No. 18-8692

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY ADAMS, JR.,

Petitioner,

v.

ROBERT NEUSCHMID, ACTING WARDEN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The BIO does not dispute that the state courts disregarded several fundamental principles this Court has announced to implement *Batson v. Kentucky*, 476 U.S. 79 (1986). Federal review should not have been limited to 28 U.S.C. § 2254(d). Even if it were, this Court should grant the petition, vacate the judgment and remand for further consideration in light of *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019), which broke "no new legal ground" but "simply enforce[d] and reinforce[d] *Batson* by applying it" to the facts of the case before it. *Id.*, at 2235.

I. The Prosecutor's Disingenuous Stated Reasons

A. The Prosecutor Admitted Trying to Deceive the Court

Although touting the prosecutor's claim she "challenged Juror No. 6,[1] who was a pastor and a white man, in part because he had a brother who was incarcerated on multiple occasions,"[2] BIO 4, the BIO ignores that "The trial court found this reason for kicking [Prospective Juror Armstrong] not credible." App. 30a n.17. Instead of crediting her stated reason for striking Prospective Juror

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1. Unless intended to create confusion, the State's unexplained reference to Prospective Juror Armstrong only as "Juror No. 6" is inexplicable. Having been struck, he was not Juror No. 6.

2. Yet another embellishment, there is no evidence Prospective Juror Armstrong's brother was "incarcerated on multiple occasions." 2 R.T. Aug. 296. The entire testimony is that he had "an older brother who was incarcerated for a couple of years, but this was at least 40 plus years ago." 2 R.T. Aug. 217. There was no evidence he was incarcerated more than that one time four decades earlier. The magistrate judge inattentively accepted the prosecutor's assertion at face value, App. 30a, as the BIO does now, BIO 4, heedless that the prosecutor was exaggerating the record to rationalize her strikes. *Cf.* 2 R.T. Aug. 217.

Armstrong, the magistrate judge recognized that "the [trial] court thought the prosecutor struck [him] because he is a pastor and 'soft hearted,'" App. 30a n.17, which the prosecutor conceded was accurate. 2 R.T. Aug. 296.

B. The "Tattoo" Rationale

The trial judge never credited the prosecutor's tattoo rationale. Even after hearing her rationalization for striking people with tattoos, the judge reiterated that "under an objective standard I'm not sure your explanations make that much sense." 2 R.T. Aug. 299. He ultimately only credited *her* even though doubting the persuasiveness of her explanations. *Id.*; Pet. 1, 23.[3] He never wavered from doubting her stated reason of striking Ms. Hamilton for her inconspicuous tattoo.[4]

C. The "Recent Arrest" Rationalization

There is *no evidence* Prospective Juror Hamilton's father was "convicted of a felony and incarcerated for nearly a decade." BIO 13. The record does not support the hypothesis Ms. Hamilton's father was *ever* convicted of *anything* or incarcerated for *any time* after 1996, let alone remained in custody until his death in 2004.

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3. Although the BIO notes that the prosecutor struck "another prospective juror with visible tattoos," BIO 11, the prosecutor explained she was referring to a person who "has tattoos all over his body." 2 R.T. Aug. 299. Ms. Hamilton did not have tattoos "all over her body." A professional sales representative for a Fortune 50 company, she had a single, small, discrete tattoo "on the back of [her] ear." 1 R.T. Aug. 124. A business professional's single inconspicuous tattoo is not comparable to having "tattoos all over his body."

4. Not to mention its inconspicuous location, the prosecutor undoubtedly had to be searching for it since tattoos are much less conspicuous on black skin.

Ms. Hamilton stated only that her father had been incarcerated *in* 1996, "over ten years ago" at the time, and that he "passed away *in* '04." 1 R.T. Aug. 59. She did not state her father was convicted of any crime, what he might have been convicted of, or that he was incarcerated anytime other than in 1996, let alone remaining incarcerated until he died.[5] Although she asked Ms. Hamilton other questions, the prosecutor never asked whether her father had been convicted, what he was convicted of, how long he was in custody, or why he had been incarcerated.

