No. 23-248

IN THE

Supreme Court of the United States

JAMES GARFIELD BROADNAX,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF IN OPPOSITION

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas
MICHELE "SHELLY" O'BRIEN YEATTS
Assistant District Attorney
Counsel of Record
Frank Crowley Courts Building
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207
(214) 653-3625
syeatts@dallascounty.org

Counsel for Respondent

324456

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CAPITAL CASE

QUESTION PRESENTED

Does this Court have jurisdiction to review the Texas Court of Criminal Appeals' dismissal of the *Batson* claims raised in Petitioner James Garfield Broadnax's first subsequent state habeas application where the state court's dismissal order rested on independent and adequate state-law procedural grounds and explicitly stated the court did not reach the merits of the claims?

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BRIEF IN OPPOSITION

Petitioner James Garfield Broadnax was found guilty of capital murder for the shooting death of Stephen Swan in the course of a robbery. His amended first subsequent state habeas application included claims that the State violated *Batson* by striking six Black jurors. The Texas Court of Criminal Appeals (TCCA) determined Broadnax's claims did not satisfy the statutory framework to excuse procedural default under Texas's abuse-of-the-writ bar and dismissed the application without considering the merits. Broadnax now seeks certiorari review of the TCCA's dismissal of his *Batson* claims, but his petition only implicates the state court's application of state procedural rules for collateral review of death sentences. The state court's reliance on an adequate and independent state-law procedural ground forecloses certiorari review. Moreover, nothing Broadnax presents warrants this Court's review.

STATEMENT OF THE CASE

I. The Capital Murder

During the early morning hours of June 19, 2008, Broadnax and his cousin Demarius Cummings fatally shot and robbed Stephen Swan and Matthew Butler outside their recording studio in Garland, Texas. RR45: 67–72, 81, 86–88, 107.[1] Shortly after his arrest, Broadnax

[1]The State will refer to the clerk's record from Broadnax's trial as "CR" followed by the relevant volume and page number; to the reporter's record from Broadnax's trial as "RR" followed by the relevant volume and page number; and to the reporter's record from Broadnax's initial state habeas proceeding as "Habeas RR" followed by the relevant volume and page number.

gave several recorded media interviews during which he confessed in graphic detail to fatally shooting Swan and Butler, robbing them, and driving away in Swan's vehicle. RR45: 117, 270–71; RR46: 216, 219. Broadnax was convicted of capital murder and, pursuant to the jury's answers to the statutory special issues, sentenced to death. CR: 698–99.

II. Post-conviction Proceedings

A. Broadnax's Direct Appeal and State Habeas Proceeding

The TCCA affirmed Broadnax's conviction and sentence on direct appeal. *Broadnax v. State*, No. AP-76,207, 2011 WL 6225399 (Tex. Crim. App. Dec. 14, 2011) (not designated for publication). Broadnax's direct appeal included a claim that the State's strikes of six Black prospective jurors and one Hispanic prospective juror violated *Batson*. *Id.* at *2–3. The TCCA conducted the following analysis:

> The primary reason asserted by the State for striking Venire Members [S.M.], [C.R.], and [B.J.] was that they were among those venire members who circled a specific answer to a specific question on the jury questionnaire. The question asked, "With reference to the death penalty, which of the following statements best represents your feelings?" [S.M.], [C.R.], and [B.J.] chose the answer, "Although I do not believe that the death penalty ever ought to be invoked, as long as the law provides for it, I could assess it under the proper

circumstances." A venire member's responses to a written questionnaire can be valid grounds for a peremptory challenge. Here, the State struck all venire members who answered this way. Because [Broadnax] has not shown that these three minority venire members were treated differently from non-minority venire members, he has not demonstrated that the prosecutor's stated reason was a pretext for discrimination.

The State said that it struck Venire Members [M.V] and [D.M.] for affirmatively stating on the jury questionnaire that they opposed the death penalty. Here, too, the State struck all venire members who answered this way. Therefore, [Broadnax] has again failed to demonstrate that the prosecutor's stated reason was a pretext for discrimination.

The remaining two minority venire members of whose strikes [Broadnax] complains provided unique and distinguishing answers during the *voir dire* process.

Venire Member [A.L.] said that a defendant's voluntary intoxication would preclude her from assessing the death penalty. Contrary to [Broadnax's] assertions, such a definitive position was not taken by a fellow venire member whom the State did not strike.

Venire Member [A.R., a Hispanic juror,] made inconsistent and contradictory statements about

> her beliefs on capital punishment, including, at one point, stating that she had religious and moral convictions against the death penalty. [Broadnax] fails to cite any similarly situated venire member whom the State did not strike.
>
> Therefore, comparative analysis does not support [Broadnax's] contention that the trial court's rulings were erroneous.

Id. at *3 (footnote omitted). Broadnax sought certiorari review of his *Batson* claims, but this Court denied his petition. *Broadnax v. Texas*, 568 U.S. 828 (2012).

Without raising any *Batson* claims, Broadnax filed an original state habeas application.[2] The TCCA denied relief, and this Court denied review. *Ex parte Broadnax,* No. WR-81,573-01, 2015 WL 2452758, at *1 (Tex. Crim. App. May 20, 2015) (per curiam) (not designated for publication); *Broadnax v. Texas*, 577 U.S. 842 (2015).

B. Broadnax's Federal Habeas Proceeding and the State's Release of Materials from Its Trial Files

Broadnax filed an amended habeas petition in federal district court that included his *Batson* claims. *See Broadnax v. Davis,* No. 3:15-CV-1758-N, 2019 WL 3302840, at *36–43 (N.D. Tex. July 23, 2019). During

[2]In describing the history of the case, Broadnax incorrectly states in his petition that he "unsuccessfully sought review" of his *Batson* claims on both "direct appeal and during [the initial] state habeas." Pet. at 3.

the federal proceeding, the State provided Broadnax's counsel access to its trial files. In support of the *Batson* claims, Broadnax proffered items he received from the State's trial files, including an Excel spreadsheet noting each qualified juror's race (with the names of Black jurors in bold) and photographs of the jurors arranged in a seating-chart format with each person the State exercised a peremptory strike on marked with an "X."[3] First Am. Pet. for Writ of Habeas Corpus by a Prisoner in State Custody, No. 3:15-CV-1758-N, Exs. A, C.

