No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2022

TONY TERRELL CLARK,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent

THIS IS A CAPITAL [DEATH PENALTY] CASE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Mississippi continues in the present case to erroneously misapply *Batson v. Kentucky* by considering the prosecutor's purported justifications for striking seven of the eight African American prospective jurors presented to it "in isolation," rather than, as this Court directed it to do in *Flowers v. Mississippi*, --- U.S. ---, ---, 139 S. Ct. 2228, 2250 (2019), considering those strikes "in the context of all the facts and circumstances" that this Court has recognized as relevant to that determination.

II.

Whether, by upholding these strikes in part on the basis of reasons not articulated by the prosecutor in the trial court the Mississippi Supreme Court has adopted from the Fifth Circuit an erroneous interpretation of *Batson* that conflicts with not only this Court's clearly established precedent, but also with decisions of other federal circuit courts of appeal and other state courts of last resort.

LIST OF PARTIES AND RELATED CASES

Other Parties:

Teaonta Jymon Clark
Jefferson CCF
279 Ms Highway 33
Fayette, MS 39069

Co-Defendant in trial court and appellate court in proceedings on review in instant matter

Related Cases:

State of Mississippi v. Tony Terrell Clark and Teaonta Jymon Clark, Circuit Court of Madison County, Mississippi Case Nos. 2014-0540 & 2014-0541 (Trial court case in proceedings on review in instant matter. Judgments of conviction on capital murder and other counts and sentence of death on capital murder entered September 20, 2018. Motion for New Trial denied March 19, 2019)

Tony Terrell Clark v. State of Mississippi, Mississippi Supreme Court Case No. 2019-DP-00689-SCT (Appellate court case in proceedings on review in the instant matter. Affirmance of conviction and death sentence entered May 12, 2022, rehearing denied August 11, 2022, mandate issued August 18, 2022) (docket entries and all filings *available at* https://courts.ms.gov/index.php?cn=90211#dispArea)

Tony Terrell Clark v. State of Mississippi, Mississippi Supreme Court Case No. 2022-DR-00829-SCT (Pending post-conviction review case. Order entered August 25, 2022 directing Mississippi Office of Capital Post-Conviction Counsel to select counsel and setting deadline for filing motion for post-conviction relief) (docket entries and all filings *available at* https://courts.ms.gov/index.php?cn=95405#dispArea)

Teonta [sic] Clark v. State of Mississippi, Mississippi Supreme Court Case No. 2019-KA-00456-SCT (Appeal from guilty plea in trial court to single Armed Robbery count arising out of same events as conviction and death sentence of Petitioner Clark. Order entered October 17, 2019 dismissing appeal for lack of right to direct appeal from a plea of guilty) (docket entries and all filings *available at* https://courts.ms.gov/index.php?cn=89967 #dispArea)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner, Tony Terrell Clark prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming, on direct appeal, his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Mississippi Supreme Court in *Clark v. State*, No. 2019-DP-00689-SCT (Miss. May 12, 2022) (Pet. App. A) is reported at *Clark v. State*, 343 So.3d 943 (Miss. 2022). That Court's order denying rehearing on August 11, 2022 (Pet. App. B) is unpublished, as is the mandate issued August, 18, 2022 (Pet. App. C).[1]

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 12, 2022 and rehearing was denied on August 11, 2022. This Petition is filed within 90 days of the latter event. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part that:

[1] The opinion below is attached as Appendix A to this Petition. All citations to that opinion will be to "Pet. App. A" by paragraph, and, where relevant, whether from the Majority or Dissenting Opinions. Other appendices to this Petition will be cited as "Pet. App." by letter. Citations to the record below are to the Clerk's Papers (C.P.), Trial Transcript (T.), and Exhibits (Ex.) contained in the Record on Appeal lodged with the Mississippi Supreme Court, by page number.

> No state shall … 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.

STATEMENT OF THE CASE

A. Proceedings Below

The present matter arises out of the attempted armed robbery of a convenience store that turned tragically lethal when the owner of the store was shot and wounded, and his son, a 13-year-old youth who was working with him that night, was shot and killed. In short order, Petitioner Tony Terrell Clark (Clark) and his nephew Teaonta Jymon Clark (Teaonta) were identified as the prime suspects, arrested, and jointly indicted in a multi-count indictment for, *inter alia*, the capital felony murder of the son, an offense that Mississippi makes punishable by life in prison without the possibility of parole, or, if the prosecution elects to seek it, the death penalty. Miss. Code Ann. §97-3-19(2)(e). App. A at ¶¶ 2-9. Exercising its prosecutorial discretion, the State severed the cases and elected to try only Petitioner Clark on the capital count and to seek a death sentence against him.[2] It secured guilty verdicts against Petitioner from a nearly all-white jury on all counts, and on the capital murder conviction after a separate sentencing proceeding before that same jury, a verdict condemning Tony Terrell Clark to suffer the death