Rather than confirm that he was imprisoned for eight years, after learning he had been in custody in 1996, no one asked whether he was in custody in lieu of bail, pending the posting of bail, or whether he served a custodial sentence. For all the record shows (and for all the prosecutor knew), Ms. Hamilton's father may have simply been held overnight until bail was posted and released the following day without ever being in custody again.[6]

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5. The entire portion of the relevant colloquy is:

[Ms. Hamilton]:	I did have a family member that was actually incarcerated.
The Court:	How close was that family member?
Prospective Juror:	It was my father.
The Court:	How long ago did that happen to your father?
Prospective Juror:	'96.
The Court:	So over ten years ago?
Prospective Juror:	That is correct.
The Court:	And is he out now?
Prospective Juror:	My father passed away in '04.

1 R.T. Aug. 59.

6. Although the magistrate judge's report and recommendation claims Ms. Hamilton's father had been "incarcerated from 1996 until he passed away in 2004," BIO 1, the magistrate sources that purported fact to 1 R.T. Aug. 59, which is quoted above. App. 26a. *Cf.* n.5, *ante*. The record shows the assertion, and assumption, to be erroneous. 1 R.T. Aug. 59.

D. Questioning Mr. Belton's Intelligence

The BIO does not deny that claiming Prospective Juror Belton would have a "difficult time with the concept" reeks of stereotype, BIO 13, which supports an inference of discriminatory purpose. *Flowers*, 139 S.Ct. at 2246.

The record does not support the BIO's claim (not advanced by the prosecutor) that Prospective Juror Belton would be "reluctant to convict." BIO 13. Mr. Belton embraced joint, vicarious criminal liability and was committed to subordinating any personal opinions that might conflict with the law.[7] That the defendants were all children did not enter his calculus. He had no reticence towards holding them responsible for acts foreseeable to a reasonable person – even if not foreseeable to them as 15 year olds – because "Based on the absolute facts you have to come to that agreement *they're guilty, that's the law*." 2 R.T. Aug. 282-83. He was equally unsympathetic to excuses: "Regardless of the reason they're committing the violence, [I] can still hold them responsible for that." 2 R.T. Aug. 281.

Although acknowledging that the prosecutor "followed up by asking whether [Mr. Belton] accepted the idea that it was not necessary to have an eyewitness," BIO 2, the BIO ignores Mr. Belton's unqualified answer: "Yes." 2 R.T. Aug. 289; App. 27a. He later *rejected* the need for eyewitness testimony. 2 R.T. Aug. 290-91.

The BIO's discussion of Mr. Belton's responses to the prosecutor's inquiry elides that Mr. Belton never questioned the relevance or helpfulness of

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7. "[A]s I was saying, if it is a corporate thing they have already agreed to what they was going to do, then, *yes, they should all be charged*. However, if one guy went haywire and burns the building down, I don't know if they should be charged *unless it is under the law*." 2 R.T. Aug. 285.

circumstantial evidence. He specifically agreed circumstantial evidence *was* relevant. 2 R.T. Aug. 289. Mr. Belton never doubted circumstantial evidence *could* be sufficient. 2 R.T. Aug. 290-91. As the trial judge recognized, he only paused when the prosecutor's "over-simplified hypotheticals" were incomplete where, as the trial judge affirmed "he said, well, there is other stuff you would want to look at, which is exactly what you would want [jurors] to do." 2 R.T. Aug. 298.[8]

Purported concerns about Mr. Belton's legitimate caution before relying on speculation to convict are belied by the BIO's and prosecutor's concessions that Mr. Belton's responses were "fair" and "good point[s]." BIO 2; 2 R.T. Aug. 289.

Although the BIO misrepresents Mr. Belton's answers as "suggest[ing] that he would not be able to vote to convict the defendant unless there was eyewitness testimony," BIO 4, the prosecutor's actual concern about Mr. Belton's view of circumstantial evidence is belied by the fact that, "for each of the shootings, eyewitnesses identified the defendants involved as the shooters." App. 17a n.9.

