No. 23-248

In the Supreme Court of the United States

JAMES GARFIELD BROADNAX, PETITIONER

v.

STATE OF TEXAS

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

REPLY BRIEF FOR THE PETITIONER

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The State does not dispute that it withheld key evidence of *Batson* violations until after Petitioner exhausted his state remedies. Nor does it dispute that this Court repeatedly has held that evidence of this type is highly probative when determining whether there were *Batson* violations. Instead, the State asks this Court to ignore this newly disclosed evidence based on arguments that only highlight why this Court should grant certiorari.

The evidence here establishes:

- In Petitioner's capital trial involving a Black defendant and two White victims, during jury selection, the State (1) listed and tracked all qualified jurors by race on a spreadsheet which

singled out every Black qualified juror by bolding their names and race; and (2) wrote on the jury questionnaire of one qualified Black juror that the "only concern" with this Black juror regarded his race.

- The State peremptorily struck all seven qualified Black jurors from the venire pool. The resulting nearly all-White jury convicted and sentenced Petitioner to death at the age of 19.
- The State did not disclose either the spreadsheet or the annotated jury questionnaire at trial or on direct appeal, and refused to allow Petitioner's state habeas counsel to review these files. The State disclosed the documents for the first time more than a year after Petitioner's initial state post-conviction proceedings concluded.
- Because of the State's delay, Petitioner's subsequent state habeas petition is the only available channel of relief.

The Texas Court of Criminal Appeals ("TCCA") summarily dismissed Petitioner's application for failure to make a *prima facie* showing of *Batson* violations on the basis of the newly disclosed evidence. As we explain further below, despite the State's arguments otherwise, that determination is properly presented and urgently calls for this Court's review.

A. Certiorari Is Appropriate Because the Decision Below Was Based on a Substantive Federal Ground.

The State first argues that the TCCA's decision below was based on "state procedural rules," making it "unassailable on certiorari." Opp. at 1, 6. This argument is

directly contradicted by both the governing law and the record of this case.

1. To start, calling Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1) a purely "procedural bar" is wrong as a matter of law. *Id.* at 7. The TCCA was unequivocal in *Ex parte Campbell*: "[T]o satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; *and* 2) *the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief* from either the conviction or sentence." 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) (emphasis added).[1] The TCCA then dismissed Campbell's subsequent habeas application because he failed to make a "[p]rima [f]acie [s]howing" of the alleged "federal constitutional violation." *Id.* at 422. Decisions such as this are "not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985).

The State cites the Fifth Circuit's 2008 decision in *Hughes* v. *Quarterman*, 530 F.3d 336 (5th Cir. 2008) for the supposed proposition that "since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and . . . an independent and adequate state ground." Opp. at 8 (citing *Hughes*, 530 F.3d at 342). But the State ignores the Fifth Circuit's subsequent holding in *Rocha* v. *Thaler*, 626 F.3d 815 (5th Cir. 2010), which explained:

> "In *Ex parte Campbell*, the CCA extended the prima-facie-showing requirement . . . to all successive habeas

[1] Numerous decisions in Texas have since confirmed the same. *See, e.g.*, *Ex parte Rubio*, 2018 WL 2329302, at *5 (Tex. Crim. App. May 23, 2018); *Ex parte Sales*, 2023 WL 382321, at *2 (Tex. Crim. App. Jan. 25, 2023).

> claims brought under § 5(a)(1) . . . . ***It is true that prior to Campbell, our decisions had assumed that a dismissal under § 5(a)(1) always rested on an independent and adequate state-law ground. That assumption cannot survive Campbell***."

Id. at 833–35 (emphasis added). The Fifth Circuit also explained that the holding in *Hughes* was based narrowly "on the fact that the factual and legal bases for the claim were available when Hughes filed his first state habeas application." *Id.* at 835–36; *see also Hughes*, 530 F.3d at 343. *Hughes* thus provides no guidance in this case, where, as explained in the Petition and further below, there is no serious dispute about the previous unavailability of the newly disclosed evidence underlying Petitioner's subsequent habeas application.[2] Numerous cases interpreting § 5(a)(1) dismissals after *Campbell* have upheld jurisdiction for federal review. *See, e.g.*, *In re Davila*, 888 F.3d 179, 188–89 (5th Cir. 2018) (dismissal of subsequent habeas application under § 5(a)(1) not based on independent and adequate state ground); *Ruiz* v. *Quarterman*, 504 F.3d 523, 527–28 (5th Cir. 2007) (same); *Busby* v. *Davis*, 925 F.3d 699, 706–10 (5th Cir. 2019) (same).

