No. 22-6745

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Hill, -- **PETITIONER**

vs.

United States of America. -- **RESPONDENT(S)**

ON PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIR.CUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Robert Hill
Greenville Federal
Correctional Institution
P.O. Box 5000
Greenville, Ill 62246

QUESTION(S) PRESENTED

A.

WHETHER PETITIONER ESTABLISHED PRIMA FACIE EVIDENCE DEMONSTRATING COUNTERVAILING FACTORS EXCUSING HIM FROM MAKING HIS SIMILARLY SITUATED BATSON-BASED ARGUMENT BEFORE THE TRIAL COURT?

B.

WHETHER THE EIGHTH CIR.CUIT COURT OF APPEALS WRONGLY ACCEPTED THE GOVERNMENT'S POST HOC RATIONALIZATION CONCERNING ITS JUSTIFICATION FOR STRIKING JUROR 10, WHILE IGNORING OBJECTIVE FACTORS TO THE CONTRARY?

C.

WHETHER THE EIGHTH CIR.CUIT ABUSED ITS DISCRETION BY OVERLOOKING A MATERIAL MATTER OF LAW CONCERNING A BATSON CHALLENGE?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT FOR THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINOINS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Case No. 21-1026; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and is

[ ] reported at _____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

[ ] reported at _____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 21, 2022.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 15, 2022, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including January 17, 2023, on December 16, 2022.
in Application No.___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:
The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix ___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ on _____ in in Application No. __ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states in pertinent part:

"No person shall... be deprived of life [or] liberty without due process of law."

The Sixth Amendment to the U.S. Constitution states in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

STATEMENT OF THE CASE

A. Indictment / Superseding Indictment

Petitioner ("Hill") was initially charged with a two-count indictment filed on July 12, 2017. Doc. 2. In Count I, the Government alleged Hill knowingly and willfully conspired with others to distribute and possess with intent to distribute heroin and marijuana, both Schedule I controlled substances, in an amount in excess of one kilogram, in violation of 21 U.S.C. §§ 841(b)(1) and 846. Doc. 2, pp. 1-2. In Count II, the Government alleged that Hill knowingly possessed one or more firearms, which had been shipped and transported in interstate commerce, after he had been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g)(1). Doc. 2, p 2.

On July 18, 2019, the Government filed a two-count superseding indictment. Doc. 228. In Count I, Hill was charged with knowingly and willfully conspiring with others to distribute and possess with intent to distribute heroin and marijuana, both schedule I controlled substances, in an amount in excess of one kilogram, and cocaine, a schedule II

controlled substance, in an amount in excess of 500 gram, in violation of 21 U.S.C. §§ 841(b)(1) and 846. Doc. 228, pp. 1-2. In Count II, Hill was charged with knowingly possessed one or more firearms, which had been shipped and transported in interstate commerce, after knowing he had been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g)(1). Doc. 228, p. 2.

B. Pre-Trial / Trial

Hill was arrested and made his initial appearance on July 27, 2017. Docs. 14, 34. After dispensing with Hill's co-defendant's cases, the district court initially set Hill's trial for July 22, 2019. Doc. 199. *See also* Doc. 341, pp. 3-5. On July 18, 2019, the Government filed a two-count superseding indictment. Doc. 228. *See also* Section A *supra*. As a result of the issuance of the superseding indictment, the setting for the jury trial was vacated and the matter set for pretrial proceedings. Doc. 233. Thereafter, Hill moved the district court for the appointment of counsel and discharged his retained counsel. Docs. 234, 240. Hill's motions were granted and new counsel was appointed pursuant to the Criminal Justice Act. Docs. 238, 245.

In addition to the pre-trial motions filed by CJA counsel, Hill moved the district court to permit him to proceed *pro se*. Docs. 269-70, 274-76. After a hearing, the district court granted Hill's motion to represent himself but ordered CJA counsel to act as stand-by counsel. Docs. 279-80. Hill then filed four additional pre-trial motions. Docs. 286-89. Hill's motions were heard on February 19, 2020 and taken under advisement. Doc. 293. The district court

adopted the report and recommendation by the magistrate judge denying Hill's motions. Docs. 303, 318.