[2] At least one member of this Court expressed Eighth Amendment concerns about the imposition of the death penalty in Mississippi because, due to prosecutorial discretion, Mississippi is part of "a nationwide trend" of geographical arbitrariness in the imposition of the death penalty, noting that "death sentences, while declining in number, have become increasingly concentrated in an ever-smaller number of counties." *Jordan v. Mississippi*, --- U.S. ----,----, 138 S. Ct. 2567, 2569 (2018) (Breyer, J., dissenting from denial of writs of certiorari in two Mississippi cases seeking review on that basis).

penalty. App. A at ¶¶ 1, 10-12.

Immediately after all post-trial motions by Petitioner Clark were disposed of, co-defendant Teaonta Clark entered into a plea agreement dismissing the capital murder charge and other counts against Teaonta in exchange for Teaonta pleading guilty to the single count of Armed Robbery and being sentenced to 40 years on that count. *Teonta [sic] Clark v. State of Mississippi*, Supreme Court Case No. 2019-KA-00456-SCT (docket entries and judgments of conviction and sentencing *available at* https://courts.ms.gov/ index.php?cn=89967#dispArea).

Petitioner Clark timely appealed his convictions and death sentence to the Mississippi Supreme Court and raised the trial court's ruling on his *Batson* objections as error. The Mississippi Supreme Court addressed those claims at length in both its majority opinion and in a dissenting opinion representing the views of three of its members, App. A at ¶¶ 15-106 (Beam, J., for the Court), ¶¶ 302-334 (King, P.J., dissenting). It decided the questions presented here adversely to Clark both initially and on rehearing. App. B. The present Petition seeking review of the federal questions decided follows in the time and manner required by this Court's rules.

B. Relevant Factual Background

Despite the fact that Tony Terrell Clark's crime of conviction and condemnation occurred in a county with a racially diverse population that had produced a similarly diverse initial venire, the jury that convicted and condemned Mr. Clark contained only one person who was, like Mr. Clark, African-American.

App. A at ¶¶15, 309. This also occurred even though the 38 person venire passed upon by the State in final jury selection contained 8 black people – 21% of the prospective jurors tendered – who, like the white people who served in their place, had been fully vetted by the parties and qualified by the trial judge to serve on that jury. *Id.* at ¶ 309.[3] Seating an almost entirely white jury resulted *exclusively* from the prosecution's decision to disproportionately employ its peremptory strikes to remove every black juror but one tendered to it while at the same time accepting 25 of the 30 white jurors it was offered. *Id.* This unilateral prosecutorial choice not only left the defense almost exclusively white prospective jurors (other than the single black juror accepted by the State) to even consider for service on the jury but, even more importantly, ensured that despite a relatively racially diverse array of qualified prospective jurors subjected to the final jury selection process, the jury actually seated did not reflect that diversity.[4]

[3] U.S. Census figures in the record on appeal show that in 2018, African-Americans made up approximately 38% of the population of Madison County, Mississippi. C.P. 301-02. The trial court's jury lists and strike notes show that after those who reported for jury duty were screened for statutory qualifications, the venire consisted of 165 persons, of whom 57, or approximately 34.5%, were African-American. Ex. 2619-26.

[4] Under Mississippi's longstanding jury selection procedures, now embodied in its Uniform Rules of Criminal Procedure, Miss. Unif. R. Cr. P. 18.3,18.4, each side has 12 peremptory strikes to use in seating the regular jury, and, if the court elects to have alternate jurors, one strike to use for the seating of each alternate. The prosecution is tendered prospective jurors first and required to make any peremptory challenge it cares to make at the time the juror is tendered. Only after the prosecution has accepted 12 prospective jurors are those persons, *and only those persons*, tendered to the defense for acceptance or peremptory removal. As a result, if a prosecutor has peremptorily stricken a prospective juror, the defense never has a chance to pass on that person at all. This back and forth continues until a full jury is seated. The same process ensues to select any alternate jurors.

