No. 22-6057

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**

# REPLY BRIEF IN SUPPORT OF CERTIORARI


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## ARGUMENT IN REPLY

### I. This Court should grant review to decide the first question presented because to do otherwise jeopardizes its commitment to eradicating the stain of racial discrimination from our criminal justice system.

Contrary to Respondent's suggestion, the first question presented is not asking this Court to take any kind of radical or extraordinary action. It simply asks this Court to grant review to ensure that, in response to a direct challenge to its authority to do so, it does not retreat from its recently reiterated and longstanding commitment to vigorously "enforce and reinforce" the anti-discrimination mandates of *Batson*, including, where necessary, by granting review to "guard against any backsliding" on that enforcement by the lower courts. *Flowers v. Mississippi*, --- U.S. ---, ----, 139 S. Ct. 2228, 2243 (2019) (citing *Foster* v. *Chapman*, 578 U.S. 488 (2016); *Snyder v. Louisiana*, 552 U.S. 472 (2008); ); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*).

At the core of that enforcement, and prevention of backsliding, is this Court's repeated mandate that, once a prima facie case of race discrimination in jury has

been made with respect to the prosecutor's strike of a Black prospective juror, courts must not consider the reasons the prosecutor comes up with for that strike in isolation, but must also consider whether those reasons stand up in light of all of the facts and circumstances of record surrounding the prosecutor's jury selection behavior. *Flowers,* 139 S. Ct. at 2250.

The State of Mississippi's Brief in Opposition does not even attempt to engage that question. Instead, it simply reiterates the isolated, non-contextual, analysis performed by the lower courts in the instant matter, and claims that this Court must likewise ignore the abundant contextual evidence of discrimination, and fail to enforce *Batson*, because the courts below decided to ignore it. That is most emphatically what this Court has refused to do when presented with such questions in the past and what it should refuse to do here. *See, e.g., Flowers*, *supra*, *Foster, supra, Snyder, supra, Miller-El II, supra.*

The lower courts' defiance of this Court's clear *Batson* directives, and the Respondent's efforts at defending the courts below, essentially sets up a shell game. Record evidence suggesting discrimination is ignored or asserted to be barred from consideration. Instead, irrelevant characteristics of the stricken jurors, some not even cited by the prosecution as a basis for the strike, are magnified and uncritically relied upon in isolation to find a strike of a black juror – supported in large part by misrepresentations of the record and/or racially differential investigation and questioning – to be entirely justified, even where similarly situated white prospective jurors were accepted.

The most blatant example of this erroneous approach in the instant matter is the lower courts' (and Respondent's) failure to even address the significance of the multiple and repeated misrepresentations made by the prosecutor in attempting to justify particular strikes, some of which the trial judge actually found to be unsupported by the record and based on invidious assumptions arising out of jurors' shared demographics with Mr. Clark. *See, e.g.,* Pet. App. A at ¶ 27, alluding to the rejected circumstance, though not mentioning that the record reflected its rejection by the trial judge. T. 1579. [1] This Court has consistently held that such misrepresentations, in and of themselves, constitute significant evidence of discrimination that must be considered not only as evidence that the particular reason advanced was pretextual, *Flowers*, 139 S. Ct. at 2243 but as evidence sufficient to reject the general credibility of the prosecutor as to other reasons advanced, as well, *Snyder*, 552 U.S. at 485 ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.")

For example, the prosecutor volunteered – and the courts below ultimately credited – the sweeping and untrue claim that, regardless of the race of the prospective juror, "[t]he State is not accepting *anybody* that equivocates on their

[1] The opinion below is attached as Appendix A to the Petition for Writ of Certiorari. 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. References to the State's Brief in Opposition will be to "Respondent's BIO" by page.

questionnaire on the death penalty *or anything* they said during individual voir dire." T. 1587 (quoted verbatim by the dissent at Pet. App. A ¶ 328) (emphasis supplied). In fact, the prosecutor accepted several white jurors who equivocated on their questionnaires and/or in voir dire, three of whom actually served on the jury. One of those three, Dennis Meek, not only expressed such doubts in his juror questionnaire, but also reiterated and discussed the basis for them in voir dire with the prosecutor. Pet. App. A at ¶¶ 84-90, 97. The prosecutor expressly recognized that Mr. Meek was, in fact "hesitating a little" about his ability to consider or impose the death penalty, Pet. App. A at ¶ 84, and the record reflects that Mr. Meek was actually so conflicted on the topic that he became tearful discussing the issue. T. 855-56. As the Mississippi Supreme Court majority necessarily acknowledged, this white juror Mr. Meek was accepted by the State notwithstanding Mr. Meek's clearly "expressed reservations about the death penalty," that were exactly what the prosecutor asserted were automatically disqualifying regardless of race, but that in fact were used by the prosecutor exclusively to strike Black prospective juror).

The lower courts nonetheless ignored this clear misrepresentation, and disparate treatment, by the prosecutor, finding that Mr. Meek had only been accepted by the prosecutor for jury service after he stated he would follow the law. Pet. App. A at ¶ 89. But this purported "distinction" on which the lower courts relied was likewise non-existent. John Majors, an African-American prospective juror who had actually expressed strong general support for the death penalty in his

questionnaire and during voir dire, was, unlike Mr. Meek, struck by the prosecution notwithstanding Mr. Majors identical professions to those of Mr. Meek that he too would be able to follow the law and impose a death sentence if such was warranted in the present matter, even as the single aspect of the death penalty law – entirely inapplicable to the prosecution's theory of the case – that he had questions about on his questionnaire, and was questioned about at during voir dire. Pet. App. A at ¶ 79.