The federal district court denied all relief and denied a certificate of appealability. *Broadnax,* 2019 WL 3302840, at *55. The Fifth Circuit granted a certificate of appealability on one issue—whether the district court properly refused to consider the new evidence from the District Attorney's trial files on Broadnax's *Batson* claims—but ultimately denied all relief. *Broadnax v. Lumpkin,* 987 F.3d 400, 404, 416 (5th Cir. 2021). This Court then denied Broadnax's petition for writ of certiorari. *Broadnax v. Lumpkin,* 142 S. Ct. 859 (2022).

C. The Amended First Subsequent State Writ

In 2023, Broadnax filed an amended subsequent state habeas application under Article 11.071 of the Texas Code of Criminal Procedure, asserting two claims, including

[3]While Broadnax states four times in his petition that the State withheld a prosecutor's handwritten note on prospective Black juror C.R.'s questionnaire until 2021—too late to be used in the federal habeas proceeding (Pet. at I, II, 3, 15)—counsel corrected this misstatement in a September 21, 2023 letter to this Court, conceding that the State provided the handwritten note in 2016, before Broadnax filed his first amended federal habeas petition.

that new evidence received in his reviews of the District Attorney's trial files, along with the trial record, establish that the State violated his *Batson* rights. The TCCA dismissed the amended subsequent habeas application without reviewing the merits of the claims raised, concluding Broadnax failed to satisfy the requirements of Article 11.071, Section 5. *Ex parte Broadnax*, No. WR-81,573-02, 2023 WL 3855947, at *1 (Tex. Crim. App. June 7, 2023) (per curiam) (not designated for publication). The present petition followed.

REASONS FOR DENYING THE PETITION

Broadnax's petition seeks review of the TCCA's order dismissing his amended first subsequent state habeas application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. Because the TCCA's decision applied Texas's procedural rules governing subsequent habeas applications in death-penalty cases, it is unassailable on certiorari, and the Court lacks jurisdiction to grant review. Nevertheless, no *Batson* violations occurred.

I. The TCCA's Decision Rested Exclusively on State-Law Procedural Grounds

Article 11.071, Section 5 of the Texas Code of Criminal Procedure governs subsequent habeas applications by state applicants who have previously sought post-conviction relief. To receive review of his subsequent application, Broadnax needed to establish that his claims had not been and could not have been presented previously in a habeas application because the factual or legal basis for the claims was unavailable at the time a previous application was filed. *See* Tex. Code Crim. Proc. Ann. art. 11.071,

§ 5(a)(1). Article 11.071, Section 5 restricts applicants to one habeas review, and subsequent applications are prohibited except in the delineated circumstances. *See id.* § 5(a). If the TCCA determines the statutory requirements for bypassing the procedural bar have not been satisfied, it must issue an order dismissing the application as an abuse of the writ. *Id.* § 5(c).

A legal basis for a claim was unavailable within the meaning of Section 5(a)(1) if the legal basis was not recognized by or could not have reasonably been formulated from a decision of this Court, a federal appellate court, or a Texas appellate court. *Id.* § 5(d). A factual basis for a claim was unavailable within the meaning of Section 5(a)(1) if it was not ascertainable through the exercise of reasonable diligence on or before the date a prior application was filed. *Id.* § 5(e). The term "reasonable diligence" "suggests at least some kind of inquiry has been made into the matter at issue." *Ex parte Lemke,* 13 S.W.3d 791, 795 (Tex. Crim. App. 2000) (interpreting an identical provision in Article 11.07, § 4(c)), overruled on other grounds by *Ex parte Argent,* 393 S.W.3d 781, 784 (Tex. Crim. App. 2013).

After setting out the procedural history of the case and reciting the two claims presented, the TCCA's order dismissing Broadnax's application stated:

> We have reviewed the amended first subsequent application and find that [Broadnax] has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the amended first subsequent application as an abuse of the writ without considering the merits of the claims.

Broadnax, 2023 WL 3855947, at *1; Pet., App. B, at 4a.

This Court lacks jurisdiction and will not review a federal claim decided by a state court if the state court's decision rests on a state-law ground that is independent of the merits of the federal claim and an adequate basis for the court's decision. *Foster v. Chatman,* 578 U.S. 488, 497 (2016); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Because the TCCA dismissed Broadnax's subsequent writ application after determining his claims did not meet the requirements of Article 11.071, Section 5(a), the state court's disposition of the claims rested on a state procedural ground that was independent of any federal issues raised and adequate to support the judgment. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar."). The TCCA did not reference evaluation of a prima facie case and explicitly stated it did not consider the merits of the claims. Pet., App. B, at 4a. By explicitly indicating it had not considered the merits, the TCCA left no doubt as to the independent, state-law character of its dismissal.

Broadnax wholly ignores the TCCA's statement it did not consider the merits of his *Batson* claim. He argues that the independent and adequate state-law ground principle does not apply here because the procedural history of his case and *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) reveal the TCCA's decision was based on a threshold review of the merits of his claims. Pet. at 26–27. But accepting Broadnax's argument means rejecting the TCCA's clear statement that it did not consider the merits, which this Court has no reason to do.

Furthermore, both *Campbell* and the procedural history of this case cut the other way.

Because *Campbell* indicates that Article 11.071, Section 5(a) requires, in part, a prima facie showing of a cognizable claim, Broadnax argues the TCCA would have necessarily reached the merits of his *Batson* claims. Pet. at 27. *See Campbell*, 226 S.W.3d at 421–22 (holding that to satisfy Section 5(a), an applicant must show not only that the factual and legal bases for his current claims were previously unavailable but also that the specific facts alleged, if proven, establish a federal constitutional violation sufficiently serious as to likely require relief from either the conviction or sentence).