Clark timely made objections under *Batson v. Kentucky,* 476 U.S. 79 (1986) to all of the prosecutions' peremptory strikes of black prospective jurors, and the trial court found that there was a pattern of discrimination as to each strike, thus making out a *prima facie* case of discrimination. App. A at ¶¶ 16,18. The Court then moved to the second step and required the prosecution to articulate its reasons for each strike. The prosecutor responded with a laundry list of reasons for each one. *Id.* at ¶¶ 23-49. These reasons included, *inter alia*, the fruits of previously undisclosed pre-trial investigations it had made of two African-American jurors who had disclosed somewhat distant relatives who had been the subject of criminal prosecutions in Madison County, *Id.* at ¶¶ 37, 314, 328, but not of several white prospective jurors who had made similar disclosures*, Id.* at ¶¶ 69, 316. The prosecutor also made a generalized claim that it was striking all prospective jurors, both black and white, who had expressed any ambiguous feelings about the death penalty in either their juror questionnaires or during voir dire, *Id.* at ¶¶ 39, 328. The record established that this claim was materially false: the prosecutor actually did accept several white prospective jurors who had done so. ¶¶ 84-94, 329-33.[5]

The trial court conducted the third step of the *Batson* hearing without allowing Clark any additional time to find specific record citations in response to any of these assertions, or the trial court's own questions of Clark concerning them,

[5] At times, the majority opinion uses rhetoric which suggests it was skeptical about the facts cited by the dissenting opinion on this and other points. *See, e.g.,* App A. at ¶¶ 84, 85, 86, 88. However, as the dissent notes, the record does in fact accurately reflect each of the ambiguities in white juror death penalty responses cited in the dissenting opinion. App A at ¶ 329, n. 13.

even when Clark noted the need to do so. *See* App. A at ¶ 304, n.11. Clark, despite this hasty process, challenged all of the prosecutor's assertions as untrue, irrelevant to the jury selection process, not applied to comparable white jurors, and/or otherwise pretextual. T. 1575-83, 1586-92, 1594-95. The trial court credited several of Clark's rebuttal points. It declined to rely on several reasons offered by the prosecutor, expressly finding some of them to be unsupported by the record. T. 1572, 1577, 1579, 1582. But, without analyzing each of the strikes in the context of that pattern of misrepresentation, or, indeed, any other of the unrefuted circumstances suggesting discriminatory intent the trial court instead examined each challenged strike in isolation and allowed all of the prosecutor's strikes to stand. App. A at ¶¶ 314-334 (dissenting opinion making full analysis of each strike in context shown by the record, including *inter alia* at ¶¶ 314, 326, 319, evidence of misrepresentations not properly considered by the majority in its analysis).

As it was found to have erroneously done in *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019), a majority of the Mississippi Supreme Court endorsed, and in some instances elaborated on, the trial court's isolationist analysis and affirmed the denial of Clark's *Batson* objections. App. A at ¶¶ 65-106. Instead of reviewing the trial court's rulings in light of all relevant circumstances, the Mississippi Supreme Court majority went out of its way to evade this admonition in conducting its third-step analysis, using multiple methods to achieve its ends.

First, where it could, the majority simply failed to acknowledge the relevance of many contextual facts and circumstances that this Court has identified in

Flowers and its other *Batson* progeny as indicating a discriminatory motivation. It did not even mention the prosecution's multiple misrepresentations of fact – including some articulated reasons that the trial court actually found to be unsupported by the record – even in connection with the specific individuals as to whom they were made, *Compare* App. A. at ¶¶ 27-30, 34-43, 66-74, 77-98 (majority analysis of strikes of four jurors the dissenting opinion concluded had been racially motivated) *with* App. A at ¶¶ 314, 326, 329 (dissenting analysis, mentioning this pattern as a basis for finding a racial motivation in three of the four prosecutorial strikes it concluded violated *Batson*), much less as circumstances undercutting the credibility of the prosecutor's representations in general, as required by this Court's *Batson* jurisprudence. *Flowers,* 139 U.S. at 2243, *Snyder v. Louisiana*, 552 U.S. 472, 486-87 (2008) (concluding that the demonstrated falseness of one of the reasons advanced rendered another reason that the record neither supported nor affirmatively belied equally unworthy of being credited by a trial court). Likewise, though it did agree with the trial court's finding that a *prima facie case* was clearly established by the prosecution's grossly disproportionate elimination of prospective black jurors, App. A at ¶¶ 16-18, the majority did not consider that gross disparity as a circumstance supporting a finding of discrimination at the third stage, despite this Court having in *Flowers* expressly reminded it and other lower courts, that they must do so. *See Flowers* 139 S. Ct. at 2246 (reiterating that this kind of disparity at the first stage is also a circumstance that "strongly suggests that the

