No. 22-6057

IN THE
Supreme Court of the United States

TONY TERRELL CLARK,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. In a capital case, a State is entitled to a jury that will fairly consider, and be willing to impose, the death penalty. In this capital case, the State exercised peremptory strikes against prospective jurors who opposed the death penalty in any circumstance, called capital punishment "murder," had decided that the death penalty was "wasteful," disagreed with state law making capital murder death-penalty eligible regardless of intent to kill, would have held the State to a higher burden than the law requires, or otherwise expressed anti-death-penalty sentiment. In light of those facts and all the arguments and other evidence before it, the trial court rejected petitioner's claims that any of the State's preemptory strikes against black prospective jurors were made on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In reviewing the trial court's rulings, the Mississippi Supreme Court considered both the evidence and arguments presented in the trial court as well as a range of arguments and evidence that petitioner pressed for the first time on appeal—including comparisons of jurors the State struck to jurors the State accepted, claims that the State disparately questioned black and white prospective jurors, and allegations that the State misrepresented the record. After considering all of those arguments and evidence, the Mississippi Supreme Court upheld the trial court's *Batson* rulings. Did the Mississippi Supreme Court err in rejecting petitioner's *Batson* claim?

2. Under *Batson*, if a defendant establishes a prima facie case that a State has exercised a peremptory strike based on race, the burden shifts to the State to establish that it struck the prospective juror for a race-neutral reason. If the State provides such a reason, the trial court must then determine whether the defendant has shown

purposeful discrimination. Under *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), a court reviewing a trial court's resolution of a *Batson* challenge may not consider race-neutral justifications for a strike that the State did not make in the trial court. Rather, a prosecutor must "state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.* at 252. On appeal, petitioner made a raft of new comparative-juror arguments—arguments that the State's proffered reasons for peremptorily striking certain black prospective jurors did not hold up when considered against the State's decisions not to strike certain white prospective jurors. In evaluating comparative-juror arguments that petitioner made for the first time on appeal, the Mississippi Supreme Court considered record evidence showing that allegedly similar accepted jurors were not actually similarly situated to the stricken jurors for whom petitioner claimed error. Did the Mississippi Supreme Court err in considering that record evidence in upholding the trial court's rejection, in light of all the relevant evidence and arguments, of petitioner's *Batson* claims?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

OPINION BELOW

The opinion of the Mississippi Supreme Court affirming petitioner's convictions and sentences (Petition Appendix (App.) A) is reported at 343 So. 3d 943.

JURISDICTION

The Mississippi Supreme Court's judgment was entered on May 12, 2022. App. A. The court denied rehearing on August 11, 2022. App. B. The petition for a writ of certiorari was filed on November 8, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

In 2014, petitioner Tony Terrell Clark walked into a Mississippi convenience store and fatally shot 13-year-old Muhammed Saeed point-blank in the head and then shot Muhammed's father Fahd in the stomach. Surveillance cameras caught all this on video. At petitioner's capital murder trial, the State sought to seat a jury that would fairly consider and be willing to impose the death penalty. The State exercised peremptory strikes—against white and black prospective jurors—consistent with that effort. The trial court rejected petitioner's claims that the State struck any prospective juror because of race. Petitioner was convicted and sentenced to death. The Mississippi Supreme Court affirmed, rejecting petitioner's challenges to the State's use of peremptory strikes.

1. Fahd Saeed immigrated to the United States from Yemen in the 1990s when he was thirteen years old. App.1–2 (¶ 2). (All appendix cites are to Petition Appendix A unless otherwise noted.) Fahd grew up in California working with his parents in convenience stores. App.2 (¶ 2). He eventually moved to Canton, Mississippi, where

he continued to work in convenience stores until he bought his own store. *Ibid.* Fahd lived with his son Muhammed in the back of the store. *Ibid.* Fahd's wife and two daughters lived in Yemen. *Ibid.*

On the night of October 27, 2014, Fahd and Muhammed were behind the counter of the store. App.2 (¶ 3). They were talking with Mrs. Saeed on FaceTime. *Ibid.* Muhammed had just completed a transaction with a regular customer when petitioner and his nephew walked in. *Ibid.* Petitioner walked up to Muhammed and, without saying a word, shot him point-blank in the head. App.2 (¶ 4). Petitioner then shot Fahd in the stomach and demanded that Fahd "give it up." *Ibid.*

Petitioner stepped over Muhammed's body and was trying to open the cash register when his nephew warned that customers were nearing the store. App.2 (¶ 5). Petitioner and his nephew fled. *Ibid.* Customers entered the store, saw Muhammed's body, and called 911. *Ibid.* The robbery, murder, and attempted murder were captured on seven surveillance cameras throughout the store. App.2 (¶ 8). Petitioner was apprehended a week later in Dallas, Texas. App.2 (¶ 9). He was indicted and tried for capital murder, attempted murder, and possessing a firearm as a felon. *Ibid.*

2. The petition for certiorari raises questions only on jury selection. The State thus recounts the details of jury selection at some length.

a. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court set out a three-part framework for assessing an equal-protection challenge to a peremptory strike of a prospective juror as improperly race-based. First, the defendant must make a prima facie showing that a challenged strike was race-based. *Foster v. Chatman*, 578 U.S. 488, 499 (2016). This showing can be made by pointing out that the State has struck

several minority prospective jurors. *Batson*, 476 U.S. at 97. Second, if the defendant establishes a prima facie case, the prosecution must then articulate its race-neutral reasons for the challenged strike(s). *Ibid.* A prospective juror's opposition to the death penalty is a valid, race-neutral reason to exercise a peremptory strike. *See Davis v. Ayala*, 576 U.S. 257, 272 (2015) (recognizing "the prosecution's concern" that a prospective juror "might not have been willing to impose the death penalty" as a valid, race-neutral reason for a peremptory challenge). Third, "'in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'" *Foster*, 578 U.S. at 499 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). Step three "requires the judge to assess the plausibility" of the prosecutor's reasons for its challenged strike(s) "in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (*Miller-El II*).