Hill subsequently filed three additional motions, all of which were referred to the magistrate judge for determination. Docs. 322-24. The magistrate judge issued her recommendation and report denying Hill's additional motions, which was later adopted by the district court. Docs. 341, 352. Hill's jury trial was ultimately scheduled for September 8, 2020. Doc. 343.The trial commenced on September 8, 2020, and voir dire held on the first day. Doc. 393; TT, Vol. 1(a).

During the voir dire of first session of the venire,[1] the Government asked the panel members for their opinion of the testimony by a cooperating witness:

> MS. BECKER: I anticipate that you are going to hear witness testimony from one of the individuals who was actually involved in the criminal activity. I want to ask you if as a matter of judging the credibility of that witness, if you would automatically discount anything that witness had to say just because they were accused of a similar crime and similar involvement and were hoping to receive a lighter sentence. Is there anybody who just would not listen? You would not be able to adjudge that testimony fairly?
> TT, Vol. 1(a), p. 47(a); ADD:9.

Venire Person 1 responded that such testimony was "not right"and clarified, upon further questioning, that "[a]s long as [the witness] got what, you know . .

[1] The district court separated the venire into two groups of 22. TT, Vol. 1(a), p. 19(a).

. But I mean if he's throwing [the defendant] under the bus to save himself, I don't think that's right." TT, Vol. 1(a),p. 47(a); ADD:9.

In response to the follow-up question of whether anyone else felt similarly, the following four panel members responded in the affirmative: Venire Person 8 ("I agree with Juror Number 1."); Venire Person 10 ("Yeah, I agree, as well."); Venire Person 12 ("I agree."); and Venire Person 23 ("Yes, the same here."). TT, Vol. 1(a), pp. 47(a)-48(a); ADD:9-10.

At the conclusion of the voir dire, the Government struck, over Hill's objection, Venire Persons 12, 22, and 23 for cause, while Hill struck Venire Person 36 for cause. TT, Vol. 1(a), pp. 106(a)-109(a); ADD:14-17. As for its peremptory strikes, the Government sought to strike Venire Persons 9, 10, 15, 19, 21, and 27. TT, Vol. 1(a), pp. 110(a)-111(a); ADD:18-19. One of those strikes involved Venire Person 10, who had previously responded to the Government's inquiry on cooperating witness testimony.

Hill raised a *Batson* challenge to the strikes of Venire Persons 10 and 15 on the grounds that both were "African-American" and there was no substantial reason for the strikes. TT, Vol. 1(a), p. 111(a); ADD:19. The Government responded with a purported race-neutral reason and the district court overruled Hill's challenge. TT, Vol. 1(a), pp. 111(a)-112(a); ADD:19-20.

Thereafter, the jury was empaneled with Venire Person 1, Venire Person 4, Venire Person 6, Venire Person 7, Venire Person 8, Venire Person 11, Venire Person 13, Venire Person 20, Venire Person 25, Venire Person 26, Venire

Person 29, and Venire Person 30. TT, Vol. 1(a), pp. 113(a)-114(a); ADD:21-22. Of particular relevance here are Venire Person 1 and Venire Person 8.

Again, Hill objected to the Government's strike of Venire Persons 10 and 15. TT, Vol. 1(a), p. 111(a); ADD:19. In support of his objection, Hill simply stated that "[y]ou know, they're both just African-American individuals and there's no really substantial reason for striking them." TT, Vol. 1(a), p. 111(a); ADD:19. The Government initially commented on the sufficiency of Hill's *prima facie* showing but nonetheless volunteered that Venire Person 10 "indicated that she could not listen to the cooperating witness's testimony" and further that "while Jurors Number 1 and 8 were rehabilitated on that issue, [Juror Number 10] did not indicate a similar rehabilitation." TT, Vol. 1(a), pp. 111(a)-112(a); ADD:19-20.

The Government further offered, after Hill's reply, that "[a]ll the jurors that had responded in the positive were asked the follow-up. And while Jurors 1 and 8 and some of the other jurors indicated that, yes, with corroborating evidence, they could be fair, I don't believe, Judge, that Juror Number 10 indicated that." TT, Vol. 1(a), pp. 112(a); ADD:20. The Government offered no further race-neutral reason for the strike.

Thereafter trial commenced and lasted seven days ending with the jury verdict of guilty to both counts. Doc. 418. The jury further determined that the known or reasonably foreseeable amount of heroin was one kilogram or more and the known or reasonably foreseeable amount of cocaine was 500 grams or more. Doc. 418. Hill did not file any post-trial motions.