State was motivated in substantial part by a discriminatory intent.").[6] *Compare* App. A. at ¶¶ 27-30, 34-43, 66-74, 77-98 (majority opinion, omitting any mention of this statistical disparity during third step analysis of any individual strike) with App. A. at ¶¶ 308, 321, 327, 331, 334, 335 (dissent, discussing disparity as relevant context for each challenged strike at third stage)

Second, even where it acknowledged the existence of relevant evidence of discrimination – most prominently, the considerable evidence of disparate treatment of similarly situated white jurors – the Mississippi Supreme Court found it did not have to consider it at all, ignoring this Court's reminder to it in *Flowers* that disparate treatment factors necessarily "loom large" in the third step analysis, 139 S. Ct. at 2244. Instead, the Mississippi Supreme Court adopted the position that, as a matter of law, this Court's precedents "did not clearly establish any requirement that a state court conduct a comparative juror analysis at all," App. A at ¶ 55-57 (citing to and quoting from *Ramey v. Lumpkin*, 7 F.4th 271, 280-81 (5th Cir. 2021), *cert denied,* ___ U.S. ____, 142 S. Ct. 1442 (2022) (mem), *Chamberlin v. Fisher*, 885 F.3d 832, 838 (5th Cir. 2018)). Having declared such analysis optional, it then opted to disregard even undisputed record evidence of disparate treatment. *See, e.g.,* App. A at ¶¶ 314-334 (dissenting opinion, discussing the evidence of

[6] In the instant case, as in *Flowers*, the prosecution employed peremptory strikes to remove all but one of the African-American jurors tendered to it. The prosecutor exercised all 12 available peremptories, using seven (58.3%) to exclude seven of the eight (87.5 %) Black venire members it passed on, all three Black men and four of the five Black women tendered. T. 1568-69, 1584, 1593. By contrast, it used only five of those 12 (41.7%) peremptories to remove white venire members, accepting 25 (83.4%) of the 30 white venire members it considered and striking only five (16. 6%). App. A at ¶ 309 (dissent).

disparate treatment disregarded by the majority). Instead, despite the fact that Clark repeatedly mentioned disparate treatment in support of his rebuttal arguments, T. 1575-83, 1586-92, 1594-95, and notwithstanding the prosecutor's own attempts to make comparative analyses, including its assertions that it was treating black and white jurors identically with respect to ambiguous responses concerning the death penalty, T. 1572, 1587, the majority declined to consider any record evidence of disparate treatment, or make any comparative analysis concerning incidents of disparate treatment that were not expressly mentioned by Clark during the hasty *Batson* hearings. This was so even though Clark was never given the opportunity during that process to gather and present specific instances of such treatment to the trial court in support of his arguments based on disparate treatment. *See, e.g.,* App. A at ¶ 304, n.11 (dissenting opinion, citing to record showing trial court not permitting Clark opportunity to conduct review necessary to identify similarly situated white jurors in response to trial court query), T. 1587-88 (trial court accepting state's assertion that it struck all jurors who were ambiguous on the death penalty and instructing defense to address the next juror, without seeking any response at all from Clark).

Finally, even where the trial court had admittedly been presented with specific instances where a black prospective juror had been treated differently by the prosecution from white jurors who shared the characteristic cited by the prosecutor, the Mississippi Supreme Court nonetheless upheld the prosecution's strike. It was only able to do this by suggesting reasons for the strike that had not

been articulated by the prosecution or relied upon by the trial court in upholding the strike. *See, e.g.,* App. A at ¶ 70 (Majority Opinion, distinguishing uninvestigated whites with family members prosecuted in Madison County for things not cited by the prosecutor as reasons for investigating and rejecting the investigated black juror), ¶ 78 (same, expressly acknowledging that it was considering matters that "the State *may* have fairly presented," but had not actually presented in support of its strike), ¶ 320 (Dissenting Opinion, stating that "[t]he majority now compares jurors based on reasons not even suggested or given by the State or considered by the trial court in order to justify the strike of a black juror."). This appears to defy not only *Flowers*, but also this Court's longstanding requirement that, for purposes of the third stage analysis, proponents of the strike must "stand or fall" on only the reasons they actually articulated at the second stage. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (*Miller-El II*) ("If the stated reason does not hold up, its pretextual significance does not fade because . . . an appeals court can imagine a reason that might not have been shown up as false.").

By contrast, the dissent – authored by the same justice whose dissent this Court announced "our agreement" with in *Flowers* – looked at each strike, as this Court requires, "in the context of all the facts and circumstances." *Flowers,* 139 S. Ct. at 2250. Addressing the entire record relevant to Clark's fully preserved *Batson* objections, the dissent concluded that "the strikes of four black jurors were discriminatory in violation of both Clark's and those jurors' constitutional right to be free of racial discrimination." App. A at ¶¶ 314-335.