This Court's precedents "allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). "For example, defendants may present": "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"; "a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing"; "relevant history of

the State's peremptory strikes in past cases"; or "other relevant circumstances that bear upon the issue of racial discrimination." *Ibid.*

b. By the parties' agreement, prospective jurors in this case were mailed a questionnaire to fill out and bring to jury duty. The questionnaire included these questions:

> 35. Please describe your feelings about the death penalty in your own words[.]
>
> 36. Please check (✓) the one statement that best summarizes your general view about the death penalty:
>
> A._____ I am opposed to capital punishment under any circumstances.
> B._____ I am opposed to capital punishment except in a few cases where it may be appropriate.
> C._____I am neither generally opposed to nor in favor of capital punishment.
> D._____ I am in favor of capital punishment except in a few cases where it may not be appropriate.
> E._____ I am strongly in favor of capital punishment as an appropriate penalty.
>
> 40. The law provides that to determine if a sentence of death or life imprisonment is appropriate, the jury must consider any aspect of the defendant's life, character, history and background and any of the circumstances of the offense. This is commonly referred to as mitigating circumstances. How do you feel about considering individual factors about a person's life to make a determination as to what the appropriate sentence should be?
>
> 41. The law in the State of Mississippi says that an intentional murder (the intentional taking of a life without legal excuse or justification) committed in the course of a robbery is capital murder for which the death penalty may be imposed. Do you agree with this law?
>
> _____Yes _____No
>
> Please explain[.]

App.4–5, 6, 54 (¶¶ 23, 37, 323). The parties were also permitted to individually voir dire prospective jurors about their opinions on the death penalty. *See* App.6–15.

Mississippi law provides each party in a capital case twelve peremptory challenges in selecting the petit jury, plus two more challenges in selecting alternate jurors. Miss. Code Ann. §§ 99-17-13, 13-5-67.

c. The State exercised five peremptory strikes against white prospective jurors, seven against black prospective jurors, and none against alternate prospective jurors. App.3 (¶ 15). Petitioner's trial counsel alleged that the State violated *Batson* in its seven peremptory strikes against black prospective jurors. Applying the *Batson* framework, the trial court rejected each of petitioner's challenges. At the first step, the court ruled that petitioner established a prima facie case based on numbers alone. App.3 (¶ 16). At the second step, the State offered race-neutral reasons for each strike and the court allowed petitioner's counsel to respond to those reasons. *See* App.4–7 (¶¶ 23–47). At the third step, the court found that the State proffered sufficient race-neutral reasons for the strikes and that petitioner failed to show purposeful discrimination behind any strike. App.5–7 (¶¶ 26–47). The seated jury consisted of eleven white jurors, one black juror, and two white alternate jurors. App.6 (¶ 15).

The State's proffered reasons, petitioner's responses, and the trial court's rulings upholding the State's strikes of seven black prospective jurors are as follows:

(1) Prospective Juror 2 (Alexander): The State said that it struck Alexander because of her answers to question 35 (that she was "against the death penalty") and 36 (that she "was opposed to capital punishment under any circumstances") and because she was 76 years old. App.4–5 (¶¶ 23, 24). Petitioner's counsel "attempted to

rebut only one of" those reasons. App.5 (¶ 24). Counsel claimed that Alexander answered question 36 similarly to "members of both races." *Ibid*. But counsel identified no white jurors the State accepted who answered similarly, stating to the court, "I can't find that there are" any such similarly situated jurors. App.5 (¶ 25).

The trial court ruled that Alexander's opposition to the death penalty and her age were sufficient race-neutral reasons and upheld the strike. App.5 (¶ 26).

(2) Prospective Juror 6 (Esco-Johnson): The State said that it struck Esco-Johnson for four reasons: her answer to question 35 (she considered the death penalty "wasteful"); she had written a research paper on the cost of the death penalty; she was close in age to petitioner and had attended the same middle school that petitioner had attended; and (as shown by a database printout from its office) the District Attorney's Office had prosecuted many "Escos." App.5 (¶ 27). Petitioner's counsel "attempted to rebut" only two of those reasons. App.5 (¶ 28). Counsel argued that the State did not voir dire Esco-Johnson to determine whether she was related to any prosecuted Escos and that, regardless of her answer to question 35, she also indicated that she was neither opposed to nor in favor of the death penalty. *Ibid.* Counsel did not advance any argument based on comparisons to other jurors who were not struck.

The trial court ruled that Esco-Johnson's research on the death penalty and the fact that she shared the same name as others prosecuted in the county were sufficient race-neutral reasons and upheld the strike. App.5 (¶ 30).

(3) Prospective Juror 24 (Ammons): The State said that it struck Ammons because one of petitioner's attorneys previously represented Ammons, he expressed disagreement with the law that murder during a robbery is death-penalty eligible,

and he had visited the crime scene. App.5 (¶ 31). Petitioner's counsel responded that although Ammons had been previously represented by one of petitioner's attorneys and had visited the crime scene, he said that he could be fair and impartial. App.5 (¶ 32). Counsel did not address the State's reason that Ammons disagreed with controlling law making felony-murder death-penalty eligible and did not advance any argument based on comparisons to other jurors who were not struck.