2. The State repeatedly points to a line in the TCCA's decision below that states "we dismiss the amended first subsequent application as an abuse of the writ without considering the merits of the claims." *See, e.g.*, Opp. at 7 (citing Pet., App. B at 4a). The State incorrectly argues that this line of the TCCA's decision establishes that the

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[2] The only other case the State relies on is irrelevant for the same reason. *See Buntion* v. *Lumpkin*, 31 F.4th 952, 957, 963 (5th Cir. 2022) (cited in Opp. at 10–11) (upholding dismissal because the claim presented under § 5(a)(1) was the same claim presented in previous state habeas proceedings based on same evidence).

dismissal is based on state procedural grounds independent of federal law. *Id.* at 1, 6–8, 11. Not so. This sentence is boilerplate language the TCCA routinely uses when denying subsequent habeas applications under § 5, ***regardless of*** which subsection under § 5 was invoked, and ***regardless of*** whether the underlying decision was based on a procedural or substantive ground. *See, e.g.*, *Ex parte Medina*, 2017 WL 690960, at *1, 8–9 (Tex. Crim. App. Jan. 25, 2017) (dismissing "as an abuse of the writ *without considering the merits of the claims*" a subsequent application for failure to satisfy § 5(a)(2), which requires the applicant to show "by a preponderance of the evidence that but for constitutional violations, no rational juror would have found him guilty") (emphasis added); *Ex parte Davila*, 2018 WL 1738210, at *1 (Tex. Crim. App. Apr. 9, 2018) (dismissing subsequent application "as an abuse of the writ *without reviewing the merits of the claims raised*" after concluding that "Applicant has failed to make a *prima facie* showing of a *Brady* violation") (emphasis added).

Thus, contrary to what the State suggests, this boilerplate language is neither the beginning nor the end of the analysis. The Fifth Circuit, which is familiar with such orders from the federal habeas context, has long acknowledged this, and repeatedly has held that boilerplate dismissals under § 5 are based on the application of federal law where the record of the specific case so indicates. *See, e.g., Busby*, 925 F.3d at 707 ("On its face, the TCCA's order states that i[t] has denied the application as an abuse of the writ without considering the merits of the claims . . . [but] [t]hat determination is necessarily dependent on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations."); *In re Davila*, 888 F.3d at 187–89 ("[W]e are unpersuaded by

Texas's argument that the language provided at the end of the paragraph"—stating that the TCCA "dismiss[es] this application as an abuse of the writ without reviewing the merits of the claims raised"—"controls over what common sense would indicate."); *Ruiz*, 504 F.3d at 527–28 (finding federal jurisdiction despite "[t]he boilerplate dismissal by the CCA of an application for abuse of the writ"). This is consistent with this Court's own instructions that "it is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Florida.* v. *Powell*, 559 U.S. 50, 56 (2010).

3. The above makes clear that, "[w]hether a § 5(a)(1) dismissal is independent of federal law turns on case-specific factors," even in "boilerplate abuse-of-the-writ [dismissals]." *Rocha*, 626 F.3d at 835. The case-specific factors here show that the TCCA's decision was not based on a state-law ground independent of federal law. Indeed, there is no dispute that Petitioner first received the evidence of *Batson* violations contained in the spreadsheet and the annotated jury questionnaire after his direct appeal and state habeas proceedings had concluded. The TCCA's dismissal therefore only can be interpreted as an (erroneous) determination by the TCCA, based on a substantive analysis of federal law, that the newly disclosed evidence of *Batson* violations did not substantiate a *prima facie* case.

The record confirms this conclusion. When moving to dismiss Petitioner's subsequent application in the proceedings below, the State's arguments against his *Batson* claims focused almost exclusively on those claims' substantive merits under federal law. Mot. Dismiss Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 10–17,

21–36. The only exception was one short section noting that the Texas state courts rejected Petitioner's *Batson* claims on direct appeal. *Id.* at 17–21. Of course, at the time of his direct appeal, Petitioner had not received and thus did not present the newly disclosed *Batson* evidence. And in any case, § 5(a)(1) asks only whether the claims brought in a subsequent application were presented previously in a *post-conviction habeas application*, not on direct appeal. Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1).

