamberlin that day. Chamberlin was detained at the Russell County Jail.

¶ 5. At approximately 5:13 p.m. on March 29, Lyon attempted to interview Chamberlin. After Lyon read Chamberlin ***327** her *Miranda*[FN1] rights, Chamberlin told Lyon that she did not want to answer any questions. The interview ended at approximately 5:20 p.m. Only identifying questions were asked and answered in that interview.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶ 6. Chamberlin was charged with a number of drug-related offenses. Meanwhile, at approximately 5:15 p.m., other officers began to search the Gillett farm. At the farm, the first officers to arrive discovered a white Dodge Dakota pickup truck with Mississippi plates parked in a metal shed and a white freezer that was taped shut with duct tape and plugged in inside a wooden granary.

¶ 7. Upon opening the freezer, the officers discovered a dismembered body, later identified as Vernon Hullett, and a black plastic trash bag which contained severed body parts. The officers secured the premises while they sought and obtained a third search warrant. Armed with this third search warrant, which authorized the officers to search for evidence in connection with the murder investigation, the officers returned to the Gillett farm, pulled the male body out of the freezer and discovered another body frozen in a liquid in the bottom of the freezer. The officers thawed the contents of the freezer and extracted a second body, later identified as Linda Heintzelman. The search at the farm was completed the next day, March 30, at 5:22 p.m.

¶ 8. On the evening of March 29, Officer Lyon received a call from the Russell County Sheriff advising him that two bodies had been found at the Gillett farm. Officers conducted three interviews with Chamberlin during the course of the day on March 30.

¶ 9. At the end of Chamberlin's last interview on the afternoon on March 30, she agreed to show KBI Officer Delbert Hawel the location where she and Gillett had dumped evidence at the landfill in Russell. At approximately 8:00 p.m., KBI Officer Max Barrett, Hawel, and Chamberlin rode to the Russell County dump, and Chamberlin indicated where some of the physical evidence from the murders had been deposited. The landfill was secured until it could be searched. Barrett testified that later that evening, after returning to the sheriff's office, he was contacted by one of the corrections officers who told him that Chamberlin wanted to talk to a KBI agent. Since the KBI agents had left for the evening, Chamberlin indicated that she would talk with Barrett. Barrett testified that when he spoke with Chamberlin she expressed her desire to talk to one of the agents, and he relayed her request to an agent.

¶ 10. The next day, March 31, officers returned to the dump and recovered seven plastic trash bags,

containing, among other things, one of Hullett's work shirts, pants with Hullett's name on them, a pillow heavily stained with blood, a camera, a purse containing identification which apparently belonged to Heintzelman, a wallet and identification that belonged to Hullett, a Hattiesburg, Mississippi, phone book, and the cardboard center of a roll of duct tape. Barrett packaged the evidence and transferred it to Hattiesburg Police Officer Rusty Keyes.

¶ 11. During the three interviews on March 30 and the interview on the morning of March 31, Chamberlin explained her relationship with Gillett and her participation in the robbery and murders of Hullett and Heintzelman. Chamberlin met Gillett in Oregon, where she was born and raised. They lived together for a brief time in Oregon before they moved to Russell,***328** Kansas, where they lived with some of Gillett's relatives. Around the beginning of March, Chamberlin and Gillett drove from Russell County, Kansas, to Hattiesburg, Mississippi, where they stayed with Gillett's cousin, Vernon Hullett, and his live-in girlfriend, Linda Heintzelman. On March 6, shortly after arriving in Hattiesburg, Gillett and Chamberlin wrecked their car while following Hullett and Heintzelman in Heintzelman's pickup truck on Highway 49. According to Chamberlin, Heintzelman changed lanes too closely in front of their vehicle, causing them to run into the rear of Heintzelman's truck. Gillett's car was badly damaged, but Heintzelman's truck sustained only minor damage.

¶ 12. According to Chamberlin, Heintzelman promised to report the accident as a claim against her insurance and then divide the insurance proceeds with Chamberlin and Gillett. Heintzelman never submitted the accident report to her insurance company.

¶ 13. Chamberlin told KBI officers that on an unknown date in March 2004, she, Gillett, Hullett, and Heintzelman were all at Hullett's residence. Hullett and Heintzelman suggested that Gillett and Chamberlin get their own place to live. Chamberlin agreed, but Gillett wanted to stay at Hullett's. Chamberlin and Gillett argued about moving. Unable to drive her car in its damaged condition, Chamberlin left on foot and returned that evening to find Gillett standing on the front porch smoking a cigarette.

¶ 14. When Chamberlin and Gillett entered the house, Gillett became violent with Heintzelman, accusing her of not being truthful about reporting the accident to her insurance company. Gillett instructed Chamberlin to get his gun from under the mattress in the bedroom. Chamberlin complied. Chamberlin and Gillett cut the telephone wires so that Hullett and Heintzelman could not call the police. Gillett fired one round inside the house to scare Hullett and Heintzelman.

¶ 15. Gillett punched and hit Hullett several times in an attempt to get the combination to Hullett's safe. Upon discovering that all the beer in the house had been consumed, Chamberlin left again to get more beer. When Chamberlin returned, Heintzelman was bent over the safe and was not wearing any pants. Chamberlin inquired as to whether Gillett had raped Heintzelman. Gillett explained that he wanted to “break her,” so he made her take her clothes off and used a beer bottle to rape her. Still unsuccessful in opening the safe, Chamberlin became impatient and told Gillett something similar to “let's just kill them and get out of here.”

¶ 16. According to Chamberlin, Gillett bashed Hullett in the head with a hammer while Hullett was sitting in a chair in the living room. Gillett also slashed Hullett's throat. Chamberlin went out of the house and came back in a number of times over several hours while Heintzelman was lying on the floor, injured but "still breathing." Eventually, Chamberlin suggested that they smother Heintzelman. Chamberlin and Gillett worked together to bind Heintzelman's hands behind her back so that she could not struggle with them. Gillett lifted Heintzelman's head, and Chamberlin placed a bag over it. Chamberlin told the officers that she was unable to complete the asphyxiation of Heintzelman and went outside. She said that Heintzelman was still breathing when she went outside, but when she returned, Heintzelman was dead.

¶ 17. Chamberlin told the officers that she assisted in cleaning up the murder scene. She helped move the bodies to the bathroom, where Gillett cut off Hullett's head and arms and she held garbage bags open while Gillett placed Hullett's arms ***329** inside the bags. Chamberlin described how she assisted in loading Heintzelman's body and then Hullett's body, along with the black trash bag, into the freezer and how she taped the freezer shut as Gillett stood on top of the freezer to hold it closed. Chamberlin and Gillett took Hullett's pickup truck and transported the freezer containing the two bodies on the back of that truck from Hullett's house to Kansas. After arriving in Kansas, they unloaded the freezer and plugged it in at the Gillett farm. She indicated that they took the items they transported from Hullett's house and disposed of them at the Russell dump. Also, she agreed to cook some methamphetamine for five hundred dollars because they needed money. She described how they discarded the trash from making methamphetamine at the public swimming pool and how on the next day she and Gillett were arrested.

¶ 18. During trial, Dr. Donald Pojman, who performed the autopsies on Hullett and Heintzelman, testified that the cause of Heintzelman's death was from "[s]harp-force injuries of the torso and the neck," "blunt-force injuries of the head," and "asphyxiation," and that the cause of Hullett's death was blunt-force injuries to the left side of the head.

PROCEDURAL HISTORY

¶ 19. Chamberlin and Gillett were jointly indicted on two counts of capital murder in the deaths of Heintzelman and Hullett. The court granted Chamberlin's motion for severance from Gillett.

¶ 20. Chamberlin filed a motion to suppress the evidence recovered from the Russell landfill as well as a motion to suppress her statements. At the suppression hearing, three KBI officers, Lyon, Hawel, and Kelly Ralston, testified that they interviewed Chamberlin a total of five times, and in those interviews, Chamberlin admitted her participation in the murders. Two officers from the Hattiesburg Police Department, Rusty Keyes and Terrell Carson, testified that upon arrival in Hattiesburg, Chamberlin refused to make a statement and requested a lawyer. Also, two jailmates of Chamberlin's at the Forrest County Jail, Martha Petrofsky and Marilyn Coleman, testified at the suppression hearing. Petrofsky and Coleman, both housed in the one-room detention area where Chamberlin was detained, testified that Chamberlin admitted to participating in the murders of

Hullett and Heintzelman. Chamberlin did not present evidence at the suppression hearing. The trial court entered an order denying Chamberlin's motion to suppress statements.

¶ 21. During trial, Chamberlin did not put on any evidence. After the three-day trial, the jury found Chamberlin guilty on two counts of capital murder. During sentencing, Chamberlin called two former jail mates as character witnesses. She also called a psychologist appointed by the court to investigate any mitigating factors in relation to her mental state. The psychologist testified as to information she obtained from interviewing Chamberlin and people who knew her, including Chamberlin's mother, Twila Speer; Chamberlin's aunt, Loma Wagner; and a long-time friend from childhood, Veronica, among others. At the conclusion of the sentencing phase, in accordance with the recommendation of the jury, the court ordered Chamberlin to be put to death by lethal injection. The trial court stayed Chamberlin's execution pending resolution of her Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial, and her appeal to this Court. The trial court denied Chamberlin's post-trial motions, and Chamberlin timely appealed to this Court.

***330 DISCUSSION**

[1] ¶ 22. The thoroughness and intensity of review are heightened in cases in which the death penalty has been imposed. *Ross v. State,* 954 So.2d 968, 986 (Miss.2007); *Laney v. State,* 421 So.2d 1216, 1217 (Miss.1982). What may be harmless error in a case with a lesser sentence becomes reversible error when the penalty is death. *Ross,* 954 So.2d at 986; *Laney,* 421 So.2d at 1217. Under this standard of review, all doubts are to be resolved in favor of the accused. *Lynch v. State,* 951 So.2d 549, 555 (Miss.2007).

PRE-TRIAL

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE STATEMENTS MADE DURING CUSTODIAL INTERROGATIONS.

¶ 23. In the course of five interviews conducted by the KBI, Chamberlin repeatedly admitted to participating in the murders of Hullett and Heintzelman. Claiming that KBI officers violated her right to counsel and her right to remain silent, Chamberlin moved for suppression of statements she made during the second, third, fourth, and fifth interviews with KBI officers.

First Interrogation.

¶ 24. Lyon testified that he began an interview with Chamberlin on March 29, 2004, at approximately 5:13 p.m. Lyon, unaware of the homicides at the time of this first interrogation, initially was solely concerned with the narcotics investigation which had resulted in Chamberlin's arrest.

¶ 25. Lyon began by asking preliminary identification questions. Chamberlin claims that about one

minute into the interview she stated, "I won't tell you anything until I talk to a lawyer." The State contends that Chamberlin asked, "Is this where I'm supposed to ask for a lawyer," and later "Don't you think I need a lawyer?" [FN2] The videotape of the interrogation shows that Chamberlin made an unintelligible statement, and Lyon immediately asked questions to clarify whether Chamberlin had invoked her right to counsel. Subsequently, Chamberlin clearly said, "I'll talk."

> FN2. Chamberlin clearly mentions "an attorney" on the tape, but from a review of the tape, it cannot be determined exactly what she said. Chamberlin did not testify at either the suppression hearing or the trial.

¶ 26. This first interview lasted about six minutes. Lyon testified that after he read Chamberlin her *Miranda* rights, she "checked [on a *Miranda* form] that she did not want to speak with [him]." The interview concluded at approximately 5:20 p.m.

Second Interrogation.

¶ 27. After finding unidentified bodies at the Gillett farm, Hawel, along with Lyon, interrogated Chamberlin on the morning of March 30, 2004. This interview began at approximately 9:43 a.m. Approximately sixteen hours after the first interview, Lyon, for the second time, and Hawel, for the first time, interviewed Chamberlin, focusing solely on the bodies found at the farm. Hawel read Chamberlin her *Miranda* rights at the beginning of the interview, and she signed and initialed a waiver, witnessed by Hawel and Lyon. The interview was not recorded on video but was memorialized by Hawel's notes and investigation report. According to the report, Chamberlin described Hullett's and Heintzelman's dead bodies in the living room of Hullett's home, injuries to Hullett's neck, her assistance in cleaning the house and loading the bodies in the freezer, the arrangement of the bodies in the freezer and the inclusion of a black plastic trash bag in the freezer. This interview ended at approximately 10:39 a.m. There is ***331** no evidence that Chamberlin invoked her *Miranda* rights during this interview.