The trial court ruled that petitioner's counsel's prior representation of Ammons was a sufficient race-neutral reason. App.5 (¶ 33). It also ruled that Ammons' disagreement with imposing the death penalty for murder during a robbery was also a sufficient reason. *Ibid.*

(4) Prospective Juror 28 (Majors): The State said that it struck Majors because (as shown by his response to question 41) he disagreed with Mississippi law on death-penalty eligibility for murder committed during a robbery, his wife worked at the Mississippi Supreme Court, and he was close in age to petitioner and had attended the same middle school. App.5–6 (¶ 34). Petitioner's counsel responded to only two of those reasons. He said that Majors was not voir dired about his wife's employment with the state supreme court and that other potential jurors were around petitioner's age. App.6 (¶ 35). Counsel did not respond to the State's other reasons and did not make other arguments based on comparisons with jurors who were not struck.

The trial court ruled that the State's reason on Majors' response to question 41 was a sufficient race-neutral reason. App.6 (¶ 36).

(5) Prospective Juror 46 (Luckett): The State said that it struck Luckett because in response to questions 35, 40, and 41 she said "depends on the case" and

she appeared to be "on the fence" or to have "reservations" about the death penalty and because (as a printout from its office showed) the District Attorney's Office had prosecuted many Lucketts and had "active prosecutions pending … against several Lucketts" at the time of petitioner's trial. App.6 (¶¶ 37, 39). Petitioner's counsel responded that Luckett was not voir dired to determine whether she was related to any prosecuted Lucketts and that her answer of "depends on the case" to questions 35, 40, and 41 is what the law requires. App.6 (¶ 38). Counsel also noted that in response to question 36 she checked that she favored the death penalty except in a few cases that did not warrant it. *Ibid.* Counsel did not advance any argument based on comparisons with other jurors who were not struck.

The trial court ruled that Luckett's reservations about the death penalty were sufficient race-neutral reasons. App.6 (¶ 40). The trial court also ruled that it was a sufficient race-neutral reason that she had the same last name as others who were being prosecuted by the District Attorney's Office. *Ibid.*

(6) Prospective Juror 61 (Love): The State said that it struck Love for four reasons: he responded to question 35 with "I personally feel murder is wrong no matter who does it"; his voir dire responses revealed that he has a tough time with the death penalty (even though he said he thought he could consider it); he stated on his questionnaire that he met with the District Attorney's Office about a shoplifting case that was not pursued; and he had a son close in age to the victim. App.6 (¶ 41). Petitioner's counsel responded that although Love said in voir dire that he is "personally against" the death penalty, he said on his questionnaire that he is neither opposed to nor in favor of capital punishment; he said in voir dire that he would follow

the law; he was not voir dired about the unpursued shoplifting incident; and having a son close in age to the victim favored the State. App.6 (¶ 42). Counsel did not advance any argument based on comparisons with other jurors who were not struck.

The trial court ruled that Love's view toward the death penalty was a sufficient race-neutral reason. App.7 (¶ 43).

(7) Prospective Juror 81 (Day): The State said that it struck Day because: she stated on the questionnaire that she would favor the death penalty only if the State proved guilt "beyond a shadow of a doubt"; in voir dire she indicated that she would hold the State to a higher burden than the law requires ("absolute certainty"); and the District Attorney's Office had prosecuted many Lucketts, the last name of two of her children. App.7 (¶ 44). Petitioner's counsel responded that Day was not voir dired about her relation to any prosecuted Lucketts. App.7 (¶ 45). As to her answers showing that she would hold the State to a higher burden of proof, counsel responded that "people of both races ... did not understand the system coming into this process" and that Day's answers showed "that she understood the standard of proof and could abide by that and would abide by that." *Ibid.* When asked to identify any jurors the State accepted who said they would hold the State to a higher burden of proof, counsel could not identify one. App.7 (¶ 46).

The trial court found that Day's "beyond a shadow of a doubt" and "absolute certainty" answers were sufficient race-neutral reasons. App.7 (¶¶ 44, 47).

3. Trial followed. At the guilt phase, the State called six witnesses and played surveillance video for the jury. App.2 (¶ 10). The defense called no witnesses. The jury found petitioner guilty on all counts. *Ibid.* After a bifurcated sentencing trial, the jury

sentenced petitioner to death for Muhammed's murder. App.2 (¶¶ 10–11). The trial court sentenced petitioner to 40 years' imprisonment for attempted murder and 10 years' imprisonment for the firearm conviction. App.2 (¶ 12).

4. Petitioner appealed, challenging (as relevant here) the State's use of peremptory strikes. His arguments differed significantly from those his counsel had made to the trial court. As reflected above, at trial he had focused on the claim that the State's peremptory strikes were suspect because: (1) the State did not voir dire some jurors on the reasons the State offered for the strikes; and (2) although the State struck jurors who gave questionnaire and voir dire answers suggesting opposition to the death penalty, those jurors gave other answers showing willingness to consider the death penalty. App.5–7 (¶¶ 28–45). On appeal, by contrast, he relied almost entirely on comparative-juror arguments—arguments that the State's proffered reasons for striking black prospective jurors did not hold up when considered against the State's decisions not to strike similarly situated white prospective jurors. App.9, 11–14 (¶¶ 58, 69–97). Petitioner also pressed, for the first time on appeal, other alleged indicia of pretext, including "racially disparate questioning … [and] investigation" and "evidence of a fairly recent history of [race-based peremptory strikes] on the part of the office prosecuting this case." App.3, 9 (¶¶ 19, 59). He claimed that the trial court's failure to consider these indicia of pretext, not presented to it, meant that the trial court improperly viewed the State's reasons for its strikes in isolation, rather than under the totality of the circumstances. App.10 (¶ 59).