Whatever could be said about the sufficiency of a case not bolstered by eyewitness testimony, the rationalization was not "related to the particular case to be tried." *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).[9] Because ancillary to the case

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8. There was no "perhaps" about it. Mr. Belton clearly *accepted* circumstantial evidence as relevant and questioned only whether the circumstances the prosecutor hypothesized were *sufficient* to return a conviction, distinctions the prosecutor recognized as "fair" and a "good point." 2 R.T. Aug. 288-89. See also *id.*, at 290-91.

9. Because the prosecutor's case relied on eyewitness identifications for each of the defendants, not attenuated inferences from circumstantial evidence, it was the defense that hinged its case on circumstantial evidence.

For example, although witnesses thought they saw Jerry Adams at the first shooting, (1) Adams's high school teacher confirmed that he had been in school, far

to be tried, the prosecutor's harping on Mr. Belton about circumstantial evidence was further evidence of pretext. Purported concerns that Mr. Belton "would be reluctant to convict a defendant based upon circumstantial evidence, even strong circumstantial evidence," BIO 13, are makeweight in the context of a case where "eyewitnesses identified the defendants involved as the shooters." App. 17a n.9. Picking a fight with a prospective juror about an ancillary topic reflects discriminatory purpose. *Flowers*, 139 S.Ct. at 2247.

II. Deficiencies in the State Court's *Batson* Analyses

A. The BIO Does Not Dispute That the State's Comparative Analysis Contravened this Court's Precedents

The BIO does not deny that, although one of the stated reasons for striking Ms. Hamilton – "hav[ing] a family member arrested recently" – did not apply to her because her father had been arrested over 13 years earlier, 1 R.T. Aug. 59, the state courts ignored this discrepancy. *Cf.* Pet. 23, 25 n.11, 28.

The BIO also concedes "it is true that the prosecutor did not challenge certain jurors whose family members had been arrested." BIO 12. But the prosecutor did not simply give a pass to "certain" jurors. The BIO does not deny that she accepted

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away, shortly before the shooting, (2) he was escorted home by a friend after class, (3) the time and distance were insufficient for Adams to walk home and then be at the remote shooting site only 15 minutes later, and (4) although Gholston and Jefferson were indisputably involved in two shootings barely an hour apart, Adams was not present at the second shooting while Gholston and Jefferson had the two pistols one of the witnesses thought was being held by the person he mistook for Adams. A preference for eyewitness testimony over circumstantial evidence would have made Mr. Belton an ideal juror for the prosecution, not the defense.

four White jurors who had either personally been arrested or had family members arrested. Pet. 11. Contrasting TJ7's husband's decades-old arrest is inconsequential where the prosecutor explained she was only concerned with "recent" arrests. The BIO does not defend ignoring TJ1's experience within the past two years, Simpson's within 6 years, or the seeming disinterest in the timing of White TJ6's and TJ12's family members' arrests.

The BIO doesn't attempt to justify, any more than the state courts, the prosecutor's acceptance of four White jurors apart from the fact that Ms. Hamilton "had a visible tattoo, unlike the other jurors with family members who had been arrested." BIO 6, 13. The inconspicuous tattoo merely confirms that "potential jurors are not products of a set of cookie cutters." *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005). The BIO clings to the tattoo rationale even though the trial judge said it was "very difficult to find that explanation credible," 2 R.T. Aug. 298-99, because the prosecutor subsequently "elaborated" on it. BIO 11. The BIO ignores, however, that even after her elaboration, the trial court remained unconvinced: "I'm not sure your explanations make that much sense." 2 R.T. Aug. 299.

Despite rationalizing the prosecutor's disparate use of the "recent arrest" rationale by compounding it with the discredited tattoo rationale, BIO 13, the BIO (like the state appellate court) does not deny nor distinguish that "a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 139 S.Ct. at 2249 (emphasis original). Nor does the BIO deny that requiring a White twin of Ms. Hamilton

"would leave *Batson* inoperable." Pet. 26, quoting *Miller-El*, 545 U.S. at 247 n.6.

