No. 21-267

In the Supreme Court of the United States

JAMES GARFIELD BROADNAX, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner James Garfield Broadnax was convicted of capital murder and sentenced to death for fatally shooting and robbing two people. During jury selection, Broadnax challenged several of the State's peremptory strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court rejected most of Broadnax's challenges but reseated one of the prospective jurors the State had struck. Broadnax unsuccessfully pursued his *Batson* challenges on direct appeal and state habeas review.

Broadnax raised his *Batson* challenges again in a federal habeas petition. He later amended his petition to present—for the first time—new evidence in support of his *Batson* claims. The district court concluded that it could not consider Broadnax's new evidence under 28 U.S.C. § 2254(d) and *Cullen v. Pinholster*, 563 U.S. 170 (2011), and denied Broadnax habeas relief. After granting a certificate of appealability, the Fifth Circuit affirmed.

The question presented is:

Whether a petitioner may rely on new evidence not presented in state court to overcome 28 U.S.C. § 2254(d)'s relitigation bar.

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STATUTORY PROVISION INVOLVED

Section 2254(d) of Title 28 of the United States Code provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

Broadnax does not dispute that he and an accomplice fatally shot two men in a parking lot in downtown Garland, Texas, who were unlucky enough to cross Broadnax's path while he was on the prowl for someone to rob. Instead, he seeks to relitigate his claims that the prosecution in his case used preemptory challenges in a racially discriminatory manner. The state trial court correctly rejected those claims, and the Texas Court of Criminal Appeals affirmed on direct appeal. But now Broadnax wants to relitigate those claims in federal court—this time with evidence that was not before the state courts. The Court should reject Broadnax's attempt to use evidence that he never presented in state

court to relitigate claims in violation of the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Broadnax has conceded that state courts adjudicated his claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), on the merits. Federal habeas review of his *Batson* claims thus is subject to 28 U.S.C. § 2254(d) and "limited to the record that was before the state court that adjudicated the claim[s] on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see* 28 U.S.C. § 2254(d)(2). As a result, under well-established precedent from this Court, Broadnax cannot use his new evidence to support his habeas petition.

To avoid *Pinholster*'s unequivocal holding, Broadnax now attempts to frame his new evidence as giving him a new *Batson* claim. Even if that framing were incorrect—it is not—this Court's review would not help Broadnax because he has failed to exhaust his state-court remedies for that claim and thus cannot receive federal habeas relief for that claim. He also cannot overcome section 2254(e)(2)'s barrier to introducing new evidence in federal court.

The lower courts correctly denied federal habeas relief on Broadnax's *Batson* claims. And even if his new evidence could be considered, his claims would fare no better.

Broadnax's petition should be denied.

STATEMENT

"During the early morning hours of June 19, 2008, Broadnax and his cousin, Demarius Cummings, fatally shot and robbed Stephen Swan and Matthew Butler in the parking lot of Butler's recording studio in downtown Garland, Texas. There is no genuine dispute about these

facts." Pet. App. 29a; *see also* ROA.1381, 2021, 5874-75.[1] During voir dire, Broadnax challenged the prosecution's exercise of peremptory strikes against seven black prospective jurors and one Hispanic prospective juror under *Batson*. Pet. App. 119a-30a. The trial court denied Broadnax's *Batson* challenges. *See* Pet. App. 130a. Although the trial court later granted Broadnax's motion to reinstate one black potential juror whom the prosecution had stricken, it did not find that the prosecution intentionally discriminated on the basis of race or that its race-neutral reasons for striking the juror were pretextual. *See* Pet. App. 126a-30a. The trial started two weeks later, and the jury found Broadnax guilty of capital murder. Pet. App. 30a. Consistent with the jury's resolution of Texas's special questions, the trial court sentenced him to death. Pet. App. 34a.

