CAPITAL CASE
NO. 21-7584

In The Supreme Court of the United States

WILLIAM O. DICKERSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT OF SOUTH CAROLINA

REPLY BRIEF OF PETITIONER

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Respondent's brief in opposition ("BIO") rebuts neither of the compelling reasons for certiorari presented in Mr. Dickerson's petition to this Court. Respondent's BIO does not undermine the multi-faceted evidence of race discrimination in Mr. Dickerson's capital jury selection, including: the Solicitor's consistent pattern of removing Black jurors five times as often as white jurors in eight trials before Mr. Dickerson's;[1] the finding by the trial judge in a prior case that the same Solicitor had intentionally discriminated against Black jurors; her access to a training document that said explicitly that "race or gender may be one consideration for wishing to strike" a juror, so long as another "valid reason" was evident; and, in Mr. Dickerson's case, her use of three of four peremptory strikes to exclude Black citizens, and her removal of juror Gadsden for reasons that were either not supported by the record or applied equally to white jurors who were accepted.

The second reason to grant review is that Respondent and the state PCR court both rely on legal propositions that fly in the face of this Court's well-established *Batson* precedent. As explained in detail below, the state PCR court dismissed the relevance of the Solicitor's historical and statistical patterns of discrimination, ignored the Solicitor's prior *Batson* violation, held that jury selection training

[1] This was a consistent pattern that emerged through the Solicitor's consideration of *hundreds* of potential jurors. Across eight trials, the Solicitor encountered 109 Black citizens who were eligible to serve as jurors, and struck 42 of them, or 38.5%. In contrast, the Solicitor struck only 6.8% (22 of 325) of the white jurors who were eligible to serve. PC App. 7368. This was a pattern that persisted over time, and not some isolated incident attributable to the idiosyncracies of a few unique prospective jurors. Moreover, the Solicitor cannot be given credit for "only" striking 38.5% of the Black jurors, since South Carolina law, *see* S.C. Code Ann. § 14-7-1110, limited the number of strikes available in each case to five. *Compare Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005) (finding *Batson* violation where the prosecution struck 10 of 11 eligible Black jurors).

materials are not relevant to a *Batson* analysis, credited the Solicitor's bare denials of discriminatory intent, and suggested that Mr. Dickerson's claim was dubious because it focused on the strike of one potential Black potential juror. But each of these conclusions is essentially the opposite of what this Court has required for a *Batson* analysis. In short, the state PCR court denied Mr. Dickerson's claim by flouting this Court's *Batson* jurisprudence.

I. The PCR Court Clearly Misapprehended This Court's *Batson* Jurisprudence and Repeatedly Failed to Consider or Give Weight to Evidence This Court Has Found Proper And Compelling in the *Batson* Context.

In its Brief in Opposition, Respondent attempts to pass off the PCR court's various rationales for excluding Mr. Dickerson's *Batson* evidence as proper findings related to the "credibility" of the evidence presented by Mr. Dickerson. In reality, however, the PCR court simply refused to consider that evidence, as the plain language of its opinion documents. This Court has held that "criminal defendants raising *Batson* challenges [may] present *a variety* of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race," including, "[f]or example..., statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case…; relevant history of the State's peremptory strikes in past cases;" and "other relevant circumstances that bear upon the issue of racial discrimination." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235, 2243 (2019) (citing *Foster v. Chatman*, 578 U.S. 488, 514 (2016), *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005), and *Batson v. Kentucky*, 476 U.S. 79 (1986)). But the PCR

court refused to consider *the very same categories of evidence* that *Batson* and its progeny expressly permit: statistical evidence showing a pattern of discrimination; a prior *Batson* violation by Mr. Dickerson's trial prosecutor; and jury selection training materials with instructions on how to construct an ostensibly "race neutral" reason to ward off a *Batson* challenge. With neither legal nor factual support, the PCR court disparaged this evidence as "suspect," "outside the zone of relevancy," "inapplicable," and "disfavored" (Pet. App.[2] 25-27, 39, 44, 46). Instead, it denied relief to Mr. Dickerson based on the bare trial record and the Solicitor's own PCR testimony that she would never strike a juror based on race.

a. The PCR Court Improperly Held that Historical Pattern and Statistical Evidence Is Irrelevant, Disfavored, and Inapplicable to a *Batson* Analysis.