C. Sentencing

Hill objected to various aspects of the Disclosure PSR, including the offense level computation (base offense level 44, criminal history cateogory III) specific offense characteristic, and adjustment for role in the offense. Doc. 464. At sentencing, the district court overruled each of Hill's objections and imposed a sentence of imprisonment for a term of 300 months, which represented a downward variance from the Guidelines range, on Count I and 120 months on Count II, with all such terms to run concurrently. ST., Vol. 8, p. 40; Doc. 475, p. 2; ADD:2. Hill filed his Notice of Appeal with the district court on January 4, 2021. Doc. 477.

D. Opinion of the Eighth Circuit

On April 21, 2022, the Eighth Circuit affirmed Hill's conviction and sentence. Relevant here is the Appellate court's legal rationale for upholding the district court's decision denying Hill's Batson challenge. U.S. v. Hill, 31 4Fd. 1076 (8th Cir. April 21, 2022). See Appendix A.

More specifically, the Eighth Circuit found, first of all, that Hill raised a new claim on appeal – i.e., venirperson 10's responses to the government's follow-up questions were not materially different from the responses by venirpersons 1 and 8, id., at -- "provides an independent basis for affirming" on appeal. Id. at 1091.

Second, the Eighth Circuit concluded that, even if the claim was reviewed under the plain error standard of review, it would still fail because, "[E]ven

assuming that Hill's failure to present a prima facie case is moot and that [the Eighth Circuit] must review Hill's argument for plain error, Hill's claim fails because declining to correct any error that may have occurred upholds rather than undermines the fairness, integrity and public reputation of judicial proceedings." Id.

From there, Hill filed a timely petition for rehearing, and rehearing en banc, outlining the flaws in the Eighth Circuit's decision. On September 15, 2022, the Eighth Circuit issued a summary denial of Hill's petition for rehearing without issuing an opinion. See Appendix B.

This Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

A.

WHETHER HILL HAS POINTED TO EVIDENCE DEMONSTRATING COUNTERVAILING FACTORS EXCUSING HIM FROM MAKING HIS SIMILARILY SITUATED BATSON ARGUMENT BEFORE THE DISTRICT COURT.

(i). This court should grand certiorari because the Eighth Circuit overlooked the fact that the Government cause and exacerbated the error by misrepresenting the record when it proffered its sole race neutral reason that Juror # 10 was not rehabilitated when she was, then made misleading statements about it.

(a) Standard of Review

To establish a prima facie case, the defendant must show that he is a member of a cognizable racial group and that the prosecution exercised peremptory challenges to remove members of the race from the venire." *Devose v. Norris,*

53 F.3d 201, 20 (8th Cir. 1995). A plurality of this Court has stated and several panels of the Eighth Circuit have repeated, that once a race-neutral explanation has been proffered and the court has ruled on the objection, "the preliminary issue of whether the [objecting party] had made prima facie showing becomes moot." See *Hernandez v. New York,* 500 U.S. 352, 359, 111 S. Ct. 1859 (1991) (Plurality Opinion); *United States v. Walley,* 567 F.3d 354, 357(8th. Cir.2009) ("0nce the Government responded with a race-neutral explanation and the district court ruled on the ultimate question of purposeful discrimination, the preliminary prima facie issue became moot."). "The inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the State Court,not possible distinctions we can hypothesize." *Riley v. Taylor,* 277 F.3d 26·1; 2001 U.S.App. LEXIS 27336 at 36 (3rd Cir. Dec. 28th, 2001); Citing *Mahaffey v. Page,* 162 F.3d 481, 483 n.1 (7th Cir. 1998) (Concerning itself with actual reasons, not apparent ones, for state's use of preemptory challenges); *Turner v. Marshall,* 121 F.3d 1248, 1253 (9th·Cir. 1997)("The arguments that the state has made since the evidentiary hearing do not form part of the prosecutor's explanation.").

(b) Discussion

Keeping this standard of review in mind, and, pointing to Juror Number 10, the Government voluntarily proffered one principal explanation in their comparison between stricken black Juror Number 10 and sitting white juror number 1 and 8, specifically that, "Juror Number 10 indicated that she could not listen to the cooperating witness's testimony." And while Jurors Number 1

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and 8 were rehabilitated on that issue, she did not indicate a similar rehabilitation See *Turner*, 121 F.3d at 1251-52 ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination").

