No. 23-5659

IN THE
Supreme Court of the United States

CEDRIC THEODIS HOBBS, JR.,
Petitioner,
v.
NORTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Respondent does not deny that the question presented in the Petition—whether a court conducting a comparative juror analysis under *Batson v. Kentucky*, 476 U.S. 79 (1986), can rely on "favorable characteristics" offered long after a strike to distinguish otherwise comparable jurors—is important and recurring. Nor does it meaningfully dispute that the lower courts are split on that question. That is unsurprising; several judges have recognized this entrenched split, which severely harms defendants in North Carolina and across the country.

In opposing review, Respondent tries to turn the tables by accusing Petitioner of being the one who raised "new arguments" in support of his *Batson* challenge. Respondent then tries to reframe its post hoc justifications as permissible "rebuttal." *See* Opp. 10, 15. This "new arguments" theory in fact runs headlong into this Court's instruction in *Miller-El v. Dretke* that a prosecutor must "stand or fall on the plausibility of the reasons he gives" at the time, rather than relying on after-the-fact justifications. 545 U.S. 231, 252 (2005) (*Miller-El II*). As courts and judges across the country have recognized, a prosecutor's post hoc reliance on favorable characteristics of non-struck jurors is simply a repackaging of reasons for striking Black jurors—reasons the prosecutor is bound, under *Miller-El II*, to present at the time of the *Batson* challenge. If the defense refutes those reasons and demonstrates pretext, that does not give the prosecution another bite at the apple. Indeed, in *Miller-El II* itself,

this Court rejected an invitation, much like that Respondent offers here, to consider new justifications in a similar posture.

The decision below, and that of the Circuits and states that join it, thus violates this Court's *Batson* jurisprudence and principles of fundamental fairness. This case is an excellent vehicle to resolve an acknowledged split over a question of profound importance. This Court should grant the Petition.

I. There Is An Entrenched And Acknowledged Split On The Question Presented.

The Petition showed that courts of appeals and state high courts are divided over whether courts conducting a comparative juror analysis can look beyond the prosecutor's initial reasons for a strike to identify and rely on additional distinctions between otherwise comparable jurors. Pet. 17-20. Respondent's perfunctory attempts to minimize the split are unavailing.

Respondent first tries to dilute the split by ignoring that it takes place along two related dimensions laid out in the Petition. As the Petition explained, this Court's decisions, starting with *Miller-El II*, define both *what* a court may consider in comparing jurors and *when* justifications for a strike may be offered. Pet. 12-15. Properly assessed, the split is clear across each dimension. *Contra* Opp. 9-12.

A. As to *what* considerations are relevant, *Miller-El II* left no doubt that, at the third step of the *Batson* framework, courts should ask whether there are "strong

similarities" between the struck juror and a seated juror, regardless of whether there are also "some differences" between those jurors. 545 U.S. at 247. Courts, in other words, should assess whether the strike justification applies equally to a non-struck juror, not whether the non-struck juror could be otherwise favorably distinguished. Pet. 12-15 (discussing this Court's precedent).

Several circuits have applied that rule, including the Ninth Circuit in *Love v. Cate*, 449 F. App'x 570, 572 (9th Cir. 2011). *See* Pet. 18. Respondent answers (in just a footnote) that *Love* does not support a split because the Ninth Circuit "subsequently correctly applied *Batson* in line with this case." Opp. 11 n.1. That is telling: Respondent thereby concedes a conflict between *Love*'s analysis and the decision below.

The conflict is also far more entrenched than Respondent admits. *Love*'s analysis is neither dated nor an outlier. The Ninth Circuit has continued to apply it. *See*, *e.g.*, *Walker v. Davis*, 822 F. App'x 549, 553 (9th Cir. 2020) (conducting comparative juror analysis without considering differences between similarly situated jurors).[1] Moreover, multiple circuits apply the same reasoning. *See United States v. Atkins*, 843 F.3d 625, 637-38 (6th Cir. 2016) (focusing comparative juror analysis on "similarly situated" white venire members—i.e., those with "large number[s] of children

[1] As Petitioner already explained—without answer from Respondent—to the extent there is disagreement among Ninth Circuit panels that tracks the broader disagreement among circuits and state high courts, that is all the more reason to grant certiorari. Pet. 18 n.1.

and inconsistent work history"—independent of differences among those jurors); *Adkins v. Warden*, 710 F.3d 1241, 1255 (11th Cir. 2013) (comparing prosecution's explanation for striking Black juror because of that juror's "prior knowledge about the case" to "majority of white jurors" who also "had prior knowledge about the case," without assessing differences between jurors); *cf. Hardcastle v. Horn*, 332 F. App'x 764, 766 (3d Cir. 2009) (affirming district court's finding of a *Batson* violation based on its "juror comparisons" notwithstanding prosecutor's arguments that "no two jurors are exactly alike").

Respondent's only other answer is that *Love* is "unpublished." Opp. 11 n.1. Setting aside that several published decisions apply the same logic, Respondent's point does not engage at all with the Ninth Circuit's analysis. The Ninth Circuit upheld a *Batson* challenge where the prosecutor dismissed a Black venire member because she was a social worker but did not dismiss non-Black venire members who shared a similar occupation—even though, as is always the case, the compared jurors doubtless were not "exactly identical," *Miller-El II*, 545 U.S. at 247 n.6. *Love*, 449 F. App'x at 572; *see* Pet. 16-17 (describing similar factual scenario here and citing *Miller-El II*).