To justify the strike of Mr. Majors, the prosecutor not only exaggerated and misrepresented (and the courts below accepted those exaggerations and misrepresentations uncritically) Mr. Majors' responses as being "issues" with the death penalty in general, but actually manufactured some of those issues through differential questioning not applied to white jurors including those who had affirmatively expressed many more doubts about the death penalty than Mr. Majors ever did. Pet. App. A at ¶ 324 (King, Presiding Justice, dissenting) (noting undisputed facts of record that were entirely and improperly ignored by the majority in rubber stamping the strike of Mr. Majors). *Compare generally* Pet. App. A., Mississippi Supreme Court majority opinion at ¶¶ 34-36, 77-80 *with* Presiding King's dissenting opinion at ¶¶ 322-327. The lower court majority, to one degree or another, refused to consider, or simply ignored, such evidence with respect to at least three other challenged strikes to black prospective jurors, as well. *Compare* Pet. App. A at ¶¶ 27-30, 66-74 (majority discussion of strike of Alicia Esco-Johnson) *with* ¶¶ 312-321 (same, dissent); ¶¶ 37-40, 81-94 (majority, strike of Kathy Luckett)

*with* ¶¶ 328-31 (same, dissent); ¶¶ 41-43, 95-98 (majority, strike of Monshea Love) *with* ¶¶ 332-334 (same, dissent).

The Mississippi Supreme Court compounded the legal error it committed by failing to consider this ample contextual evidence of discrimination by, in the foregoing analysis, focusing not on evidence relating to what the *prosecutor* was doing or saying, but instead by improperly giving weight and relying upon immaterial distinctions among individual prospective jurors – some not even cited by the prosecutor – that this Court has expressly said are not relevant to the *Batson* determination.

*Batson,* as this Court has long held, is about determining from the totality of the circumstances the most likely motivation of the *prosecutor* in exercising his peremptory challenges in the racially disproportionate manner that was found to exist at the prima facie case first step. *See, e.g., Snyder,* 552 U.S. at 486-87 (concluding that the demonstrated falseness of one of the reasons advanced, and failure by the prosecutor to apply a second one to similarly situated whites, also made the Court confident that a third reason, the prosecutor's assertion that the struck African-American juror "seemed nervous," was also incredible and therefore unworthy of being credited by a trial court). It is most definitely not about finding ways, particularly ways not cited by the prosecutor, in which prospective jurors of different races may not be "cookie cutter" replicas of each other. *Miller-El II*, 545 U.S. at 247 n. 6. The fundamental flaw that led to this Court reversing the Mississippi Supreme Court in *Flowers* was, as in *Foster*, *Snyder,* and *Miller-El II*,

that the lower courts under review had lost the focus that *Batson* required.

Unfortunately, the Mississippi Supreme Court has persisted in the instant case in the same wrong focus, and therefore its defiance of this Court's *Batson* jurisprudence, that it was hoped this Court had corrected in *Flowers*:

> Our disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the [challenged] strike in isolation or instead look at the [challenged] 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*.

139 S. Ct. at 2250 (emphasis supplied). To allow Mississippi to continue ignoring what the precedents of this Court require would be to render this Court's heretofore fierce and unwavering commitment to eradication of racial discrimination in the criminal justice system a dead letter. Certiorari review on the first question presented should be granted to ensure this Court does not abandon that important struggle.

## II. To accept the Respondent's view that the Mississippi Supreme Court's affirmance of Mr. Clark's conviction is neither in violation of this Court's *Batson* jurisprudence nor taking a side in a clear conflict in the Circuits and among state courts of last resort about the meaning of that jurisprudence is to likewise abandon its efforts to ensure that racial discrimination is eradicated from our criminal justice system.

On the second question presented, Respondent again attempts to evade, rather than engage, the issue raised for review, by, once again, focusing on the trees over the forest. It contends that the rapidly developing conflict over whether *Miller-El II* means what it says when it forbids courts from considering reasons not advanced by the

prosecutor in justification of particular strikes does not exist because the cited jurisprudence only lets that happen if a comparative juror analysis is conducted for the first time in the reviewing court. 545 U.S. at 252. Respondent's BIO at pp. 26-28.

This ignores entirely that the Mississippi Supreme Court actually refused to conduct such an analysis while at the same time relying on reasons not advanced by the prosecution to justify the challenged strikes. It relied for both these things on the Fifth Circuit's decisions in *Ramey v. Lumpkin*, 7 F.4th 271, 280-81 (5th Cir. 2021), *cert denied,* ___ U.S. ____, 142 S. Ct. 1442 (2022) (mem), and *Chamberlin v. Fisher*, 885 F.3d 832, 838 (5th Cir. 2018) to adopt the radical and startling view that no comparative juror analysis on appeal or other review is required as to any comparison not actually made before the trial court. It thus refused to credit any of the evidence of discrimination that the comparative juror analyses advanced by Clark showed that had not been cited to the trial court, Pet. App. A at ¶¶ 55-57. Despite this, however, it went on to cite justifications not offered by the prosecution in support of upholding the challenged strikes. Pet. App. A. at ¶ 74. This is exactly the conflict that the second question present raises and is one that warrants resolution now for the reasons set forth in the Petition.

The second question presented is thus clearly before this Court. Review should be granted to decide it as part of this Court's vigorous efforts to enforce *Batson* and prevent "backsliding" in that enforcement by the trial and appellate courts to which it has delegated the front-line responsibility for eradicating the taint of racial discrimination forever from our criminal justice system. *Flowers,* 139

S. Ct. at 2243. *See also 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 marks omitted); *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).

## CONCLUSION

For the reasons set forth above and in his Petition for Writ of Certiorari, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court on the Questions Presented.

Respectfully submitted,

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