But the TCCA may have determined, without reaching the merits, that Broadnax had failed to show that his *Batson* claims could not have been raised in his initial state habeas application because the legal or factual basis for those claims was unavailable at that time. The TCCA may have concluded, as the State argued in its motion to dismiss, that Broadnax's *Batson* claims were procedurally barred on habeas because they had been raised and rejected on direct appeal—regardless of the existence of the additional alleged supporting evidence in the form of the juror spreadsheet, the prosecutor's handwritten note, and the juror photos.[4] *See Ex parte McFarland,* 163 S.W.3d 743, 748 (Tex. Crim. App. 2005). The TCCA may have also considered that Broadnax failed to exercise reasonable diligence by not filing a discovery motion or

[4]Broadnax inaccurately suggests in his petition that the State only moved for dismissal of his application on the grounds that he failed to make a prima facie showing of a *Batson* violation. Pet. at 28.

attempting to subpoena any voir dire records during his initial habeas proceeding, because he had subpoenaed and filed a motion for court-ordered discovery of other records from the State's files.[5] *See* Habeas RR2: 7–9, 25–27, 29–30, 36–38; Motion for Court-Ordered Discovery, for Court-Ordered Brady Material from Dallas DA, & for Continuance of the Evidentiary Hearing, No. W08-24667-Y(A) (seeking discovery of materials relating to pre-trial media interviews of Broadnax and other Dallas County defendants); Subpoena to the Custodian of Recs., Dallas County Dist. Att'y's Off., No. W08-24667-Y(A) (same).

Furthermore, the state court's Section 5 analysis did not require it to reach *Campbell*'s prima-facie prong. The Fifth Circuit has recently rejected the argument that the TCCA's decisions under Article 11.071, Section 5 are not independent of federal law because *Campbell* requires a two-step analysis, including whether the specific facts alleged, if true, would constitute a constitutional violation requiring relief from the conviction or sentence. *Buntion v. Lumpkin,* 31 F.4th 952, 962 (5th Cir. 2022). The court held the argument "undebatably fails" and "misreads *Campbell*" because a Texas court may dismiss a claim on *Campbell*'s first ground—that the factual or legal basis

[5]The State recognizes the parties were discussing discovery during the original state habeas proceeding, and the negotiations broke down. *See* Habeas RR2: 29–30, 33–34. Although Broadnax suggests his original state habeas counsel specifically requested the prosecution's jury selection files (Pet. at 13, 27), counsel actually sought general access to the trial files. *See* Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. D (where original habeas counsel indicated in her declaration only that she sought permission to review the files pertaining to Broadnax's case, with no specific mention of voir dire records).

for the current claims must have been unavailable as to all previous state habeas applications—without ever reaching the constitutional issue. *Id.* "That is exactly what the [TCCA] did in this case when it 'dismiss[ed] the subsequent application as an abuse of the writ *without considering the claims' merits*.'" *Id.* The court further indicated it is "undebatable that an unelaborated dismissal under article 11.071, Section 5 is based on an adequate and independent state ground." *Id.* (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Hughes,* 530 F.3d at 342). This Court, likewise, should reject Broadnax's misplaced reliance on *Campbell*.

Accordingly, an adequate and independent state law barred Broadnax's claims in state court and divests this Court of jurisdiction.

II. The Materials from the State's Trial Files Do Not Alter the State and Federal Courts' Prior Rejection of Broadnax's *Batson* Claims

Even without the procedural and jurisdictional bar, this case does not warrant this Court's review. Broadnax filed his most recent *Batson* claims in the lower court wholly as a result of items he received from the State's trial files in 2016. Along with claims about the new trial-file materials, he is resurrecting his record-based *Batson* complaints, as if they were never before litigated and rejected by the TCCA in his direct appeal, by this Court's denial of his petition for writ of certiorari of the state direct appeal, by the federal district court in his federal habeas proceeding, and by the Fifth Circuit. *Broadnax,* 2011 WL 6225399, at *2–3; *Broadnax,* 568 U.S. 828; *Broadnax,* 2019 WL 3302840, at *36–43; *Broadnax,* 987

F.3d at 409–412. But neither the items from the State's trial files, nor the reasserted challenges to the voir dire record, warrant this Court's attention.

A. Background

The presiding judge in this case assigned two other judges to conduct individual voir dire. Prospective jurors completed lengthy, 18-page questionnaires. RR3: 5–6. Each person's race was indicated on the first page of their questionnaire. The court conducted individual voir dire with 130 prospective jurors between May 26, 2009 and July 17, 2009. RR7, RR9–RR11, RR13–RR37.

The parties asserted challenges for cause throughout individual voir dire, and the court qualified a pool of 47 venire members, from which the parties then exercised their peremptory challenges. *See* RR3: 12–13. Based on their questionnaire answers and voir dire testimony, the State sought to exercise peremptory challenges on the seven Black prospective jurors in the qualified juror pool. RR38: 8, 14, 26, 44, 51, 69, 71. The judges conducting voir dire originally denied each of Broadnax's *Batson* objections. RR38: 13, 19, 30, 51, 68, 71, 79. The presiding judge, however, ordered briefing and held a hearing to reconsider the State's strike of one Black prospective juror, R.P. RR42: 5. The court reinstated R.P., who served on the jury. RR42: 35. The court indicated that, although it did not find the State's strike of R.P. to be racially motivated, it was granting the *Batson* challenge because no Black jurors were seated on the jury and a disproportionate number of Black venire members had

been struck.[6] RR42: 34–35. On direct appeal, the TCCA held the trial court erroneously sustained the *Batson* objection as to R.P. and seated him on the jury. *Broadnax*, 2011 WL 6225399, at *4.

B. The State's reasons for striking the Black prospective jurors were solidly grounded in the record and not based on race.

The State articulated multiple, race-neutral reasons for striking the six Black prospective jurors at issue. Particularly, the State explained that four of the six Black jurors—M.V., C.R., B.J., and D.M.—when asked on their questionnaire, "Are you in favor of the death penalty," responded, "No." RR38: 15, 20, 27, 29, 70, 72, 83–84. No non-stricken prospective jurors responded this way. The State also explained that on a written question asking the juror to choose one of five statements that best represented their feelings on the death penalty, three Black jurors—S.M., C.R., and B.J.—marked response number three, which said, "Although I do not believe that the death penalty ever ought to be invoked, as long as the law provides for it, I could assess it under the proper set of circumstances." RR38: 9–10, 27, 29, 70, 83–84. Three White jurors also marked response number three, and the State exercised peremptory challenges on all six. *See* Pet. at 14; RR38: 8, 30, 35–36. Thus, the State exercised peremptory challenges on five of the six Black jurors at

[6]The State's reasons for striking R.P. included that (1) R.P. indicated during individual voir dire that he was not in favor of the death penalty; (2) unlike any other prospective juror, he spontaneously used the term "jury nullification"; and (3) he was previously the foreman of a jury that returned an acquittal for murder. RR38: 53, 56–59, 62–65.

issue (all except A.L.) for the race-neutral reasons that they were not in favor of the death penalty and/or they believed it should never be invoked.

