No. 21-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2021

MICHAEL LEDFORD,
Petitioner

-v-

WARDEN, GEORGIA DIAGNOSTIC PRISON,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI
Capital Case

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QUESTION PRESENTED

1. Whether this Court meant it when it wrote that "a pattern of strikes against black [or here, women] jurors included in this particular venire might give rise to an inference of discrimination," *Batson v. Kentucky*, 476 U.S. 79, 97 (1986), or this Court meant such a pattern could never give rise to that inference?

2. Whether it is unreasonable and prejudicial for capital sentencing counsel to introduce and argue evidence that his/her client is a psychopath and sexual sadist, especially when, extensive, admissible, classic mitigating evidence is available.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Ledford respectfully petitions for a writ of certiorari to review the judgment of the United State Court of Appeals for the Eleventh Circuit affirming the district court's denial of habeas corpus relief.

OPINIONS BELOW

The Eleventh Circuit entered an opinion in Petitioner's case on September 15, 2020. This opinion, reported at 975 F.3d 1145 (11th Cir. 2020), is reproduced in the appendix at Pet. App. 1. The unpublished order denying rehearing is reproduced in the appendix at Pet. App. 2.

The opinion of the federal district court denying relief is reproduced in the appendix at Pet. App. 3.

The opinion of the Superior Court of Butts County, Georgia, denying Mr. Ledford habeas relief is reproduced in the appendix at Pet. App. 4.

The unpublished summary affirmance of the Superior Court of Butts County's denial of habeas relief is reproduced in the appendix at Pet. App. 5.

The opinion of the Georgia Supreme Court's affirmance of the conviction and death sentence imposed by a jury in the Superior Court of Paulding County, Georgia, is reported as *Ledford v. State*, 289 Ga. 70 (2011), and is reproduced in the appendix as Pet. App. 6.

JURISDICTION

The Eleventh Circuit entered judgement on September 15, 2020. Pet. App. 1. It denied a petition for rehearing and rehearing en banc on November 17, 2020.

Pet. App. 2. Mr. Ledford has filed this petition for a writ of certiorari within "150 days from the date of the lower court...order denying a timely petition for rehearing," in keeping with this Court's order of March 19, 2020, extending its filing deadlines in light of "the ongoing public health concerns relating to COVID-19." This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense." U.S. CONST. Amendment VI.

*The questions also implicate the Eighth Amendment to the United States Constitution which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. Amendment VIII.

*The case also involves the Fourteenth Amendment to the United States Constitution which provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges and 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." U.S. CONST. Amendment XIV.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On May 18, 2009, a jury sitting in Superior Court of Paulding County, Georgia, convicted Mr. Ledford of one count of malice murder, two counts of felony

murder (treated as surplusage), three counts of aggravated battery, one count of aggravated sodomy, two counts of kidnaping with bodily injury, and one count of aggravated assault. On May 22, 2009, the same jury sentenced him to death.[1] After the trial court denied his motion for new trial, Mr. Ledford appealed to the Georgia Supreme Court, which affirmed his convictions and sentences on March 25, 2011. *Ledford v. State*, 709 S.E. 2d 239 (2011) (reconsideration denied April 12, 2011). This Court denied Mr. Ledford certiorari on November 7, 2011. *Ledford v. Georgia*, 565 U.S. 1017 (2011).

On October 9, 2012, Mr. Ledford initiated state habeas corpus proceedings in the Superior Court of Butts County, D.18-14, amending his petition on December 2, 2013, D.19-16. On August 24, 2016, after conducting an evidentiary hearing and accepting briefing, the state habeas court signed, verbatim, an order drafted by Respondent that denied relief. D.28-21. On August 14, 2017, the Georgia Supreme Court summarily denied Mr. Ledford's Application for a Certificate of Probable Cause to Appeal ("CPC"). D.28-29.

On September 8, 2017, Mr. Ledford filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Georgia. D.1. On December 31, 2018, the district court entered an order denying relief but granting a Certificate of Appealability on *inter alia*, ineffective assistance of counsel and *J.E.B.*. D.58. On February 22, 2019, the district court

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[1] In addition to the death sentence, the trial court imposed two (2) sentences of life without parole and four (4) twenty year sentences, with all sentences to run consecutively.

denied Mr. Ledford's motion made pursuant to F.R.Civ.P. 59(e). D.61. Mr. Ledford appealed and, after hearing oral argument, the Eleventh Circuit issued an opinion affirming the district court on September 15, 2020. *Ledford v. Warden, Georgia Diagnostic Prison*, 975 F.3d 1145 (2020). On November 17, 2020, the Eleventh Circuit denied Mr. Ledford's timely filed Motion for Rehearing *En Banc*. Pursuant to this Court's Order of March 19, 2020, extending the deadline for the filing of a petition for writ of certiorari to "150 days from the date of . . . an order denying a timely filed petition for rehearing," this Petition is timely filed.

B. STATEMENT OF FACTS

Mr. Ledford was charged with sexual assault and the killing of Jennifer Ewing on the Silver Comet Trail, a bicycle path that follows an abandoned train line through northern Georgia. Following his arrest, the State indicated it would try him in the Superior Court of Paulding County, Georgia, and seek the death penalty.