A divided Mississippi Supreme Court affirmed. As relevant here, by a 6-to-3 vote the court rejected petitioner's claim that the State had struck any of the seven

black prospective jurors in violation of *Batson*. App.7–15 (¶¶ 48–106) (majority); App.50–58 (¶¶ 302–35) (dissent). The dissent agreed that three of the State's strikes (Alexander, Ammons, and Day) should be upheld but maintained that the four other strikes (Esco-Johnson, Majors, Luckett, and Love) violated *Batson*. App.53 (¶ 313).

At the outset, the majority expressed serious doubt about petitioner's effort to press on appeal a raft of arguments and evidence that he had never pressed in the trial court. App.8–9 (¶¶ 53–58). The court emphasized that petitioner "goes to great lengths with a comparative juror analysis for the first time on appeal." App.9 (¶ 58). The court observed that under this Court's precedent "'defendants *may* present'" to the trial court a range of evidence, *ibid.* (quoting *Flowers*, 139 S. Ct. at 2243; state court's emphasis), but that generally "rebuttal evidence and arguments not presented to the trial court will not be considered on appeal," App.9 (¶ 54). The court also noted this Court's caution about comparing jurors for the first time on appeal, given that "'an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.'" App.10 (¶ 64) (quoting *Snyder*, 552 U.S. at 483). "Having reviewed this record," the court continued, it "d[id] notice" that risk was proven true in this case. App.10 (¶ 64).

The court then evaluated the trial court's rulings on the challenged strikes. Despite its misgivings about considering new arguments not presented in the trial court, the majority considered a wide range of arguments that petitioner made for the first time on appeal—including comparisons of jurors the State struck to jurors the State accepted, claims that the State disparately questioned black and white prospective jurors, and allegations that the State misrepresented the record. App.10–

15 (¶¶ 65–105). The court also considered petitioner's assertion, picked up by the dissent, that there is "evidence of a fairly recent history of similar behavior on the part of the office prosecuting this case." App.9 (¶ 59). The dissent claimed that the District Attorney's Office that prosecuted petitioner had "demonstrated its proclivity for striking black jurors." App.52 (¶ 310). For support, the dissent cited a single case in which the District Attorney's Office had used its six peremptory strikes to strike six of eight prospective black jurors and the *Batson* challenge was in turn rejected on appeal. App.52 (¶ 310) (citing *Eubanks v. State*, 291 So. 3d 309, 319–22 (Miss. 2020)).

The court thus reviewed the trial court's rulings in light of all the arguments and evidence the parties presented at trial and in light of arguments and record material that petitioner pressed for the first time on appeal. In undertaking that holistic analysis, it upheld each strike. The majority's analysis of each strike, the dissents' responses, and the majority's analysis of those responses are as follows:

(1) Prospective Juror 2 (Alexander): In upholding the strike of Alexander, the majority reasoned that her questionnaire showed "that she was against the death penalty under any circumstances," that petitioner "did not produce any ... evidence upon request from the trial court" that the State accepted jurors who had answered similarly, and that the court could not reverse without an evidentiary basis. App.10–11 (¶ 65). The dissent "agree[d] that the reasons given for striking" Alexander "were acceptable given her age and that she stated her opposition to the death penalty in any circumstances." App.53 (¶ 313).

(2) Prospective Juror 6 (Esco-Johnson): The court upheld the trial court's ruling on Esco-Johnson on the grounds that she "expressed views" against the death

penalty (deeming it "wasteful" and having written a research paper on it) and that the District Attorney's Office had prosecuted other Escos. App.11 (¶¶ 66–68); *see* App.11–12 (¶¶ 66–74). The dissent thought the strike improper, maintaining that the State had accepted white prospective jurors who were similar to Esco-Johnson: two had relatives prosecuted or arrested in the county and a third "also indicated a concern with taxpayer dollars." App.53–54 (¶¶ 316, 319). The majority found, however, that those three accepted jurors "are not much comparable with Esco-Johnson." App.11 (¶ 70). The two prospective jurors with relatives who were arrested or prosecuted had expressed strong support for capital punishment. One "indicated that he is strongly in favor of capital punishment" and "would vote for the death penalty in every case where the law allows it." *Ibid.* The second said that "he agrees with the death penalty" and "is strongly in favor of capital punishment as an appropriate penalty." *Ibid.* And the third prospective juror who mentioned "taxpayer dollars" also "indicated that she is in favor of capital punishment except in a few cases where it may not be appropriate, whereas Esco-Johnson indicated that she is neither generally opposed to nor in favor of capital punishment." *Ibid.* That prospective juror added that "if we are going to have death as a punishment … the accused should die in the same way they killed their victims" and that she did not "want to pay ([her] hard earned money) for violent criminals to live in overcrowded prisons, so death penalty is used." *Ibid.*

In response, the dissent said the majority was comparing jurors based on reasons that the State had not given in the trial court. App.54 (¶ 320). The majority explained, however, that it was not substituting new reasons for the prosecutor's