Third Interrogation.

¶ 28. Agents Hawel and Lyon initiated a third interview later in the afternoon on March 30, beginning about 1:24 p.m. This interview was videotaped. Chamberlin was reminded of her *Miranda* rights by reference to the same waiver she signed and initialed in the interview earlier that morning, and she confirmed that she understood.

¶ 29. During this interview, Chamberlin was very emotional, intermittently crying and apologizing to Roger. Chamberlin began to relay the details of the day of the murders but then began to ramble. Chamberlin did not provide any details of the murders during this interview, which concluded at 1:39 p.m.

Fourth Interrogation.

¶ 30. Hawel and Ralston conducted a fourth interview, beginning at approximately 2:46 p.m. that same afternoon. Ralston testified that he was present when Hawel, before beginning the interview, reviewed with Chamberlin her *Miranda* rights and she acknowledged that she understood her rights and said that she wanted to speak with him. Ralston memorialized this interview in a report. The report indicates that Chamberlin described the details of the murders "from start to finish," including Gillett bashing Hullett in the head with a hammer, the dismemberment of Hullett and finally the placement of the bodies in the freezer where they were found. Chamberlin also spoke in detail about how she helped tape Heintzelman's hands behind her back so she would not struggle with Chamberlin and Gillett as they began suffocating her with a plastic bag, a process which Gillett completed. Chamberlin told Hawel that she would notify him if she recalled anything else. The report indicates that the interview concluded with Chamberlin's last statement that she would show Hawel where the trash was dumped inside the Russell landfill.

Fifth Interrogation.

¶ 31. On March 31, Hawel testified that he was contacted by officer Barrett, who stated that Chamberlin desired to talk with a KBI agent. Barrett testified that "[Chamberlin] wanted to talk to someone and she asked to speak to one of the KBI agents. They weren't there, so she asked to speak to me." Barrett passed the information on to a KBI agent.

¶ 32. Hawel sent for Chamberlin and asked her whether she wanted to talk to him, and she answered in the affirmative. Hawel and Ralston videotaped the fifth interview, which began at approximately 9:43 a.m. Hawel informed Chamberlin of her *Miranda* rights, and Chamberlin signed a waiver. Chamberlin then gave a detailed account from the day of the murders, including her involvement, through her arrest in Kansas.

Analysis.

¶ 33. Chamberlin alleges that she invoked her Fifth-Amendment right to counsel during the first interview and consequently, the KBI officers violated her right when they reinitiated the interviews with her the next day. She argues that all statements made after the first interview should be suppressed. The State argues that Chamberlin's right to counsel was not violated because she made an ambiguous request for counsel, and Lyon appropriately asked clarifying questions.

[2] ¶ 34. Findings by a trial judge that a defendant confessed voluntarily, and that such confession is admissible are findings of fact. *Davis v. State,* 551 So.2d 165, 169 (Miss.1989). As long as the trial judge applies the correct legal standards, his decision will not be reversed on appeal unless ***332** it is manifestly in error, or is contrary to the overwhelming weight of the evidence. *Davis,* 551 So.2d at 169 (citing *Frost v. State,* 483 So.2d 1345, 1350 (Miss.1986); *White v. State,* 495 So.2d 1346, 1347 (Miss.1986)).

[3][4][5][6][7] ¶ 35. The Fourteenth Amendment incorporates the Fifth-Amendment privilege against self-incrimination. The United States Supreme Court held in *Miranda v. Arizona,* 384 U.S.

436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that the privilege extends to state custodial interrogations. The *Miranda* warning requires that, before subjecting a person in police custody to interrogation, law enforcement officers must inform the person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602. Once this warning has been given, if the person in custody "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74, 86 S.Ct. 1602. Any statement taken after such an indication is the product of compulsion. *Id.* at 474, 86 S.Ct. 1602. The administration of the *Miranda* warnings and a waiver, or a fully effective equivalent, constitute the prerequisites to the admissibility of any statement made by a defendant. *Id.* at 476, 86 S.Ct. 1602. The State has the burden of proving all facts prerequisite to admissibility beyond a reasonable doubt. *Davis*, 551 So.2d at 169 (citing *Jones v. State*, 461 So.2d 686, 694 (Miss.1984); *Gavin v. State*, 473 So.2d 952, 954 (Miss.1985)).

[8][9] ¶ 36. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. *Miranda*, 384 U.S. at 474, 86 S.Ct. 1602; *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). In determining whether a defendant's right to counsel has been violated, this Court must consider two things. *Holland v. State*, 587 So.2d 848, 856 (Miss.1991) (citing *Edwards*, 451 U.S. at 482, 101 S.Ct. 1880); *Berry v. State*, 575 So.2d 1, 5 (Miss.1990). First, it must determine whether the defendant actually invoked his right to counsel. *Holland*, 587 So.2d at 856; *Davis v. United States*, 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). If the defendant invoked this right, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85, 101 S.Ct. 1880.

[10][11][12][13] ¶ 37. A defendant's request for counsel must be interpreted broadly "whether the defendant's request is explicit or equivocal." *Holland*, 587 So.2d at 856 (citing *Towne v. Dugger*, 899 F.2d 1104, 1106 (11th Cir.1990) (quoting *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1406, 89 L.Ed.2d 631, 640 (1986))). However, "[t]he likelihood that a suspect would wish counsel to be present is not the test for applicability of *Edwards*."*Davis*, 512 U.S. at 459, 114 S.Ct. 2350 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1991)). Determining whether a defendant invoked his right to counsel is an objective inquiry. *Davis*, 512 U.S. at 459, 114 S.Ct. 2350 (citing *Connecticut v. Barrett*, 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987)). "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis*, 512 U.S. at 459, 114 S.Ct. 2350 (citing *McNeil*, 501 U.S. at 178, 111 S.Ct. 2204) (internal quotation marks omitted). A defendant must "articulate ***333** his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459, 114 S.Ct. 2350. The Supreme Court explained in *Davis* that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not

require the cessation of questioning." *Id.* (emphasis in original).

¶ 38. This Court previously has held that if an officer understands only that the suspect *might* be invoking the right to counsel, an officer must cease interrogation, except for inquiries made to clarify the defendant's request. *Holland,* 587 So.2d at 856 (emphasis added). The United States Supreme Court declined to require such a procedure but noted in *Davis* that where the officers followed the same procedure as adopted by this Court, such a procedure is "good police practice for the interviewing officers." *Davis,* 512 U.S. at 461, 114 S.Ct. 2350.

¶ 39. A review of the video recording of the first interrogation shows that Lyon was in the midst of asking identification questions when Chamberlin, after spelling her last name, blurted out the unintelligible statement regarding an attorney. Lyon then ceased his series of identifying questions and asked Chamberlin a number of questions, pertaining only to whether she wanted an attorney. Eventually, Chamberlin said, "I'll talk." The trial court found that "her questions concerning an attorney were ambiguous as a matter of law and that investigators took all appropriate precautions to determine the nature and extent of the ambiguity, and that the defendant voluntarily and without coercion agreed to proceed and further answer questions." This Court agrees.

[14] ¶ 40. After the clarifying questions and Chamberlin's response that she would talk, Lyon advised Chamberlin of her *Miranda* rights, and she acknowledged that she understood. When Lyon asked Chamberlin "are you willing to answer questions now," Chamberlin shook her head "no," and Lyon ceased asking questions. Chamberlin's indication that she did not want to answer questions did not constitute an unambiguous request for counsel. Thus, at the end of the first interrogation, she successfully invoked her right to silence but not her right to counsel. This Court finds, as the trial court did, that Chamberlin's *Miranda* rights were fully respected during the first interview.

¶ 41. According to Hawel's report, Chamberlin admitted involvement in the murders during the second interrogation. Chamberlin asserts that this statement should have been suppressed, because she invoked her right to silence at the end of the first interview.

[15][16][17] ¶ 42. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' "*Michigan v. Mosley,* 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). The government may, however, use statements which are given voluntarily by the defendant after he receives full disclosure of the rights offered by *Miranda. Michigan v. Tucker,* 417 U.S. 433, 450, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). When a defendant alleges a violation of her privilege against self-incrimination, the trial court must determine, in consideration of the totality of the circumstances, whether or not the confession was made voluntarily, and whether there was a knowing ***334** and voluntary waiver of the accused's privilege against self-incrimination. *Davis,* 551 So.2d at 169 (citing *Gavin v. State,* 473 So.2d 952, 954 (Miss.1985); *Jones v. State,* 461 So.2d 686, 696 (Miss.1984)).

[18][19] ¶ 43. Invocation of the right to counsel is a rigid, prophylactic rule which prohibits further questioning until an attorney is made available or the defendant knowingly and voluntarily waives his right. *See Edwards,* 451 U.S. 477, 101 S.Ct. 1880. On the other hand, invocation of the right to silence concerns whether an officer scrupulously honors a defendant's right to cease questioning for a reasonable time, after which questioning may resume if the defendant knowingly and voluntarily waives this right. *See Neal v. State,* 451 So.2d 743, 755 (Miss.1984).

[20] ¶ 44. No passage in "the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." *Mosley,* 423 U.S. at 102-103, 96 S.Ct. 321. The officer's initiation of the second interrogation did not violate Chamberlin's *Miranda* rights when it was undisputed that a significant period of time had passed from the first interrogation (about sixteen hours). New *Miranda* warnings were administered and a waiver signed; and the interrogation was restricted to the murders, which had not been a subject of the first interrogation. *See Mosley,* 423 U.S. at 106, 96 S.Ct. 321.Further, Chamberlin makes no argument or puts forth any evidence that she invoked her right to remain silent in the second interrogation. Hawel read Chamberlin her *Miranda* rights; Chamberlin signed and initialed a waiver; and there is no indication that Chamberlin invoked any of her *Miranda* rights. The trial court found that the State had met the *Mosley* guidelines. This Court agrees. Therefore, the statements obtained in the second interrogation were properly obtained and admitted.

¶ 45. Similarly, the initiation of the third interrogation by the KBI officers was proper. During the third interrogation, Chamberlin did not make a statement concerning her involvement in the murders. However, she became very emotional and indicated that she no longer wanted to answer questions, and Hawel properly ceased questioning. Therefore, the concern with the third interrogation is not whether a statement made therein was admissible but, rather, the effect of Chamberlin's invocation of her right to silence on the statements obtained in the fourth and fifth interviews.

[21][22] ¶ 46. As to the initiation of the fourth interview, this Court must again answer the question put forth in *Neal,* 451 So.2d at 749, 751. "Once an accused states that he wishes questioning to cease, when and under what circumstances may law enforcement authorities resume interrogation and obtain an admissible inculpatory statement?" *Neal,* 451 So.2d at 754. In *Neal,* this Court held that "[n]otwithstanding an earlier valid waiver of his privilege against self-incrimination and his right to counsel, an accused may revoke that waiver." *Johnson v. State,* 512 So.2d 1246, 1252 (Miss.1987) (quoting *Neal,* 451 So.2d at 755),*overruled in part by Smith v. State,* 986 So.2d 290, 2008 Miss. LEXIS 339 (Miss.2008). Any revocation must be scrupulously honored. *Neal,* 451 So.2d at 755. However, "[w]here ... following the revocation the accused is re-advised of his *Miranda* rights, if he thereafter knowingly, intelligently and voluntarily re-waives those rights, any subsequent inculpatory statement may be received in evidence against him." *Id.*

***335** [23] ¶ 47. Chamberlin waived her *Miranda* rights at the beginning of the third interview. She then revoked that waiver by stating that she was unable to continue. Accordingly, Hawel stopped

the interview. Later that afternoon, a *Miranda* warning was re-administered, and she re-waived her rights. Due to the undisputed evidence that she knowingly, intelligently, and voluntarily waived her rights at the beginning of the fourth interrogation, the initiation of the fourth interrogation by the KBI officers was proper, and her subsequent inculpatory statements were admissible in evidence against her. The trial court found that "Chamberlin's rights were sufficiently safeguarded during this colloquy and that all statements made therein were made after intelligently, knowingly, and voluntarily waiving her rights." This Court agrees. The trial court properly admitted the statements obtained in the fourth interview.