The present matter thus presents for review a fully developed, but still regrettably stark, example of the continuing failure of the Mississippi Supreme Court to comply with this Court's efforts over the last nearly four decades to eradicate the stain of racial discrimination from the administration of justice in this nation. A writ of certiorari should issue in this case to ensure that this Court's mandates to do so are respected and followed.

REASONS FOR GRANTING THE WRIT

I. The Mississippi Supreme Court persists in defying this Court's precedent governing what lower courts must consider when deciding claims of racial discrimination in jury selection.

This Court could not have been clearer in *Flowers* about where the Mississippi Supreme Court's error with respect to conducting its *Batson v. Kentucky,* 476 U.S. 79 (1986) analysis lay: It held that the Mississippi court's analysis defied the requirements of *Batson* by evaluating the prosecutor's strikes and the reasons offered in defense of them in isolation from each other and from the totality of the circumstances in which they were made. *Flowers*, 139 S. Ct. at 2250.

This Court also could not have been more explicit on how the Mississippi Supreme Court *should* have properly conducted its *Batson* analysis, *i.e.,* exactly as the dissenting opinion had conducted it.

> *Our disagreement with the Mississippi courts (and our agreement with [Presiding] Justice King's dissent in the Mississippi Supreme Court*) largely comes down to whether we look at the . . . strike in isolation or instead look at the . . . strike in the context of all the facts and circumstances. Our precedents require that we do the latter. As Justice King explained in his dissent in the Mississippi Supreme Court, the Mississippi courts appeared to do the former. *Flowers [v. State]*, 240 So.3d [1082] 1163–1164 (Miss. 2017).

Flowers v. Mississippi, 139 S. Ct. 2228, 2250 (2019) (emphasis supplied).

The ways in which the *Flowers* case – where there were six trials conducted over a more than 12-year time span during which the prosecutor had the opportunity to repeat the same kinds of discriminatory conduct multiple times – may differ from the instant matter do not justify the Mississippi Supreme Court majority's attempt at distinguishing, and thus ignoring, this fundamental requirement of *Flowers* and this Court's other *Batson* precedent. App. A. at ¶¶ 49, 61-64 ("The types of exceptional circumstances or extraordinary facts found in *Foster* [v. *Chapman*, 578 U.S. 488 (2016)], *Miller-El II*, or *Flowers* are not present here.") As the dissenting opinion in the instant matter points out, requiring a full consideration of all relevant circumstances only where discrimination is somehow "extraordinary, exceptional, and unusual" would effectively render this Court's efforts to eradicate racial discrimination from the criminal justice system a dead letter by excluding from meaningful review the ordinary, usual, and unexceptional racial discrimination that has occurred in cases like the instant one that have only been tried a single time. App. A. at ¶ 306 ([The majority opinion] appears to assert that racial discrimination that evinces itself in a more ordinary, unexceptional, or usual manner is perfectly acceptable in jury selection. Yet, the [United States] Supreme Court has made abundantly clear *any* racial discrimination in jury selection violates the Constitutional rights of both the defendant and the jurors in question.") (internal quotation marks and citations to majority opinion's use of quoted words omitted, emphasis supplied).

In *Flowers* this Court identified several circumstances shown by the evidence of record in Mr. Flowers' sixth trial, the only one then under review, that were in no way unique to the *Flowers* case. It expressly faulted the Mississippi trial and appellate court in *Flowers* for ignoring or improperly failing to credit in addition to the unique history of the case, the following as evidence of discrimination:

> • *statistical evidence* about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a *prosecutor's disparate questioning and investigation* of black and white prospective jurors in the case;
>
> • *side-by-side comparisons* of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a *prosecutor's misrepresentations* of the record when defending the strikes during the *Batson* hearing;

139 S. Ct. at 2243 (emphasis supplied) (citing *Foster*, 578 U.S. 488, *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), *Batson v. Kentucky*, 476 U.S. 79 (1986)); 2244 (noting that the first three circumstances necessarily "loom large" in establishing discrimination at the third stage inquiry); 2249-51 (finding all four to exist with respect to the strike of the black prospective juror this Court found to have been discriminatory).