Among other reasons, the State explained that the sixth Black juror, A.L., (along with M.V., who already was not in favor the death penalty) answered "yes" to a written question asking if she would *automatically* be prevented from imposing a death sentence if the defendant committed the offense while under the influence of drugs or alcohol.[7] RR38: 47. The State knew Broadnax's alleged drug use during the offense would be a key defensive theory in this case. RR38: 47–48. No non-stricken prospective jurors responded similarly.

The State gave additional, usually secondary, reasons for striking each person. *See Broadnax*, 2019 WL 3302840, at *36–38 (detailing the State's reasons for exercising peremptory challenges on the minority jurors); State's Motion to Dismiss Broadnax's Am. Subsequent Appl. for Writ of Habeas Corpus, No. WR-81,573-02, at 13–16 (hereinafter Mot. to Dismiss) (same).

[7]Although Broadnax does not acknowledge it in his analysis, this question was distinguishable from other questions about whether the prospective juror believed a defendant's substance use could be considered a mitigating circumstance. *See* Pet. at 21 (misstating that the State struck A.L. because "she considered intoxication a mitigating factor," while citing RR38: 47, where the State cited A.L.'s questionnaire response that use of drugs during an offense would automatically prevent her from assessing the death penalty). Also, regardless of whether A.L. vacillated during voir dire (*See* RR30: 66–67), the State was entitled to rely on her questionnaire response.

C. Consideration of all relevant facts and circumstances shows there was no purposeful discrimination by the prosecution.

Broadnax improperly sets the stage for the *Batson* analysis by contending that "prospective jurors who were opposed to or felt uncomfortable with the death penalty were categorically excluded from the pool" of 47 qualified jurors. Pet. at 9. This is incorrect: jurors who could not follow the law or consider the full range of punishment were excluded for cause from the pool of qualified jurors. Jurors who merely opposed the death penalty or felt uncomfortable with it were qualified for the panel and properly subject to removal on the basis of a peremptory challenge. The State's use of peremptory challenges on prospective jurors—including five Black jurors—who indicated on their questionnaire that they were either against the death penalty or believed it should never be invoked was not improper or nefarious. A sixth Black juror, A.L., provided a unique response on her questionnaire. Broadnax skews the voir dire analysis by wholly disregarding these principal, distinguishing reasons for the State's strikes.

The state court on direct appeal, this Court in its denial of certiorari from the direct appeal, the federal district court, and the Fifth Circuit have all rejected some form of Broadnax's record-based *Batson* claims. Though he tries to revive them, the meritless record-based claims still do not support a *Batson* violation.

For example, the federal district court concluded the reasons given by the prosecution for peremptorily striking each minority juror "all constituted racially-

neutral, objectively verifiable, record-based [] reasons for a prosecutorial peremptory strike" and characterized the *Batson* complaints as "refuted by the record and without arguable legal merit." *Broadnax*, 2019 WL 3302840, at *41, *43, *48. The court relied on the prospective jurors' questionnaire answers that they were not in favor of the death penalty or it should never be invoked. *Id.* at *41–42, *41 n.65, *42 n.71, *67–69. The court also concluded the State provided valid, race-neutral reasons justifying its strike of A.L., including that she checked a response on her questionnaire that a person's use of drugs or alcohol during an offense would automatically prevent her from assessing the death penalty. *Id.* at *42, *42 n.72.

Furthermore, the items Broadnax relies on from the State's trial files do not fundamentally alter the prior *Batson* analysis, as Broadnax alleges. Primarily, he misinterprets or misconstrues the context or weight of this evidence or fails to tell the whole story. Considering the entire record and facts, the trial-file items do not supplant the State's race-neutral reasons for its strikes or show a pretext for discrimination.

1. The courts have soundly rejected Broadnax's record-based claims that the State's reasons for its peremptory challenges of Black jurors applied equally to non-challenged White jurors.

In his analysis, Broadnax completely disregards that the State struck all six prospective jurors in the 47-person panel, both Black and White, who indicated on their questionnaires the death penalty should never be invoked. He likewise disregards several Black prospective

jurors' responses on their questionnaires that they were not in favor of the death penalty. While ignoring this clear anti-death-penalty sentiment, he focuses on the secondary, less-critical reasons these were non-favored jurors for the State—such as whether the juror was nervous or believed in rehabilitation. *E.g.,* Pet. at 20 (arguing that one of the State's reasons for striking S.M., that she appeared nervous, applied equally to three White jurors); Pet. at 22 (pointing to three reasons for the State's strike of C.R. that applied equally to non-challenged White jurors—concerns about exonerations, belief in rehabilitation, and having an incarcerated relative—while ignoring the State's primary, compelling reasons for striking C.R.—that he said on his questionnaire both he was not in favor of the death penalty and the death penalty should never be invoked (RR38: 26–27, 29, 84)).

Regarding a side-by-side comparison of jurors, the federal district court concluded "Broadnax failed to identify any white jurors against whom the prosecution failed to exercise a peremptory strike who were genuinely similarly situated in terms of their questionnaire answers and voir dire testimony to those whom the prosecution struck peremptorily." *Broadnax,* 2019 WL 3302840, at *48. Regarding prospective juror A.L., the TCCA on direct appeal indicated: "Venire Member [A.L.] said that a defendant's voluntary intoxication would preclude her from assessing the death penalty. Contrary to [Broadnax's] assertions, such a definitive position was not taken by a fellow venire member whom the State did not strike." *Broadnax,* 2011 WL 6225399, at *3.

2. The courts have soundly rejected Broadnax's record-based claims that the State failed to exercise peremptory challenges on White prospective jurors with similar voir dire responses as Black prospective jurors.