1. Jury Selection Shows State Bias Against Women

After the questioning of potential jurors, jury selection began from a panel of 43 jurors consisting of 25 men and 18 women. The jury proper was selected from the first 36 of those jurors, which consisted of 15 women (42%) and 21 men (58%).[2]

[2] Both the trial court and the Georgia Supreme Court limited their review to the first 36 venire members from whom the "panel of 12" was selected. Because the AEDPA requires this Court to review the state courts' adjudication as a threshold to review and relief, Petitioner, when discussing why that adjudication does not satisfy the AEDPA, will limit the analysis to the "panel of 12," as the state courts did. Petitioner recognizes this Court's precedent holding that alternate jurors must also be considered when examining a *Batson/J.E.B.* claim and accordingly analyzes the entire panel when arguing how this Court should apply its de novo review of this

The trial court employed a selection process of "silent strikes," in which the state and defense were each allotted 12 strikes, with the state striking first and the defense striking second. D.15-12:38-39.

When selecting the jury, the prosecution used its first 5 strikes, and 9 of its 12, to remove women--or 75% of its alloted peremptory challenges to eliminate 66% of the women on the panel. When selecting the alternates, the prosecution, thinking it had two peremptory strikes available, struck a male and attempted to strike another woman. [3] Ultimately, Mr. Ledford's jury consisted of 10 men and 2 women; when including the 4 alternate jurors, it consisted of 12 men and 4 women. D.26-12:22-23.[4]

At the conclusion of jury selection, the defense objected to the state's use of its strikes, noting that the "percentage, nine out of twelve strikes for women, would appear as though it would be a gender bias on the part of the state." D.15-12:4657. Examining the state's strikes as to the "panel of 12" only, the trial court concluded

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claim. *See, e.g., United States v. Ochoa-Vasquez,* 428 F.3d 1015, 1046, n. 41 (11th Cir. 2005).

[3] The state, believing it had more than one strike to use when selecting alternate jurors, attempted to strike Kathy Jackson, but had already used its only strike. D.15-12:39-41.

[4] Jurors Bailey and Wood, both women, were seated on the "panel of 12." After the state and defense exercised their single peremptory challenge, two women were seated as alternates: Jackson, discussed *supra* at note 5, and Benifield. Including the panel of alternates, the entire venire from which Mr. Ledford's jury was selected consisted of 43 people—25 men (58%) and 18 women (42%). When considering the entire venire, the state used 69% of their strikes to remove 50% of the female jurors. The defense struck 4 women from the "panel of 12."

no prima facie case of discrimination had been established. D.15-12:59-60. The trial court stated that "41 percent of the available [jurors] were women out of the first 36" and, without further calculation, decided that, "[c]onsidering the number of women available [and] the number of women that the state accepted," it would not find "a prima facie case...[of] intentional discrimination based on...the available number of women and men and the number of strikes the state made versus the number of accepted jurors." D.15-12:59-60. The jury ultimately convicted Mr. Ledford of all counts.

2. Counsel's Performance at Sentencing – Introduction of Evidence that Mr. Ledford was a Psychopath and Sexual Sadist

In preparing for the sentencing phase of the trial, the defense obtained records showing that Mr. Ledford has been previously diagnosed with anti-social personality disorder. As counsel knew, Georgia law would allow that diagnosis to be placed before the jury by the State only if the defense were to present mental health as mitigation evidence; if they chose not to introduce mental health testimony, it would be excluded. *See State v. Abernathy*, 265 Ga. 754, 754-55 (1995); *State v. Nance*, 272 Ga. 217, 220 (2000). Counsel affirmatively introduced this harmful evidence, along with objectively harmful testimony from their own experts that Mr. Ledford was a psychopath and a sexual sadist. The prosecution presented their own experts who concurred that Mr. Ledford was a psychopath, and therefore a future danger. Not surprisingly, the jury recommended a sentence of death.

3. Direct Appeal: Additional Facts Always Required to Establish a Prima Facie Case of Discrimination

Mr. Ledford pursued his *J.E.B. v. Alabama* claim on direct appeal. The Georgia Supreme Court affirmed the trial court, stating:

> The record shows that, during the selection of the panel of 12 jurors, the State used 75 percent of the peremptory strikes it exercised to strike women. The trial court found that Ledford failed to make a prima facie showing of discrimination and, therefore, did not require the State to offer gender-neutral reasons for its strikes. In light of Ledford's failure to present any "additional facts which may give rise to an inference of discriminatory purpose," we hold that the trial court did not err in concluding that Ledford had failed to carry his burden of establishing a prima facie case of discrimination.

Ledford v. State, 289 Ga. 70, 83 (2011).

4. State Habeas Proceedings: Trial Counsel Undermined Compelling Sentencing Evidence of Childhood Poverty and Trauma by Presenting Evidence of Psychopathy

In state post-conviction proceedings, Mr. Ledford alleged he received ineffective assistance of counsel when his lawyers introduced affirmatively prejudicial evidence that he was a psychopath and sexual sadist during the penalty phase of his trial. Rather, Mr. Ledford alleged, a compelling case in mitigation depicting childhood poverty, trauma, abuse, and neglect could have been presented through lay witnesses. The state habeas court signed verbatim an order drafted by the Attorney General that found neither deficient performance nor prejudice. The Georgia Supreme Court summarily denied Mr. Ledford's Application for Certificate of Probable Cause to Appeal.