The PCR court held that statistical evidence "falls outside the zone of relevancy. Bare statistics are not demonstrative of causation …" Pet. App. 39. The PCR court explained: "Our appellate court has viewed with disfavor the use of gross figures, statistics, and probabilities in support of post-conviction relief allegations." Pet. App. 44. And further, the PCR court claimed that "raw statistics simply do not apply" to step three of a *Batson* analysis. Pet. App. 46.

However, this Court has specifically permitted (and encouraged) the use of statistical pattern evidence in *Batson* challenges. In *Batson* itself, the Court explained that "proof of systemic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination." 476 U.S. at

[2] Mr. Dickerson has adopted Respondent's citation format, using "Pet. App." when citing to the Appendix ("Appx.") utilized in the Petition for Writ of Certiorari.

94. *See also Vasquez v. Hillary*, 474 U.S. 254, 259 (1986) ("As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that 'chance or accident could hardly have accounted for the continuous omission of Negroes from the grand jury lists for so long a period as sixteen years or more'" (quoting *Hill v. Texas*, 316 U.S. 400, 404 (1942)).

Similarly, in *Miller-El v. Cockrell (Miller-El I)*, the historical evidence of racial discrimination by the prosecutor's office was not only accorded weight but was used to conclude that Black persons had been "almost categorically excluded from jury service." *Miller-El I,* 537 U.S. 322, 346-347 (2003) (granting a certificate of appealability on petitioner's *Batson* claim). *See also Miller-El II, supra* (granting *Batson* relief based in part on the fact that "the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones."). The Court in *Miller-El I* found this evidence to be both relevant and useful "to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case." *Id*. And, the relevance of pattern evidence was recently reaffirmed in *Flowers*, which held that a "historical pattern of racial exclusion" is relevant, as is "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." *Flowers*, 139 S. Ct. at 2244-2245. The *Flowers* Court emphasized that the importance of historical evidence was contemplated even prior to *Batson* in *Swain v. Alabama*, 380 U.S. 202 (1965), where a historical pattern of racial discrimination "was the only way that a defendant could make out a claim

that the State discriminated on the basis of race in the use of peremptory challenges." *Flowers*, 139 S. Ct. at 2244.

Respondent cannot excuse the PCR court's blatant refusal to consider the pattern evidence in Mr. Dickerson's case. The PCR court's conclusion that historical pattern evidence was "irrelevant," "disfavored," and "inapplicable," flies in the face of the Court's longstanding precedent and prevented the thorough analysis of Mr. Dickerson's *Batson* claim that this Court requires.

b. The PCR Court Improperly Held that Evidence of the Solicitor's Prior *Batson* Violation is "Suspect" and "Will Never Affect, Inform, or Alter the Record Made at the 2009 Trial."

Nor can Respondent defend the PCR court's rejection of the Solicitor's *Batson* violation in *State v. Jalal Beyah*, 2001-GS-10-1736, a case tried prior to Mr. Dickerson's. The PCR court held that "[r]eliance on *Beyah* to establish some sort of pattern is suspect for its isolated nature," and further held that "[u]nrelated cases will *never* affect, inform, or alter the record made at the 2009 trial." Pet. App. 25 (emphasis added). Again, the PCR court's holding is contrary to *Batson* and its progeny. In *Flowers*, this Court reviewed the prosecutor's prior *Batson* violations and determined that "the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in part by discriminatory intent." *Flowers*, 139 S. Ct. at 2245 ("Not only did the State's use of peremptory strikes in Flowers' first four trials reveal a blatant pattern of striking black prospective jurors, the Mississippi courts themselves concluded on two separate occasions that the State violated *Batson*.").