Broadnax's claims that some Black prospective jurors had similar voir dire responses to some non-stricken White jurors should again be given no weight. *E.g.,* Pet. at 11–12 (arguing the State accepted White jurors who, like A.L., indicated on their questionnaire that the death penalty is appropriate in some cases; arguing the State accepted White jurors who, like M.V., had grammar and spelling errors on their questionnaire). The federal district court said:

> Broadnax also argues the prosecution failed to exercise peremptory strikes against several white venire members who gave at least some answers on their juror questionnaires that were similar to the questionnaire answers given by minority venire members against whom the prosecution did exercise peremptory strikes. Given the extensive length and detail in the juror questionnaires, any similarity between some answers [by stricken minority venire members] and the answers [by non-stricken White venire members] is hardly surprising – or conclusive of anything. . . .
>
> Unlike the venire members against whom the prosecution exercised peremptory strikes, however, none of [the non-stricken White] venire members gave any questionnaire or voir dire answers indicating they were opposed to

> the death penalty . . . . For equal protection purposes, none of these venire members were similarly situated with the venire members against whom the prosecution exercised challenged strikes.

Broadnax, 2019 WL 3302840, at *43. The Fifth Circuit expanded on this analysis:

> Broadnax counters that the state did not strike several white veniremembers who answered their questionnaires similarly to minority veniremembers who were struck. But with the exception of Juror [A.L.], every *Batson*-challenged veniremember who was excluded from the jury indicated he or she was not in favor of the death penalty and/or believed the death penalty ought not be invoked. The state struck all who answered this way, **a fact Broadnax glosses over**. . . .
>
> Juror [A.L.] was the sole minority veniremember who expressed support for the death penalty and did not select option three. However, [A.L] indicated that she would be "automatically prevented" from imposing the death penalty if the defendant was using drugs or alcohol at the time of the offense. As the state knew that intoxication would be a core component of the defense theory, [A.L.'s] answer was highly prejudicial to the state's case. Moreover, several of [A.L.'s] explanations for her answers revealed mixed feelings about the death penalty. While one other veniremember considered intoxication

> to be a mitigating circumstance, Broadnax musters no other potential juror who believed that intoxication *automatically* rendered a defendant ineligible for the death penalty. . . . The district court correctly concluded that the state courts did not unreasonably apply *Batson* in rejecting this claim.

Broadnax, 987 F.3d at 411–12 (emphasis added).

3. The courts have soundly rejected Broadnax's record-based, statistical claim that the State's use of seven of its 15 peremptory challenges on Black jurors proves race discrimination.

Regarding the prosecution's alleged attempt to use peremptory challenges to remove most minority venire members, the Fifth Circuit noted that bare statistics are not the "be-all end-all," and the more powerful evidence is a side-by-side comparison of the stricken Black jurors to the non-stricken jurors. *Id.* at 412 (*citing Chamberlin v. Fisher*, 885 F.3d 832, 840 (5th Cir. 2018) (en banc) and *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)). The Fifth Circuit determined that the federal district court "thoroughly conducted side-by-side analysis of the state courts' determinations and correctly concluded that *Batson* was not unreasonably applied." *Id.*

4. The federal district court has soundly rejected Broadnax's record-based claim that the prosecutor misrepresented the voir dire record in articulating one of its reasons for exercising a peremptory challenge against C.R.

Broadnax cites *Snyder v. Louisiana,* 552 U.S. 472, 485 (2008), and *Miller-El,* 545 U.S. at 252, for their holdings that a prosecutor's misrepresentation of the record while providing reasons for the State's strikes implies discriminatory intent. He alleges a single instance of misrepresentation (Pet. at 12, 22–23), but his allegation fails to consider the whole record.

The prosecutor indicated the State struck C.R. primarily because he said on his questionnaire that he was not in favor of the death penalty and he circled response number three regarding his feelings on the death penalty—that the death penalty should never be invoked. RR38: 26–27, 29, 84. The prosecutor also provided several supplementary reasons C.R. was not a favored juror for the State, including that on a question regarding how strongly C.R. believes in the death penalty on a ten-point scale (with one being the least support), he circled "1." RR38: 27–29, 84. Lastly, the prosecutor explained:

> He had stated then also that 'I see my son in this room.' And that kind of gave me pause because apparently his son is about the same age as this particular defendant in this case. **But first and most primarily, Your Honor, Mr. [C.R.] doesn't believe in the death penalty. And he is a 3**, and he lists himself as a 1 on a 1-to-10 scale.

RR38: 28–29 (emphasis added). Broadnax claims the prosecutor's reference to C.R. "seeing" his son in the courtroom misrepresented the voir dire record because C.R. was referring to a Black bailiff and a Black attorney in the courtroom. Pet. at 22–23. But Broadnax disregards that the comment first arose from a discussion of the juror's son's age. The conversation started the following way:

Prosecutor:	[ ] How old is your son?
C.R.:	He's fifteen.
Prosecutor:	He's fifteen. So, he's still a young man.
C.R.:	**He's a young man basically. I mean I see him. I see him. I see him in this room.**

RR13: 249 (emphasis added). The prosecutor reasonably explained at the strike hearing "that kind of gave [her] pause" because C.R.'s son was close in age to Broadnax. RR38: 28–29. The prosecutor's explanation—a concern that C.R.'s son and Broadnax were close in age—did not misrepresent the voir dire record and was not race-based. The federal district court characterized the prosecutor's statement as "accurately point[ing] out the fact [C.R.] had stated during voir dire examination that he had a son about the same age as the defendant and that he felt his son was in the courtroom." *Broadnax,* 2019 WL 3302840, at *41, n.67.

Instead of acknowledging the earlier questions and answers, Broadnax focuses exclusively on what C.R. said

next. The prosecutor inquired as to what C.R. meant. RR13: 249. C.R. added: "The lawyer right there. One of those gentlemen in the back . . . a bailiff. You know, my son is a black boy, and I see him in this room." RR13: 249. Thus, C.R. himself, not the prosecutor, raised the issue of race. *See* RR13: 232–49. The prosecutor asked whether it "factor[ed] into the equation" that Broadnax is a Black man. RR13: 249–50. C.R. responded, "It factors in because we are black people. It's just like our district attorney is a black guy … [and] it's good because my son gets to see, besides seeing the black guys on TV all the time with the mugshots - - he can see the lawyer, he can see the bailiff, he can see the District Attorney of Dallas."[8] RR13: 250.