5. Proceedings Below

Mr. Ledford pursued relief pursuant to 28 U.S.C. § 2254, raising *inter alia,* the *J.E.B.*claim and ineffective assistance of counsel. As to the the *J.E.B.*claim, Mr. Ledford alleged that the state courts' determination of the *J.E.B.* claim was contrary to or an unreasonable application of clearly established Supreme Court precedent because the state courts required more than just a pattern of strikes to establish a *prima facie* case. In denying relief, the district court relied upon Eleventh Circuit precedent holding that "statistics, without more, do not establish a prima facie case." (D.58 at 17 (citing *United States v. Hill* 643 F.3d 807, 838 (11th Cir. 2011).) Pertaining to the ineffective assistance of counsel claim, Mr. Ledford argued that his trial counsel's affirmative introduction of harmful evidence of future dangerousness, like counsel in *Buck v. Davis*, 137 S.Ct. 759 (2017), constituted prejudicially deficient performance. The district court disagreed and found the state habeas court did not unreasonably apply *Strickland v. Washington.*

The Eleventh Circuit conducted *de novo* review of the district court's order and affirmed. Regarding the *J.E.B.* claim, the court noted "Ledford relied solely on statistical disparities in seeking to make out a prima facie case of discrimination...[and] did not present any additional facts," citing *Hill* for the proposition that "not just any statistical disparities will suffice to demonstrate a prima facie case of discrimination." *Ledford* , 975 F.3d at 1156. In addressing the ineffective assistance of counsel claim, the court did not even mention this Court's decision in *Buck*, relying instead on inapplicable circuit precedent (*Morton v. Sec'y,*

Fla. Dept. of Corr. 684 F.3d 1157 (11th Cir. 2012)) in affirming the district court's denial of relief. *See Ledford v. Warden*, 975 F.3d at 1158 – 60.

REASONS FOR GRANTING THE WRIT

I. THE STATE AND LOWER COURTS' RESOLUTION OF MR. LEDFORD'S *J.E.B v. ALABAMA* CLAIM IS IN CONFLICT WITH RELEVANT DECISIONS FROM THIS COURT, *BATSON* AND *J.E.B.*

A. *Batson v. Kentucky* and *J.E.B. v. Alabama, ex rel. T.B.*

Almost forty years ago this Court set out the now familiar three-step analysis used to determine whether a party has exercised their peremptory strikes in a discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79 (1986). As this Court summarized the analysis:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts give rise to an inference of a discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful discrimination.

Johnson v. California, 545 U.S. 162, 168 (2005) (internal citations and quotations omitted). *Batson* itself dealt with only the issue of racial discrimination.[5] However, in 1994, this Court extended *Batson's* protections to gender-based discrimination. *J.E.B. v. Alabama ex rel. T.B*, 511 U.S. 127 (1994).

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[5] *Batson* originally required the defendant to be of the same race as the stricken jurors. However, in *Powers v. Ohio*, 499 U.S. 400 (1991), this Court held that a criminal defendant can object to race-based strikes whether or not the defendant and excluded juror share the same race.

The initial, prima facie stage of the *Batson* analysis is not intended to impose an onerous burden. *Johnson v. California*, 545 U.S. at 170. "[T]he defendant is entitled to rely on the fact . . . that preemptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Batson*, 476 U.S. at 96. Thus, this Court has recognized that the proof needed to make out a prima facie case is "minimal." *St Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) ("Petitioners do not challenge . . . that respondent satisfied the ***minimal requirements of such a prima facie case.***") (emphasis added). *See also, Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 41 (5th Cir. 1996) ("To establish a *prima facie* case, a plaintiff need only make a very minimal showing."); *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000)("The burden of establishing a prima facie case is not onerous but one easily met."); *E.E.O.C v. Flasher Co.*, 986 F2d 1312, 1318 (10th Cir. 1992)("The presumption arising under the first prong of *McDonnell Douglas* ***is a relatively weak inference*** . . ."); and *Scheidemantle v. Slippery Rock University State System of Higher Education*, 470 F.3d 535, 539 (3rd Cir. 2006) ("there is a low bar for establishing a *prima facie* case of discrimination. . .").

B. The State and Lower Courts Ignored Binding Decisions from this Court Regarding the Viability of Statistics and was Contrary to or an Unreasonable Application of *Batson* and *J.E.B* under the A.E.D.P.A

The Georgia Supreme Court's, and the lower courts' requirement of a pattern of strikes ***and*** "additional facts" to make out a prima facie case of discrimination imposes a heavier burden than *Batson* or *J.E.B.* requires or allows. It is, therefore,

contrary to that clearly-established Federal case law or, at the very least, "an unreasonable application" of it.

The state and federal courts in this case have all determined that Mr. Ledford's challenge failed at this threshold, because he based his prima facie case on what they categorize as "statistics"—specifically, the percentage of the prosecution's strikes that it used to remove women. *Ledford v. State*, 289 Ga. at 83 (statistics without "additional facts which may give rise to an inference of discriminatory purpose" failed to make out prima facie case); *Ledford v. Sellers, Warden*, 4:17-CV-211-MHC (N.D.Ga. 12/13/18) Doc. 58 at 17 ("statistics, without more, do not establish a prima facie case of discrimination in the use of peremptory strikes."); *Ledford v. Warden, Georgia Diagnostic Prison*, 975 F.3d at 1156 ("Ledford relied solely on statistical disparities in seeking to make out a prima facie case . . . but not just any statistical disparities will suffice to demonstrate a prima facie case of discrimination."). These holdings are contrary to—indeed, irreconcilable with—this Court's directive in *Batson*, which held unequivocally that "a pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination" and, accordingly, a prima facie case. 476 U.S. at 97. Indeed, the "pattern of strikes" is one of the two specific examples this Court gave of how a movant can make out a prima facie case. *Batson*, 476 U.S. at 96-97 ("a pattern of

strikes against black jurors included in the particular venire might give rise to an inference of discrimination"). *Id.*[6]

The Georgia Supreme Court and the lower courts, faced with the uncontroverted evidence that the prosecutor used 3/4 of its allotted strikes to eliminate 2/3 of women from the venire—a stark and unambiguous pattern of strikes— demanded something more. This was contrary to *Baston* and *J.E.B.*

C. This Court Should Grant Certiorari as the Federal and State Courts are not Uniformly Applying Binding Precedent

Federal and state courts are not uniformly applying *Batson's* dictate that a "pattern of strikes" can make out a prima facie case. For example, the Fourth[7], Eighth[8] and Eleventh[9] Circuits have held that numbers or statistics alone are not

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[6] A second and distinct way an inference might be drawn could be based on "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.*

[7] *Allen v. Lee,* 366 F.3d 319, 329 (4th Cir. 2004) ("only facts that Allen has identified . . . were raw statistics about the racial make-up of the jury" which was insufficient to establish prima facie case); *Lawlor v. Zook,* 2017 WL 2603521 (E.D. Va 2017) ("the *Allen* majority opinion concludes that the use of 'raw statistics' . . . is both selective and uninformative . . .").