"proffered reasons for wanting to strike Esco-Johnson," but was explaining why, based on "all the evidence" relevant, Esco-Johnson was not "similarly situated" to the white prospective jurors that petitioner compared her to for the first time on appeal. App.12 (¶¶ 73, 74); *see* App.11–12 (¶¶ 71–74). The State had no chance in trial court to explain those features of the record because petitioner never made these "similarly situated claims in the trial court." App.12 (¶ 73). The majority recognized that this Court's precedent requires that "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." *Miller-El II*, 545 U.S. at 252 (quoted at App.12 (¶ 74)). But that statement, the majority recognized, does not bar a reviewing court from considering record evidence supporting the prosecutor's proffered reasons—"especially if a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered comparisons to other prospective jurors" and particularly given that "a reviewing court must assess the plausibility of" the prosecutor's reasons "in light of all evidence with a bearing on it." App.12 (¶ 74) (internal quotation marks omitted).

(3) Prospective Juror 24 (Ammons): The majority ruled that "[t]he fact that [petitioner's] counsel had previously represented Ammons in another matter was certainly a sufficient race-neutral reason for the State's wanting to remove him." App.12 (¶ 76); *see* App.12 (¶¶ 75–76). The majority also ruled that Ammons' "disagreement with Mississippi law allowing imposition of the death penalty for intentional murder committed during the course of a robbery," reflected in his response to question 41, was also a sufficient race-neutral reason. App.12 (¶ 76). The dissent "agree[d]" "that the State's reasoning for its strike of" Ammons "was

acceptable, given that [petitioner's] attorney had previously represented him." App.53 (¶ 313).

(4) Prospective Juror 28 (Majors): The majority ruled that, as with Ammons, it was a sufficient race-neutral reason that Majors disagreed (in response to question 41) with Mississippi law on death-penalty eligibility for murder committed during a robbery. App.12 (¶ 77); *see* App.12–13 (¶¶ 77–80). The dissent maintained that despite that response, in individual voir dire Majors showed that he agreed that an intentional (but not an unintentional) killing may be punished by the death penalty, that the State disparately questioned Majors by not seeking to clarify his views but seeking to clarify the views of prospective white jurors who did not understand the law, and that the record does not support the State's assertion that Majors expressed an issue with the death penalty. App.54–55 (¶¶ 323–26). The majority responded to the first two points by explaining why the jurors who were allegedly questioned differently were not similarly situated to Majors: none of those jurors had said in response to question 41—as Majors did—that they did not agree with the law making the described conduct death-penalty eligible. App.13 (¶ 79). So comparing them or questions put to them was inapt. *See ibid.* And the majority disagreed that the State had made a statement—that Majors expressed an issue with the death penalty—that did not have record support. App.13 (¶ 80). After noting that this argument had not been presented to the trial court, the majority quoted at length Majors' circuitous responses to questioning about his answer to question 41. *Ibid.* "At the very least, it could reasonably be argued that these particular responses by Majors lent themselves to some ambiguity, which the trial court ultimately would have had to resolve." *Ibid.*

As the record stood, petitioner had not provided a basis to overturn the trial court's ruling on appeal. *Ibid.*

(5) Prospective Juror 46 (Luckett): The majority upheld the trial court's rulings that the State had presented sufficient race-neutral reasons for striking Luckett given that she had the same last name as others prosecuted in the county and given her "repeated[ ]" "equivoc[al]" responses showing "that she had reservations about the death penalty" and that she had nodded her head at times without giving affirmative answers. App.13 (¶¶ 81–84); *see* App.13–14 (¶¶ 81–94). The dissent maintained that Luckett's "it depends" responses to various death-penalty questionnaire questions were similar to five accepted white prospective jurors (Meek, Biddle, Schommer, Green, and Hensarling) who during individual voir dire provided responses that included "it depends" or variations of that phrase. App.56 (¶ 329). The majority explained that none of the five were similarly situated. App.14 (¶¶ 89–94). Meek said that "capital punishment is a necessary option" and that he agreed with Mississippi law. App.14 (¶¶ 89–90). Biddle affirmed that she would follow the law, said that she agreed with Mississippi law, and (even when nodding in response to a question) she "provided confirming yes and no responses to questions from the State and the defense." App.14 (¶ 91). Schommer said she agreed with the law in response to question 41 and added in voir dire that "[i]f the robber murders someone, then I do not have a problem with the death penalty." App.14 (¶ 92). Green said that although she was "more for a life sentence as opposed to the death penalty," she "believe[d] that there are certain cases and circumstances where the death penalty is appropriate"; she said she agreed with the law in response to question 41 even though

she did not think the death penalty would be "appropriate in all cases"; and she gave clear yes and no responses to questions asked by the State and the defense. App.14 (¶ 93). And Hensarling said that she agreed with the law in response to question 41 and added in voir dire that "I believe if the death penalty is appropriate, so be it." App.14 (¶ 94).

(6) Prospective Juror 61 (Love): The majority upheld the strike of Love on the ground that Love had repeatedly equated the "death penalty" with "murder" and had equivocated at different points "when asked directly if he could sentence an individual to death." App.14–15 (¶¶ 95, 97); App.14–15 (¶¶ 95–98). The majority rejected the dissent's view, *see* App.57 (¶ 333), that Love's responses were similar to those given by three accepted white prospective jurors because—unlike those prospective jurors—Love had repeatedly equivocated on whether he could impose the death penalty. App.14–15 (¶ 97).