In its Opposition, the State also argues that the TCCA somehow may have concluded that Petitioner failed to exercise reasonable diligence to obtain the newly disclosed prosecution files before commencing initial state habeas proceedings. Opp. at 9–10. This argument was not raised below, and does not pass muster now.[3] It is undisputed that, during state habeas, counsel for Petitioner requested to "review the files of the Dallas County District Attorney pertaining to Mr. Broadnax's case," and that the State withheld all such files as privileged. Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. D at 1. It is also undisputed that this request (and refusal) would have encompassed the spreadsheet and the annotated questionnaire in question. The State's suggestion now that counsel should have "specifically requested the prosecution's jury selection files" is disingenuous at best. Opp. at 10 n. 5. Petitioner's counsel could not have "specifically requested" documents they had never seen and did not know existed. And as the State had withheld all prosecutorial files, any such "specific" request would have in any case been futile.

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[3] The State's brief below recited the "reasonable diligence" language, but did not argue Petitioner failed to meet this standard. *See* Mot. Dismiss Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 9.

B. Certiorari Is Necessary to Remedy the *Batson* Violations Established by the Newly Disclosed Evidence.

The State also argues that this Court should not grant certiorari because the newly disclosed evidence does not establish *Batson* violations. These arguments not only are incorrect, but underscore why certiorari is appropriate.

1. To start, the State argues that the newly disclosed spreadsheet might not have been used during jury selection. Opp. at 28. But the metadata of the spreadsheet shows it was created on July 10, 2009—the first day after the venire pool was created on July 9, 2009, and 10 days before the strike hearing on July 20, 2009. *See* Am. First Subsequent Habeas Appl., No. WR-81,573-02, Exs. F–G. By all indications, the State created and used the spreadsheet to track and strike Black prospective jurors. These are not convenient facts for the State, so the State tries to muddy the waters by stating the spreadsheet was "created and the [Black prospective jurors'] names 'bolded' on an unknown date or dates between July 10, 2009 . . . and July 22, 2009." Opp. at 26–27. It is not so complicated. The July 10, 2009 date of creation is clear in the metadata. While it may not be known how many times and on which dates the prosecution edited the spreadsheet, there is no confusion about when the prosecution created the spreadsheet—*before* it began to strike Black prospective jurors.

The State also argues that "[d]ue to the timing, it is a reasonable conclusion" the Black prospective jurors' names were bolded to prepare for the court-ordered *Batson* briefing on July 27, 2009. *Id.* But that briefing was ordered on the challenge of just one specific Black juror; there would have been no reason to bold all Black jurors' names in preparation for that briefing. And the State's

inability to assert directly that the spreadsheet was prepared for this alternative reason, when the facts are within its knowledge, confirms that this is after-the-fact hypothesis—no more.

The State also downplays the handwritten notes indicating that the prosecution's "only concern" with a Black prospective juror was his race, trying to bury this damning statement among the other notes written about this same Black juror, by listing them in the opposition brief one by one. Opp. at 32–33. But the note at issue was not just any note among a hundred—it was written in red, in a prominent place (immediately above the "JURY QUESTIONNAIRE" title), circled in a box, and designed to be noticed, as the image on the next page shows.

Feels "good" about being here. | Believes in working hard. | Believer in God. |

Believer in DP but wants to be sure. | Can consider the full range of punishment for lesser offense of murder.

A.M.

Hypo: Very clear to Juror. The father who killed his 10yr old son is still guilty of murder.

Seems okay… hardworking, smart. Only concern… Δ's age + race of Juror's son age + race, as mentioned.

P.2 – believes that life cd be better/appropriate rather than death sentence.

STATE'S 17

JURY QUESTIONNAIRE

June 1, 2001 – last one for the day.

Juror No. 222

Feelings on DP: okay w/ it but scared of the wrong person being put to death.

You have taken an oath to truthfully, correctly and completely answer the following questions. Please answer each and every question. The information you give in this questionnaire will only be used by the court and the parties to select a qualified jury. After a jury has been selected, all copies of your responses will be kept secret. The parties are under orders to maintain the secrecy of any information they learn in the course of reviewing these questionnaires.

Not a problem w/ telling his 15 yrs old kids that he took part in DP process.

Believes that everyone can be redeemed, but can follow law on DP.

PLEASE PRINT DARK ENOUGH TO MAKE COPIES:

NAME: Riser (Last) Curtis (First) Demetre (Middle) Maiden (If Applicable)

Age 48
Sex MALE
Race BLACK

Date of Birth [redacted] Month Day Year

Place of Birth [redacted] City/Town State

I see my son in this room b/c son is black and there are black people in this room.