[24] ¶ 48. As for the fifth interview, the State submitted at the suppression hearing undisputed evidence that Chamberlin initiated that interview. The trial court found that "Chamberlin initiated the final interview by sending a message through the jailer that she wished to speak to the authorities again. The interview of March 31, 2004, was the result of her request." [FN3] The record supports the trial court findings that Chamberlin's *Miranda* rights were not in question when she initiated the communication with Hawel. *See Edwards,* 451 U.S. at 485, 101 S.Ct. 1880 (an accused is subject to further interrogation when the accused "initiates further communication, exchanges, or conversations with the police"). Clearly, Chamberlin's statement made during the fifth interview was admissible.

> FN3. Barrett testified that Chamberlin communicated her request to speak to someone "late [on] the 29th or early the 30th." However, he corrected this statement during redirect. Describing the events on March 30 pertaining to the visit to the landfill with Chamberlin and Hawel, Barrett testified that after returning to the facility that night, he had his last conversation with Chamberlin, in which she told him she wanted to speak with a KBI agent.

¶ 49. The trial court's finding that Chamberlin's statements were properly obtained in accordance with her *Miranda* rights is supported by the record. The trial court did not err in admitting the statements from each interrogation, and Chamberlin's argument is without merit.

¶ 50. Lastly, Chamberlin, citing *Agee v. State,* 185 So.2d 671 (Miss.1966), argues that in order for Chamberlin's confession to be admissible, the State must have produced all of the witnesses present at the alleged confession. Accordingly, Chamberlin asserts that since Barrett, to whom Chamberlin allegedly expressed her desire to speak to KBI officers, did not testify at the suppression hearing, the motion to suppress should have been granted. In *Agee* this Court stated:

> [w]hen objection is made to the introduction of the confession, the accused is entitled to a preliminary hearing on the question of the admissibility of the confession ... after the State has made out a prima facie case as to the voluntariness of the confession, *the accused offers testimony that violence, threats of violence, or offers of reward induced the confession,* then the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness.

Agee, 185 So.2d at 673. In *Agee,* the Court held that the defendant's confession was inadmissible.

Agee, 185 So.2d at 674. ***336** One of the reasons for this holding was that, after the defendant testified at the hearing that the confession was involuntary, the State did not meet its burden by calling "all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness." *Agee,* 185 So.2d at 673.

[25] ¶ 51. Chamberlin's argument fails for two reasons. First, Chamberlin did not testify at the suppression hearing or provide any evidence. Thus, the State was not required to rebut her testimony by calling all the officers present at the questioning or signing of the confession. Second, under *Agee,* Barrett would not have been a requisite witness since Lyon, Hawel and Ralston, all of whom testified at the suppression hearing, were the officers present at the interrogations in which Chamberlin was questioned and confessed. *See Agee,* 185 So.2d at 673. The State did not veer from *Agee* in the suppression hearing in this case. Thus, this argument also is without merit.

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE EVIDENCE SEIZED FROM THE LANDFILL.

[26] ¶ 52. The standard of review for the suppression of evidence is abuse of discretion. *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 34 (Miss.2003).

¶ 53. Chamberlin asserts that the trial court should have suppressed the evidence found in seven plastic bags recovered from the Russell County Dump in Russell County, Kansas. This evidence included Hullett's work uniform, a pillow, a photograph of the pillow, a woman's purse, a coin purse, a cigarette case, keys, camera and photos, a wallet, remains of Hullett's driver's license and paperwork, a partially completed Mississippi accident report form, a direct-deposit card, a Hattiesburg telephone directory, and the cardboard center from a roll of duct tape. Chamberlin argues that the evidence was recovered as a result of information obtained from her statements on March 30 and therefore, should have been excluded, since the officers initiated the interrogations on the morning of March 30, after Chamberlin invoked her *Miranda* rights.

[27][28][29] ¶ 54. The *Miranda* rule is employed to protect against violations of the Fifth-Amendment Self-Incrimination Clause. *United States v. Patane,* 542 U.S. 630, 636, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004). The exclusionary prohibition against "fruit of the poisonous tree" applies to violations of the Fifth-Amendment privilege against self-incrimination. *Brown v. Illinois,* 422 U.S. 590, 599, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Having found no Fifth-Amendment self-incrimination violation, we hold that the "fruit of the poisonous tree" doctrine is inapplicable to the evidence found in the dump. The trial court did not abuse its discretion by admitting the evidence in question, and this argument is without merit.

GUILT PHASE

III. WHETHER THE TRIAL COURT ERRED IN DENYING CHAMBERLIN'S *BATSON* CHALLENGE.

[30][31] ¶ 55. During jury selection, Chamberlin objected to the State's use of seven of its twelve peremptory challenges to strike black individuals from the jury panel. The United States Supreme Court has held that the equal protection clause prohibits exclusion of persons from participation in jury service on account of their race. *Batson v. Kentucky,* 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court gives great deference to a trial ***337** court's determination under *Batson* because it is based largely on credibility. *Batson,* 476 U.S. at 98, n. 21, 106 S.Ct. 1712; *Flowers v. State,* 947 So.2d 910, 917 (Miss.2007) (citing *Berry v. State,* 802 So.2d 1033, 1037 (Miss.2001)). This Court will not overrule a trial court's *Batson* ruling absent finding the ruling was clearly erroneous or against the overwhelming weight of the evidence. *Flowers,* 947 So.2d at 917.

[32][33][34][35][36] ¶ 56. The *Batson* inquiry has three steps. *Batson,* 476 U.S. at 93-94, 106 S.Ct. 1712. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. *Rice v. Collins,* 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (citing *Batson,* 476 U.S. at 96-97, 106 S.Ct. 1712). Inequality under *Batson* draws from "the general equal protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.' " *Batson,* 476 U.S. at 93, 106 S.Ct. 1712. In order to establish a prima facie case, Chamberlin must show that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose. *Strickland v. State,* 980 So.2d 908, 915 (Miss.2008); *Tanner v. State,* 764 So.2d 385, 393 (Miss.2000) (citing *Bush v. State,* 585 So.2d 1262, 1268 (Miss.1991)); *Randall v. State,* 716 So.2d 584, 587 (Miss.1998) (citing *Batson,* 476 U.S. at 94, 106 S.Ct. 1712). "In deciding whether the defendant has made the requisite showing, the trial court should consider *all* relevant circumstances." *Batson,* 476 U.S. at 96, 106 S.Ct. 1712 (emphasis added).

> The *Batson* doctrine is not concerned with racial, gender, or ethnic balance on petit juries, and it does not hold that a party is entitled to a jury composed of or including members of a cognizable group. Rather, it is concerned exclusively with discriminatory intent on the part of the lawyer against whose use of his peremptory strikes the objection is interposed.

Strickland, 980 So.2d at 915 (quoting *Ryals v. State,* 794 So.2d 161, 164 (Miss.2001)). Therefore, the sheer number of strikes exercised against a cognizable group of jurors is not, in itself, dispositive. *Strickland,* 980 So.2d at 916 (citing *Flowers,* 947 So.2d at 935).

[37][38] ¶ 57. Once a prima facie case has been made, the prosecutor must present race-neutral reasons for the strikes. The reasons need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory, they will be deemed race-neutral. *Rice,* 546 U.S. at 338, 126 S.Ct. 969 (citing *Purkett v. Elem,* 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam)). Once the prosecutor proffers his explanation, and the Court determines that it is race-neutral and satisfies the prosecution's step-two burden of articulating a nondiscriminatory reason for the strike, the inquiry should proceed to step three, where the trial court determines

whether the prosecutor was motivated by discriminatory intent. *Purkett*, 514 U.S. at 769, 115 S.Ct. 1769.

¶ 58. Chamberlin objected numerous times to the State's use of challenges, ultimately using seven out of twelve challenges against blacks. The court allowed Chamberlin to argue her prima facie case. Counsel asserted:

> My prima facie case is that seven out of twelve constitutes a pattern, and particularly-I mean of those that were available of the first, I believe seven of the first eight strikes went to African American jurors. I submit that constitutes a ***338** pattern with an inference of discrimination.

The court then directed the State to provide race-neutral reasons for its challenges exercised against blacks. The State offered race-neutral reasons for each juror it struck, explaining that each black juror was excluded based on his/her answers to the juror questionnaire, which the State compiled and both parties agreed to.

¶ 59. The State struck juror number five because she answered that she had personal views against the death penalty that would prevent her or impair her from reaching a verdict; her beliefs were so strong that she could not vote for death for the defendant; she was uncertain whether she was emotionally capable of announcing her verdict; she was uncertain whether she would hold the State to a greater burden; and she would need to be one-hundred-percent certain of the defendant's guilt.

¶ 60. The State struck juror number thirty-eight because she was uncertain that she was emotionally capable of announcing her verdict; she was uncertain whether she would require a greater burden from the State; and she was uncertain whether she would need to be one-hundred-percent certain of the defendant's guilt.

¶ 61. The State struck juror number eighty-one because she answered that she was uncertain whether she was emotionally capable of standing up and announcing her verdict in court; she was uncertain whether she could follow the law given by the court; she would hold the State to a greater burden; she would require one-hundred-percent certainty of guilt; she would be less likely to find someone guilty if there was the possibility of the death penalty; and she had a family member who had been recently convicted on a drug charge in that county. The State conducted an individual voir dire of juror number eighty-one, in which she confirmed several of the questionnaire answers which the State proffered for striking her.

¶ 62. The State struck juror number ninety-two because she answered that she would require one-hundred-percent certainty of guilt; she would have a problem voting for the death penalty without concrete evidence; and she would not feel comfortable seeking the death penalty because of fear of retaliation to herself or her family.

¶ 63. The State struck juror number 104 because he answered that he was uncertain whether he

was emotionally capable of standing up in court and announcing his verdict; he was uncertain whether he would hold the State to a greater burden; and he would want to be one-hundred-percent certain of guilt.

¶ 64. The State struck juror number 106 because he answered that he was uncertain whether he was emotionally capable of rendering a verdict; he was uncertain whether he would hold the State to a greater burden; and he would require one-hundred-percent certainty.

¶ 65. The State struck juror number 117 because she answered that she could not set aside her personal opposition or hesitancy to the death penalty and evaluate the case based on what the judge would provide and the facts and circumstances presented; she would require the State to meet a greater burden of proof; and she was uncertain whether she would require one-hundred-percent certainty of guilt.

¶ 66. Chamberlin asserts that the trial court erred first by not making a clear determination that Chamberlin had established a prima facie case of discrimination by showing that the State had exercised seven of its twelve peremptory challenges to strike black jurors from the regular ***339** panel. This argument is moot since all three steps of the *Batson* analysis were completed. *See Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The United States Supreme Court has held that under *Batson,*"[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez,* 500 U.S. at 359, 111 S.Ct. 1859. In *Thomas v. State,* 818 So.2d 335, 342-45 (Miss.2002), where the trial judge did not make a definitive ruling on whether the objector had made a prima facie case, this Court held that such a ruling was moot, since the judge decided the ultimate question of whether the State exercised its challenges with a discriminatory purpose.

[39] ¶ 67. For the first four jurors challenged, jurors five, thirty-eight, eighty-one, and ninety-two, Chamberlin offered no rebuttal to the State's reasons. As the State asserts, Chamberlin is procedurally barred from arguing pretext as to the first four jurors, for whom she did not argue pretext to the trial court. *See Flowers,* 947 So.2d at 921-922 (citing *Evans v. State,* 725 So.2d 613, 632 (Miss.1997) (finding that the defendant's argument of pretext was barred from consideration on appeal because the argument as to that particular juror was presented for the first time on appeal)).

[40] ¶ 68. On the remaining three challenged jurors, jurors 104, 106, and 117, Chamberlin argued reasons why they would make good jurors but failed to rebut the specific reasons proffered by the State for striking them. The objector must come forward with proof when given the opportunity for rebuttal. *Thomas v. State,* 818 So.2d at 344. "[I]f the defendant offers no rebuttal, the trial court is forced to examine only the reasons given by the State." *Thorson v. State,* 895 So.2d 85, 119 (Miss.2004) (quoting *Walker v. State,* 815 So.2d 1209, 1215 (Miss.2002) (quoting *Bush,* 585 at 1268)). Because Chamberlin failed to offer any proof that the State's reasons were pretextual, the

State's reasons for the challenges were the only considerations before the trial judge. *See Thomas,* 818 So.2d at 345.

[41] ¶ 69. This Court must then evaluate "the persuasiveness of the justification" proffered by the prosecutor, while keeping in mind that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice,* 546 U.S. at 338, 126 S.Ct. 969; *Purkett,* 514 U.S. at 768, 115 S.Ct. 1769.