As Mississippi Supreme Court Presiding Justice King's dissenting opinion in the present matter sets forth, these same circumstances exist in the present case, but were improperly ignored or discounted as evidence of discrimination by the majority opinion, just as they had been by the majority in *Flowers*. *See* App. A at ¶¶ 307-310. After performing the analysis that should have been done – and

supporting that analysis with a detailed discussion carefully reviewing the record and explaining why the circumstances identified were relevant proof of discrimination as to each of the black jurors whose strikes the dissent found to be discriminatory – the dissent finds that all of these circumstances, App. A ¶¶ at 314-334, along with evidence of a history of racially disparate jury selection practices by the prosecutor in the past, App. A at ¶ 310,[7] exist in the present case. Citing each of these circumstances, the dissent concludes that the "strikes of four black jurors were discriminatory in violation of both Clark's and those jurors' constitutional right to be free of racial discrimination," finding specifically that

> [t]he *statistical evidence* demonstrating the State's large disparity in striking black jurors in comparison to striking white jurors is stark. The *State's investigation of black jurors was disparate as compared to white jurors*, none of whom it investigated, despite several with common names and several with relatives who had been through the criminal justice system. The *State's disparate questioning of black jurors as compared to white jurors* evinces an attempt to find pretextual reasons to strike black jurors. The *prosecutor's*

[7] The majority opinion erroneously overlooks, but the dissent does not, the "relevant history of the State's peremptory strikes in past cases." App. A. at ¶ 310 and n. 12 (citing racially disparate striking behavior similar to that in the instant matter by the same DA in *Eubanks v. State*, 291 So. 3d 309 (Miss. 2020)). While there may not have been six trials of Mr. Clark to review, the dissent points out the *Eubanks* case as demonstrating a disproportionate "proclivity for striking black jurors" that, even though it was not remedied in *Eubanks*, should be "considered an emerging pattern" in light of its repetition in the present case. App. A. at ¶ 310. And – as Clark's briefing in the Mississippi Supreme Court points out, but the majority likewise does not address – even though there was only a single trial of Mr. Clark, that same proclivity is demonstrated in the present record by numerically significant racial disparities in the prosecutor's handling of other aspects of jury selection, including either exercising or agreeing to, or forbearing from exercising or agreeing to, cause challenges to similarly situated black and white venire members. *See* Brief of Appellant at pp. 31-35, *available at* https://courts.ms.gov/appellatecourts/docket/sendPDF.php?f=web0001.SCT.2019-DP-689.43418.0.pdf&c=90211&a=N&s=2. This disparate treatment is not merely evidence of a proclivity. It had a direct impact on the final jury selection, as well. It contributed to reducing the percentage of African-Americans from 34.5% in the initially qualified venire to only 21% of the venire actually tendered to the State for final jury selection. *See* p. 4 n. 3 and accompanying text, above.

> *misrepresentations of the record during the Batson hearing* to justify the strikes of black jurors further indicate pretext. And the *side-by-side comparisons of struck black jurors to similarly situated white jurors* provides strong evidence of pretext, particularly in the context of all the relevant circumstances.

App. A at ¶ 335 (emphasis supplied). Under these circumstances, for this Court to decline review in the present matter would be to reward the Mississippi Supreme Court majority for persisting in open defiance of this Court's clearly established law.

More importantly, unless this Court grants such review, it jeopardizes its own longstanding efforts "in the decades since *Batson* [to] vigorously enforce and reinforce the decision, and guard against any backsliding." *Flowers,* 139 S. Ct. at 2243 (internal grammatical adjustments omitted) and otherwise ensure the integrity of our system of justice. *See also Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (stating that "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice") (internal quotation markings omitted); *Miller-El II*, 545 U.S. at 238 ("The very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication.") (internal quotation markings omitted). *Pena-Rodriguez v. Colorado*, --- U.S. ---. 137 S. Ct. 855, 867 (2017) ("[R]acial discrimination in the jury system pose[s] a particular threat both to the promise of [equal protection in] the [Fourteenth] Amendment and to the integrity of the jury trial.").

Further, the chief way the Mississippi Supreme Court majority reaches its

affirmance is by restricting its review of the record only to facts of record that were mentioned by Clark to illustrate his rebuttal assertions of comparative disparate treatment. App. A at ¶¶ 54-58. But particularly where the circumstances being considered include comparative juror analysis, as long as there is record evidence of disparate treatment of similarly situated non-minority prospective jurors, this Court has not ever limited appellate review only to facts that were actually mentioned to the trial court during arguments at the third step of its *Batson* analysis. *Flowers*, 139 S. Ct. at 2249-51 (using evidence of record to make, *inter alia*, a comparative statistical analysis showing vastly different questioning of black and white prospective jurors, even though that analysis was never made to trial or appellate lower courts). Indeed, it affirmatively requires reviewing courts, including itself, to assess whether the trial court properly ruled on a *Batson* objection in light of all the circumstances shown by the record as a whole before the reviewing court. *Miller-El II,* 545 U.S. at 241 n. 2 (2005) (faulting the dissent and the lower court for suggesting that it was improper to consider record evidence of discrimination that was not argued before the original trial court, holding that this "conflates the difference between evidence . . . and theories about that evidence [because] [t]here can be no question that the transcript of voir dire, record[s] the evidence on which Miller–El bases his arguments and on which we base our result.").