Social Security Number: [redacted]
Driver's License Number: [redacted]
Home Address: [redacted] Number Street City/Town Zip

Does not feel he owes Δ any allegiance b/c he's black. Not a problem if someone asks him how cd he vote to put to death a black man.

Home Number [redacted]
Cellular Number ( )
Pager Number ( )

Work Number [redacted]
Fax Number ( )

Seems very thoughtful w/ his answers during voir dire.

DEATH PENALTY

Are you in favor of the death penalty? [ ] YES [✓] NO Please explain your answer. There have been too many people convicted of a crime, that we have later found were innocent.

Has a problem w/ people finding God in jail. It's possible, however.

With reference to the death penalty, which of the following statements best represents your feelings? **(Circle only one).**

1. I believe that the death penalty is appropriate in all murder cases.
2. I believe that the death penalty is appropriate in some murder cases, and I could return a verdict in a proper case which assessed the death penalty.
3. (circled) 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.
4. I believe that the death penalty is appropriate in some murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

Will probably not change anything on questionnaire today.

* Qualified #12

Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. B.

Ultimately, the State's attempts to explain away the newly disclosed *Batson* evidence only reinforce why certiorari should be granted: given the significance of the evidence, a factfinder should meaningfully evaluate the evidence and the *prima facie Batson* violations it substantiates. The TCCA's decision, if not reversed, means no factfinder will ever do so.

2. The remainder of the State's arguments about the merits rests on the proposition that, because the state and federal courts below previously rejected some version of Petitioner's *Batson* claims, this Court should do the same despite the newly disclosed evidence. Opp. at 15–16, 18–23. These arguments have two fundamental problems: they (1) disregard this Court's explicit instructions that "in reviewing a ruling claimed to be *Batson* error, *all of the circumstances* that bear upon the issue of racial animosity must be consulted," *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added); and (2) ignore the fact that none of the previous decisions—from direct appeal to federal habeas—had the full benefit of the newly disclosed evidence, which fundamentally changes the entire *Batson* analysis and cannot simply be assumed away.

To take one example, the State argues that the federal district court accepted the State's theory that all of its challenged peremptory strikes could be justified on the basis of three responses in jury questionnaires: whether the jurors (i) answered that they were in favor of the death penalty, (ii) selected a particular option to describe their "feelings" towards the death penalty, and (iii) indicated intoxication should be an automatic bar to death sentence. Opp. at 15-16; *see id.* at 13–14. But the federal district court did not have the benefit of the newly disclosed evidence or the opportunity to meaningfully evaluate any of it. When put in the context of the new evidence, it is apparent the State's arguments about the questionnaires are mere pretext, and a more reasonable explanation surfaces: the State was focused on the race of the Black prospective jurors throughout the jury selection, and only

came up with reasons that fit the Black jurors after the fact.[4]

The State repeats this exercise with the remaining *Batson* evidence, asking this Court to review each item of evidence separately and individually and deny certiorari on the basis of each. *See* Opp. at 15–25, 36. But that is wrong as a matter of law. The correct inquiry, as this Court has emphasized, is not whether "any one of those . . . facts alone would" establish a *Batson* violation, but whether "all of the relevant facts and circumstances taken together"—including, now, the record supplemented by the newly disclosed evidence—do so. *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2251 (2019). That is especially true here. Together, the spreadsheet and the annotated questionnaire offer significant and rare insights into the prosecution's state of mind during jury selection, and cast the other "record-based" evidence, and all the facts and circumstances surrounding it, into a new light. *See* Br. of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc., No. 23-248, at 11–13. No analysis would be complete without considering the newly disclosed

[4] The jury questionnaires contained multiple and overlapping questions about prospective jurors' attitude towards the death penalty; the State offers no principled reason why it treated some but not all of these questions as conclusive. *See* 57 RR 106 (Black prospective juror rejected for disfavoring the death penalty actually ranked herself a 7 out of 10 on a scale of support for the death penalty); *id.* at 141 (accepted White juror answering "yes" to the question of "Are you in favor of the death penalty?" but caveating that it was only "'Yes' in theory"). It is likewise puzzling why the State automatically rejected all Black prospective jurors who selected the option that stated "as long as the law provides for [the death penalty], I could assess it under the proper set of circumstances," when it accepted multiple White jurors who expressed an equivalent or greater degree of hesitation towards the death penalty in their other answers. *See* Pet. at 11.

documents. *See Foster* v. *Chatman*, 578 U.S. 488, 501 (2016) (when prosecutorial files have emerged to reveal the State's discriminatory intent during jury selection, "we cannot accept the State's invitation to blind ourselves to their existence.").

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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