(7) Prospective Juror 81 (Day): The majority ruled that Day's strike had to be upheld because she repeatedly indicated that to impose the death penalty she would "require a higher standard of proof" than the law requires. App.15 (¶ 104); *see* App.15 (¶¶ 99–105). The dissent "agree[d]" that Day "made professions during her individual voir dire that she would require 'absolute certainty' before imposing the death penalty that render her strike acceptable." App.53 (¶ 313).

Having rejected petitioners' *Batson* arguments and other claims on appeal, the Mississippi Supreme Court affirmed petitioner's convictions and sentences. The court denied rehearing by a divided vote. App. B.

REASONS FOR DENYING THE PETITION

Petitioner seeks this Court's review, claiming that the Mississippi Supreme Court committed two errors in rejecting his *Batson* challenges. The decision below is correct and does not warrant further review. The petition should be denied.

1. Petitioner first contends that the Mississippi Supreme Court misapplied *Batson v. Kentucky*, 476 U.S. 79 (1986), by "evaluating" the State's peremptory "strikes and the reasons offered in defense of them in insolation from each other and from the totality of the circumstances in which they were made." Pet. 11; *see* Pet. 11–19. Petitioner is wrong. The Mississippi Supreme Court soundly applied this Court's precedents to correctly reject petitioner's *Batson* arguments.

This Court's precedents "allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). "For example, defendants may present": "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"; "a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing"; "relevant history of the State's peremptory strikes in past cases"; or "other relevant circumstances that bear upon the issue of racial discrimination." *Ibid.*; *see* App.4 (¶ 20 n.1), 8 (¶ 51). A defendant alleging racial discrimination in jury selection has the burden of proving

that the prosecution exercised a peremptory strike on the basis of race. *Batson*, 476 U.S. at 93; *see Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

Where, as here, the parties do not contest that petitioner "demonstrated a prima facie case" and that the prosecution "offered race-neutral reasons for [its] strikes," a reviewing court need only address *Batson*'s third step—whether petitioner carried his burden to show that any peremptory strike was made on the basis of race. *Foster v. Chatman*, 578 U.S. 488, 500 (2016). "That step turns on factual determinations, and, 'in the absence of exceptional circumstances,'" a reviewing court defers to the trial court's factual findings. *Ibid.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). This Court has recognized that considering such credibility-dependent and fact-dependent rulings on appeal is delicate. The Court has cautioned in particular about consideration of comparative-juror arguments raised for the first time on appeal, because "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder*, 552 U.S. at 483. At all events, "'[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.'" *Flowers*, 139 S. Ct. at 2244 (quoting *Snyder*, 552 U.S. at 477).

The Mississippi Supreme Court soundly applied these principles to correctly uphold the trial court's rejection of petitioner's challenge to the State's peremptory strikes as race based. In reviewing the trial court's rulings, the state supreme court considered the arguments and evidence the parties presented in the trial court as

well as arguments and evidence that petitioner pressed for the first time on appeal. App.10–15 (¶¶ 65–105); *supra* pp. 11–17. Despite its misgivings about considering petitioners' new arguments that his counsel failed to make in the trial court, the Mississippi Supreme Court considered many arguments that petitioner made for the first time on appeal. These included comparisons of jurors the State struck to jurors the State accepted, App.11–15 (¶¶ 69–74, 78–79, 84–94, 97); *supra* pp. 13–17 claims that the State disparately questioned black and white prospective jurors, App.13 (¶ 79); *supra* p. 15; and allegations that the State misrepresented the record, App.13 (¶ 80); *supra* p. 15. *See Flowers*, 139 S. Ct. at 2243 (noting relevance of "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck," "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case," and "a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing"). The court also considered petitioner's assertion that there is "evidence of a fairly recent history of similar behavior on the part of the office prosecuting this case." App.9 (¶ 59); *see Flowers*, 139 S. Ct. at 2243 (noting relevance of "history of the State's peremptory strikes in past cases"). The Mississippi Supreme Court thus undertook the holistic analysis that this Court's precedents require and considered the numerous features that petitioner claims that it did not. *See* Pet. 11–13.

To start, all nine judges on the Mississippi Supreme Court agreed that no *Batson* violation occurred in the State's strikes of three black prospective jurors—Alexander, Ammons, and Day. Alexander was against the death penalty under any circumstances, App.10–11 (¶ 65) (majority); App.53 (¶ 313) (dissent); *supra* pp. 5, 12.

Ammons had previously been represented by petitioner's counsel, App.12 (¶ 75) (majority); App.53 (¶ 313) (dissent); *supra* pp. 6, 14–15. And Day repeatedly said during voir dire that she would require a higher standard of proof to impose the death penalty than what the law requires. App.15 (¶ 104) (majority); App.53 (¶ 313) (dissent); *supra* pp. 9, 17. In arguing for this Court's review, petitioner does not offer a juror-by-juror assessment. So he does not identify anything specific that the Mississippi Supreme Court should have considered but did not consider for these three prospective jurors. And petitioner contends that the dissent "perform[ed] the analysis that should have been done" in assessing petitioner's *Batson* claims. Pet. 13. The dissent agreed with these strikes. App.53 (¶ 313); *supra* pp. 12, 14–15, 17. There is no sound basis for challenging them.