Accordingly, Broadnax's single allegation that the prosecutor misrepresented the record in providing reasons for the State's strikes is meritless.

5. Broadnax's record-based claim that the State engaged in disparate questioning oversimplifies the issue and is meritless.

Broadnax contends the State engaged in disparate, race-based questioning because the prosecutor gave a graphic description of the execution process to five of the seven prospective Black jurors (or asked the juror to look at Broadnax), while the majority of White prospective jurors were not subjected to similar treatment. Pet. at 9, 19–20. His analysis only brushes the surface of the record.

[8]At the time of Broadnax's trial, the Honorable Craig Watkins was serving as the first Black elected district attorney of Dallas County.

The State asked four of the seven Black jurors if they could be part of a process where Broadnax would ultimately die on a gurney by lethal injection. RR10: 23; RR11: 123; RR30: 36–37; RR34: 21–22. Each of these jurors were also asked to look at the defendant. While Broadnax includes C.R. in his total count of five of seven jurors, *see* Pet. at 9, 19, citing RR13: 249–50 (where the prosecutor indicated, "That's the defendant right there"), the prosecutor's question to C.R. lacked any graphic descriptions. She asked, "If we proved our case to you beyond a reasonable doubt, then you could be part of the death of another human being?" RR13: 244.

Broadnax points to three White jurors in support of his contention that a majority of White prospective jurors were not given a graphic description of an execution. But his allegation of disparate questioning warrants a closer scrutiny of the record. During the first five days of voir dire, from May 26 through June 2, 2009, the prosecutor asked all 13 qualified jurors (in other words, all jurors subjected to complete voir dire by the parties) some variation of whether they could participate in a case that resulted in an execution. RR7: 30, 156–57; RR9: 48–49, 90–91, 187; RR10: 23, 117, 188–89; RR11: 123; RR13: 90, 175–76, 244; RR14: 21–22. For example, during this first week, the prosecutor said to a prospective White juror: "We're asking you to take part in a situation where if he's found guilty of capital murder and given the death sentence, he's going to be strapped to a gurney and fed a lethal injection until he dies. We are going to kill him. And you, as a juror, would be taking part in that." RR10: 117.

After the first week, the State ceased inquiries of every juror and only confronted certain prospective jurors with the more detailed execution scenario. It is a

reasonable conclusion these inquiries were made based on the substance of the person's individual voir dire and the content of their questionnaires, and not based on the person's race. After the first week, two of the remaining four Black prospective jurors were asked about Broadnax ending up on a gurney, and two (R.P. and D.M) were not. RR30: 36–37; RR31: 23–58; RR34: 21–22, 86–131. All in all, after the first week, the State confronted at least eight prospective jurors (some qualified and some excused for cause) with a more detailed description of an execution. RR19: 17–19, 96–98; RR23: 105–06; RR29: 101; RR30: 36–37; RR34: 21–22; RR35: 109–10, 138–39. The pattern during the first week of voir dire, along with the selective use of the descriptive script thereafter, shows not race-based use but instead a strategy by the State to attempt to exclude some weak State's jurors via a potential challenge for cause. *See, e.g.,* RR29: 101, 104–05 (where a White prospective juror was excused after an emotional outburst due to the prosecutor's graphic description of the defendant being "strapped literally to a gurney" and being "fed poisons").

Considering the whole record, this Court should reject Broadnax's disparate-questioning argument.

6. Considered in context and properly weighed, the items from the District Attorney's trial files do not materially change the *Batson* analysis.

Broadnax points to three items from the District Attorney's trial files as evidence of race discrimination: an Excel spreadsheet of the 47 qualified prospective jurors, with the names of the seven Black jurors in bold type; photos of the qualified jurors; and one prosecutor's handwritten note on a copy of prospective juror C.R.'s

questionnaire, indicating: "Seems okay … hardworking, smart. Only concern … [defendant]'s age + race w/ Juror's son age + race, as mentioned." But Broadnax's analysis disregards or misinterprets the context, the related voir dire record, or the proper weight of the evidence.

a. The Excel spreadsheet "is no smoking gun."

Broadnax's *Batson* objections were initially overruled at the July 20, 2009 strike hearing. RR38: 13, 19, 26, 30, 51, 68, 71, 79. The trial judge later informed the parties he was reconsidering the *Batson* objection relating to R.P., a Black prospective juror, and ordered the parties to submit briefing. *See* CR3: 542–58. The District Attorney's trial files include a July 22, 2009 email from a trial prosecutor in this case to an appellate prosecutor, transmitting two Excel spreadsheets, including the one at issue. Mot. to Dismiss, Ex. A. The complained-of spreadsheet lists the jurors in the order they were qualified, along with their original juror number; their name, race, and sex; and their numerical response [either "2" or "3"] to the written question regarding their feelings about the death penalty. The names of the Black jurors are in bold type. The timing of the email indicates the spreadsheet was sent to aid the appellate prosecutor in preparing the State's briefing on R.P., which the prosecutor filed on July 27, 2009. CR3: 550–58. The presiding trial judge held the second *Batson* hearing regarding R.P. on July 30, 2009 and seated him on the jury. RR42: 1, 35.