The undue restriction in the present case of what circumstances of record the Mississippi Supreme Court would consider also violates this Court's longstanding due process jurisprudence governing direct appeals of right. "The Fourteenth

Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective'." *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois,* 351 U.S. 12, 20 (1956)). If a state elects to provide criminal defendants a first appeal as of right, "the procedures used in deciding [such] appeals *must* comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Lucey*, 469 U.S. at 393.

The procedures followed by state appellate courts disposing of claimed *Batson* errors by the trial court fall squarely within this requirement. *See Rivera v. Illinois*, 556 U.S. 148, 160-61 (2009). In *Rivera*, this Court in fact conducted such a review. It concluded that the "enforcement of the antidiscrimination requirements of our *Batson*-related precedents" was of such importance that the state appellate court's procedures permitting it to ratify the trial court's "good-faith, if arguably overzealous" effort to *enforce Batson* by mistakenly *granting* a *Batson* challenge to a peremptory strike comported with the due process and equal protection requirements of *Lucey*. *Rivera,* 556 U.S. at 160. However, the *Rivera* Court reiterated that the opposite was not true. An appellate court's use of procedures that ratify the erroneous *denial* of a *Batson* challenge, and thereby permit a discriminatorily selected juror to serve, would be in violation of its obligation to provide review in accord with the Equal Protection and Due Process Clauses of the Fourteenth Amendment. This would, as established by *Batson* and its progeny, require automatic reversal. *Rivera*, 556 U.S. at 161.

The instant matter is "a first appeal as of right" protected by *Lucey*. The Mississippi Supreme Court's majority opinion – relying on a federal habeas precedent that the opinion admits follows stringent standards inapplicable to a direct appeal, *Ramey v. Lumpkin*, 7 F.4th 271, 280 (5th Cir. 2021) (acknowledging that this Court "conducted a comparative juror analysis for the first time on appeal in *Flowers*, . . . a case beyond the strictures of AEDPA") – nonetheless substantially restricted the appellate review of an admittedly adequately preserved claim of disparate treatment by declining to make its comparative juror analysis based on the entire record. App. A at ¶¶ 54-58 (also citing *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018)). Instead, it adopts and relies on a procedure for direct review of *Batson* claims allowing it to ignore any factual basis not expressly articulated by Clark during the hasty, time-restricted *Batson* hearing permitted by the trial court. *See* App. A at ¶ 304, n. 11 (dissent). This is clearly at odds with the long established and important constitutional precedent this Court established in *Lucey*, 469 U.S. at 393.

The Mississippi Supreme Court's decision in this matter has thus decided important federal questions controlled by *Batson* and *Lucey* in a way that conflicts with the clearly established precedent this Court has crafted to preserve and protect the integrity and fairness of the criminal justice system from invidious racial discrimination, and to ensure that where states provide for a first appeal of right from criminal convictions, that the procedures governing that appeal comply with the Due Process Clause. The Petition must be granted in this matter to ensure that

those efforts are not thwarted.

II. In defying this Court, the Mississippi Supreme Court exacerbates a conflict among federal circuit courts of appeal and state courts of last resort on whether justifications for a strike not articulated by the prosecutor at the second step *Batson* phase may be relied upon by appellate courts to deny claims of racial discrimination in jury selection.

In affirming the denial of Clark's *Batson* objections, the Mississippi Supreme Court decision relies on the Fifth Circuit's decision in *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) and considers justifications for the strikes of black jurors that were not advanced by the prosecution to refute the inference of discrimination raised by the prima facie case. In so doing, the decision takes a side in a significant circuit and state court of last resort split on this point. This Court should grant review of this case to resolve this split.

That such a split even exists to be exacerbated by the Mississippi Supreme Court is perplexing. In *Miller-El II* this Court expressly reaffirmed that the *Batson* inquiry is not into what prosecutors *might* or *could* have been thinking in striking a black juror, but into what they *actually were* thinking in doing so and whether that actual thinking was tainted by "illegitimate grounds like race." 545 U.S. at 252. To ensure the inquiry is properly focused, *Miller-El II* expressly held that

> when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Id. The *Miller-El II* Court expressly rejected arguments that there were other

reasons why the white comparators would have been more favorable to the prosecution. This Court explained that those justifications were irrelevant because they were "reasons the prosecution itself did not offer." *Id.* at 245 n.4.

