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

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

REPLY BRIEF FOR THE PETITIONER

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After using peremptory strikes against all seven qualified Black venire members and one qualified Hispanic venire member, the prosecutors presenting the State's case against petitioner offered, in response to petitioner's *Batson* challenges, supposed race-neutral explanations for their strikes. What the prosecutors failed to tell defense counsel, the trial court, and the Texas Court of Criminal Appeals, was that they had prepared and used a spreadsheet that identified potential jurors by their race, and indeed bolded the names of Black jurors to easily track potential jurors' races, as the prosecutors decided whom to

strike. As this Court recognized in cases like *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), and *Foster* v. *Chatman*, 578 U.S. 488 (2016), evidence like this "plainly belie[s] the State's claim that it exercised its strikes in a 'color-blind' manner." *Foster*, 578 U.S. at 513.

This evidence was not available to petitioner during state court proceedings because the State concealed its existence. A new Dallas County District Attorney disclosed it only after petitioner had filed his original federal habeas petition. Yet both the district court and court of appeals refused to consider this evidence, interpreting this Court's decision in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), as barring them from doing so. Whether *Pinholster* prevents federal courts from considering concealed evidence of a prosecutor's racially discriminatory intent is a question of exceptional importance. *Batson* serves not only to protect the rights of defendants, but also of jurors, and "to enhance public confidence in the fairness of the criminal justice system." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2242 (2019). It is critical that the Court resolve this issue left open in *Pinholster*, both to ensure that petitioner and jurors receive the fair treatment the Constitution guarantees them, and to clarify the circumstances in which a petitioner may present evidence unavailable to him during state court *Batson* proceedings in support of a federal habeas claim.

The State argues that petitioner's case is not an appropriate vehicle to consider this issue because petitioner's *Batson* claim: does not present the issue left unresolved by the *Pinholster* majority and dissent; is not exhausted; was not diligently pursued in state court proceedings; and cannot be established. Petitioner addressed the first argument in his opening brief. The State failed to argue the exhaustion and diligence points before either the district

court or court of appeals, and, consequently, this Court should not consider them now. But even if these arguments are considered, they lack merit and should not impede this Court's consideration of the important question this petition presents. And the State's argument regarding the substance of the *Batson* claim fails on the merits.

A. Certiorari Is Appropriate in This Case.

The Court should grant certiorari to clarify the application of *Pinholster* to cases where new evidence, previously unavailable despite a petitioner's diligence, establishes a *Batson* violation. There is currently significant uncertainty in how to resolve this issue under federal law, which threatens paradoxical results at odds with the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The State's contention that certiorari is not appropriate here is incorrect.

First, contrary to the State's suggestion, Br. in Opp. at 7-9, *Pinholster* did not conclusively resolve the circumstances under which courts may consider new evidence in federal habeas proceedings. The Court in *Pinholster* explicitly acknowledged that "state prisoners may sometimes submit new evidence in federal court," while declining to decide "where to draw the line between new claims"—for which federal habeas courts could consider new evidence—"and claims adjudicated on the merits"—for which courts could not consider new evidence under 28 U.S.C. § 2254(d). 563 U.S. at 186, 186 n.10.

In addition to petitioner's case, a recent Ninth Circuit decision, issued after this petition was filed, highlights the uncertainty among federal courts about whether federal courts can consider additional evidence, for the first time in federal habeas proceedings, in support of a *Batson* claim. In *Ervin* v. *Davis*, 12 F.4th 1102, 1108 (9th Cir.

2021), the Ninth Circuit recognized that the "overall context" and "relevant history" of a state's use of peremptory strikes was relevant to a *Batson* analysis. In so holding, the Ninth Circuit remanded the case to the district court to consider whether, in light of *Pinholster*, parties may submit additional evidence of a prosecutor's race-consciousness to support the *Batson* claim "because the California State Supreme Court made an unreasonable determination of facts, which would relieve the district court of AEDPA deference, or whether such evidence must be submitted for the first time in state court."[1] *Id.*

Second, this uncertainty threatens paradoxical results. The State interprets *Pinholster* as barring the consideration of new evidence for claims that were previously adjudicated on the merits in state court, notwithstanding the petitioner's diligence or the reasons why the new evidence was previously unavailable. If applied this way, *Pinholster* would disadvantage petitioners who diligently raise claims and later discover new evidence supporting those claims versus those who never raised the claims below but could demonstrate cause and prejudice for their failure to do so. Such a result would run afoul of AEDPA's goal of encouraging petitioners to pursue their claims in state court. *See Pinholster*, 563 U.S. at 216-17 (Sotomayor, J., dissenting).