[42] ¶ 70. The State exercised seven out of twelve peremptory strikes against blacks and five against venire persons who were not black. The State tendered a total of four potential black jurors, two of whom the defendant struck. The resulting jury included two black veniremen. The State offered reasons for the strikes that the trial court considered race-neutral, and the defense failed to rebut those reasons. Therefore, the defense did not meet its burden to show "that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose." Considering the totality of the evidence, the trial court's ruling on Chamberlin's *Batson* challenge was neither clearly erroneous nor against the overwhelming weight of the evidence.

IV. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF GRUESOME PHOTOGRAPHS OF THE VICTIMS.

[43] ¶ 71. Chamberlin argues that, over her objections, the trial court admitted***340** thirteen prejudicial photographs, each of which she alleges had no probative value. The State replies that each photograph was relevant, as it aided in describing the circumstances of the killings or causes of death, or clarifying or supplementing the witness's testimony to the jury.

¶ 72. Chamberlin cites *Sudduth v. State,* 562 So.2d 67, 70 (Miss.1990), for this Court's statement that "photographs of the victim should not ordinarily be admitted into evidence where the killing is not contradicted or denied, and the corpus delicti and the identity of the deceased have been established." *Id.* at 70.(citing *Davis,* 551 So.2d at 173; *Shearer v. State,* 423 So.2d 824, 827 (Miss.1982)). However, Chamberlin ignores the declaration immediately following in which the Court stated, "[p]hotographs of bodies may nevertheless be admitted into evidence in criminal cases where they have probative value and where they are not so gruesome or used in such a way as to be overly prejudicial or inflammatory." *Sudduth,* 562 So.2d at 70 (citing *Davis,* 551 So.2d at 173; *Griffin v. State,* 504 So.2d 186, 191 (Miss.1987); Miss. R. Evid. 403).

[44][45][46][47][48][49] ¶ 73. Admission of photographs by the trial court is reviewed for abuse of discretion. *Dampier v. State,* 973 So.2d 221, 230 (Miss.2008). A decision favoring admissibility will not be disturbed absent a clear abuse of that judicial discretion. *Id.* The discretion of the trial judge is "almost unlimited ... regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." *Id.* (quoting *Williams v. State,* 544 So.2d 782, 785 (Miss.1987)). *See also Bennett v. State,* 933 So.2d 930, 946 (Miss.2006); *Jones v. State,* 920 So.2d 465, 476 (Miss.2006); *McIntosh v. State,* 917 So.2d 78, 83-84 (Miss.2005); *Dubose v. State,* 919 So.2d 5, 11 (Miss.2005);

Blake v. Clein, 903 So.2d 710, 728 (Miss.2005); *Hodges v. State,* 912 So.2d 730, 781 (Miss.2005). "Some probative value is the only requirement needed in order to support a trial judge's decision to admit photographs into evidence." *Jones,* 920 So.2d at 476-477 (quoting *Jordan v. State,* 728 So.2d 1088, 1094 (Miss.1998) (quoting *Scott v. State,* 878 So.2d 933, 985 (Miss.2004), *overruled in part by Lynch v. State,* 951 So.2d 549 (Miss.2007)); *McIntosh v. State,* 917 So.2d at 84. "So long as a photograph has probative value and its introduction serves a meaningful evidentiary purpose, it may still be admissible despite being gruesome, grisly, unpleasant, or even inflammatory." *Dampier,* 973 So.2d at 230 (citations omitted). *But see McNeal v. State,* 551 So.2d 151 (Miss.1989)) (the solitary instance where this Court held a photograph, a close-up of the victim's partly decomposed skull, was gruesome and lacked an evidentiary purpose and was more prejudicial than probative). A photograph has a meaningful evidentiary purpose when it: (1) aids in describing the circumstances of the killing; (2) describes the location of the body or cause of death; or (3) supplements or clarifies witness testimony. *Dampier,* 973 So.2d at 230.

[50] ¶ 74. Similarly, autopsy photographs are admissible only if they possess probative value. *Hodges,* 912 So.2d at 781-82 (citing *Puckett v. State,* 737 So.2d 322, 338 (Miss.1999); *Noe v. State,* 616 So.2d 298 (Miss.1993)). The comment to Mississippi Rule of Evidence 401 states that if there is any probative value, the rule favors admission of the evidence. *Thorson,* 895 So.2d at 120.

¶ 75. The State cites *Simmons v. State,* 805 So.2d 452, 485 (Miss.2001). In *Simmons,* the defendant gutted, beheaded, and dismembered the victim and discarded the parts in a bayou. *Simmons,* 805 So.2d at 470. The defense argued that the trial court erred in admitting into evidence a photograph of the victim's severed head. ***341** *Id.* at 485. This Court stated the aforementioned test that "[p]hotographs of the victim have evidentiary value when they aid in describing the circumstances of the killing, the location of the body, the cause of death, or clarify or supplement a witness's testimony." *Simmons,* 805 So.2d at 485 (citation omitted).

¶ 76. In *Simmons,* the State used the photograph in question numerous times. *Id.* at 485. Once, an officer used it to identify the victim's head. *Id.* To the defendant's objection, the State responded that it needed the photograph to identify the flesh found in the bayou as human, and specifically, as belonging to the victim. *Id.* The judge overruled the objection and the photo was entered into evidence. *Id.* at 486. The State again used the photograph when questioning the victim's girlfriend. *Id.* at 486. She positively identified the head in the photograph as that of the victim's. *Id.* This Court held that "[s]ince the discretion of the trial judge runs toward unlimited admissibility, it is impossible for this Court to say that the trial judge abused his discretion." *Id.* at 486.

¶ 77. Of the thirteen photographs in question in this case, two depicted the bodies as they were found at the Gillett farm. Exhibit 48 showed Hullett's body in the top of the freezer, and Exhibit 49 showed Heintzelman's body after removal from the freezer, still wrapped in a blanket as it had appeared in the bottom of the freezer upon thawing. The State entered the photographs during the testimony of a KBI officer who was describing what he saw at the crime scene. He testified that the photographs aided him in explaining what he saw.

¶ 78. The remaining ten photographs were taken during the autopsies performed by Dr. Donald Pojman. Dr. Pojman chose these photographs from his file for the purpose of helping him explain the injuries about which he would testify to the jury. Dr. Pojman testified as to each photograph that it was either necessary or would aid him in explaining to the jury the injuries he found. Each photograph varied in its depiction of scratches, scrapes and lacerations on various parts of each victim's body, including on Hullett's disarticulated arms; stab wounds and long cuts on Heintzelman's back; and lacerations and holes in each victim's head from hammer-inflicted injuries. The trial court admitted each photograph over the defendant's objection that the photographs were inflammatory, that their probative value was outweighed by their inflammatory nature, and that the photographs "[went] beyond any probative necessity."

¶ 79. The question as to each photograph is whether it: (1) had probative value and (2) aided in described the circumstances of the killing, described the location of the body and cause of death, or supplemented or clarified witness testimony. As in *Simmons,* each picture to which the defense objected satisfied both of these requirements. *See Simmons,* 805 So.2d at 485-86. In order to exclude any photograph, the trial court would have been required to find as to any particular photograph that, pursuant to Mississippi Rule of Evidence 403, the probative value of such photograph was substantially outweighed by the danger of unfair prejudice. With Rule 403 and the record in this case squarely before us, we cannot find that the trial court abused its discretion in allowing these photographs to be admitted into evidence; therefore, this assignment of error is without merit.

SENTENCING PHASE

V. WHETHER THE TRIAL COURT ERRED IN DENYING SENTENCING INSTRUCTIONS D-3 AND D-10.

[51][52] ¶ 80. Whether to give a jury instruction is within the sound discretion ***342** of the trial court. *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001). Chamberlin argues that the trial court erred when it refused to give two proposed instructions, D-3 and D-10. Proposed instruction D-3 read:

> A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.
>
> The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

¶ 81. Proposed instruction D-10 read:

> If based upon your consideration of the aggravating and mitigating circumstances each and every one of you agrees that death is the appropriate sentence, you must still consider the final step of the penalty phase process. Just as you are the sole judges of the facts, so too are you the sole arbiters of mercy. Regardless of your consideration of aggravating and mitigating circumstances, as the jury, you always have the option to recommend against death. This means that even if you conclude that death is an appropriate sentence based on your consideration of mitigating and aggravating circumstances, you may still show mercy and sentence Ms. Chamberlin to life in prison. As a jury, this option to recommend life must always be considered by each and every one of you before an ultimate and irrevocable sentence may be passed.

[53] ¶ 82. Chamberlin argues that *Kansas v. Marsh,* 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), required the trial court to give a mercy instruction in this case. However, *Marsh* does not speak to or even consider the issue of whether a mercy instruction is required. Rather, the *Marsh* Court held that "the States enjoy a constitutionally permissible range of discretion in imposing the death penalty." *Marsh,* 126 S.Ct. at 2525 (quoting *Blystone v. Pennsylvania,* 494 U.S. 299, 308, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990)) (internal quotations omitted). "[T]he States are free to determine the manner in which a jury may consider mitigating evidence," i.e., whether the evidence should be viewed through the lens of mercy. *Marsh,* 126 S.Ct. at 2523.

¶ 83. That discretion allows trial courts to avoid the potential arbitrariness of an emotional decision encouraged by a mercy instruction.

> This Court has repeatedly held that "capital defendants are not entitled to a mercy instruction." *Jordan v. State,* 728 So.2d 1088, 1099 (Miss.1998) (citing *Underwood v. State,* 708 So.2d 18, 37 (Miss.1998); *Hansen v. State,* 592 So.2d 114, 150 (Miss.1991); *Williams v. State,* 544 So.2d 782, 788 (Miss.1987); *Lester v. State,* 692 So.2d 755, 798 (Miss.1997); *Jackson v. State,* 684 So.2d 1213, 1239 (Miss.1996); *Carr v. State,* 655 So.2d 824, 850 (Miss.1995); *Foster v. State,* 639 So.2d 1263, 1299-1301 (Miss.1994); *Jenkins v. State,* 607 So.2d 1171, 1181 (Miss.1992); *Nixon v. State,* 533 So.2d 1078, 1100 (Miss.1987)). "The United States Supreme Court has held that giving a jury instruction allowing consideration of sympathy or mercy could induce a jury to base its sentencing decision upon emotion, whim, and caprice instead of upon the evidence presented at trial." *Id.* (citing *Saffle v. Parks,* 494 U.S. 484, ***343** 492-95, 110 S.Ct. 1257, 1262-64, 108 L.Ed.2d 415 (1990)).

Howell v. State, 860 So.2d 704, 759 (Miss.2003). *See also Ross,* 954 So.2d at 1012 (holding there was no error in refusing the defendant's proposed instruction specifically citing mercy or sympathy as a mitigator since "a capital defendant is not entitled to a sympathy instruction, because, like a mercy instruction, it could result in a verdict based on whim and caprice"); *King v. State,* 784 So.2d 884, 890 (Miss.2001) ("neither side is entitled to a jury instruction regarding mercy or deterrence"); *Wiley v. State,* 750 So.2d 1193, 1204 (Miss.1999) ("[T]he State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.").

¶ 84. Additionally, the requested instruction D-10 states that "even if you conclude that death is an appropriate sentence based on your consideration of mitigating and aggravating circumstances, you may still show mercy and sentence Ms. Chamberlin to life in prison." This Court has found that "a defendant is not entitled to an instruction that the jury may return a life sentence even if the aggravating circumstances outweigh the mitigating circumstances or if they do not find any mitigating circumstances." *King v. State,* 960 So.2d 413, 442 (Miss.2007) (citing *Holland v. State,* 705 So.2d 307, 354 (Miss.1997), *Hansen v. State,* 592 So.2d 114, 150 (Miss.1991), *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001), *Foster v. State,* 639 So.2d 1263, 1301 (Miss.1994)). "[T]his Court has repeatedly refused to accept instructions that would nullify the balancing of aggravating and mitigating factors, since such instructions might induce verdicts based on whim and caprice." *Ross,* 954 So.2d at 1012 (citing *Manning v. State,* 726 So.2d 1152, 1197 (Miss.1998), *overruled in part by Weatherspoon v. State,* 732 So.2d 158 (Miss.1999)).

¶ 85. The trial court did not abuse its discretion in refusing either instruction. This issue is without merit.