[8] *United States v. Baxter*, 778 Fed. Appx 617, 619 (8th Cir. 2019) ("The *prima facie* case determination is not to be based on numbers alone but on the totality of the circumstances."); *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir. 1990) ("numbers alone are not sufficient to establish or negate a prima facie case.").

[9] *United States v. Saylor*, 626 Fed. Appx 802, 807 (11th Cir. 2015) ("The prima facie case determination cannot be based on numbers alone but should be made in light of the totality of the circumstances."); *United States v. Hill*, 643 F.3d 807, 838 (11th Cir. 2011) ("Under our precedent these statistics, without more, do not establish a prima facie case.").

sufficient to establish a prima facie case at stage one of the *Batson* analysis. The Second[10], Third[11], Seventh[12] and the Ninth[13] Circuits, however, have recognized that statistics alone are sufficient to make out a prima facie case of discrimination. Similarly, state courts are haphazardly interpreting *Batson's* prima facie

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[10] *United States v. Alvarado*, 923 F.2d 253, 255-56 (2nd Cir. 1991) (statistical disparities sufficient to establish prima facie case); *United States v. Overton*, 295 F.3d 270, 278 (2nd Cir. 2002) ("we have no doubt that statistics, alone and without more can, in appropriate circumstances" make out a prima facie case).

[11] *Williams v. Beard*, 637 F.3d 195, 214 (3rd Cir. 2011) ("Statistical evidence may be sufficient by itself to make out a prima facie case of discrimination.").

[12] *United States v. Stephens*, 421 F.3d 503, 512 (7th Cir. 2005) (where strikes eliminate all or nearly all or where a "disproportionate number of peremptory challenges were used to eliminate members of a particular cognizable group.")

[13] *Williams v. Runnels*, 432 F.3d 1102, 1107 (9th Cir. 2006) (defendant can make a prima facie case based on a statistical disparity alone."); *Avitt v. Hubbard*, 31 Fed. Appx. 560 (9th Cir. 2002) ("statistics alone may be enough to establish a *prima facie* case of discrimination in some instances. . .).

requirements. For example, Alabama[14], Georgia[15], Louisiana[16] and Illinois[17] require more than a pattern of strikes, while New York[18] and Arkansas[19] do not.

This Court should grant certiorari and reaffirm its directive in *Batson* so that lower courts apply it uniformly.

D. The Georgia Supreme Court's Decision was an Unreasonable Application of *Batson* and *J.E.B.* and Contrary to this Court's Precedent

When properly assessed, the pattern of the prosecution's strikes in this case—using 75% of its strikes to eliminate 66% of the potential female jurors from the "panel of 12" (as compared to using 25% of its strikes to remove only 14% of males)—is more than sufficient to raise an inference of discriminatory intent.

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[14] *Lam Luong v. State*, 199 So.3d 173, 190 (AL. C.C.A. 2015) ("this Court has recognized that numbers alone are not sufficient to establish a prima facie case . . .").

[15] *Livingston v. State*, 271 Ga. 714, 718 (1999) ("numbers alone may not establish a disproportionate exercise of strikes sufficient to raise a prima facie inference . . .").

[16] *State v. Dorsey*, 74 So.3d 603, 617 (La. S.C 2011) ("this Court has held bare statistics are insufficient to support a prima facie case of discrimination.).

[17] *People v. Holman*, 132 Ill.2d 128, 142-43 (1989) (in determining whether a prima facie case is made, courts should consider more than just the number of jurors excluded).

[18] *People v. Smocum*, 99 N.Y.2d 418, 422 (N.Y. C.A. 2003) ("parties often rely on numbers to show a pattern of strikes" in making out a prima facie case).

[19] *Rose v. State*, 72 Ark. App. 175, 182 (Ark. C.A 2000) (expressly rejecting state's argument that prima facie case cannot be established by "mere numbers alone.").

In this case, when "[c]onsidering the number of women available [and] the number of women that the state accepted," D.15-12:4661-62, the state courts ignored numbers that gave rise to an inference of discrimination even on their face. When those numbers are subjected to the types of statistical analysis on which the courts have relied in assessing a prima facie case, that inference grows even starker.

When assessing the significance of the state's pattern of strikes, courts have examined "[e]vidence contrasting the rate at which the prosecution accepts black and white jurors," which "may also raise an inference of discrimination." *Williams v. Beard*, 637 F.3d 195, 215 (3rd Cir. 2011). In *Williams*, the Third Circuit affirmed that the prosecution's strike pattern made out a prima facie case because, with a venire that was 39% African American, the prosecution used fourteen of sixteen strikes on African Americans—a rate of 87.5%. *Id.* at 214. "In a venire that was less than 40% black," the Circuit wrote, "it is hardly a leap to conclude that a strike rate of 87.5% raises an inference of discrimination." *Williams*, 637 F.3d at 215. Similarly, the Seventh Circuit found a prima facie case where African Americans composed 35% of the venire and the State struck at least 71% of them—numbers that Court deemed "staggering." *Harris v. Hardy*, 680 F.3d 942, 951-52 (7th Cir. 2012). No leap is required to reach that same inference here, where Mr. Ledford's venire was scarcely 40% female and the strike rate was 75%—numbers that are staggering in their own right.