The electronic file data indicates the spreadsheet was created and the names "bolded" on an unknown date or dates between July 10, 2009 (the day after the trial court qualified a 47th venire person) and July 22, 2009 (the date

the spreadsheet was sent to the appellate prosecutor, after the trial judge had ordered briefing on R.P.). Am. First Subsequent Appl., Ex. F; RR36: 77, 154, 225. Due to the timing, it is a reasonable conclusion the spreadsheet was made and the jurors who were the same race as Broadnax emphasized either in order to prepare for the inevitable *Batson* objections at the July 20, 2009 strike hearing or to aid the appellate prosecutor, who had not participated in voir dire, in writing the State's briefing on R.P. *See United States v. Barnette*, 644 F.3d 192, 211 (4th Cir. 2011) (accepting that prosecutors' notations of race and gender on cover of juror questionnaires were for "quick access to information about each juror and also helped them deal with any potential *Batson* challenges"). Particularly, the transmittal email to the appellate prosecutor explained that the attached spreadsheets showed "the names of the African American jurors on the 'qualified pool' of 47." Mot. to Dismiss, Ex. A. It is not surprising, then, that the names of the Black jurors were emphasized in bold type, for the appellate prosecutor's reference. The names of the two Hispanic prospective jurors are not in bold type. The State exercised a strike against one; Broadnax exercised a strike against the other. RR38: 21, 82–83. Broadnax asserted a *Batson* objection to the State's strike of the Hispanic juror. RR38: 21. Had the State bolded the prospective jurors' names in preparation for the strike hearing, the Hispanic jurors' names would presumably also have been bolded, to prepare for a potential *Batson* objection on *any* minority juror. That neither Hispanic name was in bold type thus weighs in favor of a conclusion that the names of the Black jurors were not bolded before the strike hearing, but rather when the list was sent to the appellate prosecutor tasked with preparing briefing regarding the strike of R.P.

In short, Broadnax presumes the spreadsheet was made *to decide* the State's strikes. But the context, timing, and surrounding documents in the State's trial files more reasonably support the conclusion that the Black jurors' names were bolded *to defend* the State's strikes of jurors who shared the same race as Broadnax, or particularly *to defend* (a second time) the State's strike of R.P. Moreover, the spreadsheet is anecdotal to the details comprising the whole record of jury questionnaires, individual voir dire, and the strike hearing, which show the minority jurors were not treated differently than non-minority jurors and the reasons for the State's strikes were not a pretext for discrimination.

Even while presuming the spreadsheet was created and the names of the Black jurors bolded prior to the strike hearing, the federal district court concluded the spreadsheet did not evidence a sinister motive by the State:

> [M]ore significantly, the [spreadsheet] now presented by Broadnax does nothing more than indicate that the Dallas County District Attorney's Office made a point of memorializing the ethnicity and gender of the remaining members of the jury venire prior to the exercise of its peremptory challenges. Having twice been criticized by the United States Supreme Court for its exercise of racially discriminatory peremptory strikes in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), it would have been professionally irresponsible for the Dallas County District Attorney's Office (in 2009)

> to have failed to identify the members of the remaining jury venire who were members of a protected class and against whom it might have been preparing to exercise a peremptory challenge. . . . No sinister motive can be inferred rationally simply because the prosecution noted the race and gender of every remaining member of the jury venire or highlighted those for whom that office would need to be prepared to offer sound, race-neutral, reasons in the event the prosecution chose to exercise a peremptory strike against such an individual and the defense raised a *Batson* objection.

Broadnax, 2019 WL 3302840, at *43 n.73. The Fifth Circuit, likewise, concluded the spreadsheet is no smoking gun:

> The spreadsheet, at most, places Broadnax's *Batson* claim "in a stronger evidentiary position;" in no way does it "fundamentally alter" the preexisting claim. As the district court noted, the spreadsheet "does nothing more than indicate that the Dallas County District Attorney's Office made a point of memorializing the ethnicity and gender of the remaining members of the jury venire prior to the exercise of its peremptory challenges." *Batson* claims are evaluated under a three-step process: (1) the defendant makes a prima facie showing that the peremptory challenge was based on race; (2) the prosecution provides a race-neutral basis for the strike; (3) the trial court determines whether the prosecutor

> purposefully discriminated against the juror. *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016). The spreadsheet arguably enhances Broadnax's argument at the first step, and it may be relevant to the third.
>
> **But the prosecution was still required to—and did—provide racially neutral reasons for each of the strikes. The spreadsheet alone is no smoking gun; it fails to render all those reasons merely pretextual.** Moreover, the district court observed that the Dallas County District Attorney's Office has twice been criticized by the United States Supreme Court for the use of racially discriminatory peremptory strikes. *Broadnax*, 2019 WL 3302840, at *43 n.73. **The office would have had considerable motivation to identify which jury venire members belonged to a protected class when preparing to defend its use of peremptory challenges.**

Broadnax, 987 F.3d at 409–10 (citation omitted and emphasis added).

b. The complained-of note, among the many handwritten notes on C.R.'s questionnaire, does not supplant the State's race-neutral reasons for the strike or prove pretext.

As described *supra*, C.R. testified his son was 15 years old. Then, C.R. repeated three times that he saw his son "in this [court]room." RR13: 249. On further inquiry, C.R. independently offered that "[his] son is a black boy," and

he saw him reflected in an attorney and a bailiff in the room (who were also Black). RR13: 249. After C.R. had raised the issue of race, both parties discussed race with him. *See* RR13: 250–53, 317–19.

The attorney in the courtroom whom C.R. was referencing made a handwritten note regarding race and age on a copy of C.R.'s questionnaire. Broadnax contends that the note establishes race was the State's whole basis for striking C.R. (Pet. at I, 17, 23–24), but the prosecutor's note simply arose from C.R.'s discussion of race in the courtroom. The face of the note indicates this, by referencing the defendant's age and race compared to the juror's son's age and race, with the addition of "as mentioned."

C.R. was questioned on the fifth day of individual voir dire. RR13: 1, 232–329. Three prosecutors were present and taking notes, including the prosecutor questioning C.R. RR13: 235–36. The State provided these notes to Broadnax in 2016, before he filed his amended federal habeas petition. The three prosecutors' notes vary greatly in content. The complained-of questionnaire contains detailed notes throughout its 18 pages. *See* Am. First Subsequent Appl. for Post-Conviction Writ of Habeas Corpus Pursuant to Tex. Code Crim. Proc. Art. 11.071, No. W08-24667-Y(B), Ex. B (hereinafter Am. First Subsequent Appl.) (depicting the first page of C.R.'s questionnaire). Some notes were written in red and others in blue, but it is unclear why. The handwritten notes on page one of C.R.'s questionnaire are as follows (where applicable, the citation to the reporter's record after the note references the corresponding discussion in the courtroom):

- Feels "good" about being here. Believes in [death penalty], but wants to be sure. RR13: 237, 242–245.