On direct appeal, Broadnax argued (among other claims) that the state trial court erred by overruling his *Batson* challenges. The Texas Court of Criminal Appeals rejected Broadnax's *Batson* claims and affirmed the trial court's judgment. *Broadnax v. State*, No. AP–76,207, 2011 WL 6225399, at *2-4 (Tex. Crim. App. Dec. 14, 2011). The court explained that Broadnax failed to show that the prosecution's race-neutral reasons for striking the jurors at issue were pretextual. *Id.* at *2-3. And the court concluded that the trial court did not err by reinstating one of the struck jurors to remedy an alleged *Batson* violation. *Id.* at *4. The court reasoned that the trial court actually erred by finding a *Batson* violation in the first place, and it further explained that even a correct finding that one peremptory strike was racially

[1] Citations to "ROA.XX" refer to the Fifth Circuit Record on Appeal.

motivated does not "automatically indicate that all other peremptory strikes were racially motivated." *Id.* This Court denied Broadnax's petition for a writ of certiorari. *Broadnax v. Texas*, 568 U.S. 828 (2012).

Broadnax also filed an application for a writ of habeas corpus in state court. ROA.11394-493. He did not raise his *Batson* claims in that application. ROA.11394-493. The Texas Court of Criminal Appeals adopted the trial court's findings and conclusions and denied relief. *See Ex parte Broadnax*, No. WR-81,573-01, 2015 WL 2452758, at *1 (Tex. Crim. App. May 20, 2015) (per curiam); *see also* ROA.12354-86. This Court denied Broadnax's petition for a writ of certiorari. *Broadnax v. Texas*, 577 U.S. 842 (2015).

Broadnax then raised his *Batson* claims in a federal habeas petition. ROA.208, 277-96.[2] After he filed that petition, he obtained a copy of a spreadsheet that had been prepared by the prosecution during jury selection, which the prosecution had previously withheld on the ground that it was protected by the work-product doctrine. ROA.1040-41, 1090-91. That spreadsheet listed all qualified members of the jury pool and specified each prospective juror's race, gender, and response to a question about support for the death penalty; the spreadsheet listed information about black prospective jurors in bold type. ROA.720. Broadnax later filed an amended federal habeas petition, ROA.541, which relied on that spreadsheet to support his *Batson* claims. ROA.612, 717-18.

The district court denied relief on all claims and denied a certificate of appealability. Pet. App. 28a-216a. Regarding Broadnax's *Batson* claims, the court explained

[2] Broadnax also raised a number of other claims in his federal habeas petition. Because those claims are not at issue in this petition, respondent does not address them here.

that the prosecution provided "racially neutral, objectively verifiable, record-based, reasons" for its peremptory strikes and that Broadnax failed to present "clear and convincing evidence showing the state trial court's implicit credibility findings . . . were erroneous." Pet. App. 137a-38a. The district court held that Broadnax's new evidence was not properly before it because "*Cullen v. Pinholster*, 563 U.S. 170, 185 (2011)[,] . . . bars this Court from considering new evidence that was not properly before the Texas Court of Criminal Appeals," and 28 U.S.C. § 2254(d)(2) "expressly limits review to the state court record." Pet. App. 138a n.73 (quoting *Halprin v. Davis*, 911 F.3d 247, 255 (5th Cir. 2018) (per curiam)). The district court concluded that section 2254(d) of AEDPA barred relitigation of Broadnax's *Batson* claims. Pet. App. 137a-40a.

Broadnax appealed, ROA.1261, and moved for a certificate of appealability, *see* Mot. for Certificate of Appealability and Brief in Support, *Broadnax v. Davis*, 813 F. App'x 166 (5th Cir. 2021) (No. 19-70014). In his COA motion, Broadnax insisted that the district court had improperly failed to "consider significant documentary evidence of discriminatory intent," *id.* at 15 (capitalization altered), and had misapplied *Pinholster* and 28 U.S.C. § 2254(d)(2), *id.* at 36. The Fifth Circuit granted a COA "limited to one issue: Whether the district court erroneously concluded that the spreadsheet was barred by *Pinholster* and 28 U.S.C. § 2254(d)(2). (Issue IA(2)(b) and (d) in Petitioner's Briefing)." Pet. App. 219a.