The comparison between stricken black juror number 10 and both sitting white jurors number 1 and 8 is relevant to determining whether the prosecution's asserted justification for striking black juror 10 is pretextual. "The reasons stated by the prosecutor provide the only reasons on which the prosecutor's credibility is to be judged." *Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir. 2009). "The credibility of the prosecution's explanation is to be evaluated considering the 'totality of the relevant facts' including whether members of a race were disproportionately excluded." Id. *Batson* is quite clear that "[i]n determining whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Batson*, 476 U.S. at 96.

Neither the trial judge nor the Eighth Circuit, however, addressed a crucial fact unearthed on appeal by the voir dire transcripts not available to Hill in the trial court at the time of his Batson objection, namely, that the prosecutors stated reason for striking black juror number 10, were at odds with the record evidence. In short, the government's sole proffered reason for striking black juror number 10 is unsupported by the record of the voir dire transcript, a fact which should have been included in the trial court's analysis of the third step of

Batson, where all relevant circumstances must be examined to determine whether the government struck any jurors based on their race. Instead, "the district court then overruled Hill's *Batson* objection without comment." See Appendix A Panel Opinion at 6; *Ervin v. Davis*, 12 F.4th 1102, 1106-08 (9th Cir. 2021) (Explaining that federal habeas corpus should consider Flowers factor when record contains evidence applicable to them); *Sifuentes v. Brazelton*, 825 F.3d 506, 522 (9th Cir. 2016). It considers the following factors: a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing.

On direct appeal, a panel from the Eighth Circuit considered an argument posited by Hill for black juror number 10 struck by the government. After reviewing the voir dire transcript, with assistance of appointed appellate counsel, it was discovered that struck black juror number 10 clearly indicated an almost identical response to both sitting Juror's number 1 and 8 who were noted to be white.

The government plainly made misrepresentations of the record, in that, the government stated that "[black] venire person number 10 was less rehabilitated than venire persons 1 and 8 [who were white] on the issue of cooperating-witness testimony." (See Panel Opinion at pg. 7 of attached Appendix A). See *Ervin*, 12 F.4th at 1107 ("Prosecutor's misstatements about juror in justifying strike could evidence discriminatory intent when misstatements went to heart of prosecutors justification and were explicitly contradicted by jurors actual answer."); *Riley v. Taylor*, 237 F.3d 348 (3rd Cir. 2001) (excused black juror and

unexcused white juror gave exactly the same answers to questions... So this was not a legitimate basis for challenge to black juror).

Thus, the government's explanation made to the district court instantly is entirely unsupported by the record transcript of voir dire. *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (stating that courts are not bound to accept race-neutral reasons that are either unsupported by the record or refuted by it).

The Eighth Circuit's decision failed to address the contradiction between the voir dire record and the government's proffered reason for striking black venire member number 10. Their decision, in short, "conflicts with relevant decisions of this Court" (S.Ct. Rule 10(c)) and is an unreasonable application of *Batson* to the facts of this case. This is supported by this Court's decision in *Miller-El* v. *Dretke*, 545 U.S. 231 (2005). In *Miller-El*, this Court ultimately held that "[t]he State Court's conclusion that the prosecutor's strikes of [two black jurors] were not racially determined... was unreasonable as well as erroneous." 545 U.S. at 266. In the Eighth Circuit's omission of the contradiction between the prosecutors proffered reason for striking black juror number 10 and the misleading comparative juror analysis between juror 10 and juror number 1 and 8 voir dire responses, the Eighth Circuit omitted the above highly relevant fact from its *Batson* analysis, to wit: the court did not undertake a review of "all relevant circumstances as required by the third step of *Batson*." *Batson* requires the court to review "The State's proffer of specific explanations, after the trial to see whether its explanations overcame the very strong prima facie case of discrimination." *McGhee v. Ala. Dept. of Corr.*, 560 F.3d 1252, 1267

(11th Cir. 2009). In this analysis, this court shall "review all relevant circumstances." Id. at 1266. "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El* at 251-52.