VI. WHETHER THE TRIAL COURT ERRED IN DENYING CHAMBERLIN'S PETITION FOR PAYMENT OF TRAVEL AND RELATED EXPENSES FOR MITIGATION WITNESSES.

[54][55][56] ¶ 86. Chamberlin argues that the trial court erroneously denied her petition for payment of travel and related expenses for her aunt and childhood best friend, who were to testify during the sentencing phase. The State responds that Chamberlin never obtained a ruling from the trial court on her petition, and thus, the issue is procedurally barred.

> Under Rule 2.04 of the Uniform Rules of Circuit and County Court Practice, the burden is on the movant to obtain a ruling on a pre-trial motion, and failure to do so constitutes a procedural bar. *See Berry v. State,* 728 So.2d 568, 570 (Miss.1999) ("It is the responsibility of the movant to obtain a ruling from the court on motions filed by him and failure to do so constitutes a waiver of same."); *Holly v. State,* 671 So.2d 32, 37 (Miss.1996) (finding that the burden to obtain a ruling on an in limine motion to exclude evidence rests on the moving party); *Martin v. State,* 354 So.2d 1114, 1119 (Miss.1978) (same).

...

> "It is the duty of the movant, when a motion ... is filed ... to pursue said motion to hearing and decision by the court. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, said motion may be ***344** heard after the commencement of trial in the discretion of the court." U.R.C.C.C. 2.04.

Ross, 954 So.2d at 992. Chamberlin's failure to obtain a ruling on her pre-trial motion was a direct result of her failure to request a ruling at an appropriate time. The trial court heard several pre-trial motions brought by the defense, including a motion for severance, a motion for change of venue,

and a motion for funds for an expert psychologist. The trial court granted the motion for severance and the motion for change of venue. However, the defendant did not present to the trial court her motion for payment of travel expenses. Therefore, the trial court did not, in fact, decline Chamberlin's pre-trial motion, rather, it did not rule on it at all. This Court agrees with the State that this issue is procedurally barred.

¶ 87. Further, this issue is without merit. Chamberlin asserts that this denial of travel expenses for the two witnesses constituted a violation of her rights to due process, equal protection of law and a reliable capital sentencing hearing, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Chamberlin cites *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), among other cases, in support of this argument. This Court previously has stated:

> [w]hile under the holding of the United States Supreme Court in *Eddings v. Oklahoma,* 455 U.S. 104, 113-115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), it might have been proper in the sentencing phase of the trial to have such witnesses testify on Johnson's background, that case is not authority for the proposition that a state is required to furnish travel expenses for out-of-state prospective character witnesses.

Johnson v. State, 477 So.2d 196, 215 (Miss.1985). The opinion went on to state that defense counsel was, at a minimum, "under a duty to furnish detailed statements in affidavit form from each of these proposed witnesses as to what their testimony would be in the trial of the case." *Id.* The only thing counsel in that case presented was an unsworn summary as to what the witnesses might have testified. *Id.* The information in *Johnson* exceeded the information provided in this case. Chamberlin's petition consisted only of the statements that: (1) Chamberlin was a pauper; (2) the two witnesses for which funds were requested did not have adequate funds for lodging or travel; and (3) those witnesses were "vital to the defense of the Defendant." This Court finds the purpose of these two witnesses was that of character witnesses, according to Chamberlin's post-trial notice of filing of her statement of evidence, where she claimed denial of the travel expenses in question violated her right to present the jury the full range of her mitigating factors.[FN4] Further, the psychologist testified as a mitigating witness during the sentencing phase concerning information she gathered from interviewing the aunt and childhood best friend about Chamberlin.

> FN4. The State further argues that Chamberlin is procedurally barred from having this Court consider her statement of evidence, filed pursuant to Mississippi Rules of Evidence Rule 10(c), which states that while the trial court did not rule on her motion on the record, the trial court advised her that it would not authorize the funding. Having found both that this issue is procedurally barred and that it had no merit, this Court need not address this argument.

¶ 88. Chamberlin failed to meet her duty to provide sufficient information to the trial court, and she further failed to obtain a ruling on her motion. Therefore, ***345** this argument is not only procedurally barred, but also without merit.

VII. PROPORTIONALITY.

[57] ¶ 89. Mississippi Code Annotated Section 99-19-105(3) (Rev.2007) requires this Court to perform a proportionality review when affirming a death sentence in a capital case. Section 99-19-105(3) states:

> (3) With regard to the sentence, the court shall determine:
>
> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and (d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

¶ 90. After reviewing the record in this appeal as well as the death penalty cases listed in the appendix (attached), we conclude that Chamberlin's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

¶ 91. We also find that the evidence is more than sufficient to support the jury's finding of statutory aggravating circumstances. The jury unanimously found as to the murders of both Hullett and Heintzelman that the aggravating circumstances were: “[t]he capital offense was committed while the defendant was engaged [in] or was an accomplice in the commission of or an attempt of flight after committing a robbery” (Miss.Code Ann. § 99-19-101(5)(d)); “the capital offense was committed for the purpose of avoiding or preventing a lawful arrest” (Miss.Code Ann. § 99-19-101(5)(e)); and “the capital offense was especially heinous, atrocious, or cruel” (Miss.Code Ann. § 99-19-101(5)(h)).

¶ 92. Further, upon comparison with other factually similar cases in which the death sentence was imposed, the sentences of death were neither excessive nor disproportionate in this case. Finally, we find that the jury did not consider any invalid aggravating circumstances. Therefore, this Court affirms the death sentences imposed in this case.

CONCLUSION

¶ 93. Based upon the aforementioned analysis, this Court affirms the final judgments and sentences of the Circuit Court of Forrest County as to Chamberlin for the murders of Hullett and Heintzelman.

¶ 94. COUNTS I AND II: CONVICTIONS OF CAPITAL MURDER AND SENTENCE OF

DEATH BY LETHAL INJECTION, AFFIRMED.

SMITH, C.J., WALLER, P.J., EASLEY, CARLSON, GRAVES, DICKINSON AND RANDOLPH, JJ., CONCUR. DIAZ, P.J., CONCURS IN RESULT ONLY.

APPENDIX

DEATH CASES AFFIRMED BY THIS COURT

Loden v. State, 971 So.2d 548 (Miss.2007).

King v. State, 960 So.2d 413 (Miss.2007).

Bennett v. State, 933 So.2d 930 (Miss.2006).

***346** *Havard v. State,* 928 So.2d 771 (Miss.2006).

Spicer v. State, 921 So.2d 292 (Miss.2006).

Hodges v. State, 912 So.2d 730 (Miss.2005).

Walker v. State, 913 So.2d 198 (Miss.2005).

Le v. State, 913 So.2d 913 (Miss.2005).

Brown v. State, 890 So.2d 901 (Miss.2004).

Powers v. State, 883 So.2d 20 (Miss.2004)

Branch v. State, 882 So.2d 36 (Miss.2004).

Scott v. State, 878 So.2d 933 (Miss.2004).

Lynch v. State, 877 So.2d 1254 (Miss.2004).

Dycus v. State, 875 So.2d 140 (Miss.2004).

Byrom v. State, 863 So.2d 836 (Miss.2003).

Howell v. State, 860 So.2d 704 (Miss.2003).

Howard v. State, 853 So.2d 781 (Miss.2003).

Walker v. State, 815 So.2d 1209 (Miss.2002). *following remand.

Bishop v. State, 812 So.2d 934 (Miss.2002).

Stevens v. State, 806 So.2d 1031 (Miss.2002).

Grayson v. State, 806 So.2d 241 (Miss.2002).

Knox v. State, 805 So.2d 527 (Miss.2002).

Simmons v. State, 805 So.2d 452 (Miss.2002).

Berry v. State, 802 So.2d 1033 (Miss.2001).

Snow v. State, 800 So.2d 472 (Miss.2001).

Mitchell v. State, 792 So.2d 192 (Miss.2001).

Puckett v. State, 788 So.2d 752 (Miss.2001). *following remand.

Goodin v. State, 787 So.2d 639 (Miss.2001).

Jordan v. State, 786 So.2d 987 (Miss.2001).

Manning v. State, 765 So.2d 516 (Miss.2000). *following remand.

Eskridge v. State, 765 So.2d 508 (Miss.2000).

McGilberry v. State, 741 So.2d 894 (Miss.1999).

Puckett v. State, 737 So.2d 322 (Miss.1999). *remanded for *Batson* hearing.

Manning v. State, 735 So.2d 323 (Miss.1999). *remanded for *Batson* hearing.

Hughes v. State, 735 So.2d 238 (Miss.1999).

Turner v. State, 732 So.2d 937 (Miss.1999).

Smith v. State, 729 So.2d 1191 (Miss.1998).

Burns v. State, 729 So.2d 203 (Miss.1998).

Jordan v. State, 728 So.2d 1088 (Miss.1998).

Gray v. State, 728 So.2d 36 (Miss.1998).

Manning v. State, 726 So.2d 1152 (Miss.1998).

Woodward v. State, 726 So.2d 524 (Miss.1997).

Bell v. State, 725 So.2d 836 (Miss.1998).

Evans v. State, 725 So.2d 613 (Miss.1997).

Brewer v. State, 725 So.2d 106 (Miss.1998).

***347** *Crawford v. State,* 716 So.2d 1028 (Miss.1998).

Doss v. State, 709 So.2d 369 (Miss.1996).

Underwood v. State, 708 So.2d 18 (Miss.1998).

Holland v. State, 705 So.2d 307 (Miss.1997).

Wells v. State, 698 So.2d 497 (Miss.1997).

Wilcher v. State, 697 So.2d 1087 (Miss.1997).

Wiley v. State, 691 So.2d 959 (Miss.1997).

Brown v. State, 690 So.2d 276 (Miss.1996).

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Jackson v. State, 684 So.2d 1213 (Miss.1996).

Williams v. State, 684 So.2d 1179 (Miss.1996).

Davis v. State, 684 So.2d 643 (Miss.1996).

Taylor v. State, 682 So.2d 359 (Miss.1996).

Brown v. State, 682 So.2d 340 (Miss.1996).

Blue v. State, 674 So.2d 1184 (Miss.1996).

Holly v. State, 671 So.2d 32 (Miss.1996).

Walker v. State, 671 So.2d 581(Miss.1995).

Russell v. State, 670 So.2d 816 (Miss.1995).

Ballenger v. State, 667 So.2d 1242 (Miss.1995).

Davis v. State, 660 So.2d 1228 (Miss.1995).

Carr v. State, 655 So.2d 824 (Miss.1995).

Mack v. State, 650 So.2d 1289 (Miss.1994).

Chase v. State, 645 So.2d 829 (Miss.1994).

Foster v. State, 639 So.2d 1263 (Miss.1994).

Conner v. State, 632 So.2d 1239 (Miss.1993).

Hansen v. State, 592 So.2d 114 (Miss.1991).

FN* *Shell v. State,* 554 So.2d 887 (Miss.1989), *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding, *Shell v. State,* 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

> FN* Case was originally affirmed in this Court but on remand from U.S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

Davis v. State, 551 So.2d 165 (Miss.1989).

Minnick v. State, 551 So.2d 77 (Miss.1989).

* *Pinkney v. State,* 538 So.2d 329 (Miss.1989), *Pinkney v. Mississippi,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990)vacating and remanding *Pinkney v. State,* 602 So.2d 1177 (Miss.1992) remanding for new sentencing hearing.

* *Clemons v. State,* 535 So.2d 1354 (Miss.1988), *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)vacating and remanding, *Clemons v. State,* 593 So.2d 1004 (Miss.1992) remanding for new sentencing hearing.

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Nixon v. State, 533 So.2d 1078 (Miss.1987).

Cole v. State, 525 So.2d 365 (Miss.1987).

Lockett v. State, 517 So.2d 1346 (Miss.1987).

***348** *Lockett v. State,* 517 So.2d 1317 (Miss.1987).

Faraga v. State, 514 So.2d 295 (Miss.1987).

[*] *Jones v. State,* 517 So.2d 1295 (Miss.1987), *Jones v. Mississippi,* 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988)vacating and remanding, *Jones v. State,* 602 So.2d 1170 (Miss.1992) remanding for new sentencing hearing.

Wiley v. State, 484 So.2d 339 (Miss.1986).

Johnson v. State, 477 So.2d 196 (Miss.1985).

Gray v. State, 472 So.2d 409 (Miss.1985).

Cabello v. State, 471 So.2d 332 (Miss.1985).

Jordan v. State, 464 So.2d 475 (Miss.1985).

