No. _____

In the Supreme Court of the United States

AMY HEBERT,

Petitioner,

v.

JAMES ROGERS, Warden, Louisiana Correctional Institute for Women,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When reviewing a claim of gender discrimination in violation of *J.E.B. v. Alabama*, is comparative juror analysis appropriate even where the male and female comparators are not identical in all respects?

2. Where the prosecution proffers gender-neutral reasons for its strikes and disavows reliance on other reasons, should the reviewing court consider the gender-neutral reasons given for the strikes instead of the reasons that have been disavowed?

3. Where the petitioner has raised her claim of jury discrimination via a claim of ineffective assistance of trial counsel, does the petitioner establish prejudice if she can show that, had the *J.E.B. v. Alabama* objection been made, it would have been granted?

PARTIES TO THE PROCEEDING IN THE COURTS BELOW AND CORPORATE DISCLOSURE STATEMENT

Amy Hebert is the Petitioner in this case, and she was represented in the court below by Counsel of Record, Letty S. Di Giulio.

James Rogers,[1] Warden, Louisiana Correctional Institute for Women, is the Respondent and was represented in the court below by District Attorney Camille Morvant and Assistant District Attorney Joseph Soignet of the Lafourche Parish District Attorney's Office.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

[1] Since Ms. Hebert originally filed this action, Mr. Rogers has been replaced by Warden Frederick Boutte.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amy Hebert respectfully prays that a Writ of Certiorari issue to review the judgment that the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The published panel decision of the Fifth Circuit Court of Appeals can be found at *Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018), and is contained in Appendix B. The Magistrate's Report and Recommendation can be found at 2016 U.S. Dist. LEXIS 184381 (E.D. 2016), and is contained in Appendix D. The state post-conviction court's ruling denying relief is contained in Appendix F, and the Louisiana Supreme court's writ denial is reported at *State v. Hebert*, 182 So. 3d 23, 24 (2015), and found in Appendix E.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254 to review this Petition. The Fifth Circuit Court of Appeals affirmed the denial of Ms. Hebert's habeas petition on May 10, 2018. App. B. That court denied a timely petition for rehearing on June 12, 2018. App. A. On August 28, 2018, an extension of time to file the petition for writ of certiorari was granted to and including October 10, 2018, in Application No. No. 18A217. App. I.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and . . . have the assistance of counsel for his defense.

U.S. Const. Amend XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

(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.

STATEMENT OF THE CASE

On September 26, 2007, Amy Hebert was charged with capital murder following the stabbing deaths of her two children, Camille and Braxton. R.86-88.[2] That Ms. Hebert, an adoring and devoutly religious mother, killed her kids in the middle of the night was never in dispute. At the same time that she stabbed and killed her children, Ms. Hebert stabbed and killed the family dog and tried to kill herself. R.5548-807. Ms. Hebert pled not guilty by reason of insanity (NGRI). R.3.

[2] Citations to the trial record are noted as "R.____"; citations to the federal court record are noted as "ROA.___."

Jury selection in Ms. Hebert's capital trial began on April 16, 2009. R.1863-5546. During jury selection, the parties were each given a total of 14 peremptory strikes (12 for the selection of the jury, 2 for the selection of the alternates). The State used a total of 12 of its peremptory challenges, and it used them all against female prospective jurors. Defense counsel did not object to the prosecutor's strikes. On May 14, 2009, Ms. Hebert was found guilty of two counts of first degree murder. R.7344. On May 16, 2009, the jury was unable to reach a unanimous verdict, and a life sentence was entered. R.7501. Ms. Hebert's conviction and sentence were affirmed on direct appeal. *See State v. Hebert*, No. 2010-KA-0305, 57 So. 3d 608 (La. App. 1st Cir. 2011); *State v. Hebert*, No. 2011-K-0864, 73 So.3d 380 (La. 2011).

On January 16, 2013, Ms. Hebert filed an *Application for Post-Conviction Relief and Motion for Evidentiary Hearing*. In her post-conviction petition, Ms. Hebert alleged that the prosecution violated *J.E.B. v. Alabama ex rel. T.B.* when it used 12 peremptory strikes against qualified prospective female jurors for no reason other than gender, and trial counsel rendered ineffective assistance in failing to raise an objection to the prosecutor's strikes during jury selection. In response to Ms. Hebert's petition, the prosecutor who tried the case provided a list of gender-neutral reasons for each of its 12 strikes against female jurors. App. G at 10-13. Ms. Hebert argued that the gender-neutral reasons provided by the prosecutor did not withstand scrutiny, including comparative juror analysis. Ms. Hebert argued that the prosecutor discriminated against female prospective jurors in violation of

Equal Protection, and trial counsel was ineffective under *Strickland* in failing to object to the prosecutor's strikes.

On December 29, 2014, the district court judge, who had also been the trial judge, denied Ms. Hebert's post-conviction petition without a hearing. ROA.771-78. In his ruling denying Ms. Hebert's *J.E.B./Strickland* claim, the post-conviction judge referred generally to the reasons given by the prosecutor, without tethering them to specific jurors:

> Of the jurors stricken, there were many sufficiently gender-neutral explanations for the use of peremptory challenges including: religious, moral or ethical considerations, self-employed business owners, jurors with medical or psychiatric problems, jurors with family members that had psychiatric problems, one juror who knew the defendant, and those jurors that had misgivings about imposing the death penalty.

App. F at 5. With respect to the *Strickland* aspect of her claim, the judge stated only, "The record in this matter reflects that petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges." *Id.* Both the Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court subsequently denied writs. In its *per curiam*, the Supreme Court adopted the reasons given by the district court judge. *See* App. E.

On October 2, 2015, Ms. Hebert filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. ROA.4-130. On November 14, 2016, the magistrate judge issued a Report and Recommendation concluding that Ms. Hebert's petition should be denied. *See* App. D at 12-13. With respect to Ms. Hebert's *J.E.B./Strickland* claim, the magistrate did not acknowledge any of the gender-

neutral reasons provided by the prosecutor, instead concluding that trial counsel was not ineffective because "trial counsel had ample strategic reasons to abstain from making *J.E.B./Batson* challenges regarding any number of the State's strikes." App. D at 14 (giving as an example the fact that Mary Davidson favored the death penalty).[3] The district court judge subsequently adopted the magistrate judge's Report in its entirety but granted a certificate of appealability. App. C.

Ms. Hebert filed an appeal in the Fifth Circuit, again raising her *J.E.B./Strickland* claim. On May 10, 2018, the Fifth Circuit affirmed the denial of Ms. Hebert's petition, including her *J.E.B./Strickland* claim. *See* App. B. In a published opinion, the panel held that, because the prosecution had provided gender-neutral reasons for its strikes, the issue of whether a *prima facie* case existed became moot. *Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018), App. B at 4. Nonetheless, the court concluded that Ms. Hebert could not establish a violation of *J.E.B.* because there were no "adequate comparators" for any of the 12 women struck among the men who were permitted to serve on the jury. App. B at 6. The court based this conclusion on a comparison of the death penalty views of all of the jurors and not a comparison of the gender-neutral reasons provided by the prosecutor. *Id.* A concurrence opined that the majority had not conducted the proper analysis of Ms. Hebert's claim, arguing that the court should have conducted

[3] Ms. Hebert had pointed this fact out in arguing that the prosecutor should have wanted to retain Ms. Davidson rather than strike her, as she was the "ideal juror" for the prosecution.

a *Strickland* analysis without reference to the *Batson/J.E.B.* or comparative juror analysis. App. B at 9-11.

Ms. Hebert now seeks review of her *J.E.B./Strickland* claim from this Court.

REASONS FOR GRANTING THE PETITION

Discrimination during jury selection on the basis of race or gender "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986). Discrimination against even one juror is too much. *See Snyder v. Louisiana*, 552 U.S. 472 (2008). Assessing whether a prosecutor in fact has used his peremptory strikes to discriminate on the basis of race or gender despite offering race- or gender-neutral reasons for his strikes can be difficult, but this Court has provided several clear, easy-to-follow rules to facilitate that process. One of the most "powerful" tools for determining whether a prosecutor has engaged in discrimination during jury selection is "side-by-side comparisons" of jurors, also known as comparative juror analysis. *Miller-El v. Dretke* ("*Miller-El II*"), 545 U.S. 231, 241 (2005). As the Court in *Miller-El II* explained: "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." *Id.* (finding that the prosecutor's proffered race-neutral reason's "plausibility [wa]s severely undercut by

the prosecution's failure to object to other panel members who expressed views much like [his]").

Comparative juror analysis has been consistently applied by this Court since *Miller-El* and has played an important role in ferreting out discrimination in jury selection. *See*, *e.g.*, *Snyder*, 552 U.S. 472; *Foster v. Chatman*, 136 S.Ct. 1737, 1751 (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).[4] The Fifth Circuit has likewise relied on comparative juror analysis to detect discrimination during jury selection. *See Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009); *accord Hayes v. Thaler*, 361 F. App'x. 563 (5th Cir. 2010). Considered alongside other evidence of discrimination, comparative juror analysis provides courts with a readily-accessible way to detect jury discrimination and is critical to effectuating the promises of *Batson* and *J.E.B.*

In two recent published habeas opinions, however, the Fifth Circuit dispensed with the clear directives of *Miller-El*. The Fifth Circuit in these cases found a new way to conduct comparative juror analysis in cases in which the prosecutor has proffered specific gender- or race-neutral reasons that do not hold up to scrutiny under this Court's jurisprudence. First, in *Chamberlin v. Fisher*, the Fifth Circuit granted rehearing *en banc* in order to allow the full court to consider

[4] *See also* Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 Yale L.J. 187 (1989) (noting that comparative juror analysis "seems to be the best way to show discrimination after the prosecutor has proffered her reasons, since reasons given to challenge black venirepersons may also apply to white venirepersons who were not challenged").

whether a reviewing court could rely on additional characteristics not identified in the specific race-neutral reasons articulated by the prosecutor to distinguish a white juror accepted by the prosecution from a black prospective juror who was struck by the prosecution. *See Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018). In a deeply divided opinion, Judge Clement wrote for the majority that there is "a crucial difference between asserting a new reason for *striking* one juror and an explanation for *keeping* another. . . . 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." *See id.* at 842 (emphasis in original). The majority's opinion garnered a strong rebuke from dissenting judges who noted that "[c]omparative juror analysis plays a crucial role in rooting out [] discrimination" which is "largely neutered if an appellate court can come up with 'any rational basis' that distinguishes jurors":

> 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 more troubling is that we have been down this road before [in *Miller-El II*]. . . . 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 not to learn from it.

Chamberlin, 885 F.3d at 846 (Costa joined by Stewart, C.J., and Davis, Dennis, and Prado, Circuit Judges dissenting). The cert petition in *Chamberlin* is currently pending before this Court. Docket No. (15-70012) (filed Oct. 4, 2018 pursuant to Application 18A112).

Not long after *Chamberlin* was decided, the Fifth Circuit issued its published opinion in Amy Hebert's case, applying the "useful comparator" principle first articulated in *Chamberlin* to Ms. Hebert's claim that the prosecutor used his strikes to discriminate against females in violation of *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 128 (1994). Writing for the majority again, Judge Clement concluded that none of the males who were permitted to serve on Ms. Hebert's jury was an "adequate comparator" to any of the 12 females struck by the prosecution during jury selection. *See Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018). In reaching this conclusion, the panel never actually addressed the gender-neutral reasons articulated by the prosecutor[5] despite the fact that Ms. Hebert argued that many of those gender-neutral reasons applied equally—in some cases, identically—to men who were permitted to serve. Not only did the court disregard the gender-neutral reasons proffered by the prosecutor, but it instead compared, as a threshold matter, the death penalty views of the female and male comparators even where the death penalty views were not among the gender-neutral reasons proffered by the prosecutor. As detailed below, Ms. Hebert's case presents an even more significant

[5] While the court included a chart listing in very summary fashion the stated reason for eight of the prosecutor's strikes against females, the court otherwise failed to address those gender-neutral reasons. *See Hebert*, 890 F.3d at 223.

departure from *Miller-El* because the prosecutor specifically disavowed reliance on the death penalty views of the jurors.

Together, the Fifth Circuit's novel and interrelated rulings in *Hebert* and *Chamberlin* demand this Court's intervention. Indeed, Judge Costa of the Fifth Circuit, writing for the dissenting judges in *Chamberlin*, specifically requested this Court's "[c]orrection" because the majority's opinion "defies precedent." *Chamberlin*, 885 F.3d at 861. Because Ms. Hebert's case presents an extreme application of the Fifth Circuit's new take on *Miller-El*, certiorari is appropriate in this case to resolve the conflict created by the Fifth Circuit and the cases affected by that conflict. Sup. Ct. R. 10(a), (c). Alternatively, Ms. Hebert respectfully requests that this Court summarily reverse Ms. Hebert's case; or, should this Court grant review in the en banc ruling in *Chamberlin v. Fisher*, Ms. Hebert requests that the Court stay her case pending resolution of *Chamberlin*.

In addition, this Court should grant review to provide instruction to lower courts about whether prejudice should be presumed when a petitioner raises a *Batson* or *J.E.B.* claim *via* a claim of ineffective assistance of counsel, as happened in Ms. Hebert's case. This question was specifically left open in the Court's decision in *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), and it is one about which there is a split among the federal circuit courts. In his concurrence in Ms. Hebert's case, Chief Judge Stewart suggested that this Court's guidance on how to analyze a *Strickland*/*J.E.B* claim is needed. *See Hebert*, 890 F.3d at 230 (Stewart, C.J., concurring) ("There is little guidance on whether a trial court must evaluate

deficient performance before prejudice."). Petitioner, therefore, prays that this Court grant review.

ARGUMENT

I. The Fifth Circuit's New Twist on Comparative Juror Analysis Conflicts With This Court's Clear Guidelines in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and the Consistent Rulings in Other Circuits.

> The view that courts may credit new reasons jurors were *kept* despite sharing the trait the prosecution claimed justified striking black [or female] 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.[6]

In *Miller-El v. Dretke* ("*Miller-El II*"), 545 U.S. 231 (2005), this Court provided state and federal courts around the country with clear guidelines about how to conduct an inquiry into discrimination during jury selection. Indeed, before addressing the facts of Ms. Hebert's case, the Fifth Circuit panel in Ms. Hebert's case succinctly set out the "three principles from the Supreme Court's analysis in *Miller-El II*":

> First, the struck juror and the comparator-juror do not need to "exhibit all of the exact same characteristics." *Id.* Second, if the state presents a particular reason for striking a juror without "engag[ing] in meaningful voir dire examination on that subject," that is "some evidence" that the asserted reason for the strike was pretext for discrimination. *Id.* Third, we must confine our inquiry to the reasons provided by the state for its strikes. *Id.*

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[6] *Chamberlin*, 885 F.3d at 854 (Costa joined by Stewart, C.J., and Davis, Dennis, and Prado, Circuit Judges dissenting) (emphasis in original). The dissent also noted that the court's ruling created a split among the circuits. *See Love v. Scribner*, 278 F. App'x 714, 718 (9th Cir. 2008); *United States v. Taylor*, 277 F. App'x 610, 613 (7th Cir. 2008).

Hebert, 890 F.3d at 222 (citing *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009)). Despite articulating these clear, easy-to-follow rules, the panel then, without skipping a beat, applied the contorted reasoning announced in *Chamberlin* to Ms. Hebert's case.

A. The Fifth Circuit Did Not Confine Its Inquiry to the Reasons Provided by The State and Improperly Required the Stricken Females and the Accepted Males to Be Identical With Respect to Their Views on the Death Penalty.

As noted above, *Miller-El* requires the court to consider only the reasons provided by the State, and it does not allow the reviewing court to supplement the State's proffered gender- or race-neutral reasons. As the *Miller-El* Court explained, "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 ("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 shown up as false."). Accordingly, the Fifth Circuit was required to evaluate first and foremost the gender-neutral reasons proffered by the State without supplementing them. That is not what the court did.

In state post-conviction, the prosecutor, who was also the trial prosecutor in the case, provided a detailed list of gender-neutral reasons for his 12 strikes against women. *See* App. G. Specifically, with respect to two stricken females, **Mary McFarland** and **Janet Loupe**, the prosecution gave as its only gender-neutral reason for striking them their views on and experience with mental illness:

> 1. Mary McFarland: She informed the court that "My brother was under the care of a psychiatrist. He was schizo (sic)." She also stated during voir dire that it would be important to her to know whether or not the defendant herein was taking or not taking medication at the time of the offense.
>
> * * *
>
> 5. Janet Loupe: On her questionnaire, she stated that she was bipolar, noting "I suffer from depression. I take medicine to help me sleep at night. I am bi-polar. I see a psychiatrist at the mental health in Raceland, La." She noted that she had taken amopine for over 22 years, lithium for eight years, and was still on both. She was taking seven prescription drugs at the time of jury selection.

App. G at 11. The prosecutor said nothing about these jurors' views on the death penalty. Had the Fifth Circuit applied the principles set forth in *Miller-El*, it should have assessed whether the proffered gender-neutral reasons—their experience and views on mental illness—applied equally well to male jurors who were not struck by the prosecutor. *See Miller-El*, 545 U.S. at 266.

To be sure, that is what Ms. Hebert argued. **Timmy Guidry**, a male who was accepted by the State and seated on the jury, gave answers during jury selection and on his jury questionnaire that were indistinguishable from Ms. McFarland's and Ms. Loupe's purportedly problematic statements about mental illness. Specifically, Mr. Guidry disclosed on his jury questionnaire that both he and his wife receive treatment from both psychologists and psychiatrists and that he currently takes Clonezapam and Adderol and intends to add Cymbalta to his psychiatric medications soon. App. H. at 4-5. Mr. Guidry also said he "definitely" believes in mental illness. R.5111. Ms. Hebert argued that, in light of the fact that the gender-neutral reasons provided by the prosecution applied equally well to

Timmy Guidry and the fact that the prosecution never asked these female prospective jurors any follow-up questions about its purported concern or sought to challenge these two jurors for cause on this purported ground, the gender-neutral reasons given by the prosecution for its strikes against Mary McFarland and Janet Loupe do not withstand scrutiny. *See Miller-El*, 545 U.S. at 266.

Likewise, the tendered reasons for striking female prospective juror **Erma Usea** were equally applicable to male juror Timmy Guidry. The prosecution gave two gender-neutral reasons for striking Ms. Usea, one of which was her experience and views on mental illness:

> 10. Erma Usea: Had been prosecuted and placed on probation for DUI. Noted on questionnaire that "my sister has mental problems, all I can say is when she takes the meds they prescribe it helps her."

App. G. at 12. As noted above, Timmy Guidry expressed similar views and experiences with medication for mental illness. But the similarities did not end there. Timmy Guidry, like Ms. Usea, also had a conviction for possession of marijuana. ROA.304. Nonetheless, Timmy Guidry was permitted to serve on Ms. Hebert's jury, while Ms. Usea was excluded. Again, not only did the prosecution not question Ms. Usea about its purported concerns or seek to challenge her for cause on these grounds, but it did not even use an initial peremptory strike on Ms. Usea, instead backstriking[7] her. Application of comparative juror analysis with respect to all three of these female prospective jurors would have immediately revealed the disparate treatment they had received.

[7] The practice of backstriking in Louisiana is addressed below.

In the Fifth Circuit's opinion in this case, however, the only mention of the prosecutor's gender-neutral reasons was in a chart in the opinion, where the court listed in short-hand form not only the "reason for strike" but also the "death penalty" views of Ms. McFarland, Ms. Loupe, Ms. Usea, and Mr. Guidry. *See Hebert*, 890 F.3d at 223. As set forth above, the death penalty views of these two jurors were *never* identified as gender-neutral reasons for their strikes. Nonetheless, the court explained that "the comparator-juror must be similar in the relevant characteristics," and the court identified, without any explanation, the "relevant characteristics" as the individual jurors' views on the death penalty. *Id.* at 223. The court even identified the "views on the death penalty" as "perhaps the most important factual point." *Id.* The court then engaged in an in-depth analysis of the death penalty views of each of the men who served on Ms. Hebert's jury in order to establish that none of the men was a "valid" or "adequate comparator" for the purposes of comparative juror analysis. *Id.* at 224. With respect to Timmy Guidry, the court stated,

> T.G. indicated that he was neutral on the death penalty. From among the women that Hebert identified as victims of gender discrimination, F.R. [Faye Reynolds] and A.O. [Arlene Orgeron] were the only ones who were neutral on the death penalty. All the other women favored life over death. Thus. T.G. is not a valid comparator to those women.

Id. For the Fifth Circuit, that ended the inquiry, and the court never even reached the gender-neutral reasons that the prosecutor provided for McFarland, Ms. Loupe, and Ms. Usea. The Fifth Circuit's opinion so far departed from the accepted and

usual course of comparative juror analysis that it conflicted not only with this Court's jurisprudence but also with the jurisprudence of other circuits.

In *Miller-El*, this Court explicitly rejected the argument that a comparative analysis between a stricken juror and an accepted one could only be undertaken between jurors who are identical. The Court explained,

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El, 545 U.S. at 247, fn. 6. In *Miller-El*, the majority and the dissent disputed whether the two comparators were sufficiently "similarly situated" with respect to the "reasons the prosecution gave for striking the potential juror." *Id.* at 291 (quoting Thomas, J., dissenting). In effect, not even the dissent opined that comparative juror analysis requires some threshold finding that the comparators have enough *other* qualities, above and beyond what the prosecution identified, in common to be comparable. *See id.* (addressing the jurors' death penalty views only because the prosecutor gave them as the race-neutral reasons for the strikes). The Court's subsequent opinions bear this truth out. For instance, in the case of *Snyder v. Louisiana*, the prosecution proffered as its race-neutral reason for striking an African-American juror a purported scheduling conflict, and the Court conducted a comparative analysis with two white jurors, Law and Donnes, only with respect to

the proffered race-neutral reason. *See Snyder*, 552 U.S. 472, 482-84 (2008). Like Ms. Hebert's case, *Snyder* was a capital prosecution, but the death penalty views of the stricken jurors and the accepted jurors were never assessed because they are only relevant to the comparative analysis where they form part of the basis of the State's proffered reasons for striking the juror in question. *See id.*; *see also Foster v. Chatman*, 136 S. Ct. 1737 (2016) (prosecution claimed to have struck juror because she was divorced and young, but they did not strike divorced or young white prospective jurors). Moreover, this has been the approach applied by the Fifth Circuit until now. *See Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009) (conducting a comparative analysis, *inter alia*, between an African-American juror's statements about future dangerousness with those of three other white jurors without requiring proof that those other jurors were otherwise similar enough to be suitable for comparison); *accord Hayes v. Thaler*, 361 F. App'x. 563 (5th Cir. 2010) (conducting a comparative analysis regarding the race-neutral reasons only).

The Fifth Circuit's insertion of this additional hurdle to comparative juror analysis also conflicts with the opinions of other federal circuit courts. In *United States v. Atkins*, the Sixth Circuit reiterated the meaning of "similarly situated" as it was used in *Miller-El* :

> In conducting a comparative juror analysis, the compared jurors need not be "'similarly situated' in all respects." *Odeneal*, 517 F.3d at 420. In fact, the empaneled white jurors need not even match the stricken black venirepersons in all of the characteristics the prosecution identified in striking the black venirepersons. *Dretke*, 545 U.S. at 247 n.6. It suffices that, after reading the "*voir dire* testimony in its

> entirety," we find that the differences identified by the prosecution "seem far from significant."

United States v. Atkins, 843 F.3d 625, 631 (6th Cir. 2016) (citing *United States v. Odeneal*, 517 F.3d 406 (6th Cir. 2008), in which the court had noted that, in *Miller-El*, "an African-American juror who expressed particular views about the death penalty also had a brother who had previously been convicted of a crime. Although *both the juror's views and his brother's conviction* were cited as race-neutral reasons for his dismissal, the Supreme Court nonetheless found the juror to be similarly situated to white jurors who expressed the same views of the death penalty yet were allowed to remain on the jury") (emphasis added).

Moreover, the D.C. Circuit pointed out in *United States v. Gooch* that it would become "farcical" if a reviewing court were put in the position of having to conduct a comparative analysis on every possible individual characteristic of various jurors in order to determine whether the jurors were "similarly situated":

> 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. The same is not true here.
>
> Appellant argues that the views of a number of black jurors — on issues such as the death penalty, rehabilitation, and trust of police officers — resemble the views expressed by several seated white jurors. The array of issues and comparisons would make a retrospective comparison of jurors based on a cold appellate record farcical. The record in this case does not, as in *Snyder*, allow for easy comparisons of jurors' views. For example, the jurors' views on the death penalty covered a wide spectrum, and several jurors wavered on that topic during questioning.

United States v. Gooch, 665 F.3d 1318, 1330-1331 (D.C. Cir. 2012).

The Fifth Circuit majority appears to stand alone in making this threshold determination that none of the seated male jurors was similar enough to the stricken females with respect to their death penalty views to merit a comparative analysis.

B. The Comparative Juror Analysis Conducted in this Case Represents an Even More Significant Departure from *Miller-El* than *Chamberlin*.

As set forth in great detail in the dissent in *Chamberlin v. Fisher* and in Ms. Chamberlin's certiorari petition to this Court, the Fifth Circuit majority's opinion in *Chamberlin* was wrongly decided. *Miller-El v. Dretke* and its progeny forbid a reviewing court from supplementing the specifically articulated race-neutral reasons given by the trial prosecutor with other reasons that might explain why the prosecutor kept white jurors. Comparative juror analysis is an effective tool for detecting discriminatory intent precisely because it depends upon the *words* of the trial prosecutor whose intent is at issue.

In the instant case, the Fifth Circuit disregarded the prosecutor's words (*i.e.*, the specific gender-neutral reasons he gave for his strikes against 12 women) in favor of a threshold comparison of a characteristic (*i.e.*, the death penalty views of the jurors) that formed no part of 9 of the prosecutor's 12 proffered gender-neutral reasons. The court's inattention to the prosecutor's words, however, went further than that. In fact, throughout the proceedings in this case, the trial prosecutor reiterated that his primary motivation in selecting jurors in this NGRI case was centered on their views about insanity and *not* on their views about the death

penalty. First, in state post-conviction proceedings when the prosecutor gave his gender-neutral reasons for his strikes, he explained:

> While the petitioner now places an inordinate amount of emphasis on the views each prospective juror held on the death penalty, she ignores the fact that there was also a guilt phase of the trial. *Many of the State's decisions regarding the suitability of jurors focused on whether a particular juror would be more or less likely to accept the petitioner's insanity defense.*
>
> For example, the petitioner now suggests that Janet Loupe should have been an ideal juror for the State because of her views on the death penalty. That view completely ignores the fact that Loupe was bipolar, suffered from depression and required medicine to help her sleep at night. She informed the court that she was taking seven prescription drugs at the time of jury selection, including lithium for the last eight years. She was also a patient at the mental health clinic in Raceland. It is not unreasonable for the State to question whether such personal issues would not make her more sympathetic to the defense which was expected to follow.

App. G at 8. The State again told the federal district court:

> The primary focus of voir dire was to secure a conviction, first and foremost. The initial part of the screening process was only to remove Witherspoon and Witt impaired jurors. ***The primary focus in voir dire was not on a particular juror's views regarding the death penalty, but on whether a particular juror's view of insanity as a defense fit more with the prosecution's way of thinking rather than the defense.***

State's Response to Petitioner's Objections at 10 (emphasis added). Once again, in its brief to the Fifth Circuit, the State even more explicitly asserted that its strikes against the female prospective jurors were motivated not by their death penalty views but by their receptiveness to the insanity defense:

> The simple fact is, as voir dire progressed, an ever-increasing proportion of potential jurors expressed reservations about executing a mother, even one who had killed her own children. *The State's strategy, accordingly, was adapted to accepting some jurors with*

> *reservations about the death penalty if the State felt they could nonetheless ignore the insanity defense and convict in the guilt phase of trial.*

Appellate Brief of Warden-Appellee at 18 (emphasis added). Accordingly, in relying solely on the jurors' death penalty ratings and views without ever engaging what the prosecutor actually said, the Fifth Circuit's analysis eschewed any meaningful assessment of the State's discriminatory intent. In effect, more than simply supplementing the prosecutor's proffered reasons, the Fifth Circuit deleted the prosecutor's reasons (provided at step two) from the *Batson*/*J.E.B.* analysis altogether.

Had the Fifth Circuit properly conducted a comparative juror analysis regarding the actual gender-neutral reasons provided by the State, it would have been compelled to conclude that the reasons given for the strikes against **Janet Loupe**, **Mary McFarland**, and **Erma Usea** were pretextual. *See Reed*, 555 F.3d at 380-81 ("the comparative analysis demonstrates what was really going on: the prosecution used its peremptory challenges to ensure that African-Americans would not serve"). Significantly, this Court has long recognized that it only takes discrimination against one juror to constitute an Equal Protection violation, but this case involves *at least* three. *See Synder*, 552 U.S. 472 ("'the Constitution forbids striking even a single prospective juror for a discriminatory purpose'") (citations omitted).[8]

[8] The strikes against five other female prospective jurors were also belied by the record. Specifically, the gender-neutral reasons provided by the State for its strikes

C. Other Circumstantial Evidence Establishes That the State Discriminated Against Female Prospective Jurors in Violation of *J.E.B. v. Alabama*.

In addition to the results of a properly-conducted comparative juror analysis, other circumstantial evidence supports the inescapable conclusion that the prosecutor used his peremptory strikes to discriminate against female prospective jurors including (i) the percentage of peremptory strikes used against females compared to the percentage of strikes used against males; (ii) the pattern of the prosecutor's strikes including the use of "backstrikes"; and (iii) the absence of any questions about the purported areas of concern and the inclusion of a questionnaire question about membership in the National Organization of Women.

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against Catherine Landry, Tracey Faucheaux, and Harriet Pennex applied equally well to males who were permitted to serve on Ms. Hebert's jury and, thus, do not hold up to proper comparative jury analysis. *Cf.* R.3306-3307, 5277-78 (seated male juror Jordan Orgeron stated repeatedly that he opposed the death penalty *under any circumstances* and, with respect to mental illness, believed that only Ms. Hebert could say what she was thinking on the day of the crime).

Further, with respect to prospective juror Faye Reynolds, the State did not offer as its gender-neutral reason for her strike anything about the substance of her answers. To be sure, there was nothing remotely problematic about her answers, which were uniformly fair and even-handed. Rather, the State claimed that she was more talkative with the defense. *See* App. G at 12. The record, however, does not support this claim, as a review of the entire jury selection indicates that the prosecutor *never* engaged in questioning Ms. Reynolds individually beyond asking her yes or no questions like whether she understood what he had explained and whether she had any questions. The State's proffered reason for striking Ms. Reynolds does not hold up. *See Miller-El*, 545 U.S. at 252 (noting the "pretextual significance" of a "state reason [that] does not hold up"). For the same reasons that the State's proffered gender-neutral reasons for striking prospective jurors Loupe and Reynolds simply do not hold up, its reasons for striking Arlene Orgeron (that her daughter saw a psychiatrist and she was more talkative with the defense) were mere pretext. *See* App. G at 11-12.

i. The statistical evidence indicates that the prosecutor was using his peremptory strikes to exclude people on the basis of gender.

The record in this case establishes that, of the 198 people called for service in Ms. Hebert's case, 112 (56%) were women, and 86 (44%) were men. Following the cause and hardship challenges, the parties were ultimately presented with a total of 40 jurors (28 females and 12 males) upon whom they exercised peremptory strikes because the court permitted the parties to exercise backstrikes. Both the State and the defense were given 12 main peremptory strikes and 2 alternate peremptory strikes. Following the use of peremptory strikes by each side, the final jury in this case was composed of 10 females and 2 males, and the alternates consisted of 3 males and 1 female.

In the instant case, the prosecution used all 12 of the peremptory strikes it exercised (11 during the selection of the jury and 1 during the selection of the alternates) on female prospective jurors and did not use a single peremptory on male prospective jurors. In effect, the State used 100% of its peremptory strikes to remove women from Ms. Hebert's jury. By contrast, despite unfavorable responses from a number of them, the prosecution used 0% of its strikes against qualified male veniremembers. As the Fifth Circuit has recognized, "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero." *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969); *see also Capitol Hill Hosp. v. Baucom*, 697 A.2d 760, 772 (D.C. Cir. 1997) ("Nothing is as emphatic as zero. Zero blacks were challenged by plaintiff."). To be sure, this Court in *Miller-El*

found less stark statistical evidence "remarkable." *See Miller-El*, 545 U.S. at 240-41 noting where prosecutor used 10 out of 14, or 71%, of its peremptory challenges against African-Americans, that "[h]appenstance is unlikely to produce this disparity."); *see also United States v. Thompson*, 528 F.3d 110 (2nd Cir. 2008) (reverse-*Batson* finding upheld where 65% of the venire was white, and the defendants used 12 of 14 strikes against whites). The extreme divergence in the prosecutor's use of peremptory challenges against women compared to men strongly supports an inference that gender discrimination motivated the State's choices. *See Batson*, 476 U.S. at 93 (noting that "seriously disproportionate exclusion" of black jurors "is itself such an 'unequal application of the law . . . as to show intentional discrimination").

As noted above, the final jury selected in Ms. Hebert's case contained 10 females, but that fact does little to resolve the inquiry into the prosecutor's intent considering the nature of the right at issue and the random makeup of the venire.[9] While the jury panels presented to the parties for peremptory strikes consisted of more women than men, the prosecution had abundant opportunity to strike males from the jury, as the trial judge directed the first opportunity to strike individual jurors to the prosecution and not to the defense. For instance, in the first round, the prosecution was given the first opportunity to strike three (3) males in that panel alone, including Timmy Guidry (who reported his own extensive psychiatric

[9] *See* Kavanaugh, *supra* n.4 ("A court may not simply ensure that an adequate number of blacks remain on the petit jury; rather, the judge must look into the circumstances of each peremptory challenge.").

history), but it declined to do so. R. 5158-61. Instead, the prosecutor exercised his first peremptory against Mary McFarland (purportedly because her brother was taking psychiatric medications). R. 5160. Likewise, in the second round of peremptory strikes, the trial judge again directed the first opportunity to strike jurors to the prosecution. R. 5295-302. The prosecution had the first opportunity to strike four (4) more males in that panel, including Jordan Orgeron, whose opposition to the death penalty was unequivocal and far more emphatic than Catherine Landry's, but it declined to do so. *See id.* Instead, the prosecutor struck two females from the panel, including Catherine Landry (purportedly because of her opposition to the death penalty) and backstruck one female from the earlier panel. R. 5300-1. In the third panel, the trial judge once again directed the first opportunity to strike jurors to the prosecution. R. 5419-24. That panel included two (2) males, but the prosecution chose instead to strike four females from the panel and backstrike three females from the earlier panels. R. 5422. The same pattern of accepting all men and rejecting a qualified female continued in the selection of the alternates. R. 5425.

ii. The pattern of the prosecutor's peremptory strikes indicates that the prosecutor was deliberately seeking to alter the gender composition of the jury.

Further, *Miller-El* also provides an example of how discriminatory intent can be gleaned from the prosecution's methods of conducting jury selection in a given case. In *Miller-El*, the Court addressed the Texas procedure of "jury shuffling" whereby either side may reshuffle the cards bearing panel members' names, thus

rearranging the order in which members of a venire panel are seated and reached for questioning. *See Miller-El II*, 545 U.S. at 253. This Court noted the way in which the prosecution's use of the jury shuffle was additional evidence of discriminatory intent:

> the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury.

Id. (quoting *Miller-El v. Cockrell*, 537 U.S. 346 (2003)). The Court noted that the prosecution never offered a racially-neutral reason for using jury shuffling. *Id.* at 254-55.

In the instant case, the prosecution did not simply use 12 peremptories on women, but four of those peremptories were backstrikes. In Louisiana, the practice of backstriking jurors is a method for delaying the use of a peremptory strike until after a juror has survived initial peremptory strikes and has been accepted to sit on the jury but not sworn in. Louisiana state and federal judges have recognized that backstriking may be an indicia of an intent to discriminate against jurors. *See*, *e.g.*, *Williams v. Cain*, 2009 WL 1269282 (E.D. La 2009) (holding that defense counsel failed to establish an inference of discrimination where "the State struck several potential African American jurors [but] did not use any back strikes in the process"); *State v. Weary*, 931 So.2d 297, 337 (La. 2006) (Johnson, J. dissenting) (noting that, when backstriking is used, it "is impossible [for trial counsel] to see the

pattern of [] discrimination"), *rev'd in related proceeding*, *Wearry v. Cain*, 136 S.Ct. 1002 (2016). The prosecutor exercised backstrikes against Arlene Orgeron, Harriet Pennex, Patricia Bonnette, and Erma Usea after each of these female veniremembers had survived at least two rounds of cause challenges and a round of peremptory strikes.

Indeed, the record reflects that the State backstruck female jurors each time the jury was composed of 12 people, and the judge was suspicious of the tactic. R. 5300 (the judge asking, "Every time we hit 12 you're going to backstrike?"). During a discussion with the parties about whether the process by which the prosecution was using its backstrikes was proper under the law, the judge said, "I take the Fifth." R. 5158. The trial judge's comments during jury selection indicated that he thought the prosecution might be doing something improper with its use of backstrikes, but no one intervened to curtail the prosecutor's methods.

iii. The absence of any follow-up questions or indications of the purported areas of concern and the inclusion of a question on the jury questionnaire about membership in the National Organization of Women.

Finally, this Court in *Miller-El* held that, if the prosecutor asserts that he was concerned about a particular characteristic but did not engage in meaningful *voir dire* examination on that subject, then the prosecutor's failure to question the juror on that topic is evidence that the asserted reason was a pretext for discrimination. *See Miller-El* II, 545 U.S. at 246. For instance, with respect to Janet Loupe, the prosecutor explained that her disclosure of a mental health history

was the reason for its strike against her. *See* App. G at 11. Yet, the prosecutor did not ask her any questions about her ability to serve as a result of her anxiety, nor did he challenge Ms. Loupe for cause on that or any other ground. R.3060, 3144. The prosecutor offered similar explanations for his strikes against Mary McFarland, Harriet Pennex, and Erma Usea, but, again, he did not ask any of them follow-up questions about this purported concern, never sought to challenge any of them for cause on this purported concern, and did not strike Ms. Pennex or Ms. Usea with his initial peremptory strikes, instead backstriking them after seeing the composition of the jury.

Finally, one of the questions posed to all jurors on the jury questionnaire raises serious concerns about whether women were being targeted for removal from Ms. Hebert's jury. Question #50 on the Jury Questionnaire stated:

> 50. Have you ever belonged to or been involved with the American Civil Liberties Union, or the *National Organization of Women* [sic], or Amnesty International? Yes ___ No ___; if the answer is yes, please list the group you had contact with and explain your participation: _____.

App. H at 5 (emphasis added). While the inclusion of a question about organizations like the ACLU and Amnesty International could be taken to be an effort to distinguish jurors on the basis of their political affiliation, it is impossible to view the inclusion of a question about the National Organization for Women (NOW) to be anything but a gender-based distinction.

Because the Fifth Circuit stopped its *Batson/J.E.B.* analysis upon concluding that none of the 12 women who were struck by the prosecutor could be compared to

the 5 men accepted by the prosecutor, the court never reviewed the abundant circumstantial evidence establishing a discriminatory intent.

The Fifth Circuit's ruling in Ms. Hebert's case, like Ms. Chamberlin's, demands this Court's review.

II. This Court Should Grant Review In Order to Give the Lower Courts Guidance About How to Analyze a Claim of Jury Discrimination When It Has Been Raised Via a Claim of Ineffective Assistance of Counsel.

At Amy Hebert's first degree murder trial, the prosecution used 12 peremptory strikes to remove qualified female prospective jurors. In a case in which the defendant was a female, whose role as an adoring mother was central to her defense, trial counsel should have immediately questioned the prosecutor's actions and lodged an objection when the prosecution used such a remarkable number of strikes against females. Indeed, the prosecution had never expressed any reservations regarding these jurors' ability to be fair and impartial, and 4 of the removals occurred through the use of backstrikes after both the State and the defense had accepted the female panel members. At the time of Ms. Hebert's trial, *J.E.B. v. Alabama* had more than ten years earlier established that it is a violation of both the defendant's and the individual juror's rights to equal protection to discriminate on the basis of gender. *See J.E.B.*, 511 U.S. 128 (1994). Still, trial

counsel did nothing to sound the alarm bell to protect the rights of the females in this capital trial.[10]

Accordingly, at her first available opportunity, Ms. Hebert in state post-conviction proceedings, which were held before the trial judge, raised a claim of ineffective assistance of counsel for failing to object to the prosecutor's discrimination during jury selection.[11] *See Strickland v. Washington*, 466 U.S. 668 (1984). In response to Ms. Hebert's claim, the prosecutor who tried the case provided gender-neutral reasons for the 12 strikes against female prospective jurors. As detailed above, several of those reasons did not hold up upon scrutiny, and their implausibility was further established by the other circumstantial evidence, including the percentage of strikes used against women, the pattern of backstriking, and the nature of the questioning of the jurors. Ms. Hebert argued that, because the trial prosecutor proffered gender-neutral reasons for his strikes, the question of whether a *prima facie* case was established became moot under *Hernandez v. New York*, 500 U.S. 352 (1991). This approach is consistent with a long line of Fifth Circuit caselaw. *See*, *e.g.*, *United States v. Williams*, 264 F.3d 561, 571 (5th Cir. 2001); *Ladd v. Cockrell*, 311 F.3d 349 (5th Cir. 2002) ("Where, as here, the State 'tendered a [gender]-neutral explanation," the question of the defendant's

[10] Lead trial counsel in this case subsequently lost his certification to handle capital trials.

[11] The petitioner in *Chamberlin v. Fisher* likewise raised a claim of ineffective assistance of counsel for failing to properly preserve the petitioner's *Batson* objection in state post-conviction after Ms. Fisher's original *Batson* claim was denied on direct appeal. *Chamberlin*, 885 F.3d 839.

prima facie case is moot, and our review begins at step two."); *United States v. Williamson*, 533 F.3d 269 (5th Cir. 2008) ("[w]here, as here, the prosecutor tenders a race-neutral explanation for his peremptory strikes, the question of Defendant's prima facie case is rendered moot and our review is limited to the second and third steps of the *Batson* analysis"); *United States v. Williams*, 610 F.3d 271, 280 (5th Cir. 2010) (same).

Further, Ms. Hebert also argued that the prosecutor's provision of gender-neutral reasons established the prejudice prong of *Strickland*: had trial counsel lodged an objection to the prosecutor's use of its strikes to exclude qualified women, the objection would have been sustained because the proffered reasons were pretextual. *See Miller-El*, 545 U.S. at 265 ("[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"). Put another way, because the prosecution discriminated against female prospective jurors, and trial counsel unreasonably overlooked the prosecution's strikes and failed to lodge this meritorious objection, Ms. Hebert argued that she was entitled to a new trial. This approach is consistent with the approach taken by the Fifth Circuit, and it was precisely the approach taken in the Sixth Circuit case of *Drain v. Woods*, 595 Fed. Appx. 558, 583 (6th Cir. 2014). *See Scott v. Hubert*, 610 Fed. Appx. 433, 435 (5th Cir. 2015) (holding that prejudice for failure to raise a *Batson* objection exists if the challenge would have been successful); *accord Shaw v. Dwyer*, 555 F.Supp.2d 1000, 1009 (E.D. Mo. 2008) (granting habeas relief for ineffective assistance of counsel for failure to raise a

J.E.B. claim in the defendant's motion for a new trial and noting that "it was not reasonable to conclude that the exclusion of the meritorious gender-based *Batson* claim was a strategic decision"; the "error was obvious").

A. None of the Courts Reviewing Ms. Hebert's Case Applied The Same Mode of Analysis.

While Ms. Hebert presented the same facts and the same legal standards to each of the state and federal courts reviewing her claim, none of the courts reviewing her claim applied the same mode of analysis. Not only did the lack of uniformity create a complicated procedural history in this case, *see supra*, but it ultimately resulted in the Fifth Circuit issuing opposing opinions—the majority and the concurrence—on Ms. Hebert's *Strickland/J.E.B.* claim. In the majority opinion, the Court adopted the approach advanced by Ms. Hebert (until it reached the comparative juror analysis). By contrast, in his concurring opinion, Chief Judge Stewart argued that the court should not conduct a "*Batson* analysis" (by which he apparently meant a comparative juror analysis) because the state court correctly concluded that no *prima facie* case existed in the first instance, and the gender-neutral reasons provided by the prosecutor "reeked of afterthought" because they were not given until five years after *voir dire*. *Hebert*, 890 F.3d at 230. Instead, the concurrence posited that the courts should treat Ms. Hebert's claim purely as a *Strickland* claim without reference to the gender-neutral reasons provided by the prosecution. *Id.* While both the majority and the concurrence ultimately reached

the same result,[12] the disparate reasoning in their opinions indicates that this Court's guidance is needed. Indeed, the concurrence in Ms. Hebert's case suggested as much. *See Hebert*, 890 F.3d at 230 ("There is little guidance on whether a trial court must evaluate deficient performance before prejudice.").

B. There is A Split in the Circuits Regarding How to Assess Prejudice From Jury Discrimination Raised *Via* a Claim of Ineffective Assistance of Counsel.

This Court should also grant review because there is a marked split among the state and federal courts about how to analyze a jury discrimination claim raised as ineffective assistance of counsel. First, among the federal circuit courts that have addressed the issue, there is disagreement about whether prejudice should be presumed when counsel fails to object to the kind of structural error represented by jury discrimination. The Eighth Circuit and a panel of the Eleventh Circuit have concluded that a petitioner must establish that the result of the trial itself would have been different had trial counsel raised the *Batson*/*J.E.B.* objection. *See Young v. Bowersox*, 161 F.3d 1159 (8th Cir. 1998) (relying on *Wright v. Nix*, 928 F.2d 270 (8th Cir. 1991)); *Jackson v. Herring*, 42 F.3d 1350, 1362 (11th Cir. 1995).

[12] It is unnecessary here to address the full array of errors in the concurrence's reasoning, but Ms. Hebert notes that, even considering just the *prima facie* evidence of discrimination (including the prosecutor's use of 100% of his peremptory strikes on qualified women, 4 of which were backstrikes after the jury had been fully composed, while failing to express any concerns about those females), counsel should have lodged an objection and requested that the State be compelled to provide gender-neutral reasons for its strikes. As noted above, this Court has found a *prima facie* case of discrimination on less compelling facts, and the gender-neutral reasons ultimately provided in this case were belied by the record.

By contrast, circuit courts that have more recently addressed this issue have come to a different conclusion. The Fifth, Sixth Circuit, Seventh Circuit, Ninth Circuit (en banc), and a panel of the Eleventh Circuit have concluded that a petitioner raising a *Batson/J.E.B.* claim *via* a claim of ineffective assistance of counsel need not show that the trial itself would have resulted in a different outcome but only that the objection if raised would have been successful; in that respect, prejudice may be said to be presumed. *See Scott v. Hubert*, 610 Fed. Appx. 433, 435 (5th Cir. 2015) (holding that prejudice for failure to raise a *Batson* objection exists if the challenge would have been successful); *Drain v. Woods*, 595 Fed. Appx. 558, 583 (6th Cir. 2014); *Winston v. Boatwright*, 649 F.3d 618 (7th Cir. 2011); *Carrera v. Ayers*, 699 F.3d 1104 (9th Cir. 2012); *Eagle v. Linhahan*, 279 F3d 926 (11th Cir. 2001). This approach is consistent with the approach taken by a number of state courts as well. *See*, *e.g.*, *In re the Commitment of George Melvin Taylor*, 272 Wis. 2d 642 (2004) (adopting the approach taken in *Davidson v. Gengler*, 852 F.Supp. 782, 786-87 (W.D. Wis. 1994)); *Ex Parte Yelder*, 575 So. 2d 137, 138 (Ala. 1991) (prejudice presumed where a prima facie case of deliberate discrimination exists, and defense counsel neglects to make a *Batson* objection); *see also Triplett v. State*, 666 So.2d 1356, 1362 (Miss. 1995) (citing with approval *Yelder's* holding).

The Fourth Circuit has not ruled on whether prejudice should be presumed, but the federal district courts have reached opposing conclusions on the issue. *Compare United States v. Lighty*, 2016 U.S. Dist. LEXIS 107377, *18 (D. Md. 2016) ("The Court adopts the *Carrera*/*Eagle*/*Drain* approach and rejects the *Jackson*

approach.") *with Lawlor v. Zook*, 2016 U.S. Dist. LEXIS 187862 (D. Ed. 2016) (relying on *Blakeney v. Branker*, 314 F. App'x 572 (4th Cir. 2009), for the inference that the Fourth Circuit would not presume prejudice).

In *Eagle v. Linahan*, the Eleventh Circuit explained the inherent problem in requiring a showing of prejudice at trial for the kind of structural error involved in a violation of *Batson* or *J.E.B.*:

> [W]e are troubled by the practical implication of that requirement when the alleged deficient performance is failure to raise a *Batson*-type claim at trial or on appeal. How can a petitioner ever demonstrate that the racial make-up of the jury that convicted him affected its verdict? Furthermore, in requiring a petitioner to make such a showing, we are asking that he convince us of the very conclusion that *Batson* prohibits: that the race of jurors affects their thinking as jurors. Certainly we acknowledge, as Justice O'Connor noted in *J.E.B. v. Alabama*, 511 U.S. 127, 148, 114 S. Ct. 1419, 1432, 128 L. Ed. 2d 89 (1994) (O'Connor, J., concurring), that, like any other attribute an individual brings to jury service, race matters, but the foundation of *Batson* is that race cannot be allowed to matter if the Equal Protection Clause is to be given its full due. The Equal Protection Clause simply prohibits the use of race as a proxy in the exercise of peremptory challenges. As Justice Kennedy observed in *J.E.B.*, 511 U.S. at 154, 114 S. Ct. at 1434, "nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice." That being the case, how can a court, in attempting to give force to the Equal Protection Clause, ask a habeas corpus petitioner to prove, or itself conclude, that the bare factor of juror race, standing alone, affected the outcome of his trial?

Eagle, 279 F.3d at 943 n. 22. The Eleventh Circuit panel's concerns comport with long-standing United States Supreme Court precedent holding that the prejudice caused by discrimination is not amenable to the trial prejudice standard. *See*, *e.g.*, *Ballard v. United States*, 329 U.S. 187 (1946) ("But reversible error does not depend

on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith* v. *Texas*, 311 U.S. 128, or an economic or social class, *Thiel* v. *Southern Pacific Co., supra*, deprives the jury system of the broad base it was designed by Congress to have in our democratic society."); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) ("It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the [discriminated against] laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection."); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (addressing the deliberate exclusion of African-Americans from the grand jury that handed down the defendant's indictment and concluding that "we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal").

This Court should grant review in this case to resolve this circuit split.

C. This Question Was Expressly Left Open in This Court's Recent Decision in *Weaver v. Massachusetts*.

Finally, this Court should grant review in this case because the question of whether prejudice should be presumed where a claim of discrimination during jury selection is raised via a claim of ineffective assistance of counsel was left open by this Court in its decision last year in *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017). In *Weaver*, the Court addressed whether the defendant must demonstrate prejudice when trial counsel fails to object to the closure of the courtroom during jury selection. Explaining the scope of the question presented, the Court stated,

> There is disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice in a case like this one—in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel. Some courts have held that, when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry. [Citations omitted]. Other courts have held that the defendant is entitled to relief only if he or she can show prejudice. [Citations omitted]. The Court does so specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection.

Weaver, 137 S. Ct. at 1907. Not only did the Court limit its holding to the context of closure of the courtroom during jury selection, but it identified a number of other structural errors that were not being addressed by the Court's opinion, and *Batson/J.E.B.* errors were one of those automatic reversal errors identified:

> Neither the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive

> undermining of the systemic requirements of a fair and open judicial process. . . . This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, see *Batson v. Kentucky*, 476 U. S. 79, 100 (1986); *J.E.B. v. Alabama ex rel. T. B.*, 511 U. S. 127–146 (1994), though the Court has yet to label those errors structural in express terms, see, e.g., Neder, supra, at 8. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. *And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.*

Id. at 1911 (emphasis added). This case, which involves powerful evidence of jury discrimination even before the prosecutor offered his gender-neutral reasons, also provides an excellent opportunity to resolve the question left open by *Weaver v. Massachusetts*.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this court grant Petitioner's petition and issue a writ of certiorari to review the decision of the Fifth Circuit; or grant this petition and summarily reverse; or, should this Court grant review in *Chamberlin v. Fisher*, stay Ms. Hebert's case pending resolution of *Chamberlin*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's *Motion to Proceed In Forma Pauperis* and *Petition for Writ of Certiorari* were served *via* regular U.S. Mail upon Assistant District Attorney Joseph Soignet of the Lafourche Parish District Attorney's Office, 406 W. 3rd Street, Thibodaux, LA 70302.

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