Despite this Court's clear admonitions and example in *Miller-El II*, the Mississippi Supreme Court in the present case, like the Fifth Circuit in *Chamberlin* before it, did not merely "fade" the pretextual significance of a showing the reasons articulated by the prosecutor to be false, or not applied to white jurors. It entirely vitiated that pretextual significance by imagining what "the State *may* have fairly presented," but had not actually presented, in support of its strike App. A. at ¶ 78.

In taking this position, the Mississippi Supreme Court has joined the Fifth Circuit in a direct conflict with the First, Seventh, and Ninth Circuits, all of which rejected attempts by lower courts to consider justifications not originally articulated by prosecutors in defense of their strike after it was shown that the record belied the original justifications or established that they had not been applied to comparable non-black jurors. *See Porter v. Coyne-Fague*, 35 F.4th 68, 78-79 (1st Cir. 2022) (finding it "luminously clear" that state court unreasonably applied *Miller El II* when "the state court assembled its own rationale for the strike rather than examining the one put forth by the prosecutor."); *United States v. Taylor,* 636 F.3d 901, 905 (7th Cir. 2011) (rejecting "new, unrelated reasons extending well beyond the prosecutor's original justification for striking [the juror]"); *Love v. Cate,* 449 F. App'x 570, 572-73 (9th Cir. 2011) (rejecting lower court's acceptance of new reasons at remand hearing attempting to show white jurors had other "non-racial

characteristics that distinguished them from the black venire member."). This also places the Fifth Circuit and Mississippi at odds with earlier decisions by the Eleventh and Third Circuits. *See McGahee v. Alabama Dep't of Corr.,* 560 F.3d 1252, 1269-70 (11th Cir. 2009)*; see also Holloway v. Horn,* 355 F.3d 707, 725 (3d Cir. 2004) *(*same analysis prior to *Miller-El II).*

This same question has also been considered by other state courts of last resort. Most reject following Mississippi's revisionist approach and agree that neither trial nor appellate courts may consider or rely upon justifications that were not originally advanced by the prosecution in support of the strike. *See, e.g., People v. Ojeda*, 503 P.3d 856, 865 (Colo. 2022) (citing *Miller-El II* and holding that "[t]he question under *Batson* is: Whether the prosecutor actually struck the potential juror based on race. By supplying its own reasons, the trial court instead answered whether there was some race-neutral explanation for the strike that could be gleaned from the record irrespective of the prosecutor's actual reason for doing so."); *State v. Clegg*, 867 S.E.2d 885, 908 (N.C. 2022) (same, "trial court erred by considering within its *Batson* step three analysis reasoning not presented by the prosecution on its own accord). *State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002) (en banc) (same, finding that new reasons the State gave on appeal for not striking a comparable white juror were "irrelevant" "[p]ost-hoc justifications," because the "focus of the third step [of the *Batson* inquiry] is the plausibility of the contemporaneous explanation"). By contrast, California, using the same rationale as Mississippi and the Fifth Circuit, permits some consideration on direct appeal of

reasons not specifically articulated by the prosecution in its initial defense of a strike, but (unlike Mississippi in the instant matter) *only* when the appellate court is making a comparative juror analysis for the first time on appeal. *People v. Miles*, 9 Cal. 5th 513, 543, 464 P.3d 611, 637 (2020), *reh'g denied* (July 15, 2020), *cert. denied sub nom. Miles v. California,* --- U.S. ---, 141 S. Ct. 1686 (2021) ("[w]hen conducting comparative juror analysis for the first time on appeal, we need not turn a blind eye to reasons the record discloses for not challenging other jurors.").

Petitioner Clark is mindful of the fact that this Court has previously declined to step in and resolve this conflict. *See Miles*, *supra*, *Chamberlin v. Hall*, --- U.S. --- 139 S. Ct. 2773 (2019). However, even in the year since this Court elected not to resolve the conflict as presented by *Miles*, this important question has continued to rapidly develop and percolate in the lower courts. In addition to Mississippi's decision in the instant matter, two other state courts of last resort and one additional federal circuit court of appeals have entered this fray, thus making the conflict ripe for review at the present time. *See Clegg*, 867 S.E.2d at 908, *Ojeda*, 503 P.3d at 865, *Porter,* 35 F.4th at 78-79. This Court should grant the review sought here to ensure that its heretofore unwavering efforts at preventing backsliding on the essential task of banishing race discrimination from our criminal justice system have not been in vain.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court on each of the Questions Presented.

Respectfully submitted,

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INDEX TO APPENDICES