Notably, at the oral argument hearing, the government shifted explanations for the striking of black juror number 10 as their new proffered reason for why the strike of juror 10 did not apply as well to the otherwise-similar non-black panelist juror 1 and 8 who were allowed to serve. In doing so the government asserted on appeal that black juror number 10 was less open to cooperating witness testimony than venire persons 1 and 8 based on facts not reflected in the transcript, including "eye contact" and "body language" See Appendix A Panel Opinion at 9.

Although the Eighth Circuit has stated "[i]t is a cardinal rule in our Circuit that one panel is bound by the decisions of a prior panel" *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). The Panel majority disregarded *U.S. v. Hawkins*, 796 F.3d 843, 865 (8th Cir. 2015) quoting *U.S. v. Young*, 753 F.3d 757, 80 (8th Cir. 2014) ("reviewing courts will defer to the trial court so long as the record confirms that the juror's demeanor was a sufficient basis for the peremptory challenge.").

Here, the Eighth Circuit overlooked the fact that the government did not articulate a concern about black stricken juror number 10's demeanor when proffering their explanation to the trial court. Instead, the government said that

Juror 10 was not "rehabilitated" despite on appeal the transcript of voir dire evidence almost identical responses between non-stricken jurors 1 and 8 and stricken juror 10. Here the government's reason for factual basis for strike of juror 10 turned out to be inaccurate as unexcused jurors 1 and 8 had same qualities as excused juror 10. Hill argues the side-by-side comparison of excused black juror 10 and unexcused juror's 1 and 8 (who were white) established the jurors were similarly situated in their voir dire response when "the government asked if any of the venire persons would not be able to adjudge [cooperating-witness] testimony fairly."

Unexcused white venire person 1 stated "if the witness throwing [the defendant] under the bus to save himself, I don't think that's right." As relevant here, [unexcused white] venire person 8 and [excused black] juror 10 indicated that they agreed.

The government inquired further: "Juror 10... Juror 1... and Juror 8... I want to probe a little bit further. So what you're saying is you don't think you could even listen to that person's testimony? And even if it was corroborated by other evidence and other materials, that you don't think you could even listen to anything that person has to say?" Unexcused white venire person 1 spoke up first stating: "You could always listen to it" he explained "but I mean your mind is always going to wonder if he's just, you know, saying stuff to make himself sound better and him sound worse." But when the government asked if he could at least consider the testimony alongside other evidence, [unexcused white] venire person 1 replied, "Yeah.

Likewise, [unexcused white] venire person 8 replied, "I'd still be able to listen and consider it, yes."

[Excused black] venire person 10 replied, "Yes maam."

Later, the government revisited the issue of cooperating witnesses in connection with recordings of wiretaped conversations. If the [cooperating] witness's testimony was borne out by wiretap conversations, the government asked "could you consider that?"

[unexcused white] venire person 1 replied, "Sure."

[unexcused white] venire person 8 replied, "Yeah"; and

[excused black] venire person 10 replied, "Yeah, I could." (See App. A, Panel Opinion at 5).

The Eighth Circuit, in reviewing the record (to wit: Trial court voire dire transcripts), overlooked the fact that the government's explanation with respect to the reason for the peremptory strike, that [Excused Black] "Juror number 10 indicated that she could not listen to the cooperating witness's testimony. And while [both unexcused white] Jurors number 1 and 8 were rehabilitated on that issue, she did not indicate a similar rehabilitation," was untruthful.

The Eighth Circuit's erroneous application of this court's decision in Batson, consequently, warrants the grant of a writ of certiorari.

B.

The Eighth Circuit allowed the government to construct an impermissible Post Hoc explanation for its strike of excused black juror #10.

The Eighth Circuit's opinion straightforwardly conflicts with how this Court has treated new reasons proffered by the government concerning a *Batson* challenge -- it did not consider them. There is a difference between evidence bearing on the plausibility of the prosecutor's stated reason, which reviewing courts should consider, and new reasons, which they may not.

In evaluating whether proffered reasons were plausible, *Miller-El-II* looked to evidence of the prosecutor's veracity other than just the Juror comparisons: did he rely on misrepresentations about 'stricken jurors answers, probe jurors about the area of concern, or give inconsistent explanations for strikes? *Id.* at 244-51. All these inquiries kept the focus on the reasons for the strikes asserted at trial.