Because the trial court remained dubious of all the prosecutor's explanations, conjoining the discredited tattoo reason does not mitigate the prosecutor's discriminatory use of the inapplicable "recent arrests" rationale for striking Ms. Hamilton.

Second, unlike the state appellate court, the BIO embellishes upon the trial record to argue that, unlike Ms. Hamilton's father, the arrests of seated jurors' family members "were in the distant past, were for relatively less serious offenses such as driving under the influence, or apparently did not lead to conviction and incarceration." BIO 12.

The BIO doesn't dispute that, rather than being "in the distant past," TJ1's son had been arrested only *two* years earlier, in contrast to Ms. Hamilton's father, whose encounter was 13 years earlier, Pet. 11, 18, 25; 1 R.T. Aug. 59, which the prosecutor herself conceded was "*not* a short time ago." 2 R.T. Aug. 299. Nothing in the record supports the BIO's assertion that the criminal justice contacts of *any* of the *four* White jurors was "in the distant past." Pet. 11.

Nor is there any support for the assumption that Ms. Hamilton's father's detention was not also for a "relatively less serious offense such as driving under the influence." The record contains *no* indication why Ms. Hamilton's father was incarcerated, only that he accepted responsibility for "something he did. It was basically his choice and the consequences he had to pay," 2 R.T. Aug. 60, self-criticism one might hear from someone arrested for DUI or failing to attend to a

traffic ticket.[10]

The prosecutor admitted asking about Ms. Hamilton's inconspicuous tattoo, 1 R.T. Aug. 124, so she could rationalize a future strike. 2 R.T. Aug. 296. Had she been genuinely concerned about the nature of Ms. Hamilton's father charges, the disposition, or the cause and length of his incarceration, she would have asked about it. Instead, it remains telling that rather than inquire, she was content to rely on speculation and suppositions. Moreover, if she was actually concerned about "recent arrests," it is also telling that she did not inquire about the law enforcement contacts of White jurors she allowed to remain on the jury. Pet. 11.

The district court's juror comparison is no substitute. *Cf.* BIO 8. The BIO doesn't dispute that, rather than adhere to this Court's rules, "the magistrate judge . . . manufactured reasons the prosecutor could have had for striking other jurors" even though "the prosecutor never identified the reasons for any of her other strikes." Pet. 21 n.8.[11] The magistrate judge's approach directly contradicted *Miller-El*'s recognition that "If the stated reason does not hold up, its pretextual

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[10] As observed above, there is no support for the assertion Ms. Hamilton's father "was convicted of a felony and incarcerated for nearly a decade," BIO 13, an exaggeration not even the trial prosecutor advanced.

[11] Rather than evaluate the *prosecutor's* reasons, the magistrate judge conjured up post-hoc rationalizations the prosecutor never mentioned and *assumed* those hypothesized reasons explained the strikes. App. 40a-41a. The magistrate's approach disregarded this Court's clear instruction that *Batson* "does not call for a mere exercise in thinking up any rational basis" for a prosecutor's strikes. *Miller-El*, 545 U.S. at 252. There is no evidence the magistrate's hypothesized reasons were the prosecutor's actual reasons for the strikes. Because "illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.*, at 241.

significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252.

B. The State Does Not Defend Numerous Other Legal Errors in the State Courts' Rulings

Although blithely repeating the magistrate's claim that "[t]here is no indication in the record that the trial court did not properly evaluate [the] credibility of the prosecution's reasons for striking the jurors," BIO 8; App. 37a, the BIO does not dispute that the trial erroneously:

- focused only on the prosecutor's personal credibility rather than "the persuasiveness of [her] justification," Pet. 23;
- failed to weigh the prosecutor's invocation of a discredited reason for striking Prospective Juror Armstrong, Pet. 23;
- failed to shift the burden to the prosecutor to show that her pretextual reasons were not determinative, Pet. 24; and
- failed to give weight to the prosecutor's aggressive and improper questioning of Mr. Belton, Pet. 24.

The BIO does not dispute that the trial judge ultimately failed to "consider the prosecutor's [stated] explanations in light of *all* of the relevant facts and circumstances." *Flowers*, 139 S.Ct. at 2243 (emphasis added).