The Fifth Circuit affirmed the district court's denial of habeas relief, rejecting Broadnax's argument that he could present his new evidence in federal court based on "a footnote in *Pinholster*, which recognized that in some instances new evidence may present a new claim of which

federal habeas courts may take cognizance." Pet. App. 8a. The court explained that Broadnax's new evidence was not the type of exculpatory *Brady* material this Court referenced in the *Pinholster* footnote, Pet. App. 8a-9a, and that the Fifth Circuit's post-*Pinholster* decisions demonstrated that Broadnax's new evidence could not be considered, Pet. App. 9a-12a. The court concluded that even if Broadnax's new evidence could be considered, he still could not receive habeas relief for his *Batson* claims because his new evidence "fails to render all" of the prosecution's racially neutral reasons for the strikes at issue "merely pretextual." Pet. App. 13a-14a. Broadnax's new evidence, the court explained, "does nothing more than indicate that the Dallas County District Attorney's Office made a point of memorializing the ethnicity and gender of the remaining members of the jury venire prior to the exercise of its peremptory challenges." Pet. App. 13a-14a (quoting Pet. App. 138a n.73).

The Fifth Circuit further explained that Broadnax "had no basis to offer evidence outside the state court record" because the state courts' rejection of Broadnax's *Batson* claims on the state-court record was not unreasonable. Pet. App. 19a; *see also* Pet. App. 14a-19a. The court agreed with the district court that the strikes Broadnax challenged "share common, race-neutral characteristics." Pet. App. 15a. The court also agreed with the district court's conclusion that the state courts did not unreasonably apply *Batson* by reseating a struck juror to remedy an alleged *Batson* violation. Pet. App. 18a-19a. The court noted that the Texas Court of Criminal Appeals "found on direct appeal that no *Batson* violation had occurred." Pet. App. 18a. The court went on to credit the district court's findings that "no clearly established Supreme Court law requires dismissal of an entire jury

panel in the face of a single *Batson* violation" and that a new rule to that effect could not retroactively apply to Broadnax's case under *Teague v. Lane*, 489, U.S. 288 (1989). Pet. App. 18a-19a.

REASONS FOR DENYING THE PETITION

I. This Court Should Not Grant Certiorari To Review the Application of 28 U.S.C. § 2254(d) Under Well-Settled Precedent.

Certiorari is unwarranted because the Court has already answered the question presented by forbidding federal habeas petitioners from relitigating their claims with new evidence. Broadnax conceded that state courts adjudicated his *Batson* claims on the merits.[3] He also admitted that he "exhaust[ed] his state appellate and post-conviction remedies." Pet. 11; *see* Broadnax C.A. Br. at 5; ROA.632. As a result, federal habeas review of Broadnax's *Batson* claims is subject to AEDPA's "highly deferential" standard. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted). And this Court's decision in *Pinholster* has conclusively resolved the appropriate level of evidentiary development allowed under section 2254(d): none.

Broadnax does not dispute that section 2254(d)(2) bars petitioners from attacking a state-court's factual determination as unreasonable with evidence outside the state-court record. Nor can he, as review under section 2254(d)(2) is expressly limited to "the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

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[3] *See* Broadnax C.A. Br. at 5; ROA.632; *see also* Pet. App. 119a-30a (trial); *Broadnax*, 2011 WL 6225399, at *2-4 (direct appeal); *Broadnax*, 568 U.S. 828 (direct appeal).

This Court squarely rejected consideration of such new evidence under section 2254(d)(1) in *Pinholster*. There, this Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. This Court explained:

> Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

Id. at 181-82. "This understanding of the text," this Court continued, "is compelled by 'the broader context of the statute as a whole,' which demonstrates Congress' intent to channel prisoners' claims first to the state courts." *Id.* at 182 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "It would be contrary to that purpose," the Court reasoned, "to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." *Id.*

While *Pinholster* focused on section 2254(d)(1), this Court also recognized that section 2254(d)(2) bars new evidence with even more "clarity" than section 2254(d)(1). *Id.* at 185 n.7; *see also id.* at 211-12 (Sotomayor, J., dissenting).