The PCR court's claim that the Solicitor's prior *Batson* violation has no impact when assessing her intent in Mr. Dickerson's case ignores the "wide net" of "relevant circumstances" that this Court contemplated when evaluating a *Batson* challenge. 139 S. Ct. at 2245. As in *Flowers*, the history of a prosecutor's prior actions in striking Black jurors cannot be ignored; it must "inform our assessment of the State's intent going into…trial." *Id.* at 2246.

c. The PCR Court Improperly Held that Jury Selection Training Materials Are Irrelevant to a *Batson* Analysis and Protected by Work Product.

Respondent cannot redeem the PCR court's refusal to consider prosecutorial training materials because they were supposedly protected by work product and "irrelevant to a *Batson* motion analysis," and because the Solicitor testified that she did not use them. Pet. App. 26-27. Prosecutorial training materials have been specifically identified by this Court as relevant when evaluating a *Batson* claim. *See Miller-El I*, 537 U.S. at 335.

In *Miller-El I*, the petitioner presented evidence that a training manual, "Jury Selection in a Criminal Case" had been written in 1968 and in circulation among prosecutors until 1976 or later. *Id.* In part, the manual outlined reasons to exclude minorities from jury service. Though prosecutors in *Miller-El* claimed that the manual was no longer used at the time of his trial in 1986, testimony revealed that the manual was at the very least available to one of the prosecutors. *Id.* Based solely on its availability and the "culture of discrimination" such training materials condone, this Court found the existence of the manual to be relevant regardless of the

passage of time or denials regarding its use. As this Court stated, "this evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case. Even if we presume at this stage, that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it." *Miller-El I*, 537 U.S. at 347. Thus, the PCR court's ruling that such training materials lack relevance to *Batson* flatly ignored this Court's precedent.

Respondent's BIO leans on the PCR court's assertion that state law governing work product privilege precludes Mr. Dickerson's access to these training materials. *See* BIO, p. 12. However, Respondent's attempt to place this evidence out of reach violates not only this Court's *Batson* decisions, but the very structure of our federal constitutional system. The Court held in *Miller-El*, under the Equal Protection Clause, that training materials are relevant to the *Batson* analysis. The Court has likewise emphasized in nearly all of its *Batson* decisions that the inquiry casts a "wide net" and must permit reliance on "all relevant circumstances." *See, e.g., Flowers*, 139 S. Ct. at 2245. State courts are not free to disregard these federal constitutional rulings on the basis of state law. Rather, the Supremacy Clause binds them to follow this Court's construction of the federal constitution. *See Johnson v. California*, 545 U.S. 162, 168-72 (2005) (holding that the California courts' interpretation of step one of the *Batson* analysis violated the law set forth in *Batson*). It is axiomatic that this Court's decisions of federal constitutional law are "binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding."

Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 221 (1931). The position taken by Respondent and the PCR court defies this fundamental principle.

d. The PCR Court Improperly Relied on the Solicitor's Self-Serving Testimony to Deny Mr. Dickerson's *Batson* Claim.

Next, Respondent cannot justify the PCR court's disregard of relevant *Batson* evidence and improper reliance on the Solicitor's self-serving denials of wrongdoing. At the PCR hearing, the Solicitor testified that she did not engage in discriminatory jury strikes because: "I don't think it's right. I don't think it's right for the defendant. I don't think it's right for the juror who has a right to be part of our system." Pet. App. 33-34. The PCR court relied on the Solicitor's refutations to deny relief to Mr. Dickerson, finding her testimony was corroboration of "the trial record made at the time of the *Batson* motion and ruling . . . the reasons for the strikes were not race motivated." Pet. App. at 34.