In contrast, *Miller-El II* refused to consider a new reason such as the one the Eighth Circuit identified on appeal. *Id at 252.* Although a Juror's "demeanor and body language may serve as legitimate, race-neutral Reasons" to distinguish and strike a juror, *United States v. Hampton,* 877 F.3d 339,342 (8th Cir, 2018)(cleaned up), other circuits conducting comparative Juror analysis have also read *Miller-El II* as requiring that the validity of a strike challenged under *Batson* must 'stand or fall' on the plausibility of the explanation given for it at the time, not new post hoc justifications." *Taylor,* 636 F.3d at 902; *see also Love v. Cate,* 449 F. App'x 570,572 (9th Cir. 2011) *McGhee v. Alabama Dept. of Corr.*, 560F.3d 1252,1269 (11th Cir. 2009) *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. March 20, 2018). The *Miller-El*

Court criticized both the prosecutor and later reviewing courts for accepting either entirely different substituted reasons or post hoc reasons for strikes: "

> "The prosecutor effectively concedes that his initial (race-neutral) reasons were insufficient basis for striking the juror. *Miller-El's* "stand or fall" requirement applies to this situation, blocking post hoc rationalizations." *"Miller-El II,* 545 U.S. at 250-52.

The Government's Counsel at oral argument, provided after-the-fact testimony as a substitute for the findings and conclusions that should have been made by the trial Judge who presided during the voir dire of juror number 10, observed the demeanor of trial counsel for the government and juror number 10, and heard the tone of trial counsel's questions and juror number 10's response. The result is that counsel for the government was, in effect, both the advocate for striking Juror number 10 and the judge of the credibility ofher own explanation. Deference is particularly appropriate when the trial judge finds that an attorney credibly relied on a Juror's demeanor when exercising the strike. *Snyder* at 1209. "Reviewing court will defer to the trial court so long as the record confirms that the juror's demeanor was sufficient basis for the challenge." See *United states v. Hawkins,* 796 F.3d 843 at 864 (8th Cir. 2015); quoting *United States v. Young,* 753 F.3d 757,780 (8th Cir. 2014). Prosecutor's justification for strikes, if not grounded in fact and thus credible, can demonstrate a *Batson* violation. See e.g., *Miller- El v. Dretke,* 545 U.S. 231,241,125 S.Ct. 2317 162 L.Ed. 2d 196 (2005).

Here the trial court did not appraise the adequacy of the new post hoc rationalization. Similarly, "shifting explanations," and misrepresentations by the prosecutor, may also compel the conclusion that a prosecution acted with racial

animosity and discriminatory intent. *Foster v. Chatman,* 578 U.S. 488,136 S.Ct. 1737,195 L.Ed. 2d1, 2016 U.S. LEXIS 3486 (U.S., 2016).

This court should consequently grant a writ of certiorari in this case to assure that the decisions of the district court and Eighth Circuit Court of Appeals are not contrary to the controlling rulings of this court.

C.

THE EIGHTH CIRCUIT ABUSED ITS DISCRETION BY OVERLOOKING A MATERIAL MATTER OF LAW CONCERNING A BATSON CHALLENGE

"Ordinarily, court of appeals don't consider claims or argument that were not raised in the district court." *U.S. v. Hayes,* 218 F.3d 615,619-20 (6th Cir. 2000)(emphasis added). However, in *Dretke,* this Court held on habeas review that the prosecutor's use of peremptory strikes violated the equal protection clause after conducting a comparative juror analysis 545 U.S. at 241. The dissenting judges argued that the comparative juror analysis was inappropriate because the defendant never argues for such an analysis before the state trial court. Id at 279-80 (Thomas J. Dissenting). The court rejected this argument. Although *Dretke's* analysis occured in the context of habeas proceedings, there is no reason why it's reasoning should not apply with equal force under the more expansive review afforded in a direct appeal as here, from a district court. Because the Eighth Circuit possessed a transcript of voir dire, and Hill, representing himself in the trial court, fairly presented his *Batson* claim to the district court. He did not waive the right to offer a comparative juror analysis on appeal. *Dretke,* 545 U.S. at 241 n.2; *Kesser v. Cambra,* 465 F.3d 351

at 361 (9th Cir. 2006)(en banc)(holding that comparative juror analysis argument is not waived on appeal "even when it was not requested or attempted in the [trial] Court" and that all that is required to preserve the argument for appellate review is "a transcript of voir dire and a *Batson* claim fairly presented").