Third, the State's interpretation of *Pinholster* incentivizes prosecutors to withhold evidence of wrongdoing

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[1] *See also Winston* v. *Pearson*, 683 F.3d 489, 493, 501 (4th Cir. 2012) (permitting petitioner to present new evidence in support of *Atkins* ineffectiveness claim); *Dickens* v. *Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (permitting petitioner to present new evidence in support of IAC claim); *Gonzalez* v. *Wong*, 667 F.3d 965, 972 (9th Cir. 2011) (barring consideration of new *Brady* evidence but directing district court to stay and abey federal proceedings).

until state court proceedings have concluded, thus insulating this evidence from consideration by any court and depriving state courts of meaningful review. *See Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (stating that state court proceedings should be "the main event").

Fourth, this is an issue of exceptional importance, particularly as applied to *Batson* claims. *Batson* serves not only to protect the rights of defendants, but also of jurors, and to bolster confidence in the criminal justice system. *See, e.g.*, *Br.* of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc., No. 21-267, at 7-8 (describing the widespread persistence of racial discrimination in jury selection). A core component of *Batson* is that courts reviewing *Batson* challenges must consider "all relevant circumstances" bearing on the strikes. *Batson* v. *Kentucky*, 476 U.S. 79, 96-97 (1986). This Court should grant Certiorari to ensure that racial discrimination in jury selection is not insulated from judicial review, and for this Court to, once again, "vigorously enforce[] and reinforce[]" *Batson* and "guard[] against any backsliding." *Flowers*, 139 S. Ct. at 2243 (collecting cases).

B. This Case Is an Appropriate Vehicle to Resolve the Question Presented.

This petition squarely presents the question debated and left unresolved by the majority and dissent in *Pinholster*: the circumstances in which federal habeas courts can consider previously withheld evidence. Petitioner's case is an appropriate vehicle to decide that question. The State's other vehicle arguments were either never presented below, lack merit, or ignore the record evidence in this case.

1. The Question at Issue Is Fairly Presented.

In *Pinholster*, the Court noted that the hypothetical petitioner outlined in Justice Sotomayor's dissent "may well present a new claim," but it declined to precisely define what constituted a "new claim." 563 U.S. at 186 n.10. The Court nevertheless suggested that diligence was an important consideration. *Id.* at 203 (Alito, J., concurring) (noting that the limitations on fact development imposed by Section 2254(d) are intended to prevent "a petitioner [from] obtain[ing] federal habeas relief on the basis of evidence that could have been but was not offered in state court . . .").

This petition presents the precise issue left unresolved in *Pinholster*. The crux of the *Batson* inquiry is the subjective intent of the prosecutor in exercising peremptory strikes; the spreadsheet at issue here, which petitioner could not have introduced during state court proceedings, provides direct, contemporaneous insight into the prosecutors' intent at petitioner's trial. This evidence is not just powerful, but transformative.

The State argues that the spreadsheet does not provide a "new claim" within the meaning of *Pinholster*, citing *Gonzalez* v. *Crosby* for the proposition that a claim is not "new" if the legal basis for it is the same. Br. in Opp. at 10. This argument entirely ignores the actual issue that *Pinholster* left unresolved. The Court's statement in *Pinholster* concerned a hypothetical petitioner who obtained new evidence in support of a previously asserted *Brady* claim after state proceedings had concluded. The fact that the hypothetical claim had been previously asserted was the entire point of the Court's discussion. *See Pinholster*, 563 U.S. at 186 n.10; *id.* at 214-16 (Sotomayor, J., dissent-

ing). Nonetheless, the Court acknowledged that petitioner "may well present a new claim." *Pinholster*, 563 U.S. at 186 n.10.