Contrary to the BIO, the trial judge never found *any* of the prosecutor's explanations credible. He reaffirmed that they remained objectively implausible and made little sense. Instead of evaluating the credibility of the proffered explanations, Pet. 23 & n.9, the trial judge denied the *Batson* objection upon "find[ing] that *you're* credible." 2 R.T. Aug. 299.[12]

[12.] The trial court did not find the prosecutor gave "a credible explanation" for any strike, let alone "particularly in combination with [Ms. Hamilton's] father's

Although the appellate court claimed the trial court purported to "understand" why the prosecutor perceived Mr. Belton as unfavorable, the trial court never endorsed any perception that Mr. Belton was "unfavorable." The trial judge said he "can see where . . . you *might* think that he has some difficulty," but never that Mr. Belton was unsympathetic or hostile to the prosecution. 2 R.T. Aug. 298. Moreover, he clarified:

> That is largely, frankly, in my opinion *a product of the way you asked the questions*. Seemed to be kind of a critical thinker. As you tried to give him over-simplified hypotheticals, he said, well, there is other stuff you would want to look at, which is exactly what you would want to do.

2 R.T. Aug. 298.

The BIO does not defend the appellate court's failure to weigh the trial court's caveat laying fault at the prosecutor's feet.

Further, in purportedly claiming to "understand . . . why the prosecutor would view [Prospective Juror Belton] as an unfavorable juror, regardless of race," App. 82a, the BIO does not defend the appellate court's:

[purported] felony conviction and [presumed] subsequent incarceration." BIO 5. Besides there being no evidence Ms. Hamilton's father was ever convicted of any crime, let alone a felony, or that his incarceration *followed* conviction, the trial judge never embraced the "recent arrest" explanation as credible or applicable to Ms. Hamilton's father. Instead, addressing the prosecutor, he stated "I'm going to find that *you're* credible," 2 R.T. Aug. 299, after opining "I don't even really get to apply the objective standard. I think under an objective standard I'm not sure your explanations make that much sense." 2 R.T. Aug. 299.

Nor did the state appellate court claim the trial court "found that the [tattoo] *explanation* was credible in light of the prosecutor's tone and demeanor." BIO 6. The appellate court acknowledged the trial court's "skepticism as to both grounds," App.73a, and simply concluded that, considering her "tone and demeanor," the trial court "found that *she* was credible." App. 79a (emphasis added).

- failure to weigh the prosecutor's dissembling why she struck Prospective Juror Armstrong, Pet. 23;
- failure to weigh the trial court's disbelief of the prosecutor's tattoo rationale, Pet. 25-26;
- failure to shift the burden following the prosecutor's admitted proffer of a disingenuous reason for striking Prospective Juror Armstrong, Pet. 24;
- ignoring the prosecutor's aggressive questioning of Prospective Juror Belton and that his answers were "largely, frankly, in my opinion, a product of the way you asked the questions," Pet. 18-19, 24; and
- engaging in a review that disregarded evidence unfavorable to the order rather than considering the totality of the relevant facts, Pet. 26.

The State does not defend the trial and appellate courts' failure to weigh the prosecutor's "disparate questioning [as] probative of discriminatory intent." *Flowers*, 139 S.Ct. at 2247; *Miller-El I*, 537 U.S. at 331-32, 344.

Although echoing the prosecutor's purported concern over jurors with "recent arrests," the BIO does not dispute that the state court failed to weigh the prosecutor's "failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about [as] evidence suggesting that the explanation is a sham and a pretext for discrimination." *Flowers*, 139 S.Ct. at 2249.[13]

Although this Court found an inference of discrimination did not dissipate despite panels with one, three, and even *five* seated African-American jurors, *Flowers*, 139 S.Ct. 2245-46,[14] the BIO does not defend the appellate court's

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13. The BIO ignores that the prosecutor asked *no* questions about Ms. Hamilton's father's incarceration, leaving it to speculation whether he was convicted, if so what he was convicted of, and how long he spent in custody and why. The BIO also ignores that the prosecutor asked no questions of the White jurors about their personal or family members' contacts.