That leaves the other four strikes—of Esco-Johnson, Majors, Luckett, and Love. The state supreme court soundly evaluated the relevant circumstances in upholding these strikes. As that court recognized, each of these prospective jurors equivocated, voiced opposition to, or expressed misgivings about the death penalty or about state law on the death penalty. *See* App.11 (¶¶ 66–68) (Esco-Johnson "expressed views" against the death penalty—deeming it "wasteful"); App.12 (¶ 77) (Majors disagreed with Mississippi law on death-penalty eligibility for murder committed during a robbery); App.13 (¶¶ 81–84) (Luckett provided "repeated[ ]" "equivoc[al]" responses showing "that she had reservations about the death penalty" and nodded her head at times without giving affirmative answers); App.14–15 (¶¶ 95, 97) (Love repeatedly equated the "death penalty" with "murder" and equivocated at different points "when asked directly if he could sentence an individual to death").

Two of these four also shared names with others who had been prosecuted by the District Attorney's Office. *See* App.11 (¶¶ 66–68) (Esco-Johnson: DA's Office prosecuted "numerous" other Escos); App.13 (¶¶ 81–84) (Luckett had the same last name as "numerous" others prosecuted in the county).

In upholding these strikes, the state supreme court did not consider the strikes in isolation but instead considered them in light of evidence and circumstances arguably bearing on the strikes. *See* App.11 (¶ 70) (considering side-by-side comparisons between Esco-Johnson and other prospective jurors and concluding that those jurors were not similarly situated to Esco-Johnson because they expressed support for capital punishment); App.13 (¶ 79) (considering side-by-side comparisons between Majors and other prospective jurors and concluding that those jurors were not similarly situated to Majors because none said—as Majors did—that they did not agree with the law; rejecting disparate-questioning claim on the same basis); App.13 (¶ 80) (for Majors, considering and finding unpersuasive claim that the State misrepresented the record); App.14 (¶¶ 89–94) (considering side-by-side comparisons between Luckett and other prospective jurors and concluding that those jurors were not similarly situated to Luckett because they expressed clearer support for imposing the death penalty); App.14–15 (¶¶ 95, 97) (rejecting comparison of Love to other prospective jurors because Love repeatedly equivocated on whether he could impose the death penalty, which accepted jurors had not done). It also considered the District Attorney's Office's relevant history—which, by the dissent's lights, amounted to a single case where a *Batson* challenge was rejected and that rejection was affirmed on appeal. App.52 (¶ 310) (citing *Eubanks v. State*, 291 So. 3d 309, 319–22 (Miss. 2020)).

The majority reasonably did not find that history helpful to petitioner. *See* App.10–11 (¶¶ 59–63); *see also Eubanks*, 291 So. 3d at 320 (explaining that prosecutor in a burglary case used peremptory strikes against someone with a brother who had been convicted of armed robbery, someone with controlled-substance and DUI arrests, someone who had failed to complete the juror questionnaire, and someone who lived in the same apartment complex as the mother of someone implicated in the burglary).

The state supreme court thus did as the law requires: It considered whether any of the "trial court's ruling[s] on the issue of discriminatory intent" was "clearly erroneous," *Flowers*, 139 S. Ct. at 2244, "in light of the parties' submissions," *Foster*, 578 U.S. at 499, and "in light of all evidence with a bearing on" the State's strikes, *Miller-El II*, 545 U.S. at 252. It correctly concluded that none of the trial court's rulings were clearly erroneous. As recounted above, the state supreme court exercised sound judgment in upholding the trial court's strikes based on the argument and record. *See supra* pp. 10–17 (walking through the majority's reasoning and its careful responses to the dissent).

As petitioner notes, Pet. 12, the majority did recognize that *Miller-El II*, *Foster*, and *Flowers* involved "exceptional circumstances or extraordinary facts." *E.g.*, App.10 (¶ 64). But as shown above, it applied those decisions faithfully—and it nowhere said or hinted that the obligation to consider the full record in evaluating a *Batson* challenge applies "only where discrimination is somehow 'extraordinary, exceptional, and unusual.'" Pet. 12 (quoting App.51 (¶ 306)).

Petitioner points out that the dissent disagreed with the majority's analysis of the Esco-Johnson, Majors, Luckett, and Love strikes. Pet. 13–15 & n.7. That is true.

But, as shown above, petitioner lacks any sound basis to claim that the majority did not apply the correct legal standards or that it "improperly ignored or discounted" the relevant evidence. Pet. 13. Nor did the majority "restrict its review of the record only to facts of record that were mentioned by" petitioner "to illustrate his rebuttal assertions of comparative disparate treatment." Pet. 16; *see* Pet. 15–16. As explained, the majority considered a wide range of arguments and evidence that petitioner pressed for the first time on appeal. *Supra* pp. 11–17. Petitioner simply faults the majority for taking a different view of the arguments and evidence that the dissent relied on. But the majority's differing view was well grounded—and, in any event, petitioner's disagreement with its application of the governing legal standard does not warrant further review.

Because the Mississippi Supreme Court applied the correct legal standards and considered all relevant evidence in totality rather than in isolation, there is also no merit to petitioner's suggestion that the state supreme court did not afford him the "minimum safeguards necessary" to make his "first appeal as of right" "adequate and effective." Pet. 17; *see* Pet. 16–19. The Mississippi Supreme Court fully considered the trial court's rulings in light of all relevant circumstances. What that court refused to do was to embrace the inferences that petitioner wanted the court to draw but that the record did not compel or support. Petitioner's disagreement with that refusal is no basis to grant certiorari.