Wilcher v. State, 455 So.2d 727 (Miss.1984).

Billiot v. State, 454 So.2d 445 (Miss.1984).

Stringer v. State, 454 So.2d 468 (Miss.1984).

Dufour v. State, 453 So.2d 337 (Miss.1984).

Neal v. State, 451 So.2d 743 (Miss.1984).

Booker v. State, 449 So.2d 209 (Miss.1984).

Wilcher v. State, 448 So.2d 927 (Miss.1984).

Caldwell v. State, 443 So.2d 806 (Miss.1983).

Irving v. State, 441 So.2d 846 (Miss.1983).

Tokman v. State, 435 So.2d 664 (Miss.1983).

Leatherwood v. State, 435 So.2d 645 (Miss.1983).

Hill v. State, 432 So.2d 427 (Miss.1983).

Pruett v. State, 431 So.2d 1101 (Miss.1983).

Gilliard v. State, 428 So.2d 576 (Miss.1983).

Evans v. State, 422 So.2d 737 (Miss.1982).

King v. State, 421 So.2d 1009 (Miss.1982).

Wheat v. State, 420 So.2d 229 (Miss.1982).

Smith v. State, 419 So.2d 563 (Miss.1982).

Johnson v. State, 416 So.2d 383 (Miss.1982).

Edwards v. State, 413 So.2d 1007 (Miss.1982).

Bullock v. State, 391 So.2d 601 (Miss.1980).

Reddix v. State, 381 So.2d 999 (Miss.1980).

Jones v. State, 381 So.2d 983 (Miss.1980).

Culberson v. State, 379 So.2d 499 (Miss.1979).

Gray v. State, 375 So.2d 994 (Miss.1979).

Jordan v. State, 365 So.2d 1198 (Miss.1978).

Voyles v. State, 362 So.2d 1236 (Miss.1978).

Irving v. State, 361 So.2d 1360 (Miss.1978).

Washington v. State, 361 So.2d 6l (Miss.1978).

Bell v. State, 360 So.2d 1206 (Miss.1978).

DEATH CASES REVERSED AS TO GUILT PHASE AND SENTENCE PHASE

Ross v. State, 954 So.2d 968 (Miss.2007).

***349** *Flowers v. State,* 947 So.2d 910 (Miss.2007).

Flowers v. State, 842 So.2d 531 (Miss.2003).

Randall v. State, 806 So.2d 185 (Miss.2002).

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Kolberg v. State, 704 So.2d 1307 (Miss.1997).

Snelson v. State, 704 So.2d 452 (Miss.1997).

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Lanier v. State, 684 So.2d 93 (Miss.1996).

Giles v. State, 650 So.2d 846 (Miss.1995).

Duplantis v. State, 644 So.2d 1235 (Miss.1994).

Harrison v. State, 635 So.2d 894 (Miss.1994).

Butler v. State, 608 So.2d 314 (Miss.1992).

Jenkins v. State, 607 So.2d 1171 (Miss.1992).

Abram v. State, 606 So.2d 1015 (Miss.1992).

Balfour v. State, 598 So.2d 731 (Miss.1992).

Griffin v. State, 557 So.2d 542 (Miss.1990).

Bevill v. State, 556 So.2d 699 (Miss.1990).

West v. State, 553 So.2d 8 (Miss.1989).

Leatherwood v. State, 548 So.2d 389 (Miss.1989).

Mease v. State, 539 So.2d 1324 (Miss.1989).

Houston v. State, 531 So.2d 598 (Miss.1988).

West v. State, 519 So.2d 418 (Miss.1988).

Davis v. State, 512 So.2d 1291 (Miss.1987).

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Foster v. State, 508 So.2d 1111 (Miss.1987).

Smith v. State, 499 So.2d 750 (Miss.1986).

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Fisher v. State, 481 So.2d 203 (Miss.1985).

Johnson v. State, 476 So.2d 1195 (Miss.1985).

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West v. State, 463 So.2d 1048 (Miss.1985).

Jones v. State, 461 So.2d 686 (Miss.1984).

Moffett v. State, 456 So.2d 714 (Miss.1984).

Lanier v. State, 450 So.2d 69 (Miss.1984).

Laney v. State, 421 So.2d 1216 (Miss.1982).

350 *DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT

Reddix v. State, 547 So.2d 792 (Miss.1989).

Wheeler v. State, 536 So.2d 1341 (Miss.1988).

White v. State, 532 So.2d 1207 (Miss.1988).

Bullock v. State, 525 So.2d 764 (Miss.1987).

Edwards v. State, 441 So.2d 84 (Miss.1983).

Dycus v. State, 440 So.2d 246 (Miss.1983).

Coleman v. State, 378 So.2d 640 (Miss.1979).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY

Rubenstein v. State, 941 So.2d 735 (Miss.2006).

King v. State, 784 So.2d 884 (Miss.2001).

Walker v. State, 740 So.2d 873 (Miss.1999).

Watts v. State, 733 So.2d 214 (Miss.1999).

West v. State, 725 So.2d 872 (Miss.1998).

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Berry v. State, 703 So.2d 269 (Miss.1997).

Booker v. State, 699 So.2d 132 (Miss.1997).

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[*] *Shell v. State,* 554 So.2d 887 (Miss.1989), *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding, *Shell v. State* 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

[*] *Pinkney v. State,* 538 So.2d 329 (Miss.1989), *Pinkney v. Mississippi,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990)vacating and remanding, *Pinkney v. State,* 602 So.2d 1177 (Miss.1992) remanding for new sentencing hearing.

[*] *Clemons v. State,* 535 So.2d 1354 (Miss.1988), *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)vacating and remanding, *Clemons v. State,* 593 So.2d 1004 (Miss.1992) remanding for new sentencing hearing.

[*] *Jones v. State,* 517 So.2d 1295 (Miss.1987), *Jones v. Mississippi,* 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988)vacating and remanding, *Jones v. State,* 602 So.2d 1170 (Miss.1992) remanding for new sentencing hearing.

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Holland v. State, 587 So.2d 848 (Miss.1991).

Willie v. State, 585 So.2d 660 (Miss.1991).

Ladner v. State, 584 So.2d 743 (Miss.1991).

Mackbee v. State, 575 So.2d 16 (Miss.1990).

Berry v. State, 575 So.2d 1 (Miss.1990).

Turner v. State, 573 So.2d 657 (Miss.1990).

State v. Tokman, 564 So.2d 1339 (Miss.1990).

Johnson v. State, 547 So.2d 59 (Miss.1989).

Williams v. State, 544 So.2d 782 (Miss.1989); *sentence aff'd*684 So.2d 1179 (1996).

***351** *Lanier v. State,* 533 So.2d 473 (Miss.1988).

Stringer v. State, 500 So.2d 928 (Miss.1986).

Pinkton v. State, 481 So.2d 306 (Miss.1985).

Mhoon v. State, 464 So.2d 77 (Miss.1985).

Cannaday v. State, 455 So.2d 713 (Miss.1984).

Wiley v. State, 449 So.2d 756 (Miss.1984); resentencing affirmed, *Wiley v. State,* 484 So.2d 339 (Miss.1986), *cert. deniedWiley v. Mississippi,* 479 U.S. 906, 107 S.Ct. 304, 93 L.Ed.2d 278 (1988); resentencing ordered, *Wiley v. State,* 635 So.2d 802 (Miss.1993) following writ of habeas corpus issued pursuant to *Wiley v. Puckett,* 969 F.2d 86, 105-106 (5th Cir.1992); resentencing affirmed,

Wiley v. State, 691 So.2d 959 (1997) (rehearing pending).

Williams v. State, 445 So.2d 798 (Miss.1984).

Miss.,2008.
Chamberlin v. State
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55 So.3d 1046
(Cite as: 55 So.3d 1046)

Supreme Court of Mississippi.
Lisa Jo **CHAMBERLIN**
v.
STATE of **Mississippi**.

No. 2008–DR–01690–SCT.
Nov. 10, 2010.
Rehearing Denied March 24, 2011.

Background: After affirmance of capital murder conviction and death sentence, 989 So.2d 320, defendant filed motion seeking leave to proceed in the Circuit Court, Forrest County, Robert B. Helfrich, J., with a petition for post-conviction relief.

Holdings: The Supreme Court, Lamar, J., held that:
(1) counsel did not perform deficiently, as element of ineffective assistance of counsel, in failing to perform a comparative jury analysis during jury selection;
(2) defendant was not prejudiced by counsel's failure to discover and present additional mitigation evidence at penalty phase; and
(3) defendant did not establish the prejudice element of her *Brady* claim relating to codefendant's allegedly exculpatory letter.

Motion denied.

West Headnotes

[1] Criminal Law 110 1134.71

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
110k1134.71 k. Capital cases, issues unrelated to sentencing. Most Cited Cases

Criminal Law 110 1144.1

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record

110k1144.1 k. In general; complaint, warrant, and preliminary examination. Most Cited Cases

Sentencing and Punishment 350H ⚿1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of review. Most Cited Cases

Sentencing and Punishment 350H ⚿1788(7)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(7) k. Presumptions. Most Cited Cases

The standard of review for capital convictions and sentences is one of heightened scrutiny under which all bona fide doubts are resolved in favor of the accused.

[2] Criminal Law 110 ⚿1134.71

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
110k1134.71 k. Capital cases, issues unrelated to sentencing. Most Cited Cases

Sentencing and Punishment 350H ⚿1788(10)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(10) k. Harmless and reversible error. Most Cited Cases

What may be harmless error in a case with less at stake may become reversible error when the penalty is death.

55 So.3d 1046
(Cite as: 55 So.3d 1046)

[3] Criminal Law 110 ⚿1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In general. Most Cited Cases

The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿1881

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 k. Deficient representation and prejudice in general. Most Cited Cases

In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must first prove that his counsel was deficient, which requires showing that counsel made errors so serious that he or she was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment, and secondly, a defendant must prove that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿1888

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1888 k. Determination. Most Cited Cases

Absent showings of both deficient performance and prejudice, a defendant may not prevail on his claim that his counsel was ineffective. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ⚿1871

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(Cite as: 55 So.3d 1046)

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1871 k. Presumptions and burden of proof in general. Most Cited Cases

Criminal Law 110 ⚿1884

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1884 k. Strategy and tactics in general. Most Cited Cases

On a claim of ineffective assistance of counsel, the court must strongly presume that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy; in other words, defense counsel is presumed competent. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⚿1883

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1883 k. Prejudice in general. Most Cited Cases

On a claim of ineffective assistance of counsel, even where professional error is proven, the court must determine if there is a “reasonable probability” that, but for counsel's unprofessional errors, the result of the proceedings would have been different, which is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

[8] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

When addressing a *Batson* challenge regarding jury selection, a trial court should employ a three-step procedure: (1) the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; (2) once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible, race-neutral justifications for the peremptory strikes; and (3) if a race-neutral explanation is tendered, the trial court must then decide whether the defendant has proved purposeful racial discrimination.

[9] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

The burden remains on the opponent of the peremptory strike to show that the race-neutral explanation given is merely a pretext for racial discrimination during jury selection.

[10] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

One of the recognized indicia of pretext for racial discrimination during jury selection is disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the peremptory challenge.

[11] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Where multiple reasons led the state to use a peremptory strike against a prospective juror, the

existence of another juror with one of his or her individual characteristics does not demonstrate that the reasons assigned were pretextual.

[12] Criminal Law 110 1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases

Counsel did not perform deficiently, as element of ineffective assistance of counsel, in failing to perform a comparative jury analysis during jury selection in capital murder trial, in order to show that state's peremptory strikes against African-American prospective jurors were pretextual; each of the African–American prospective jurors struck had at least one response in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the state. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases

Counsel did not perform deficiently, as element of ineffective assistance of counsel, in failing to make a gender-based *Batson* challenge during jury selection in capital murder trial; while defendant was female and prosecutor used nine of his 13 peremptory strikes against females, the final jury consisted of eight females, four males, and two female alternates. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases

Defendant's bare allegation that she ended up with a “hanging jury” did not establish that she was prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance during jury selection in capital murder trial by failing to attempt to rehabilitate prospective jurors who clearly indicated that their feelings about the death penalty were so strong that

they would not be able to set them aside, which indications led the trial court to excuse the prospective jurors for cause. U.S.C.A. Const.Amend. 6.