2. Broadnax's Claim Is Not Barred by Any Purported Failure to Exhaust.

The State never argued, either before the district court or court of appeals, that petitioner's *Batson* claim, including the new evidence of the spreadsheet, was unexhausted. State C.A. Br. at 6-7; D. Ct. Dkt. 63 at 61-63. Petitioner made clear before those courts that not only had he exhausted this claim, but also that any failure to exhaust had been excused because petitioner met the cause and prejudice standard. Certificate of Appealability Br. at 39 n.5; D. Ct. Dkt. 69 at 15 n.3. Given the State's failure to respond to these arguments or raise this issue below, this Court should decline to consider the argument now. *See Air Courier Conf. of Am.* v. *Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 522-23 (1991); *I.N.S.* v. *Aguirre-Aguirre*, 526 U.S. 415, 432 (1999).

In any event, there is no exhaustion bar here. Petitioner exhausted his *Batson* claim in state court proceedings. Petitioner's trial counsel objected to each of the State's strikes of minority venire members on *Batson* grounds, and those strikes were heard and decided by the trial court. *See Broadnax* v. *Texas*, No. AP-76207, 2011 WL 6225399, at *4 (Tex. Crim. App. Dec. 14, 2011). The *Batson* claim was then briefed and argued on direct appeal before the Texas Court of Criminal Appeals. *Id.* at *2-*4. Petitioner's *Batson* claim was thus fairly presented to the state courts and exhausted.

While petitioner indeed contends that the spreadsheet gives rise to a "new claim" as discussed by the Court in *Pinholster*, that contention does not obviate the undisputed reality that petitioner exhausted his *Batson* claim

in the state courts on the legal and factual record then available to him.

Even if the new evidence were to somehow render the claim unexhausted, petitioner has shown cause and prejudice; exhaustion should therefore be excused. *See Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991). As the State itself argued before the Fifth Circuit in this case, "factual or legal unavailability can be cause for failing to exhaust a procedurally defaulted claim." Opp'n to Certificate of Appealability at 33 n.8. Here, it is clear that petitioner has demonstrated cause for his failure to present the spreadsheet in state court proceedings: the State withheld the spreadsheet during the pendency of those proceedings. Thus, "the factual or legal basis for [the] claim was not reasonably available to counsel[, or] 'some interference by officials' . . . made compliance impracticable . . . ." *Coleman*, 501 U.S. at 753 (citation omitted); *cf. Strickler* v. *Greene*, 527 U.S. 263, 286, 289 (1999) (finding cause where prosecution did not disclose material or include it in its file).

Nor can the State reasonably dispute that petitioner has been prejudiced: the spreadsheet is "material," *Banks* v. *Dretke*, 540 U.S. 668, 691 (2004), because it directly reveals the prosecutors' discriminatory intent during jury selection, and its absence worked to petitioner's actual and substantial disadvantage. *See Murray* v. *Carrier*, 477 U.S. 478, 494 (1986).

3. Petitioner Diligently Prosecuted His *Batson* Claim.

The State next argues, again for the first time, that petitioner was not sufficiently diligent in developing the factual basis for his *Batson* claim. Again, the State failed to raise this issue below, and the parties, the district court,

and the court of appeals all proceeded on the understanding that Broadnax was indeed diligent. *See generally Broadnax* v. *Davis*, No. 3:15-CV-1758-N, 2019 WL 3302840 (N.D. Tex. July 23, 2019); *Broadnax* v. *Lumpkin*, 987 F.3d 400 (5th Cir. 2021). Accordingly, this Court should decline to hear this argument now. *See supra* at 7.

But even if this issue were properly before the Court, petitioner was unquestionably diligent in developing the factual basis for his *Batson* claim before the state courts. *See ibid.* And with respect to the prosecutors' file in particular, state habeas counsel asked to review the Dallas County District Attorney's file pertaining to petitioner's case, but the office refused, citing work product protection or attorney client privilege. State habeas counsel even raised the State's claim of privilege in a hearing before the state habeas court, to which the State responded that they were indeed withholding protected documents. *See* Writ Hr'g Dec. 6, 2012 at 33-34, 37.