Hill's argument on this front can be boiled down as such:

First, the prosecution said black excused juror number 10 did not indicate rehabilitation; Second, Unexcused white Juror's number 1&8 answered those questions almost identically; and therefore, third, failing to rehabilitate black excused juror number 10 could not have been the real reason Juror 10 was struck, else juror's 1&8 would have been struck as well. Accordingly, the prosecution § proffered race-neutral explanation for striking juror 10 must have been pretextual. A party can establish an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken." *Davidson vs. Harris,* F.3d 963, 965 (8th Cir. 1994).

In *Snyder* the Supreme Court held that the prosecutors strike violated Batson, relying in part on a comparative juror analysis that was not developed before the trial court. Id. at 483. The Court explained that its comparative juror analysis was proper because "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for.cause." Id., at 483.

Here there was evidence of dishonesty, as there was in, for example, *Miller-El,* evidence that the prosecutor misrepresented the record while giving

her initial justification for strike. The prosecutor caused the error and Hill, representing himself, could,not have known that prosecutor misrepresented testimony of Juror's 10, 1 and 8. *United States v. Valentine,* 820 F.3d 565, 571 (2d Cir. 1987)("because counsel could not have known that prosecutor misrepresented testimony of grand jury witness, no objection was required at time of misrepresentation"). The trial judge had access to voir dire transcripts after Hill raised discriminatory allegations in making his *Batson* challenge, which clearly indicated sufficient assurance that Juror Number 10 would hear all the evidence before decidingwhether defendant was guilty or innocent. "The record indicates that the district court failed to access whether the reason offered by the Government to strike this venire member was a valid race-neutral reason." *United States v. Carter,* 481 F.3d 601 at 610; 2007 U.S. App. LEXIS 6791(8th Cir. Minn. 2007). That analysis should include a review of the entire transcript of jury voir dire in order to conduct a comparative analysis of the jurors who were stricken and the jurors who were allowed to remain. *Boyd v.Newman,* 467 F.3d at 1144, 1149; 2006 U.S. App. LEXIS 26672(9th Cir. 2006)("We believe, however, that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.").

"Although the burden remains with the defendant to show purposeful discrimination, the third step of *Batson* primarily involves the trier of fact." *Kesser v. Cambra,*, 465 F.3d 351, 359 (9th cir. 2006); *U.S. v. Feemster,* 98 F.3d 1089, 1091-92 (8th Cir. 1996). However, "[a] court need not find all nonracial reasons pretextual in order to

find racial discrimination." *Kesser,* 465 F.3d at 360."If review of the record undermines the prosecutor stated reasons, or many of the proffered reason, the reason may be deemed a pretext for racial discrimination." *Id.* The court may also be required to conduct a comparative juror analysis to determine whether the basis upon which a prosecutor challenged and disputed juror is a pretext. *Kesser,* 465 F.3d at 361.

Hill concedes the *Batson* violations jurisprudence is complex and difficult, and it is possible that Hill's intransigence was the product of a failure to realize that he was placing at risk his fundamental right to seek direct review of what Hill knew to raise as his initial *Batson* challenge, that the trial court accepted the proffered reason at face value without evaluating the record and consider each explanation within the context of the trial as a whole. Hill should not have been penalized to first discover the facts relating to prosecutor's explanation to the trial court were a misrepresentation of the record, while on direct appeal when the voir dire transcripts were transcribed and made available as part of the record on appeal. Further, whether there the panel was to "review for clear error a district courts findings that a peremptory strike was not based on race," *Miller v. United States,* 135 F.3d 1254.1257 (8th Cir. 1998), or plain error review of unpreserved factual arguments pursuant to the Supreme Court decision in *Davis v. United States,* 589 U.S. ,140 S.Ct. 1060, 206 L.Ed. 2d 371 (2020), Hill's *Batson* claim under the facts and circumstances in this case does not signify waiver for his failure to object to the government's voir dire misrepresentation during voir dire without the benefits of transcripts.