This too is contrary to this Court's *Batson* jurisprudence. A prosecutor may not "rebut the defendant's case merely by denying that he had a discriminatory motive or '[affirming] [his] good faith in making individual selections." *Batson*, 476 U.S. at 78 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)); *See also Purkett v. Elem*, 514 U.S. 765, 769 (1995) (same). Indeed, "[i]f these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U.S. at 98 (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935). That vain illusion is exactly what the PCR court endorsed here. In *Foster v. Chatman*, the Court concluded as much – finding a *Batson* violation even though "[t]hroughout all stages of th[e] litigation, the

State ha[d] strenuously objected that 'race [was] not a factor' in its jury selection strategy … [and] at times [was] downright indignant." *Foster*, 578 U.S. at 513. As in *Foster*, instead of persuasive evidence corroborating the trial court's *Batson* denial, the Solicitor's testimony "reeks of afterthought" and "falls flat" considering the entirety of the evidence Mr. Dickerson has presented. *Foster*, 578 U.S. at 513 (quoting *Miller-El II*, 545 U.S. at 246).

e. The PCR Court Falsely Held that Mr. Dickerson's Abandonment of a *Batson* Challenge as to One Juror Diminished the Strength of His *Batson* Challenge as to Other Jurors.

Respondent and the PCR Court both claim that Mr. Dickerson's decision to not pursue his *Batson* objection as to the prosecution's striking of Juror Toomer (Juror No. 315/16) meant that his argument as to the constitutionality of the other discriminatory strikes is "diminished." BIO, pp. 22-23; Pet. App. 34. This is yet another conclusion by the PCR court that is not in line with *Batson* and its progeny. This Court has held that even a single racially discriminatory strike entitles a petitioner to reversal and a new trial. *Snyder*, 552 U.S. at 478. The *Batson* court could not have been clearer: "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *Batson*, 476 U.S. at 95 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, n. 14 (1977)). "For evidentiary requirements to dictate that several must suffer discrimination before one could object would be inconsistent with the promise of equal protection to all." *Batson*, 476 U.S. at 95-96. *See also Flowers*, 139 S. Ct. at 2242 ("Under the Equal Protection

Clause, the Court stressed, even a single instance of race discrimination against a prospective juror is impermissible."). Petitioners, like Mr. Dickerson, who have been denied *Batson* relief based on such a faulty premise have been granted relief. *See e.g., Drain v. Woods*, 595 F. App'x 558, 570 (6th Cir. 2014) (granting federal habeas relief where the Michigan Court of Appeals unreasonably applied Supreme Court law to reject the prima facie showing of discrimination in this case because some Black venirepersons remained on the panel); *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) ("the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.").

The Court's decision in *Snyder v. Louisiana*, drives this point home. In *Snyder*, there were five prospective, qualified Black jurors at trial, and the State struck all five of them. *Snyder*, 552 U.S. at 475-76. On appeal to this Court, Mr. Snyder focused his *Batson* arguments on two of those jurors. *Id.* at 477-78. But in the Court's analysis, it addressed only the reasons the State gave for striking a single Black juror; the Court did not discuss or rely on any statistical, pattern, or otherwise historical evidence; and yet the Court still granted relief. *Id.* at 477-86. In this case, certiorari review is required because the PCR court utterly ignored this well-established framework for *Batson* review.

CONCLUSION

Respondent's BIO cannot elide the PCR court's grave errors. The PCR court's refusal to follow Equal Protection rules this Court expressly requires has enabled discrimination to go uncorrected in Mr. Dickerson's death penalty trial. The PCR court's approval of race discrimination and refusal to follow the Court's precedent cannot stand. This Court should grant certiorari, vacate the decision below, and remand for a complete and proper consideration of Mr. Dickerson's *Batson* claim, free from the lawless rulings that the PCR court applied. *See e.g., Flowers*, 139 S. Ct. 2228; *Foster*, 578 U.S. 488; *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016) (granting certiorari, vacating the opinion below, and remanding for further proceedings considering *Foster v. Chatman,* 578 U.S. 488 (2016)); *Floyd v. Alabama*, 579 U.S. 916 (2016) (same); *Williams v. Louisiana*, 579 U.S. 911 (2016) (same).

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