- Believes in working hard. RR13: 239.

- Believes in God. RR13: 240.

- Can consider full range of punishment for Lesser of murder. RR13: 266–68.

- Hypo[thetical]: very clear to juror. The father who killed his 10 [year] old son is still guilty of murder. RR13: 267–68.

- Seems okay … hard working, smart. Only concern … [defendant]'s age + race [with] Juror's son age + race, as mentioned. RR13: 249–50.

- p. 2 … believes that life can be better/appropriate rather than a death sentence.

- Feelings on [death penalty]. [O]kay with it scared of the wrong person being put to death. RR13: 242–44.

- Not a problem [with] telling his 15-[year] old kid that he took part in [death penalty] process. RR13: 248–49.

- Believes that everyone can be redeemed, but can follow law on [death penalty]. RR13: 247.

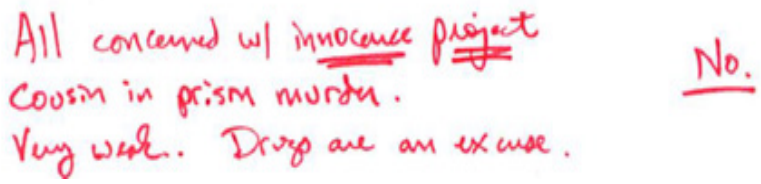
- I see my son in this room [because] son is black and there are black people in this room. RR13: 249.

- Does not feel he owes [defendant] any allegiance [because] he's black. Not a problem if someone asks him how [could] he vote to put to death a black man. RR13: 251–53.

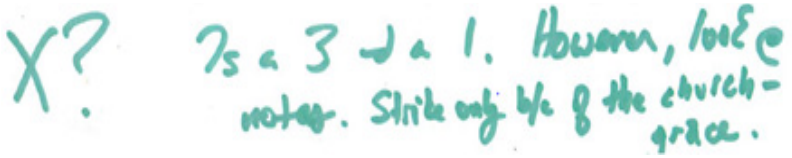
- Has a problem with people "finding" God in jail. It's possible, however. RR13: 279–80.

- Will probably not change anything on questionnaire today. RR13: 293–94.

The prosecutor who questioned C.R. during individual voir dire wrote the following notes at the top of the first page of her copy of C.R.'s questionnaire, indicating "No," he was not an acceptable juror for the State:



Additionally, at the bottom of the first page, the same prosecutor noted there is a question whether to strike C.R., that he "Is a 3" (meaning he believes the death penalty should never be invoked) "and a 1" (meaning, on a one-to-ten scale, the strength of his belief in the death penalty is "1"), and she had concerns about his church's position on the death penalty:



The State disagrees that the complained-of note on C.R.'s questionnaire shows race was a central factor in the State's strike. Nothing indicates any one of the copious handwritten notes played a particular role in the State's decision to strike C.R. While all the questionnaires were retained in the State's files, nothing indicates the prosecution team reviewed each other's notes on this juror or the notes were for anything other than each person's own use and recollection.

C.R. was only the twelfth juror qualified out of 47 jurors. Pet. at 14. It was impossible for the State to know then if it would have enough peremptory challenges available to strike every qualified person who said on their questionnaire that they did not believe in the death penalty or it should never be invoked. Thus, those prospective jurors, including C.R., were thoroughly vetted. The face of the questionnaires and the extensive voir dire indicate the State was carefully considering C.R. and not merely on a path to strike him on the basis of his race.

In short, the complained-of note does not supersede or contradict the State's firmly-grounded, record-based, race-neutral reasons for striking C.R., particularly that the State had struck all prospective jurors who, like C.R., said they were not in favor of the death penalty and it should never be invoked.

c. The prospective jurors' photos were irrelevant to the State's strike decisions.

Broadnax alleges that photos of the qualified jurors in the State's trial files show the State's strikes were race-based. Pet. at 15, 18. This argument is meritless.

During individual voir dire, the bailiff photographed each qualified juror, and the photos were provided to both parties. *See* RR7: 12–13. The court explained this was due to the delay that would occur in selecting the jury and to assist the parties in recalling the jurors. *See* RR7: 12–13. The State arranged the photos in a traditional "seating" chart in the order the jurors would be considered and selected at the strike hearing. Am. First Subsequent Appl., Ex. E. On the complained-of chart, the sixteen jurors whom the State struck were crossed out with a red "X," and the selected jurors were numbered one through fourteen (the twelve seated jurors plus two alternate jurors). The markings were made during the strike hearing, as the judge announced the jurors and each party either accepted the juror or exercised a peremptory strike, and the jury was selected.

Nothing about this practice evidences race discrimination. The race of each juror was obviously known prior to individual voir dire: each person's race was indicated on the first page of their questionnaire. The judges and both parties used copies of the questionnaires. The parties read hundreds of questionnaires and conducted individual voir dire on 130 prospective jurors over approximately two months. RR7, RR9–RR11, RR13–RR38. The photographs of the jurors were for the purpose stated in the record: they aided the attorneys in recalling and differentiating among the jurors over the lengthy voir dire process. The use of the photographs is irrelevant to Broadnax's *Batson* claims.

7. Broadnax's 2009 jury selection is distinguishable from Miller-El's pre-*Batson*, 1986 jury selection.

Broadnax alleges the Dallas County District Attorney's Office engenders a well-documented culture of race discrimination in jury selection as evidenced by the jury selection almost a quarter century before Broadnax's in *Miller-El,* 545 U.S. 231. *See* Pet. at I, 4, 24. While *Miller-El* rightfully condemned use in the 1980's of a decades-old manual fostering bias in jury selection, there is no evidence of discriminatory office policies at the time of Broadnax's trial.

CONCLUSION

The state court's dismissal of Broadnax's claims on the basis of an independent and adequate state-law ground forecloses certiorari review. Respondent respectfully asks this Court to deny Broadnax's petition.

Respectfully submitted,

John Creuzot
Criminal District Attorney
Dallas County, Texas
Michele "Shelly" O'Brien Yeatts
Assistant District Attorney
Counsel of Record
Frank Crowley Courts Building
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207
(214) 653-3625
syeatts@dallascounty.org

Counsel for Respondent