Pinholster thus provides a clear answer to the question Broadnax presents in his petition: because Broadnax's new evidence was not in the record that was before the state courts when they adjudicated his *Batson*

claims, that evidence cannot be considered when reviewing the reasonableness of the state courts' adjudication of his claims under AEDPA. *See Pinholster*, 563 U.S. at 181.

Broadnax thus needs this Court to overrule *Pinholster*, not "clarify" it, Pet. 14. To allow new facts and evidence to attack state courts' adjudications of claims on the merits would turn *Pinholster* on its head and eviscerate the "comity, finality, and federalism" that AEDPA was designed to promote. *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017). *Pinholster* would be a dead letter if petitioners can defeat limits on new facts and arguments by relying on new facts and arguments. Because Broadnax identifies no split of authority—indeed, this Court's well-established precedent forecloses the rule he seeks—all that could arguably remain is a request for error correction unworthy of this Court's review. *See* Sup. Ct. R. 10. Broadnax's petition should be denied.

II. This Is a Poor Vehicle To Resolve Any Lingering Questions Regarding *Pinholster*.

The petition should also be denied because it presents a poor vehicle to resolve any lingering questions regarding the introduction of new evidence in federal habeas proceedings. The question purportedly left open by *Pinholster*—where to draw the line between new evidence that gives rise to a new claim and new evidence that merely supports a claim that has already been adjudicated on the merits in state court—is not fairly presented. And even if Broadnax's new evidence gives rise to a new *Batson* claim (it does not), he cannot receive federal habeas relief for that claim because he has not exhausted his state-court remedies for that claim. Nor can he overcome section 2254(e)(2)'s bar on presenting new evidence in federal court because he has not shown that

he diligently attempted to develop the factual basis for that claim in state court.

A. Broadnax's habeas petition does not present the question Broadnax claims this Court left open in *Pinholster*.

Broadnax attempts to circumvent *Pinholster*'s clear and unequivocal holding by pointing to a footnote. Pet. 16-19. In that footnote, the Court suggested in dicta that a hypothetical posed in the dissenting opinion "involving new evidence of withheld exculpatory witness statements may well present a new claim." *Pinholster*, 563 U.S. at 186 n.10 (citing *id.* at 214-15 (Sotomayor, J., dissenting)). But the Court expressly declined to "draw the line between new claims and claims adjudicated on the merits." *Id.* Relying on that footnote in an attempt to avoid *Pinholster*'s limitation on the scope of federal habeas review of his *Batson* claims, Broadnax claims that his new evidence "gives rise to a new [*Batson*] claim that was not previously 'adjudicated on the merits.'" Pet. 4 (quoting 28 U.S.C. § 2254(d)(1)); *see also* Pet. 19.

As the Fifth Circuit concluded below: "Whatever lines might be drawn pursuant to the *Pinholster* footnote, they are not implicated here" because Broadnax's new evidence does not create a new, unexhausted claim. Pet. App. 9a. The scope of a "claim" under section 2254(d) is determined by the legal basis for relief it asserts, not the evidence used to support it. When AEDPA refers to the "claim" adjudicated in state court, it means "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). So if the state court rejected "an asserted federal basis for relief," *id.*, it adjudicated the claim that asserted that federal basis for relief—whatever the particular facts alleged. It is well settled that "identical

grounds may often be proved by different factual allegations." *Sanders v. United States*, 373 U.S. 1, 16 (1963). "[A] claim of involuntary confession predicated on alleged psychological coercion," for example, "does not raise a different 'ground' than does one predicated on alleged physical coercion." *Id.* Broadnax's state and federal *Batson* claims are identical, and no amount of new evidence can alter that conclusion.

B. Broadnax's efforts to evade *Pinholster* run headlong into AEDPA's exhaustion requirement.

Broadnax's attempt to evade section 2254(d)'s prohibition of using new evidence to challenge the state courts' adjudication of his *Batson* claims runs headlong into section 2254(b)(1)(A)'s exhaustion requirement. Even if Broadnax's new evidence did give him a new *Batson* claim, Broadnax acknowledges that he obtained his new evidence "*[a]fter* exhausting his state appellate and post-conviction remedies," Pet. 11-12 (emphasis added). That means he could not have presented that evidence during those proceedings or exhausted any new claim based on such evidence in his original state-court habeas proceedings. And Broadnax has not shown that he presented his new evidence in subsequent state-court proceedings. This is fatal to his petition because "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A)). So if Broadnax's new evidence gives him a new *Batson* claim, then he has failed to exhaust his state-court remedies for that claim.