(i). The Eighth Circuit's decisions is contrary to authoritative decisions of This court and other courts of appeals that have addressed race discrimination within the judicial process

Race discrimination within the judicial process at any stage; including the selection of jurors. "raises serious questions" as to the fairness of the process itself. *Edmonson v. Leesville,Concrete Co.,* 500 U.S. 614,628,111 S.Ct. 2077, 114 L.Ed. 2d 660 (1991)." Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." Id. Not only do racially motivated strikes violate the defendant's constitutional right to equal protection, See *Batson,* 476 U.S. at 84-85 (discussing the court's century-old holding in *Strauder v. est Virginia,* 100 U.S. 303,25 L.Ed. 664 (1880), that "the state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded"), they violate the venire person the honor and privilege of participating in our system of justice, *"Edmonson,* 500 U.S. at 619 (holding that *Batson* applies to jury selection in private, civil litigation). The court had engaged in "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn". *Batson,* 476 U.S. at 85-86 (discussing the courts' jurisprudence since *Strauder).*

Some Constitutional errors, this Court in *Chapman v. California,* 386 U.S. 18,48,87 S.Ct. 824,17 L.Ed. 2d 705 (1967), recognized, remain so intrinsically damaging and basic to our trial system as to never be harmless. *See id. at 23n.8* (listing examples). The law has come to call these violations structural errors. See *Weaver v. Massachusetts,137,* S.Ct. 1899,1907, 198 L.Ed. 2d 420 (2017)("The

purpose of the structural error doctrine is to ensure insistence on certain basic constitutional guarantees that should define the framework of any criminal trial."); *Batson v. Kentucky,* 476 U.S. 79,106 S.Ct. 1712,90 L.Ed. 2d 69 (1986)(exclusion of Jurors based on race). See.also *Ruiz v. U.S.,* 990 F.3d 1025 at 1030 (7th Cir. Ill. Dec;4-, 2020)."Constitutional error involving racial discrimination in jury selection is structural defect that is not subject to harmless error analysis." *Ford v. Norris,* 67 F.3d 162,170-71 (8th Cir. 1995). (In concluding that a Swain violation is a "structural error" the Court stated "our conclusion is supported by language from *Batson v. kentucky,*"where the court notes that "the basic principles prohibiting exclusion of persons from participation in jury service on account of their race are essentially the same for grand juries and for petit juries."" We hold that a constitutional violation involving the selection of jurors in a racially discriminatory manner is a 'structural defect in the trial mechanism which cannot be subjected to a harmless error-analysis.) "id., at-171.

The panel decision declining to correct any error that may have occurred undermined rather than upheld the fairness, integrity, and public reputation of judicial proceedings. Whether the prosecutor or the defendant exercises the strike, the excluded venire persons are harmed because discriminatory strikes are based on group membership... And whether the confidence in the judicial system's fairness is undermined by discriminatory strikes." *United States v. Annioni,* 57 F.3d 739 (9th Cir. 1995); *United States v. DeGross,* Y60 F.2d 433,440 (9th Cir. 1992).

The ways, then, in which the Government exercised a discriminatory strike, potentially compromised the values protected by the Defendant equal protection

rights and cannot be answered by countervailing factors, suggesting that these values were in other respects substantially vindicated that, in spite of the discriminatory strike of black juror number 10, based on the governments proffered dishonest misrepresentation of the voir dire transcript record, that the jury selection proceedings possessed the publicity, neutrality, and professionalism that are essential components of upholding an accused's right to fair and public trial. Allowing the error to stand would not leave in place an unmitigated nullification of the values and interests underlying the right at issue.

The Eighth Circuit's opinion is out-of-step with the Supreme Court in acknowledging a *Batson* violation requires automatic reversal of the conviction and remand for *a* new trial.

In *Arizona v. Fulminante,* 499 U.S. 279 (1991), Chief Justice Rehnquist, in an opinion for a 5-4 majority, attempted to reconcile cases by explaining the distinction between Constitutional-errors that are subject to harmless-error analysis and those that require automatic reversal. The Court labeled the former type "trial error" and the latter type "structural error".

The Court has held the following errors not subject to harmless-error analysis and, therefore, these errors can be placed within the category of "Structural error": *Batson* error. *Batson v. Kentucky,* 476 U.S. 79 (1986).

This is a structural error, and interpreting *Batson* to allow countervailing factors to ignore it *is* an error of law. *Batson* seeks not only to protect the rights of litigants, but also to vindicate the interests of potential jurors [Excused black juror number

Solicitor General
Of the United States
950 Pennsylvania Avenue NW
Washington DC 20530-0001

Robert Hill