2. Petitioner next contends that the Mississippi Supreme Court erred—and took sides in a lower-court conflict—by "consider[ing] justifications for the [State's] strikes of black jurors that" the prosecution did not advance "to refute the inference

of discrimination raised by" petitioner's "prima facie case" of discrimination. Pet. 19; *see* Pet. 19–22. Petitioner is mistaken, and this case does not provide a vehicle for addressing this issue.

In *Miller El-II*, this Court reversed a Fifth Circuit decision upholding the prosecution's ten peremptory strikes against black prospective jurors. 545 U.S. 231. This Court's analysis focused on the peremptory strikes of two black prospective jurors who "were ostensibly acceptable to prosecutors seeking a death verdict." *Id.* at 265. The Court held that the prosecution's stated race-neutral reasons for striking those jurors did not "hold up" when all relevant facts were considered. *Ibid.* In reaching that conclusion, the Court ruled that the court of appeals' "substitution of a reason for eliminating" one of the jurors "was erroneous ... as a matter of law." *Id.* at 250–52. The Court explained that *Batson*'s framework requires the trial court to "assess the plausibility" of the prosecution's stated reasons for the strikes, and when a reason "does not hold up, its pretextual significance does not fade" simply because a reviewing court can "think[ ] up any rational basis" for the strike. *Id.* at 251–52. When providing its race-neutral reasons for a strike, the prosecution "simply has got to state [its] reasons as best [it] can and stand or fall on the plausibility of the reasons [it] gives." *Id.* at 252.

Petitioner contends that in evaluating his challenge to Esco-Johnson, the Mississippi Supreme Court departed from *Miller-El II* by "consider[ing] justifications" for its strike that the prosecutor did not offer. Pet. 19; *see* Pet. 20 (quoting material from the state supreme court's evaluation of Esco-Johnson). But as the Mississippi Supreme Court explained, that is not what it did. That court accepted

the prosecutor's "proffered reasons for wanting to strike Esco-Johnson." App.12 (¶ 73). But the court explained why, based on "all the evidence" relevant, Esco-Johnson was not "similarly situated" to the white prospective jurors that petitioner compared her to for the first time on appeal. App.12 (¶¶ 73, 74); *see* App.11–12 (¶¶ 71–74). The State had no opportunity in the trial court to explain those features of the record because petitioner never made these "similarly situated claims in the trial court." App.12 (¶ 73). The majority recognized that *Miller-El II* requires that "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." 545 U.S. at 252 (quoted at App.12 (¶ 74)). But that statement, the majority also recognized, does not bar a reviewing court from considering record evidence *supporting* the prosecutor's proffered reasons—"especially if a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered comparisons to other prospective jurors" and particularly given that "a reviewing court must assess the plausibility of" the prosecutor's reasons "in light of all evidence with a bearing on it." App.12 (¶ 74) (internal quotation marks omitted).

The Mississippi Supreme Court was correct. Nothing in this Court's *Batson* caselaw prevents a reviewing court, when assessing a comparative-juror argument made for the first time on appeal, from considering the relevant record evidence bearing on whether a comparison is sound. To the contrary, *Miller-El II* itself directs that courts must evaluate a State's proffered reasons "in light of all evidence with a bearing on" them. 545 U.S. at 252. *Miller-El II* thus requires reviewing courts assessing newly made comparative-juror arguments to evaluate record evidence to

determine whether allegedly comparable accepted jurors are similarly situated to peremptorily struck prospective jurors. Any other approach would defy good sense. Under petitioner's approach, a defendant would have a powerful incentive not to make a comparative-juror argument in the trial court because he would know that he could secure a reversal by simply making that argument for the first time on appeal because (under petitioner's rule) the appellate court would be powerless to consider record evidence showing that the argument is unfounded. No sound reason commends that rule, which would create terrible incentives.

Petitioner's claimed lower-court conflict is also illusory. *Contra* Pet. 20–22. The Fifth Circuit and California Supreme Court agree with the Mississippi Supreme Court that *Miller-El II* does not bar a reviewing court, when evaluating a comparative-juror argument made for the first time on appeal, from considering the full record to determine whether a defendant's comparative-juror arguments rest on similarly situated prospective jurors. *See Chamberlin v. Fisher*, 885 F.3d 832, 841–44 (5th Cir. 2018) (en banc); *People v. Miles*, 464 P.3d 611, 636–37 (Cal. 2020). And in every other precedential decision that petitioner cites, the court just applied the rule recognized in *Miller-El II* to reject attempts to substitute new race-neutral reasons for the reasons a prosecutor actually gave. *See Porter v. Coyne-Fague*, 35 F.4th 68, 78–79 (1st Cir. 2022); *United States v. Taylor*, 636 F.3d 901, 905–06 (7th Cir. 2011); *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1269–70 (11th Cir. 2009); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004); *People v. Ojeda*, 503 P.3d 856, 865 (Colo. 2022); *State v. Clegg*, 867 S.E.2d 885, 908–09 (N.C. 2022); *State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002). These cases recognize that *Batson*'s framework requires

assessing the plausibility of the contemporaneous justification(s) the prosecution gave for its peremptory strike(s) and condemn consideration of post hoc or substituted reasons for the strikes. The Mississippi Supreme Court recognized the same, evaluated the reasons the prosecutor gave in the trial court for striking Esco-Johnson, and did not consider substituted reasons for that strike. Pet. 11–12 (¶¶ 66–74).

On this second question presented, as on the first, the Mississippi Supreme Court correctly applied the law to reach the right result. It sided with other sound decisions. This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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