[15] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

A prospective juror may be challenged for cause based on his views about capital punishment when those views would substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

[16] Criminal Law 110 ⚿1922

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1922 k. In general. Most Cited Cases

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance at guilt phase of capital murder trial in failing to introduce evidence that defendant was dominated by her codefendant, where defendant confessed numerous times and to several people, but never stated that codefendant made her do anything or that she was in fear of him for any reason. U.S.C.A. Const.Amend. 6.

[17] Criminal Law 110 ⚿1922

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1922 k. In general. Most Cited Cases

Counsel's decision whether to present evidence, if it existed, that defendant was dominated by codefendant fell within the ambit of trial strategy, and thus, counsel did not perform deficiently, as element of ineffective assistance of counsel, in failing to present such evidence during guilt phase of capital murder trial. U.S.C.A. Const.Amend. 6.

[18] Criminal Law 110 1959

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1959 k. In general. Most Cited Cases

When defendant alleges that counsel provided ineffective assistance at the penalty phase of a capital murder trial, the court, in order to assess the probability of a different outcome, i.e., the prejudice element of ineffective assistance of counsel, considers the totality of the available mitigation evidence, including both the evidence adduced at trial and the evidence adduced later, and reweighs it against the evidence in aggravation. U.S.C.A. Const.Amend. 6.

[19] Criminal Law 110 1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases

There is no prejudice, as element of ineffective assistance of counsel, at the penalty phase of a capital murder trial when the mitigating evidence adduced after trial would barely have altered the sentencing profile presented to the decisionmaker. U.S.C.A. Const.Amend. 6.

[20] Criminal Law 110 1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of investigation of mitigating circumstances. Most Cited Cases

Criminal Law 110 1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's failure to discover and present additional mitigation evidence at penalty phase of capital murder trial; while the evidence adduced after trial was more detailed than that presented at trial, the jury was made aware of all of the abuse and addiction in defendant's life. U.S.C.A. Const.Amend. 6.

[21] Constitutional Law 92 4594(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(2) Particular Items or Information, Disclosure of
92k4594(3) k. In general. Most Cited Cases

Criminal Law 110 1994

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1994 k. In general. Most Cited Cases

Even assuming that letter written by codefendant, which was allegedly suppressed by the prosecution, was exculpatory because it would have contradicted the prosecution's theory that defendant was the instigator of the murder, as opposed to the letter merely showing that codefendant wanted defendant to remain silent about the crime, a reasonable probability did not exist that the outcome of the proceedings would have been different if the letter had been disclosed, and thus, there was no *Brady* due process violation; the letter was vague, and overwhelming evidence existed to support the jury's verdict. U.S.C.A. Const.Amend. 14.

[22] Constitutional Law 92 4594(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial

92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(1) k. In general. Most Cited Cases

Constitutional Law 92 4716

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4712 Sentencing Proceedings
92k4716 k. Notice; disclosure and discovery. Most Cited Cases

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. U.S.C.A. Const.Amend. 14.

[23] Constitutional Law 92 4594(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(1) k. In general. Most Cited Cases

To prove a *Brady* due process violation, a defendant must show, among other things, that had the evidence been disclosed by the prosecution to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. U.S.C.A. Const.Amend. 14.

[24] Criminal Law 110 1429(2)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1428 Presentation of Issue in Prior Proceedings
110k1429 In General
110k1429(2) k. Post-conviction proceeding not a substitute for appeal. Most Cited Cases

Defendant was barred from presenting, in her motion seeking leave from the Supreme Court to proceed in the trial court with a petition for post-conviction relief, a claim that execution by lethal

injection would violate the Eighth Amendment prohibition of cruel and unusual punishment, where on direct appeal defendant had failed to make any argument regarding the method of execution. U.S.C.A. Const.Amend. 8.

[25] Sentencing and Punishment 350H ⚿1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of execution. Most Cited Cases

Mississippi's method of lethal injection does not violate the Eighth Amendment prohibition of cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

***1049** Elizabeth Unger Carlyle, Kate Margolis, Michael Bentley, Jackson, attorneys for appellant.

Office of Attorney General by Pat McNamara, attorney for appellee.

EN BANC.

LAMAR, Justice, for the Court:

¶ 1. Lisa Jo Chamberlin was convicted on two counts of capital murder and sentenced to death. Chamberlin's conviction and sentence were affirmed by this Court on direct appeal in *Chamberlin v. State,* 989 So.2d 320 (Miss.2008), *cert. denied,* —— U.S. ——, 129 S.Ct. 908, 173 L.Ed.2d 122 (2009).

¶ 2. Chamberlin has filed a motion for post-conviction-relief, asking this Court to grant her leave to proceed in the trial court, asserting the following grounds for relief:

I. That she was denied effective assistance of counsel before and during the guilt-innocence phase of her trial.

II. That she was denied effective assistance of counsel before and during the penalty phase of her trial.

III. That the State violated *Brady v. Maryland* [FN1] when it failed to produce a letter written by her codefendant, Roger Gillett, that contradicted the State's theory that she was the instigator of the crime.

FN1. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

IV. That she will be denied her Eighth Amendment right to be free from cruel and unusual punishment if she is executed by lethal injection, because the current method of lethal injection

creates a significant likelihood of a needlessly painful and prolonged death.

After review, we find that Chamberlin's claims lack merit, and we therefore deny her motion for leave to proceed in the trial court.

ANALYSIS

[1][2] ¶ 3. This Court has recognized that post-conviction-relief actions have become part of the death-penalty appeal process. *Jackson v. State,* 732 So.2d 187, 190 (Miss.1999). The standard of review for capital convictions and sentences is "one of 'heightened scrutiny' under which all bona ***1050** fide doubts are resolved in favor of the accused." *Flowers v. State,* 773 So.2d 309, 317 (Miss.2000) (citations omitted). "This Court recognizes that 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.' " *Id.*

I. Whether Chamberlin was denied effective assistance of counsel before and during the guilt-innocence phase of her trial.

[3][4][5] ¶ 4. The test for ineffective assistance of counsel is well-settled. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must first prove that his counsel was deficient, which requires showing that "counsel made errors so serious that [he or she was] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. Secondly, a defendant must prove that the "deficient performance prejudiced the defense," which requires showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Absent both showings, a defendant may not prevail on his claim that his counsel was ineffective. *Id.*

[6][7] ¶ 5. This Court must " 'strongly presume that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy. In other words, defense counsel is presumed competent.' " *Liddell v. State,* 7 So.3d 217, 219–20 (Miss.2009). And even where professional error is proven, this Court must determine if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Mohr v. State,* 584 So.2d 426, 430 (Miss.1991).

¶ 6. Chamberlin alleges that her counsel was deficient in four main areas during the guilt-innocence phase of her trial. She first asserts that her counsel was deficient during jury selection when he failed to rebut the State's proffered reasons for peremptory strikes, failed to raise a gender-based *Batson* [FN2] challenge, failed to argue on direct appeal that the trial court's acceptance of pretextual strikes was plain error, and failed to question jurors to determine whether they were qualified to serve on the jury in spite of their opposition to the death penalty. Second, she asserts that her counsel was deficient when he failed to develop and present evidence regarding her methamphetamine withdrawal and its effect on her during interrogation. Third, she asserts that her

counsel was deficient when he failed to introduce evidence that she was dominated by her codefendant, Roger Gillett. Finally, she asserts that her counsel was deficient when he failed to object to the testimony of Vanessa Stringfellow.

FN2. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

A. Jury Selection

[8][9] ¶ 7. When addressing a *Batson* challenge, a trial court should employ a three-step procedure:

> (1) the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; (2) ***1051** once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible, race-neutral justifications for the strikes; and (3) if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. The burden remains on the opponent of the strike to show that the race-neutral explanation given is merely a pretext for racial discrimination.

Pruitt v. State, 986 So.2d 940, 942–43 (Miss.2008) (internal citations omitted).

Failure to rebut proffered reasons for strikes against African–Americans

¶ 8. During voir dire, the prosecutor used eight of his thirteen peremptory strikes against African Americans.[FN3] Only two African–American jurors ultimately were seated.[FN4] Chamberlin's defense counsel made a *Batson* challenge. Although the trial judge expressed doubt that defense counsel had met his burden of making a prima facie showing of discrimination,[FN5] he asked for a response from the prosecutor. The prosecutor responded with the various reasons for his strikes of the eight African–American jurors, and the trial judge found that all of the reasons were race-neutral. Chamberlin's defense counsel requested that he be allowed to rebut the reasons offered by the prosecutor, and the trial judge allowed him to do so.

FN3. The prosecutor used seven of his twelve peremptory strikes against African–American venire members, and he used his only peremptory strike during the selection of alternate jurors against an African American.

FN4. We note that the State tendered a total of four potential African–American jurors, two of whom the defendant struck. *See Chamberlin,* 989 So.2d at 339.

FN5. The trial judge stated: “Due to the make-up of the panel, I'm not confident that the defense has made the prima facie case, has met [its] initial burden....”

¶ 9. Chamberlin argues that, while her defense counsel did request an opportunity to show that the proffered reasons were pretextual, he failed to rebut the *specific* reasons offered by the prosecutor for four of the eight struck jurors.[FN6] Further, he did not present any argument concerning

the remaining four struck jurors.

> FN6. Defense counsel's rebuttal consisted of statements such as "this is a man who ... struck me as being someone who would be a very appropriate juror." He did not attempt to counter the specific reasons offered by the prosecutor.

[10][11] ¶ 10. In *Puckett v. State,* 788 So.2d 752, 763 (Miss.2001), we said:

> One of the recognized indicia of pretext is "disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Mack v. State,* 650 So.2d [1289] at 1298 [(Miss.1994)]. This Court has explained that while such use of challenges is a factor which may be considered by the trial court, *where multiple reasons led to the strike of the State to strike one juror, the existence of another juror with one of his or her individual characteristics does not demonstrate that the reasons assigned were pretextual.*
>
> (Emphasis added.)

[12] ¶ 11. Chamberlin claims that defense counsel should have performed a comparative jury analysis, which would have demonstrated disparate treatment of the jurors, indicating that the State's strikes were pretextual. But a thorough review of the record in this case, including the jury questionnaires provided by Chamberlin, discloses that each of the African–***1052** American jurors struck had at least one response in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the State. Therefore, we are unable to find disparate treatment of the struck jurors. And because we find no disparate treatment and no other evidence of pretext, we cannot say that Chamberlin's defense counsel was deficient in this stage of the jury-selection process. This issue is without merit.

*Failure to make a gender-based **Batson** challenge*

[13] ¶ 12. During voir dire, the prosecutor used nine of his thirteen peremptory strikes against females.[FN7] Chamberlin argues that her defense counsel was deficient because he failed to make a gender-based *Batson* challenge. She argues that her counsel should have been "keenly aware and acutely concerned about a pattern of strikes against prospective jurors of the same gender as his client." But Chamberlin fails to mention that the final jury composition consisted of eight females, four males, and two female alternates. There is simply no evidence to support a claim of gender-based discrimination. This issue is without merit.

> FN7. The prosecutor used eight of his twelve peremptory strikes against female venire members, and he used his only peremptory strike during the selection of alternate jurors against a female.

Failure to argue plain error on direct appeal

¶ 13. Chamberlin argues that her counsel should have asserted on direct appeal that the trial

court's allowance of the prosecutor's strike against one or more of the African–American jurors was plain error. She asserts that there is a reasonable probability that, had counsel made the comparative-analysis argument to this Court, the outcome would have been different and she would have been entitled to a new trial. We disagree.

¶ 14. As discussed above, after a thorough review of the record, we find no evidence of pretext in the prosecution's strikes. Thus, Chamberlin's counsel's failure to argue plain error on appeal was not deficient.

Failure to question jurors about their views on the death penalty

[14] ¶ 15. During voir dire, the trial court asked if any members of the venire would be unable to set aside their personal feelings about the death penalty and return a sentence of death if the evidence justified it. Some venire members indicated that they would have a problem setting aside their personal feelings, and the court struck several of them for cause. Chamberlin argues that her defense counsel was deficient because he "failed to explore with at least some of these veni-repersons whether they were actually qualified to serve"—in other words, he failed to "rehabilitate" them after they stated their initial opposition to the death penalty.