To overcome section 2254(b)(1)(A)'s exhaustion requirement, Broadnax asserted in the district court and

in the Fifth Circuit that his *Batson* claims were adjudicated on the merits in state court. *See* ROA.632; Broadnax C.A. Br. 5. But Broadnax cannot have it both ways. Either his new evidence creates a new claim (and is barred by AEDPA's exhaustion requirement), or it merely supports the *Batson* claims he has already raised (and is subject to *Pinholster*). Either way, his federal habeas petition must be denied. If Broadnax's new evidence gives him a new *Batson* claim, then that claim must be dismissed because Broadnax has not shown that he has exhausted his state-court remedies for that claim. If, on the other hand, his new evidence merely supports the *Batson* claims for which he exhausted his state-court remedies, then AEDPA bars Broadnax from relitigating those claims using new arguments and evidence to attack the reasonableness of the state court's adjudication. *See Pinholster*, 563 U.S. at 181; *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam) (indicating that federal courts cannot consider arguments a petitioner did not present in state court).

C. Broadnax's efforts to introduce new evidence also run afoul of section 2254(e)(2).

Broadnax would also run headlong into section 2254(e)(2)'s separate barrier on presenting new evidence that was not diligently developed in state court. Subject to conditions Broadnax cannot satisfy, section 2254(e)(2) provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). When triggered, section 2254(e)(2) precludes all evidence presented for the first time in federal court. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam). As *Pinholster* confirms, "2254(e)(2) still restricts the discretion of federal habeas

courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." 563 U.S. at 186.

Although Broadnax asserts that he made "diligent attempts" to obtain his new evidence earlier, Pet. 19, he has not shown that he asked the state courts to order the disclosure of documents that support his *Batson* claims but were withheld on the grounds that they were protected by the work-product doctrine. Though uncommon, Texas courts have occasionally held that a constitutional claimant with sufficient need may pierce the protections typically afforded to attorney work product. *See Salazar v. State*, 795 S.W.2d 187, 192-93 (Tex. Crim. App. 1990) (en banc); *cf. Ex Parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012). Whether Broadnax could have satisifed that standard here is far from clear.[4] What is clear, however, is that his failure to even make the motion in his state habeas proceedings "contribut[ed] to the absence" of a state-court ruling on this evidence and thereby triggered section 2254(e)(2). *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Broadnax cannot explain away counsel's untimely failure to "investigate and pursue" work-product challenges. *Id.* at 435. Moreover, Texas allows a second habeas petition if—as Broadnax insists happened here—"the factual . . . basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). Broadnax did not even attempt to make use of that procedure. There was necessarily no "diligent" attempt, *Williams*, 529 U.S. at 432, "to develop the factual basis

[4] An independent vehicle problem is that this Court has never previously held whether, as a matter of federal law, *Batson* automatically trumps an assertion of protection under the attorney work-product doctrine.

of" Broadnax's purportedly new *Batson* claim "in State court proceedings," 28 U.S.C. § 2254(e)(2).

Instead, Broadnax tried to bypass state-court review of his new evidence by shoehorning his new evidence into the federal habeas petition he filed before he obtained that evidence. But as this Court has repeatedly observed: "[p]rovisions like §§ 2254(d)(1) and (e)(2) ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.'" *Pinholster*, 563 U.S. at 186 (second alteration in original) (quoting *Williams*, 529 U.S. at 437) (citing *Richter*, 562 U.S. at 103 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions"); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) ("[T]he state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing")).

Even if Broadnax could prevail on the question presented, he could obtain relief only if this Court were to accept his invitation to allow a petitioner to sidestep state-court review by adducing new evidence in federal court. Because "AEDPA's statutory scheme is designed to strongly discourage" such conduct, this Court should decline the invitation. *Id.* at 186.

III. The Fifth Circuit Correctly Affirmed the Denial of Federal Habeas Relief.

Finally, the Court should deny review because Broadnax's *Batson* claims fail on the merits. The state court reasonably rejected Broadnax's *Batson* claims. His new evidence would not change that conclusion. Regardless, Broadnax's *Batson* claims fail even under de novo

review. Thus, even if the Court were inclined to engage in error correction, it should deny certiorari because there is no misapplication of AEDPA or *Batson* to correct.

A. The Fifth Circuit correctly applied AEDPA to deny Broadnax relief.

Broadnax is not eligible for federal habeas relief under section 2254(d). As both the district court and the Fifth Circuit concluded, the prosecution provided "racially neutral, objectively verifiable, record-based, reasons" for each of the strikes Broadnax challenges. Pet. App. 15a, 137a. And Broadnax cannot show that the state court's reinstatement of one struck juror was an inadequate remedy for an alleged *Batson* violation under this Court's precedent. As a result, the state courts' denial of relief for Broadnax's *Batson* claims was not "contrary to" a ruling of this Court, 28 U.S.C. § 2254(d)(1), did not "involve[]an unreasonable application of, clearly established Federal law, as determined" by this Court, *id.*, and was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). Pet. App. 15a-19a, 132a-40a.

1. The prosecution provided valid race-neutral bases for the strikes Broadnax challenges.

The state court's rejection of Broadnax's challenges to some of the State's peremptory strikes was not contrary to this Court's precedent regarding *Batson.* This Court has explained that there is a "three-step process for determining when a strike is discriminatory" under *Batson*:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 578 U.S. 488, 499 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (internal quotation marks and brackets omitted)).

As the Fifth Circuit detailed, the prosecution's explanations of the strikes Broadnax challenged "share common, race-neutral characteristics." Pet. App. 15a. Five of the strikes Broadnax challenged were of potential jurors who indicated on the juror questionnaire that they were "not in favor of the death penalty." Pet. App. 16a. "The state struck every veniremember, regardless of race," who gave that answer. Pet. App. 16a.

Two of the strikes Broadnax challenged were of potential jurors who selected the following answer on the juror questionnaire: "Although I do not believe that the death penalty ever ought to be invoked, as long as the law provides for it, I could assess it under the proper set of circumstances." Pet. App. 16a. "Again, the state struck every veniremember" who gave that answer "regardless of race." Pet. App. 16a.

The last strike Broadnax challenged was of a potential juror who "indicated that she would be 'automatically prevented' from imposing the death penalty if the defendant was using drugs or alcohol at the time of the offense." Pet. App. 17a. Intoxication was "a core component of the defense theory," and that "automatic ineligibility formed the core of the state's justification to the

trial court for a peremptory strike." Pet. App. 17a. "[N]o other potential juror" indicated that he or she "believed that intoxication *automatically* rendered a defendant ineligible for the death penalty." Pet. App. 17a.

Those explanations alone are enough to show that the state courts did not unreasonably apply *Batson* and its progeny. And that was only part of the thorough "side-by-side analysis of the state courts' determinations" that the district court conducted. Pet. App. 18a; *see* Pet. App. 132a-40a. The Fifth Circuit and the district court "correctly concluded that *Batson* was not unreasonably applied." Pet. App. 18a.

2. The trial court's reinstatement of a juror to remedy an alleged *Batson* challenge was not an unreasonable application of this Court's precedent.

The district court also correctly rejected Broadnax's argument that the state trial court unreasonably applied *Batson* by reseating a single struck potential juror to remedy an alleged *Batson* violation. Pet. App. 141a-42a. "[N]o clearly established Supreme Court law requires dismissal of an entire jury panel in the face of a single *Batson* violation," and a new rule to that effect could not retroactively apply to Broadnax's case under *Teague*. Pet. App. 18a-19a.

In short, the lower courts properly denied Broadnax federal habeas relief on his *Batson* claims on the state-court record.

B. The Fifth Circuit correctly concluded that Broadnax's claims would fail even under de novo review.

The district court and the Fifth Circuit also correctly concluded that Broadnax would fare no better even

considering his new evidence. To secure federal habeas relief, Broadnax must do more than overcome AEDPA's relitigation bar. He must still show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[A] habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review [under] § 2254(a)." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010)). Broadnax cannot make that showing.

Broadnax's new evidence—a spreadsheet prepared by the prosecution—"does nothing more than indicate that the Dallas County District Attorney's Office made a point of memorializing the ethnicity and gender of the remaining members of the jury venire prior to the exercise of its peremptory challenges." Pet. App. 138a n.73. Although the names of each black juror are in bold, that spreadsheet "is no smoking gun; it fails to render all" of the racially neutral reasons the prosecution gave for its strikes "merely pretextual." Pet. App. 13a.

Broadnax relies heavily on *Foster v. Chatman*, 578 U.S. 488, and *Miller-El v. Dretke*, 545 U.S. 231 (2005). But the evidence Broadnax presented to the district court—including both the evidence he presented in state court and his new evidence—comes nowhere near the evidence proffered to support the successful *Batson* claims in *Foster* and *Miller-El*.

Although the petitioner in *Foster* offered a list of prospective jurors similar to the spreadsheet Broadnax now asks federal courts to consider, *Foster*, 578 U.S. at 493-95, the petitioner there also offered several additional pieces of evidence that were considerably more damning.[5] That evidence included: an affidavit drafted by an

[5] To the extent Broadnax relies on *Foster* to overcome section 2254(d)'s relitigation bar, that reliance is misplaced: the evidence in

investigator for the prosecution in which the investigator gave his views of ten black prospective jurors and indicated which one he would pick "[i]f it comes down to having to pick one of the black jurors"; handwritten notes about three black prospective jurors with the annotations "'B#1,' 'B#2,' and 'B#3,' respectively"; two lists indicating that the prosecution intended to strike all five black prospective jurors (along with a few other prospective jurors); a document with the notation "*No*. No *Black* Church"; and juror questionnaires for several black prospective jurors on which "the juror's response indicating his or her race had been circled." *Id.* at 493-95 (citations omitted). And this Court described the evidence that the State's racially neutral explanations were pretextual as "compelling." *Id.* at 512. This Court also noted "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file." *Id.* Broadnax offered nothing close to comparable to that evidence.

Any claimed similarities to the evidence in *Miller-El* also withers under scrutiny. Although this Court noted in *Miller-El* that the prosecutors had "marked the race of each prospective juror on their juror cards," *Miller-El*, 545 U.S. at 264 (citation omitted), the Court's decision did not turn on that evidence, *see id.* at 266; *see also id.* at 256 n.15.[6] This Court conducted detailed "side-by-side

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Foster that Broadnax points to was offered during state-court proceedings. 578 U.S. at 493-96.

[6]Although some of the evidence in *Miller-El* had not been presented in state court, this Court decided *Miller-El* six years before this Court held in *Pinholster* that evidence that was not presented in state court is outside the scope of federal habeas review under section 2254(d). Moreover, "the State raised no objection" in *Miller-El* to the petitioner's presentation of evidence for the first time in federal court. *Miller-El*, 545 U.S. at 256 n.15. Indeed, the State

comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Id.* at 241; *see id.* at 241-52. Based on those comparisons, this Court concluded that the "prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." *Id.* at 265. The Court found further support for its conclusion in the "broader patterns of" the prosecution's "practice during the jury selection." *Id.* at 253; *see id.* at 253-62. Again, Broadnax offered nothing close to comparable to that evidence. Any similarity between the juror cards in *Miller-El* and the spreadsheet Broadnax presented for the first time in federal court fails to make up for the lack of evidence to support Broadnax's claim.

In sum, regardless of whether Broadnax is allowed to offer his new evidence for the first time during federal habeas review of his state court conviction, he cannot show that he is entitled to habeas relief.

"joined with Miller-El in proposing that [this Court] consider this material" and "expressly relied" on it before this Court. *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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