The State's argument that petitioner should have moved to compel the State's work product in order to be considered a "diligent" petitioner ignores the fact that petitioner had no knowledge that the State was concealing material evidence of its wrongdoing. And it ignores the relevant legal standard—that a petitioner exercise *reasonable* diligence. *Williams* v. *Taylor*, 529 U.S. 420, 435 (2000).

This Court's decision in *Williams* is instructive. In *Williams*, the Court held that an evidentiary hearing under 28 U.S.C. § 2254(e)(2) was not be barred where a claim was "pursued with diligence but remained undeveloped in state court because, for instance, the *prosecution concealed facts* . . . ." *Id.* (emphasis added). That the prosecutors here had unclean hands is reinforced by the fact that petitioner's trial took place only a few years after this

Court issued its *Miller-El* decisions, reviewing and criticizing the jury selection practices of the very same office that prosecuted petitioner. *See Miller-El* v. *Dretke*, 545 U.S. 231, 253-54 (2005); *see also* NAACP LDF Br. at 9-12 (detailing the history of race discrimination in jury selection by the Dallas County District Attorney's Office).

Further, the State's suggestion that a motion to compel would have been fruitful before the Texas courts is belied by Texas caselaw. *See Guilder* v. *State*, 794 S.W.2d 765, 767 (Tex. App. 1990) ("*Batson* does not create an exception to the work product privilege."); *Goode* v. *Shoukfeh*, 943 S.W.2d 441, 448-49 (Tex. 1997) (denying request to obtain counsel's voir dire notes as privileged work product); *id.* (distinguishing *Salazar* v. *State*, 795 S.W.2d 187, 192-93 (Tex. Crim. App. 1990), cited in the State's Brief in Opposition at 13, in which a petitioner was permitted to examine voir dire notes only where "the attorney relies upon these notes while giving . . . testimony").

4. The State Ignores the Powerful *Batson* Evidence in the Record.

The State also argues that petitioner failed to present sufficient evidence akin to the petitioners in *Foster* and *Miller-El* to overcome AEDPA's relitigation bar or to establish a *Batson* violation. This argument, and the language from the courts below that the State references, ignore both that the spreadsheet clearly demonstrates the prosecutors' discriminatory intent, and that the other record evidence in this case only confirms that demonstration. The spreadsheet shows, undeniably, that the prosecutors were conscious of and actively tracking the venire members' races, in clear violation of *Batson* and its progeny. *See* NAACP LDF Br. at 20-21 (noting that such evidence "offers rare and unique insight into the prosecution's intent"). And the record directly contradicts the

State's contention that the prosecutors offered sufficient race-neutral justifications for the strikes. Br. in Opp. at 15-17. The State's brief fails to address petitioner's comparative juror analysis, which demonstrates: (i) the disparate treatment of Black and White venire members despite their comparable attitudes toward the death penalty; (ii) that the reasons given for striking nonwhite venire members did not apply equally to White venire members; (iii) the race-based questioning of Black venire members; and (iv) the disparate questioning and treatment of White and nonwhite venire members. *See* Pet. at 7-11; *Flowers*, 139 S. Ct. at 2243, 2246-50 (finding similar indicia of discriminatory intent to be probative of *Batson* violations). Nor does the State address its own shifting explanations and misrepresentations of the spreadsheet's origin. *See* Pet. at 19.[2]

Finally, the State seeks to distinguish *Miller-El*, in which the Court considered new evidence during federal proceedings, arguing that there, unlike here, the State "raised no objection" to consideration of the new evidence. Br. in Opp. at 19 n.6. But if federal courts are barred from considering such evidence, as the State contends, the lack of objection from the State should be irrelevant. Clearly,

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[2] The State's opposition also raises an argument made by petitioner below that he has not made here: whether the reinstatement of one Black juror sufficed as a remedy for the State's strike of that juror. Br. in Opp. at 17. To the extent the State may be arguing that the reinstatement of one juror could serve as a remedy for the improper strikes of *other* jurors, such an argument clearly fails. The "Constitution forbids striking even a single prospective juror for a discriminatory purpose," *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008) (internal quotation marks omitted), and petitioner has consistently argued that striking eight minority potential jurors—not just the one Black juror who was restored to the jury—violated *Batson*. *See, e.g.*, Pet. at 20.

the State's position before this Court is irreconcilable with *Miller-El*.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

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