[15] ¶ 16. Under *Strickland,* Chamberlin must show that the failure to attempt to "rehabilitate" these venire members resulted in error so serious as to deprive her of a fair trial and reliable result. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. This Court clearly has stated that a juror may be challenged for cause based on his views about capital punishment when " '*those views would substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.*' " *Evans v. State,* 725 So.2d 613, 656 (Miss.1997) (citations omitted) (emphasis added). As mentioned above, several of the venire members cited ***1053** by Chamberlin clearly indicated that their feelings about the death penalty were so strong that they would not be able to set them aside. Chamberlin's bare allegations that she ended up with a "hanging jury" do not suffice. This issue is without merit.

B. Failure to Develop Evidence Regarding Effect of Methamphetamine Withdrawal and Interrogation Techniques

¶ 17. Chamberlin argues that her defense counsel knew that she had been abusing methamphetamine at the time of her arrest, and that he should have consulted an expert about the possible effects of her methamphetamine addiction and withdrawal on the voluntariness of her confessions. Further, she argues that counsel erred in not consulting an expert or presenting evidence about the effects of police interrogation techniques on her demeanor in her videotaped statements.

¶ 18. On direct appeal, this Court thoroughly examined the voluntariness and admissibility of Chamberlin's statements to police and found no error. *See Chamberlin,* 989 So.2d at 330–36. Thus, we cannot say that Chamberlin's counsel was deficient for failing to consult an expert about the possible effects of her methamphetamine addiction. Additionally, Chamberlin has failed to show how she was prejudiced by the lack of evidence of the possible effects of her methamphetamine addiction, and we cannot say that such evidence deprived Chamberlin of a fair trial or produced an

unreliable result.

C. Failure to Introduce Evidence that Chamberlin was Dominated by Gillett

[16] ¶ 19. Chamberlin argues that her defense counsel should have presented evidence that she was dominated by her codefendant, Roger Gillett—that she "was a follower, not a leader." Further, she argues that her counsel could have presented evidence that her intelligence is well below average and that she suffers from memory impairment.

¶ 20. We disagree with Chamberlin's claims that, had her defense counsel elicited this testimony, there is a reasonable probability that the jury would have come to a different conclusion. Chamberlin confessed numerous times and to several people, but never stated that Gillett made her do anything, or that she was in fear of him for any reason. From our review of the record, it does not appear that Chamberlain was "dominated" by anyone, but rather was a willing participant in the robbery and murder of the two victims.

[17] ¶ 21. Moreover, the decision whether to introduce evidence—if any existed—that Chamberlin was dominated by Gillett falls directly into the ambit of trial strategy. *See Cole v. State,* 666 So.2d 767, 777 (Miss.1995) ("Complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the ambit of trial strategy."). And this Court has clearly stated that there is a strong presumption that counsel's trial strategy was sound. " 'In considering a claim of ineffective assistance of counsel, an appellate court must strongly presume that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy. In other words, defense counsel is presumed competent.' " *Liddell v. State,* 7 So.3d 217, 219–20 (Miss.2009) (citation omitted). Thus, we find this issue is without merit.

D. Failure to Object to the Testimony of Vanessa Stringfellow

¶ 22. Vanessa Stringfellow was incarcerated in the Forrest County Jail with ***1054** Chamberlin for a short time. She testified that she had overheard Chamberlin say that "after [she and Gillett] cut [the male victim's] throat, we propped him up on the couch, and his head was hanging to one side, and we proceeded to have sex in front of the corpse and it was the greatest sex that [we] had ever had and it was an extreme adrenaline rush." Later, in closing arguments, the prosecutor asked the jury to give Chamberlin an "adrenaline rush."

¶ 23. Chamberlin asserts that defense counsel was deficient because he failed to object to Stringfellow's prejudicial testimony. This assertion is incorrect. Chamberlin's defense counsel filed a motion in limine to exclude any statements made by Chamberlin to "fellow inmates," but the trial court denied the motion. Thus, Chamberlin's defense counsel was not deficient for failing to object to Stringfellow's testimony, as he attempted to exclude her testimony before trial began.

¶ 24. We find that all of Chamberlin's claims regarding ineffective assistance of counsel during the guilt phase are without merit. Chamberlin has failed to show error on the part of her trial counsel, nor has she shown a reasonable probability that the results of the trial would have been

different but for the allegations of error.

II. Whether Chamberlin was denied effective assistance of counsel before and during the penalty phase.

¶ 25. Chamberlin argues that her trial counsel was deficient before and during the penalty phase of her trial, because he conducted only a minimal investigation of her background in search of mitigating evidence. Chamberlin argues that, if all the evidence and additional witnesses found during post-conviction investigation had been presented, there was a reasonable probability of a different outcome at the penalty phase.

[18][19] ¶ 26. "To assess the probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Sears v. Upton,* —— U.S. ——, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). The United States Supreme Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker...." *Id.* at 3266.

[20] ¶ 27. During sentencing, the jury heard testimony from defense expert Dr. Beverly Smallwood [FN8] of the sexual and physical abuse in Chamberlin's family—by her mother, her half-brother, her biological father, her stepfather and a fourth-grade teacher. The jury heard that Chamberlin's mother had bipolar disorder, was a severe alcoholic, and was physically abusive. The jury heard that Chamberlin frequently engaged in abusive relationships with men and that she was often used and abused by men whom she dated. Specifically, the jury heard that Roger Gillett had even tried to drown Chamberlin, and that her reaction was to try to make him feel better about his actions. The jury heard about Chamberlin's severe drug addiction, and that she had started drinking at age ***1055** twelve and using methamphetamine at age thirteen. The jury heard that Chamberlin had post-traumatic stress disorder, and that she met the criteria for borderline personality disorder.

> FN8. Dr. Smallwood was appointed by the trial court to "investigate any factors in Lisa Jo Chamberlin's life or in her psychological or mental or emotional state that might relate to mitigation in understanding her mental state and how she got there, anything relating to mitigation in this case." Dr. Smallwood testified that she conducted more than twenty hours of clinical interviews with Chamberlin, performed psychological tests and interviewed several collateral witnesses during the course of her evaluation.

¶ 28. After detailing and providing numerous examples of Chamberlin's behavior in relation to the problems mentioned above, Dr. Beverly Smallwood stated the following regarding the day of the murders:

> I guess the way I would sum it up is as an accumulative effect and growing mental and emotional disturbance on the day that these crimes were committed and the days thereafter. This isn't a very clinical term, but I'll just say it this way and I think we'll all understand it. Lisa was a psychological mess. And it had grown starting in her early childhood with things that she couldn't help

> but then choices that she made over time and not having the tools, having never had role models or a support system and having not taken some of the opportunities she did have. When she got to that day, the day that these crimes were committed, she was a life spun out of control.

¶ 29. Dr. Smallwood also testified that, when Chamberlin was not on drugs and not involved in abusive relationships, she "did not see a person who is interpersonally callous." Dr. Smallwood testified that some of Chamberlin's most fulfilling times were when she was "working in helping roles," like during her employment at a nursing home and as a private caregiver where she "attended to [those] people with love and care" and was "well-liked." Dr. Smallwood also gave examples of Chamberlin's recent incarceration during which she devoted her time to helping other inmates and jailers. Finally, Dr. Smallwood testified that, if Chamberlin were sentenced to life without parole, she would "take advantage of the opportunities that were in prison to continue to grow herself as well as then to essentially serve as a warning to others and to help them along the way."

¶ 30. The mitigation evidence presented to this Court in Chamberlin's post-conviction petition is essentially the same as the testimony presented during the penalty phase. While it is true that the mitigation evidence uncovered during post-conviction investigation is more detailed than that presented at trial, the jury was made aware of all of the abuse and addiction in Chamberlin's life. We cannot say that Chamberlin was prejudiced, as the additional mitigating evidence would, if anything, " 'barely have altered the sentencing profile presented' to the decisionmaker....' " *Sears,* 130 S.Ct. at 3266.

III. Whether the State violated *Brady v. Maryland* when it failed to produce a letter written by Chamberlin's codefendant, Roger Gillett.

[21][22][23] ¶ 31. Chamberlin argues that the prosecution's failure to disclose a "favorable" letter written by Roger Gillett violated the rule pronounced in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady,* the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194. To prove a *Brady* violation, a defendant must show, among other things, that "had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Thorson v. State,* 994 So.2d 707, 720 (Miss.2007).

***1056** ¶ 32. Gillett's letter contained the following language that Chamberlin asserts is exculpatory:

> I believe this is a blessing in disguise ... I don't pass on any blame and am not sad about my situation. The burden I have put on the ones I love is the only part I regret but the burden is a constant reminder of my families [sic] love for me. Not so much directly but by the way you treat Lisa. Although we know its [sic] to keep her from burning me but in the process of self-preservation to keep her from burning herself as well. If she keeps quiet and takes no deals

we will be set free.

¶ 33. We question Chamberlin's claim that this letter is exculpatory. Although she argues that it would have contradicted the prosecution's theory that she was the instigator of the crime, it seems, at best, to show merely that Gillett wanted her to remain silent about the crime. But more importantly, we find that overwhelming evidence existed to support the jury's verdict, and the introduction of this vague letter was highly unlikely to affect the outcome. Thus, we find no "reasonable probability" that, had the letter been introduced, the outcome would have been different.

IV. Whether Chamberlin will be denied her Eighth Amendment right to be free from cruel and unusual punishment if she is executed by lethal injection.

[24] ¶ 34. Chamberlin failed to make any argument regarding the method of execution on direct appeal, and, therefore, the claim is barred. *See Spicer v. State,* 973 So.2d 184, 206 (Miss.2007) ("It is Spicer's contention that execution by lethal injection constitutes cruel and unusual punishment. This is the first time Spicer has raised this issue, and it was capable of being raised on direct appeal. The issue is now procedurally barred from further consideration on collateral appeal."). *But see Bennett v. State,* 990 So.2d 155, 160 (Miss.2008) ("Bennett next argues that death by lethal injection violates his First- and Eighth–Amendment rights under the U.S. Constitution. Although Bennett failed to raise this issue on direct appeal, we do not hold that it is procedurally barred from further review on collateral appeal.").

[25] ¶ 35. Procedural bar notwithstanding, this Court already has addressed this issue on the merits and held unequivocally that Mississippi's method of lethal injection does not violate the Eighth Amendment. In *Bennett v. State,* 990 So.2d 155 (Miss.2008), this Court stated:

> If differences exist between Mississippi's execution protocols and those used in Kentucky, then, the inquiry is whether Mississippi's lethal-injection protocol meets Constitutional muster in light of this recent Supreme Court decision. The Fifth Circuit, when considering inmate Dale Leo Bishop's Eighth–Amendment challenge to Mississippi's lethal-injection procedures, recently announced that "Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in *Baze* [*v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008)]." *Walker v. Epps,* 2008 WL 2796878 at *3, 2008 U.S.App. LEXIS 15547 at *3 (5th Cir. Miss. July 21, 2008). We agree with the Fifth Circuit's analysis, and hold that Bennett's Eighth Amendment challenge to the lethal injection protocol in Mississippi is without merit.

Bennett, 990 So.2d at 161. *See also Goff v. State,* 14 So.3d 625, 665 (Miss.2009) ("Goff's claim that Mississippi's method of inflicting death by lethal injection constitutes cruel and unusual punishment was dispositively rejected in favor of the State ***1057** by the United States Supreme Court's holding in *Baze v. Rees* and by this Court's holding in *Bennett v. State.*").

CONCLUSION

¶ 36. Based on the foregoing, we find that Chamberlin's claims lack merit, and her motion for

leave to proceed in the trial court is denied.

¶ 37. **PETITION FOR POST–CONVICTION RELIEF DENIED.**

WALLER, C.J., CARLSON AND GRAVES, P.JJ., DICKINSON, RANDOLPH, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR.

Miss.,2010.
Chamberlin v. State
55 So.3d 1046

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70012

LISA JO CHAMBERLIN,

Petitioner - Appellee

v.

MARSHALL L. FISHER, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondent - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES, HIGGINSON, and COSTA, Circuit Judges.[1]

EDITH BROWN CLEMENT, Circuit Judge, joined by JOLLY, JONES, SMITH, OWEN, ELROD, SOUTHWICK, HAYNES, and HIGGINSON, Circuit Judges:

PER CURIAM:

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[1] Judge Prado retired from the Court on April 2, 2018, and, therefore did not participate in this decision. Judge Jolly, now a Senior Judge of this court, participated in the consideration of this en banc case. Judge Graves is recused and did not participate in this decision. Judges Willett and Ho also did not participate in this decision.

IT IS ORDERED that the appellee's petition for panel rehearing of the en banc opinion is denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE