No. 18-6306

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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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?

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Amy Hebert respectfully submits the instant *Reply to the Respondent's Brief in Opposition*. In light of the page limitations imposed by this Court's rules on reply briefs, Ms. Hebert herein addresses the primary objections advanced by the State against a grant of certiorari in this case and otherwise rests on her Petition and the record in this case.[1]

STATEMENT OF THE CASE

In its *Brief in Opposition*, the Respondent disputes the number of peremptory strikes the prosecution used against women during jury selection as well as the number of gender-neutral explanations that the prosecution provided in state post-conviction. *See BIO* at p. 32 (arguing that Petitioner "repeatedly misstates and mischaracterizes the number and order of peremptory challenges used by the State, as well as the number of gender-neutral reasons offered by the prosecution for those strikes"). The Respondent also produced, for the first time, a chart that purports to reflect more accurately the "Order of Selection of Jury." *See BIO*, Appendix A.[2] According to the Respondent, the prosecution only used 9 of its 12 regular strikes, and it used 2 of its 2 alternate strikes, bringing the total number of its strikes to 11

[1] Ms. Hebert also refers this Court to the amicus brief filed in this case, as it is responsive to the Respondent's arguments regarding the disproportionate number of women in the venire. *See BIO* at p. 6, 32.

[2] The Respondent's chart provides little clarity about the progress of jury selection since jurors are, for instance, listed twice within the same panel and marked as both accepted and eliminated in the same line (*e.g.*, Patricia Bonnette in Panel 3). *See BIO*, Appendix A, p. 4. The color coding of the chart further highlights the pervasiveness of gender stereotypes. *Cf. Appendix* at B5 (Fifth Circuit's comparative analysis chart).

against women. *See id.* at p. 32, fn. 21; *see also id.* at p. 8 (asserting that the State had 3 unused peremptory strikes). Ms. Hebert submits that the record speaks for itself.

The record shows that prosecution used peremptory strikes on the following 12 female prospective jurors at the following trial record cites: (1) Mary McFarland, R. 5160; (2) Harriet Pennex, R. 5298; (3) Catherine Landry, R. 5297; (4) Faye Reynolds, R. 5300; (5) Arlene Orgeron, R. 5420; (6) Janet Loupe, R. 5420; (7) Erma Usea, R. 5421; (8) Patricia Bonnette, R. 5422; (9) Tracy Faucheaux, R. 5422; (10) Beth David, R. 5425; (11) Mary Davidson, R. 5426; (12) Randie Hebert, R. 5519. In its *Memorandum in Support* of its *Answer* to Ms. Hebert's state post-conviction petition, the State gave its gender-neutral reasons for striking each of these 12 prospective jurors. *See Petitioner's Appendix* at G11-12. The chart supplied in the Appendix to the Respondent's *Brief in Opposition* to this Court likewise confirms that the prosecution used 12 strikes against females. *See BIO*, Appendix A. Whether these strikes formed part of the prosecution's general or alternate strikes does not diminish the fact that it used 100% of its strikes against women and 0% against men. To be sure, neither the state court nor the federal courts considered the distinction between general and alternate strikes to be important to their analyses. *See Petitioner's Appendix* at E4-E5 (state post-conviction ruling); D12 (federal magistrate's ruling) ("Hebert does point to a fact that might be troubling on its face and in a vacuum, i.e., that the State used all of its peremptory challenges on women . . ."); B5 (Fifth Circuit ruling). Moreover, all of the jurors addressed in

Petitioner's comparative analyses have been drawn from the group of women struck with general peremptory strikes. *See Petition* at 21-22; *cf.* Appendix at B5 (Fifth Circuit comparative analysis considering male alternate jurors).

The Respondent also asserts that the "State had nothing to do with the question [about membership in the National Organization for Women], which was drafted and included in the questionnaire by the trial judge." *See BIO* at p. 35. The Respondent does not offer a citation to the record for this representation. *See id.* The record shows only that the discussions about the questionnaire the judge proposed to use, including any changes or objections thereto, happened off the record at the State's request. R. 1810-11. Considering that the question draws a patently gender-based distinction that has no relevance to the jurors' ability to be fair to both sides in this prosecution of a female defendant, its inclusion should have prompted an objection from the defense regardless of its origins. Notably, no such question was included in the subsequent Lafourche Parish capital trial of *State v. David Brown*, No. 520401.

REASONS FOR GRANTING THE PETITION

I. THE FACT THAT THIS CASE COMES BEFORE THE COURT IN HABEAS DOES NOT DIMINISH EITHER THE NEED FOR OR THE APPROPRIATENESS OF THIS COURT'S INTERVENTION.

Throughout its *Brief in Opposition*, the Respondent posits that this Court should not grant review of this case because Ms. Hebert's Questions Presented arise in the context of a habeas case. *See*, *e.g.*, *Brief in Opposition* at p. 14, 28. Specifically, the Respondent argues that this Court cannot "second guess" the state

courts, especially after their decisions have been upheld by the federal courts (*id.* at 15) and that a habeas case is not the appropriate vehicle for this Court to "give guidance" to the lower courts (*id.* at 28). As set forth below, Petitioner submits that Respondent is mistaken on both counts.

A. AEDPA Only Limits Federal Courts' Ability to Grant Relief For Claims Reasonably Adjudicated On the Merits By The State Court, and It Does Not Limit This Court's Review Of A Federal Court's Subsequent Ruling.

As an initial matter, the Respondent throughout his brief appears to conflate the §2254(d) analysis of the state court ruling with the federal courts' analysis of the underlying constitutional claim and, as a result, repeatedly extends the "clearly established federal law" language of § 2254(d) beyond its intended scope.[3] It is true that, in performing the § 2254(d) analysis, the federal court is required to focus its analysis on the Supreme Court law in effect at the time of the state court ruling and the facts that were before the state court. *See Cullen v. Pinholster*, 131 S.Ct. 1388 (2011); *Harrington v. Richter*, 562 U.S. 86, 101 (2011). However, if the state court ruling has unreasonably applied that law or unreasonably determined those facts, then the state court's ruling poses no barrier to relief from the federal court. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (§2254 does not preclude relief if either "the

[3] *See, e.g.*, *BIO* at p. 24 (arguing that the Sixth Circuit's ruling in *U.S. v. Atkins* was not "clearly established at the time the state courts ruled"); p. 24 (arguing that the "Fifth Circuit also has not created a new rule that conflicts with clearly established Supreme Court precedents"); p. 25 (arguing that *Foster v. Chatman* was not "clearly-established Supreme Court precedent" at the time the state courts ruled); p. 31 (arguing that Ms. Hebert's "approach on the issue of mootness is [not] clearly established").

reasoning [or] the result of the state-court decision contradicts [our cases]"). In effect, in a habeas case, the federal court is called to answer two separate questions:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different.

Richter, 562 U.S. at 101. Accordingly, in her habeas petition, Ms. Hebert set forth in detail the bases for concluding that the *state court's adjudication of her claim* constituted an unreasonable application of this Court's precedent and an unreasonable determination of the facts. *See* ROA.46-50. Notably, the Respondent does not attempt to defend the state court's actual application of *Batson v. Kentucky*, and he devotes a single paragraph to the state court's analysis of *Strickland v. Washington*, which constitute the relevant clearly-established law. *See BIO* at p. 17.[4] Ms. Hebert submits that this omission amounts to a concession. As set forth below, whether considering the state court's *Batson/J.E.B.* analysis or

[4] Instead, the Respondent devotes much of its brief to arguing that Ms. Hebert's failure to raise this claim on direct appeal should be treated as a waiver, a ruling that the state court never made or was even asked to make. *See*, *e.g.*, *BIO* at p. ii, 9-10, 19. A federal court will not apply a state procedural rule that the state court does not apply. *See Harris v. Reed*, 489 U.S. 255, 266 (1989) (holding that a state court must clearly and expressly rely on a state procedural default to bar federal review). Even if they had been presented to the state court, the Respondent's waiver arguments are meritless under Louisiana state law, which has long recognized that post-conviction is the most appropriate forum for ineffective assistance of counsel claims. *See*, *e.g.*, *State v. Stowe*, 635 So. 2d 168, 173 (La. 1994); *Coleman v. Goodwin*, 833 F.3d 537, 543 (5th Cir. 2016) (holding that Louisiana's procedural system "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of [IATC] on direct appeal . . . ." such that post-conviction counsel rather than appellate counsel is expected to raise such claims).

its *Strickland* analysis, it is clear that the state court did not reasonably apply this Court's precedent, and that conclusion does not require the citation of a case that looked exactly like Ms. Hebert's case. As this Court has explained,

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer* v. *Andrade*, 538 U.S. 63, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Panetti v. Quarterman, 551 U.S. 930, 953 (2007).[5]

Where the petitioner successfully overcomes the hurdle imposed by § 2254(d), the federal court owes no deference to the state court's ruling and is authorized to grant any relief to which the petitioner is entitled. *See id.*; *Brumfield v. Cain*, 135 S.Ct. 2269 (2015). In fact, after a petitioner has satisfied §2254, she is permitted to present new evidence in federal court.[6] *See Brumfield*, 135 S.Ct. 2269. In resolving whether the petitioner is entitled to relief for a constitutional violation, the federal

[5] Furthermore, the state court was free to assess the *J.E.B.* aspect of Ms. Hebert's claim before the *Strickland* aspect of her claim, or vice versa, and Ms. Hebert never argued otherwise, despite the Respondent's suggestion. *See BIO*, p. 16. They do not, however, enjoy the freedom to unreasonably apply either *Batson/J.E.B.* or *Strickland*, which were both clearly established precedent. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (citing *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000)).

[6] Ms. Hebert requested evidentiary hearings on her claim in both state and federal court which were denied.

court must take into account its own precedent as well as the precedent of this Court, and this Court has always played an important role in giving guidance to the federal courts. As this Court has explained,

> The inquiry mandated by the [§ 2254(d)] amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; the amendment does not alter the underlying grant of jurisdiction in § 2254(a), see n. 7, *supra*. When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). At the core of this power is the federal courts' independent responsibility -- independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States -- to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.

Williams v. Taylor, 529 U.S. 362, 378-379 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (observing that, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief"). Where both the state court and the federal court have erred in resolving a constitutional claim in the habeas context, this Court has not hesitated to intervene. *See*, *e.g.*, *Panetti*, 551 U.S. 930 (granting relief where the state court unreasonably applied the standard in *Ford v. Wainwright*); *Brumfield*, 135 S.Ct. 2269 (granting relief where the state court's factual determinations were unreasonable under *Atkins v. Virginia*); *Wiggins*, 539 U.S. 510 (granting relief where the state court unreasonably applied the standard in

Strickland v. Washington); *Miller-El v. Dretke*, 545 U.S. 231 (2005). In fact, this case is a particularly appropriate vehicle for this Court's guidance considering the disagreement between the Fifth Circuit panel majority and the concurring opinions regarding how the instant claim should be reviewed. *See Respondent's BIO* at 13, 17-18, 38. As set forth in Ms. Hebert's *Petition*, like the state court, the majority misapplied *Batson* and *Miller-El*, which is what brought this case before this Court and what aligns this case with *Chamberlin*. *See Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018), *cert petition pending Chamberlin v. Hall*, No. 18-6286. *Chamberlin*, of course, is also a case brought under 28 U.S.C. § 2254. Ms. Hebert's claim has yet to receive a meaningful adjudication on the merits.

B. The State Court Did Not Reasonably Adjudicate Ms. Hebert's Constitutional Claim, So She Was Entitled To Federal Review Of Her Claim Without Any Deference To The State Court Ruling.

The Respondent's accusation that Ms. Hebert has "ignored" the fact that this case comes to the Court in federal habeas is also not supported by the record. *See BIO* at p. 14. In fact, Ms. Hebert has argued throughout the federal proceedings that the federal courts owed no deference to the state court's adjudication of her claim because it was both contrary to and involved an unreasonable application of both *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 128 (1994), and *Strickland v. Washington*, 466 U.S. 668 (1984), and because it was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). ROA.46-50.

First, with respect to the *J.E.B.* aspect of Ms. Hebert's claim, Ms. Hebert argued that the state court disregarded the clearly-established three-step

framework for assessing a claim of jury discrimination. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Not only did the court fail to articulate the *Batson/J.E.B.* legal framework, but its bald listing of the "many sufficiently gender-neutral explanations" in summary fashion does nothing to address the legal inquiry imposed by the *Batson/J.E.B.* framework. While the state court was repeating the gender-neutral reasons provided by the prosecutor, indicating that it had moved beyond the *prima facie* case, it did not assess the credibility of these gender-neutral explanations. As this Court noted in *Miller-El v. Dretke*, "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. . . . If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." 545 U.S. at 241.

The state court's unreasonable application of the *Batson/J.E.B.* framework also resulted in an unreasonable determination of the facts. *See*, *e.g.*, *Reed v. Quarterman*, 555 F. 3d 364, 368, 382 (5th Cir. 2009) (federal court's review shows the state court's "conclusion that the prosecution did not discriminate on the basis of race in using its preemptory strikes was an 'unreasonable determination of the facts' under section 2254(d)(2)). Not having conducted any analysis of the credibility of the prosecutor's gender-neutral reasons in light of the rest of the record, which included the use of 100% of its strikes on women, backstrikes of women to which the prosecution had posed no questions on the purported areas of concern, and comparative analysis between the struck jurors with seated jurors, the state court failed to make the factual findings required by the third step of *Batson*.

Significantly, a *Batson/J.E.B.* violation occurs even if the prosecution discriminates against a single juror, but the state court's analysis, which failed to tether the State's gender-neutral explanations to the individual jurors, never could have uncovered it.[7] Where the state court fails to consider relevant facts as required by law in reaching its decision, its determination is both an unreasonable application of the law and an unreasonable determination of the facts. *See*, *e.g.*, *Miller-El v. Dretke*, 545 U.S. at 240 (finding that the state court's ruling was an unreasonable determination of the facts in light of the evidence in the state court proceeding); *see also Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (*per curiam*) (granting habeas relief and noting that the state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"); *Williams v. Taylor*, 529 U.S. at 397-98 (state court's application of *Strickland* standard to Williams' ineffective assistance claim "was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation").

Second, the state court's handling of the *Strickland* aspect of her claim involved an unreasonable application of clearly-established federal law and was based on an unreasonable determination of the facts in light of the state court record. *See* 28 U.S.C.S. § 2254(d)(1)-(2). While the state court in its ruling at least

[7] *See Snyder v. Louisiana*, 552 U.S. 472 (2008) ("'the Constitution forbids striking even a single prospective juror for a discriminatory purpose'") (citations omitted).

articulated the legal standard established by *Strickland v. Washington*, 466 U.S. 668 (1984), it applied neither prong of the *Strickland* two-part test to the relevant facts, nor did it suggest that the failure to lodge a *J.E.B.* objection was somehow strategic. Rather, the judge's generic reference to counsel's actions in defending Ms. Hebert "against the charges" was unresponsive and inapposite to Ms. Hebert's specific allegation, and supporting facts, that counsel was ineffective during jury selection.[8] This Court has recognized that such an analysis does not amount to a reasonable application of the law. *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 388-90 (2005) (finding that the state court's "conclusion" that "defense counsel's efforts [in preparing for capital sentencing hearing] were enough to free them from any obligation to enquire further" into prior crime evidence that State planned to use in aggravation "fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion"). Accordingly, having unreasonably applied both *Batson/J.E.B.* and *Strickland* and unreasonably determined the facts, the state court's ruling was not entitled to any deference from the federal court.

C. The State Court Did Not Address The Prejudice Prong of Ms. Hebert's Claim, So The Federal Courts' Review Was *De Novo*.

Finally, the Respondent suggests that this case is not an appropriate vehicle for resolving the question of how prejudice should be assessed where trial counsel fails to object to jury discrimination because there is no "clearly-established"

[8] Indeed, the state court judge recited this same generic mantra—that "petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges"—twice in its analysis of a separate ineffective assistance of counsel claim. *See Petitioner's Appendix* at E-6-7. The Respondent likewise repeats it by rote. *See BIO* at p. 2, 11, 17, 36.

Supreme Court precedent on this issue. *See BIO* at p. 25-29. As an initial matter, whether there is "clearly-established law, as determined by the United States Supreme Court" is only relevant to the § 2254 inquiry, and it is not dispositive of the underlying constitutional claim. To be sure, had the state court adjudicated the question of prejudice, its reasoning and result would have been scrutinized by the federal court according to the standard set forth in § 2254. However, by the Respondent's own admission, the state courts did not address the issue of prejudice under *Strickland*. *See BIO* at p. 26 ("none of the lower courts' decisions relied on the prejudice prong of *Strickland*"). Where the state court to which the claim was presented failed to adjudicate a component of the claim on the merits, then §2254(d) by its own terms is inapplicable. *See Wiggins*, 539 U.S. at 534 ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis"). Accordingly, the federal court owed no deference to the state court's prejudice ruling, which does not exist, and it had the authority to assess prejudice *de novo*. *See*, *e.g.*, *Rompilla*, 545 U.S. at 390 ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*.") (internal citation omitted).

In fact, most of the federal cases cited in Ms. Hebert's discussion of the circuit split regarding whether prejudice under *Strickland* is established by showing that the *Batson/J.E.B.* objection would have succeeded or whether prejudice is established by showing that the result of the trial itself would have been different

were habeas decisions subject to the current provisions of § 2254. *See Petition* at p. 33-35 (*e.g.*, *Young v. Bowersox*, 161 F.3d 1159 (8th Cir. 1998); *Scott v. Hubert*, 610 Fed. Appx. 433 (5th Cir. 2015); *Drain v. Woods*, 595 Fed. Appx. 558 (6th Cir. 2014); *Winston v. Boatwright*, 649 F.3d 618 (7th Cir. 2011)); *see also Davis v. Sec'y of Dept. of Corr.*, 341 F.3d 1310 (11th Cir. 2003) (granting habeas relief on the ground that the failure to raise the objection at trial deprived the defendant of a meritorious claim on appeal).[9] Accordingly, both the Fifth Circuit and this Court are empowered to determine whether prejudice under *Strickland* has been established.