The Third Circuit has also found a prima facie case where the prosecutor accepted only 41%-47% of the black venire persons that he had the opportunity to strike, while accepting 83% of the white venire persons. *Bond v. Beard*, 539 F.3d 256, 270 (3rd Cir. 2008). The state struck first in Mr. Ledford's trial; it accepted only 6 of the 15 women it had the option to strike—or 40%—but accepted 18 of the 21 men, or approximately 86%. That, too, raises an inference of discrimination.

The proportion of a party's strikes of a suspect class relative to the percentage of the struck group in the venire can also raise an inference of discrimination. *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991). Mr. Ledford's venire consisted of 21 men (58.3%) and 15 women (41.66%), and the state used 75% (9 of 12) of its strikes to exclude 60% (9) of the women from the venire. Where, as here, "a rate of minority challenges [is] significantly higher than the minority percentage of the venire . . . a statistical inference of discrimination [is supported]." *United States v. Alvarado*, 923 F.2d 253, 255 (2nd Cir. 1991).

Finally, Mr. Ledford notes the Fifth Circuit's decision in *Price v. Cain*, 560 F.3d 284 (5th Cir. 2009). That court reviewed the trial court's finding of no prima facie case where the petitioner's all-white jury was empaneled from "a 54-member venire, of which 16 members were African-American," and the state "used six of its twelve peremptory challenges to strike African-Americans, three of whom the State had unsuccessfully challenged for cause," while the defendant used one. *Id.* at 285. Using only these facts as developed in the trial court, the Fifth Circuit found the

state court adjudication unreasonable pursuant to the AEDPA, found a prima facie case, and remanded to the district court for a full *Batson* inquiry. *Id.* at 287.

In light of these analyses, it is clear that the state courts' and the lower courts' finding of no prima facie case ignores both this Court's precedent and the clear and convincing weight of these numbers.

E. Even Considering the Alternates, Mr. Ledford has Established a Prima Facie Case

Should this Court believe it needs to consider the alternate jurors in the determination of whether Mr. Ledford established a prima facie of consideration, the result should be the same. As discussed *supra*, the pool from which the jurors and alternates were selected consisted of 43 venire persons—18 women and 25 men. The state used its first five strikes and nine of its 13—a rate of 69%—to remove half of those women. As discussed *supra*, it further attempted to strike another female alternate before that was disallowed by the trial court. The ultimate panel consisted of 12 men and four women; two of those women were alternates.

There is a substantial disparity between the percentage of women struck and the percentage of women on the venire, *ibid*, as women made up only 42% of Mr. Ledford's venire, and the state struck 50% of them. By contrast, men made up 58% of the venire, but only 16% were struck by the state. Similarly, there is a substantial disparity between the number of women struck and the percentage of their representation on the jury, *ibid*, as the state struck nine of the 18 women in the venire—or 50%. Only two women sat on the final jury panel, accounting for 16%; four women were seated on the panel as a whole, accounting for 25%. As to

the question of whether unchallenged group members served on the jury, "while the presence of one or more [women] jurors might tend to rebut an inference drawn by the trial court in connection with the defendant's attempt to establish a prima facie case . . . this fact alone is not sufficient to refute an otherwise appropriate inference of discrimination." *Brown v. Alexander*, 543 F.3d 94, 102 (2nd Cir. 2008). Here, the fact that two jurors and two alternates were women does not refute the prosecution's use of 69% of its strikes to remove 50% of the women venire members, which resulted in a jury that was only 23% female, in light of the argument and authority *supra*. Mr. Ledford contends that it is of no consequence that the "prosecutor passes up the opportunity to strike some [women]. [*J.E.B.*], was designed to ensure the State does not use peremptory strikes to remove any [woman] because of [her gender]." *Brinson v. Vaughan*, 398 F.3d 225, 233 (3rd Cir. 2005).[20] And, as this Court has declared, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v Mississippi*, 139 S. Ct. 228, 2244 (2019) (citing *Foster*, 136 S. Ct. at 1747).

In light of the lower courts' imposition of a burden far beyond what this Court's precedent anticipates for the minimal showing required for a prima facie

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[20] Likewise, the fact that the defense struck five women from the venire "does not open the door for illegitimate prosecution strikes . . . even if the defense itself violated equal protection by striking a potential juror based on [gender]." *Brinson v. Vaughan*, 398 F.3d at 234.

case, and the divergent approaches among the federal circuit and state courts, certiorari is merited.

II. THE STATE COURTS' RESOLUTION OF MR. LEDFORD'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS AN UNREASONABLE APPLICATION OF *STRICKLAND V. WASHINGTON* AND ITS PROGENY AND THE LOWER COURTS' DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

The standard for accessing an ineffective assistance of counsel claim is long-settled: "a petitioner must show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). To establish deficient performance, a petitioner must demonstrate his counsel's performance "fell below an objective standard of reasonableness," defined as "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Wiggins*, 539 U.S. at 521. If deficient performance is established, a petitioner must next establish there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Williams v. Taylor*, 529 U.S. 362, 362 (2000). In Georgia, prejudice in an ineffective assistance claim directed at the penalty phase of a capital trial is established if there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. Mr. Ledford readily established both prongs of *Strickland*, and the state courts' decision to the contrary is an unreasonable application of this Court's precedent. *See* 28 U.S.C. § 2254.

A. Counsel Performed Unconstitutionally in Allowing *and Introducing* Aggravating Evidence of a Diagnosis of Psychopathy

Trial counsel's investigation revealed that on at least one prior occasion, Mr. Ledford had been diagnosed as suffering from antisocial personality disorder (ASPD). Counsel were also aware that under Georgia law, the only way the state could introduce mental health evidence was if the defense first opened the door by introducing mental health evidence and/or testimony. *See Abernathy v. State,* 265 Ga. 754, 754-55 (1995) (state may only present mental health evidence if the defense first presents such evidence); *see also Nance v. State,* 272 Ga. 217, 220 (2000) (same). In fact, the State is prohibited from conducting its own mental health evaluation of a defendant unless and until the defense invites the issue of the defendant's mental health into the proceedings. *See Pope v. State,* 286 Ga. 1, (2009). (trial court erred in having defendant evaluated where defense had not served notice of its intent to rely on mental health evidence). Moreover, counsel was aware that the state would be privy to Mr. Ledford's prior diagnosis for ASPD either through reciprocal discovery or the state's own investigation into Mr. Ledford's prior convictions. Finally, counsel knew, or should have known,[21] that labelling a capital

[21] Trial counsel testified they had attended numerous state and national capital training seminars, including those presented by the Georgia Capital Defender. (*See, e.g.*, D.22-1:20; D.22-1:90). At the time, both national and state capital trainers emphasized that it was trial counsel's obligation to do *whatever was necessary* to prevent any testimony to the effect that their client was either antisocial or a psychopath. (D.21-1:26-32, Affidavit of Pamela B. Leonard) ("We have, for more than a decade, advised lawyers who represent capitally charged defendants to make every effort to exclude evidence that the defendant has an antisocial personality disorder or is a psychopath"); (D.22-1:33-45, Affidavit of Sean D. O'Brien) ("To a reasonable degree of legal certainty, no competent capital defense

defendant as "antisocial" is highly aggravating and prejudicial[22] serving only "one overriding purpose: to obtain and carry out a sentence of death." *See*, Wayland, K. And O'Brien, S., *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFLR 519 (Winter 2013) Art. 6 at 7.

Trial counsel were presented with two options: (1) introduce mental health evidence/testimony and allow the introduction of irrefutable[23] testimony that Mr. Ledford was a psychopath; or (2) forego mental health evidence/testimony which would preclude any mention of antisocial personality disorder and/or psychopathy

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attorney would ever, under any circumstances, introduce evidence from any mental health expert that his or her client has psychopathy or ASPD").

[22] *See*, *Weeks v. Jones*, 26 F.3d 1030, 1035, n.4 (11th Cir. 1994) (diagnosis of antisocial personality disorder is not mitigating as a matter of law); *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1245 (11th Cir. 2010) ("diagnosis of antisocial personality disorder was . . . not good mitigation."); *Cummings v. Secretary for Dept. Of* Corrections, 588 F.3d 1331, 1368 (11th Cir. 2009)("a diagnosis of antisocial personality disorder, which is not mitigating but damaging."); *Evans v. Secretary, Dept of Corrections*, 703 F.3d 1316, 1332 (11th Cir. 2013) ("we have consistently held, this evidence is potentially aggravating as it suggests that [the defendant] has antisocial personality disorder, which is a trait most jurors tend to look dis-favorably upon, that is not mitigating but damaging."); *Kokal v. Secretary, Dept. of Corrections*, 623 F.3d 1331, 1349 (11th Cir. 2010)(same); *Suggs v. McNeil*, 609 F.3d 1218, 1229 (11th cir. 2010)(same); *Gray v. Epps*, 616 F.3d 436, 449 (5th Cir. 2010) (antisocial personality disorder could be interpreted as aggravating); *Daniels v. Woodford*, 428 F.3d 1181, 1204, 1210 (9th Cir. 2005 (indicating testimony suggesting a capital defendant is a sociopath is aggravating rather than mitigating).

[23] The defense experts employed by counsel also opined Mr. Ledford was antisocial or a psychopath. The only difference between the defense and state experts was whether there was an organic etiology to the psychopathy.

and present lay witness testimony about Mr. Ledford's depraved upbringing.[24] Given their ability to shield Mr. Ledford from the harm of these diagnoses, allowing such evidence into his case *by any means* would have constituted deficient performance.

Trial counsel, however, compounded their unreasonable failures by not only permitting the admission of these diagnoses, but by *affirmatively* presenting them to the jury through their own expert witnesses. Perhaps more even more egregiously, trial counsel devoted much of their closing argument to a discussion of the most aggravating qualities of these diagnoses. For its part, the State expressly relied upon the evidence that Mr. Ledford "is a psychopath" to argue that "[h]e's going to continue to victimize people . . . . [and] [n]obody's going to be safe. He's going to be preying on people to the best of his ability." (D.16-9:43.)

This Court has noted the inherently prejudicial impact of harmful evidence of future dangerousness being introduced by a *defense* witness in a capital sentencing. *See Buck v. Davis*, 137 S. Ct. 759, 777 (2017) ("When a defendant's own lawyer puts in the offending evidence, it is the nature of an admission against interest, more likely to be taken at face value."). "It would be preferable to present no mental health experts at all than to inject such damning, unreliable evidence into a capital case." (D.21-1:33-45, Affidavit of Sean D. O'Brien).

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[24] As scholars have noted "[b]ecause prosecutors easily turn the defense's ASPD evidence against the defendant no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment." O'Brien and Weiland, *supra* at 12.

Trial counsel's decision was not reasonable, as they never considered the option of not presenting mental health evidence/testimony or contemplated what a penalty phase case would look like if this aggravating evidence were excluded from it. See D.20-38:158; 164. Whether trial counsel failed to appreciate fully how prejudicial this evidence would be[25], their decision to present mental health as mitigation was uninformed and unreasonable. *See, e.g., Sears v. Upton*, 561 U.S. 945, 954 (2010) ("We reject [] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . was 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." (*quoting Williams v. Taylor*, 529 U.S. at 396).

B. The Evidence of Mr. Ledford's Horrific Background, Minus this Aggravating Evidence, Would, Within A Reasonable Probability, Have Yielded a Different Result

But for their unreasonable myopia, trial counsel would have realized that they could present a compelling and mitigating account of the tragedy, depravity, poverty and abuse that Mr. Ledford had suffered throughout his life *and* exclude any testimony that he was antisocial or a psychopath. Instead of presenting the evidence of Mr. Ledford's horrific upbringing through their mental health experts,[26] trial counsel could have employed, for instance, a testifying social worker, who could have told the story of Mr. Ledford's life history in a coherent manner, but would not

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[25] Trial counsel testified he did not have a strategy for dealing with a diagnosis of antisocial personality disorder. (D.20-38:163-64).

[26] See note 4, *supra*.

– indeed, *could* not – have testified to his mental health issues. This would have entirely changed the sentencing picture before the jury. Mr. Ledford would still have been able to present powerful evidence of the poverty, incest, molestation, familial alcohol abuse, physical violence, neglect and poor parenting, residential instability, social isolation and multi-generational mental illness in his family that marred his childhood. Indeed, Mary McLaughlin,[27] a social worker, did precisely this in the state habeas proceedings, explaining how "[t]he records from [Mr. Ledford's] childhood, the affidavits of his siblings and the interviews [she] personally conducted reveal a family system that was so chaotic and abusive that the Ledford children's basic needs for safety and security were not guaranteed . . . ." *Id.* The fact that Mr. Ledford "was born into a family already mired in poverty, incest and alcoholism" and, "[a]s a result of multiple moves, . . . was not in a position long enough for any protective community factor to reach him . . . . [and] was not given a chance to develop along the normal life pathway that most children are afforded," are precisely the categories of evidence that this Court found mitigating in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

Had trial counsel acted reasonably and ensured the prejudicial evidence concerning psychopathy and antisocial personality disorder were not admitted, the sentencing picture would have been entirely altered, and there is a reasonable

[27] *See e.g.,* Pet. Appendix 7, Report of Mary McLaughlan.

probability that "at least one juror would have struck a different balance" and voted to impose a sentence less than death. *Wiggins*, 539 U.S. at 537.

C. Counsel's Ineffectiveness is Illustrated by *Buck v. Davis*

The prejudicially deficient performance of Mr. Ledford's trial counsel is illustrated by this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017). In *Buck*, this Court found that the petitioner's trial counsel had provided ineffective assistance by calling to the stand a psychologist, Dr. Walter Quijano, who testified that the petitioner was statistically more likely to act violently in the future because of his race, and had prepared a report that focused primarily upon his future dangerousness. *Buck*, 137 S. Ct. at 768.[28] *Id.* While Dr. Quijano's report reached some conclusions that argued against him being a future danger, the report also included a statement that because the petitioner was black, there was an

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[28] As this Court noted, "[a]t the time of Buck's trial, a Texas jury could impose the death penalty only if it found—unanimously and beyond a reasonable doubt—'a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'" *Buck*, 137 S. Ct. at 768 (citing Tex.Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1) (Vernon 1998). "The second issue, to be reached only if the jury found Buck likely to be a future danger, was whether mitigating circumstances nevertheless warranted a sentence of life imprisonment instead of death." *Id.* The Georgia capital sentencing scheme does not expressly require a finding the defendant poses a future danger, but "future dangerousness is on the minds of most capital jurors, and is thus at issue in virtually all capital trials." Blume, J., Garvey, S., and Johnson, S, *Future Dangerousness in Capital Cases: Alsways "At Issue."*, Cornell L. Rev. 397, 398-99 (January 2001). Moreover, that Mr. Ledford would pose a future danger was argued by the prosecutor in the state's penalty phase closing argument. *See e.g.* Tr. 7501 ("he's going to continue to victimize people . . . nobody's going to be safe. He's going to be preying on people to the best of his ability.").

"[i]ncreased probability" of future dangerousness, as "[t]here is an over-representation of Blacks among the violent offenders." *Id.*

Like Mr. Ledford's trial counsel, trial counsel in *Buck*, "[d]espite knowing Dr. Quijano's view that Buck's race was competent evidence of an increased probability of future violence," called him to the stand and *expressly elicited* that "certain factors were 'know[n] to predict future dangerousness' and, consistent with his report, [that] . . . race [w]as one of them." *Id.* Consequently, this Court noted, the prosecutor was able to secure Dr. Quijano's agreement on cross-examination "that the race factor, black, increases the future dangerousness for various complicated reasons." *Id.* This Court noted, the State referenced Dr. Quijano's testimony in closing, emphasizing "the crime's brutal nature and Buck's lack of remorse, along with the inability of Buck's *own experts* to guarantee that he would not act violently in the future." *Id.* at 769.

This Court concluded that "counsel's performance fell outside the bounds of competent representation." *Buck*, 137 S. Ct. at 775. As counsel knew that, "Dr. Quijano's report reflected the view that Buck's race disproportionately predisposed him to violent conduct" and that "the principal point of dispute during the trial's penalty phase was whether Buck was likely to act violently in the future," this Court concluded that they had performed deficiently in "nevertheless (1) call[ing] Dr. Quijano to the stand; (2) specifically elicit[ing] testimony about the connection between Buck's race and the likelihood of future violence; and (3) put[ting] into evidence Dr. Quijano's expert report that stated, in reference to factors bearing on

future dangerousness, '**Race.** Black: Increased probability.'" *Id.* at 775 (internal citations omitted) (emphasis in original).

This Court also found prejudice in *Buck* despite the highly aggravating nature of the crime. Mr. Buck was convicted of invading the home of his former girlfriend with a rifle and shotgun, shooting and killing his stepsister and wounding another, then pursuing his girlfriend as she fled the house and shooting her to death as her two young children begged for her life. *Buck*, 137 S. Ct. at 767. A police officer who arrested him "would later testify that Buck was laughing at the scene . . . . [and] remained 'happy' and 'upbeat' as he was driven to the police station, '[s]miling and laughing' in the back of the patrol car." *Id.* at 768. The State also called another former girlfriend who testified that "Buck had routinely hit her and had twice pointed a gun at her" and "introduced evidence of Buck's criminal history, including convictions for delivery of cocaine and unlawfully carrying a weapon." *Id.*

This Court should reach the same conclusion here. The harm from the testimony in *Buck* was more equivocal than that in Mr. Ledford's case. In *Buck* the expert testified to "factors [he] thought favorable to Buck, as well as his ultimate opinion that Buck was unlikely to pose a danger in the future" and only referred to one characteristic that made him statistically more likely to be dangerous in the future. *Buck*, 137 S. Ct. at 768–69. By contrast, the portrait of Mr. Ledford that emerged from his experts, *his counsel*, the state's experts, and the prosecutors virtually assured his future danger and incorrigibility.

In *Buck*, this Court noted its concern that expert evidence might overwhelm the jury's deliberations—a concern that is only magnified in Mr. Ledford's case. This Court noted that"[d]eciding the key issue of Buck's dangerousness involved [asking] . . . . [t]he jurors . . . not . . . to determine a historical fact concerning Buck's conduct, but to render a predictive judgment ... entailing a degree of speculation ... [w]ould he do so again?" *Buck*, 137 S. Ct. at 776. Accordingly, the Court feared that expert testimony as to an "immutable characteristic [that] carried with it an increased probability of future violence" would be treated as "hard statistical evidence—from an expert—to guide an otherwise speculative inquiry." *Id.* That fear was realized during Mr. Ledford's penalty phase, when the State invited his jury to resolve this same unusual inquiry by considering the "immutable[29] characteristic" of his psychopathy. (D.16-9:43.)[30]

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[29] All experts agreed, becoming a psychopath is not volitional. Thus, Mr. Ledford's disorder is as immutable as race was in *Buck*.

[30] Indeed, "[p]rosecutors regularly invoke diagnoses of psychopathy or antisocial personality disorder in capital sentencing, likely because both are highly correlated with recidivist violence . . . . [and] courts have specifically permitted both diagnoses to be introduced as evidence of future dangerousness at the sentencing phase of capital trials . . . . [E]ither diagnosis both can have a devastating effect on the defendant's mitigation claims and can create an expectation in jurors' minds "that no rehabilitation is possible and that future criminal violence is inevitable." Snead, O. Carter, *Neuroimaging and the "Complexity" of Capital Punishment*, 82 NYULR 1265, (November 2007) (emphasis added). "Testimony labeling a capital defendant antisocial or psychopathic has one overriding purpose: to obtain and carry out a sentence of death." *Deconstructing Antisocial Personality*, 42 HOFLR 519 (Winter 2013).

This Court also expressed concern that the testimony about race and future danger was "potent" because it "appealed to a powerful racial stereotype." *Buck*, 137 S. Ct. at 776. The testimony here is no less potent and "invoke[d] the stereotype of 'unfeeling psychopaths who kill for the sheer please of it, or as dark, anonymous figures who are something less than human." *Deconstructing Antisocial Personality,* 42 HOFLR at 525 *citing*, Craig Haney, Comment, Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases, 37 Golden Gate U. L. Rev. 131, 145 (2006). Indeed, "[t]he term 'psychopath' is used to describe some of society's most feared individuals. Serial killers, mass murderers, individuals who lack a conscience or remorse - - these are people commonly referred to as psychopaths, and believed to be beyond all possibility of reform." Amanda Tufts, 17 LCLR 333, 334 (2013), *Born to be an Offender? Antisocial Personality Disorder and its Implications on Juvenile Transfer to Adult Court in Federal Proceedings.*

Finally, and perhaps most critically, this Court acknowledged the particular harm to Mr. Buck from the fact that this evidence was introduced by his own counsel. In rejecting the State's argument that Dr. Quijano's testimony was not prejudicial because "Buck's own counsel, not the prosecution, elicited the offending testimony," this Court stated "[w]e are not convinced." *Buck,* 137 S. Ct. at 777.

> In fact, the distinction could well cut the other way. A prosecutor is seeking a conviction. Jurors understand this and may reasonably be expected to evaluate the government's evidence and arguments in light of its motivations. When a defendant's own lawyer puts in the

> offending evidence, it is in the nature of an *admission against interest, more likely to be taken at face value.*

Id. (emphasis added).

The state courts' resolution of this claim was an unreasonable application of *Strickland v. Washington*, and its progeny (including *Buck*), and this Court should grant certiorari, vacate Mr. Ledford's death sentence and remand for further proceedings.

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari.

Dated: This 16th day of April, 2021.

Respectfully submitted,

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