14. "This Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors." *Flowers*, 139 S.Ct. at

erroneously crediting the prosecutor with exhibiting "significant" indicia of "good faith" because she stopped striking African-Americans after the trial judge grilled her over the implausibility of her stated reasons. Pet. 2, 20.

C. The State's "Substantial Evidence" Review Is Inconsistent with Evaluating "the Totality of the Relevant Facts"

Although the state appellate opinion repeatedly emphasizes its limited "substantial evidence" review, including multiple times on the same page, App. 77a, 82a, the phrase appears nowhere in the BIO. By contrast, the state court's lone reference to "totality of the circumstances" is taken out of context and mentioned repeatedly throughout the BIO.

The BIO does not dispute that the appellate court "examin[ed] only whether substantial evidence support[ed]" the trial court's decision, App. 77a,[15] nor that California's "substantial evidence" standard of review "accepts the evidence most favorable to the order as true and discards the unfavorable evidence." Pet. 20, citing *People v. Campbell*, 2 Cal.App.5th 844, 850 (2016). The State makes no attempt to harmonize such review with considering the "totality of the relevant facts" as this Court has repeatedly demanded. *E.g. Miller-El*, 545 U.S. at 239.

2246, quoting *Miller-El II*, 545 U.S. at 250.

15. The appellate court concluded only that "the trial court's decision is supported by substantial evidence," App. 77a, and "substantial evidence supports the trial court's conclusion." App. 82a. After declaring that it would "focus on that ultimate finding, to determine whether it is supported by substantial evidence," App. 77a, the state court explained "applying our deferential standard of review, we conclude that substantial evidence supports the trial court's ruling." App. 82a.

Notably, the appellate court's isolated reference to "totality" did not describe its review of the prosecutor's reasons, but was only a prelude to justifying a comparative analysis focusing on how the jurors were not identical. Rather than looking to the "totality of the relevant facts" when evaluating the discrepancy between her striking Prospective Juror Hamilton based on her father's incarceration from 13 years previously and the prosecutor's acceptance of five jurors with personal or family contacts with law enforcement – one of which was within the past two years – the appellate court rationalized that the "totality" indicated Ms. Hamilton was *sui generis* among the jurors because of her inconspicuous tattoo.

The appellate court's supposed "totality" analysis did not factor in that the prosecutor asked neither Ms. Hamilton nor White jurors TJ1, TJ6, or TJ12 anything about their family member's contacts with law enforcement. Here, too, the prosecutor's "failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Flowers*, 139 S.Ct. at 2249.

III. *Rice* and § 2254(d) Are Inapplicable

As the petition discussed and the BIO does not dispute that in *Rice v. Collins*, 546 U.S. 333 (2006) "the state courts . . . used the correct analytical framework." Pet. 27. As the BIO leaves undisputed in many critical respects, the state courts applied principles "contrary to" this Court's clearly established rules, rendering *Rice*'s "no permissible alternative" test inapplicable, *cf.* BIO 10, and exempting Mr.

Adams's habeas petition from the strictures of 28 U.S.C. § 2254(d). Pet. 27; see also *id.*, at 25 n.11.

The trial judge disbelieved some explanations and remained "troubled" by the strikes. Pet. 19. Had he shifted the burden to the prosecutor to disprove reliance on her discredited and (some admittedly) spurious reasons – or, had he required the prosecutor to establish the "persuasiveness of [her] justification" Pet. 22-23, 28 – all indications are he would have sustained the *Batson* objection.

The appellate court below acknowledged abundant reason to "doubt the veracity of the prosecutor's explanations." Pet. 27; App. 2a-3a. Mr. Adams is entitled to habeas relief. Had the panel reviewed the petition "unencumbered by the deference AEDPA normally requires," *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007), it most certainly should have granted that relief.

CONCLUSION

The petition should be granted and the case either set for argument or vacated and remanded in light of *Flowers*.

Respectfully Submitted,

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/s/
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AUGUST 7, 2019