II. IN REVIEWING THE MERITS OF THE UNDERLYING CLAIM, THE FEDERAL COURTS WERE FREE TO INTERPRET THIS COURT'S PRECEDENT, BUT THEY WERE NOT FREE TO IGNORE IT.

In his *Brief in Opposition*, the Respondent too finds fault with the Fifth Circuit majority's opinion, further establishing the need for this Court's guidance. Specifically, the Respondent asserts that (1) the court should not have found moot the question of whether a *prima facie* case existed after the prosecutor provided a "non-exhaustive" list of gender-neutral reasons in a "non-required" filing, and (2) the court should not have engaged in a comparative juror analysis when the state court did not engage in such an analysis. *See BIO* at i-ii, 17-18, 19, 24, 30. Ms. Hebert submits that the Respondent is mistaken on both counts.

First, contrary to the Respondent's assertions, the prosecutor in this case was directly ordered by the state court to respond to the claims in Ms. Hebert's petition under a provision of Louisiana law, La. C.Cr.P. art. 927, that provides that the

[9] Ms. Hebert likewise argued prejudice in this respect. *See* ROA. 45. None of her arguments were adjudicated.

State must respond where the petitioner's allegations, if true, entitle her to relief. ROA.773. In fact, the prosecutor was so ordered on three separate occasions. Accordingly, the suggestion that the *Memorandum of Law* filed by the State was somehow discretionary is belied by the record and the law. *See BIO* at p. i-ii, 11. Moreover, the Respondent's current attempt to characterize his gender-neutral reasons as "non-exhaustive" is also belied by the record. In its *Memorandum of Law*, the prosecutor wrote, "although the State respectfully submits that the petitioner has failed to establish a prima facie *Batson/J.E.B.* violation, it would nonetheless proffer the following gender-neutral reasons for exercising each of its peremptory strikes in this matter." *Petitioner's Appendix* at G10. The prosecutor never represented that he was offering an incomplete list, and, indeed, the list was quite exhaustive.[10]

Further, the Fifth Circuit's conclusion that the issue of whether a *prima facie* case was moot was not only consistent with this Court's and the Fifth Circuit's precedent, but it was consistent with the state court's ruling in this case. As noted above, the state court did not address whether a *prima facie* case existed, instead resting its ruling on the "many sufficiently gender-neutral explanations" provided by the prosecutor. In effect, the state court took the same path as the Fifth Circuit

[10] Nor is there merit to the Respondent's claim that his inability to give gender-neutral reasons contemporaneously should defeat this claim. *See BIO* at p. 21. Courts routinely review *Batson/J.E.B.* claims in which the prosecution is not called upon to explain their actions until years after trial, requiring them to rely on the transcripts. *See, e.g., Miller-El II*, 545 U.S. at 235-36 (*Batson* hearing held two years after *voir dire*, requiring the trial judge to rely on the transcripts); *Reed v. Quarterman*, 555 F.3d 364, 369, 373 (2009) (*Batson* hearing held ten years after *voir dire*, and prosecutors noting that they had no "independent recollection of the jury selection"). Again, the Respondent never claimed that he could not recall his reasons.

panel majority: it accepted that a *prima facie* case of discrimination existed. Once the prosecutor stated his gender-neutral reasons, the courts were not permitted to ignore them. *See Hernandez v. New York*, 500 U.S. 352, 363 (1991) ("Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, 'the trial court then [has] the duty to determine if the defendant has established purposeful discrimination.'") (citing *Batson*).

Second, the Respondent takes issue with the Fifth Circuit panel's comparative juror analysis. As set forth in detail in Ms. Hebert's *Petition*, she too believes that the majority's comparative analysis directly conflicts with the guidelines set forth in *Miller-El*, militating in favor of this Court's review. *See Petition* (Questions Presented 1 and 2). The Respondent, by contrast, complains that the majority should not have engaged in a comparative juror analysis at all because the state court did not do so. *See BIO* at 19. As noted above, the state court never conducted a comparative analysis because it prematurely curtailed the *Batson/J.E.B.* analysis without addressing the third step. Having unreasonably applied the legal framework in the first instance, the state court deserved no deference from the federal courts, and the Fifth Circuit was correct in undertaking a comparative juror analysis, albeit a flawed one.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's *Reply Brief* was served *via* e-mail and U.S. Mail or FedEx 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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