By contrast, in *Chamberlin v. Fisher*, the en banc Fifth Circuit reversed a successful *Batson* challenge where the struck and non-struck jurors "answered … identically" certain questions but the prosecutor offered favorable distinguishing

characteristics in support of the retained jurors. 885 F.3d 832, 840-41 (5th Cir. 2018) (en banc); Opp. 11-12. Here, too, the North Carolina Court rejected a *Batson* challenge where the prosecutor's proffered justification applied equally to struck and non-struck jurors because the prosecution offered distinguishing "favorable characteristics" of non-Black jurors—in Respondent's words, reasons that "made [the non-struck jurors] a better juror for the prosecution," Opp. 6-7. *See, e.g.*, Pet. App. A 19 ("Even though the alleged observations regarding excused juror Humphrey may have been equally valid as to other similarly situated white prospective jurors who were not struck in this case, other favorable characteristics in those not struck outweighed any alleged similar, unfavorable characteristic."); Pet. App. A 59-61 (similar); Pet. App. B 9-10 (approving "the State's 'whole juror' approach"); *see also* Pet. 15-16. Other courts have similarly erred, showing just how deep the split goes. *See United States v. Morrison*, 594 F.3d 626, 633 (8th Cir. 2010) (treating "very fine distinctions" between Black and white jurors as sufficient to overcome similarities related to strike); *People v. Jones*, 247 P.3d 82, 98-99 (Cal. 2011) (looking to "other answers, behavior, attitudes or experiences" to differentiate between jurors that shared characteristic on which Black juror was struck (quotation marks omitted)).

B. The split over *Miller-El*'s application merits this Court's review all the more because it also plays out along a second dimension: *when* justifications for a strike may be offered. As the Petition explained (at 15), in assessing the basis on which a

juror was struck, the prosecutor must "stand or fall on the plausibility of the reasons he gives" at the time of the strike, *Miller-El II*, 545 U.S. at 252. *See id* at 246 (rejecting explanations that "reek[] of afterthought").

Respondent does not deny that several circuits have held (following *Miller-El II*) that it is "improper for the [prosecutors] to offer belated or additional rationalizations for the strikes of Black potential jurors after trial." Opp. 10 (citing *United States v. Taylor*, 636 F.3d 901, 904, 906 (7th Cir. 2011), and *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1259-67, 1270 (11th Cir. 2009)); *see* Pet. 18. Again, other courts of appeals agree. *Accord Love*, 449 F. App'x at 572-73 (holding that district court properly rejected distinguishing characteristics offered on remand but not in original proceedings); *Shirley v. Yates*, 807 F.3d 1090, 1108-09 (9th Cir. 2015) (applying same rule); *cf. Porter v. Coyne-Fague*, 35 F.4th 68, 78-79 (1st Cir. 2022) (where "the state court assembled its own rationale for the strike rather than examining the one put forth by the prosecutor," it "unreasonably applied the *Batson* rule" at step 2); *Atkins*, 843 F.3d at 638-39 (rejecting as pretextual "government[] explanations [that] 'reek[] of afterthought'"); *Adkins*, 710 F.3d at 1254 (declining to credit prosecutor's explanation "offered only after the trial court brought contradictions in the record to the prosecutor's attention" in part because it "'reeks of afterthought'" (quoting *Miller-El II*, 545 U.S. at 246)); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (noting "our review is focused solely upon the reasons given" by the prosecutor).

Respondent cannot dispute a clear split among lower courts on this question given the en banc Fifth Circuit's decision in *Chamberlin* and other cases applying similar logic. *See Chamberlin*, 885 F.3d at 841-42; *see also Jones*, 247 P.3d at 98-99; Pet. 15-16 (discussing decision below). Indeed, the *Chamberlin* dissent recognized the conflict with the Seventh, Ninth, and Eleventh Circuits—the only three decisions Respondent even attempts to distinguish. *Chamberlin*, 885 F.3d at 855-56 (Costa, J., dissenting) (discussing *Taylor, Love*, and *McGahee*).

Respondent's purported distinction between a new explanation "for the strikes of Black potential jurors" as opposed to "an explanation for keeping another," Opp. 10-11, is a red herring; in either case, the "new … explanation," Opp. 11, goes beyond "the reasons [the prosecutor] gives" in the first instance, *Miller-El II*, 545 U.S. at 252. In *Chamberlin*, for instance, the divided Fifth Circuit, sitting en banc, held that *Miller-El II* does not "prevent[] the prosecution from later supporting its originally proffered reasons with additional record evidence" years later. 885 F.3d at 841. While the district court had found a *Batson* violation where the prosecutor struck Black prospective jurors based on their answers to three specific questions and kept a white juror who answered the questions identically, the Fifth Circuit majority reversed on the ground that the white juror answered another question not initially raised by the prosecution more favorably. *Id.* at 840-41. As the dissenters explained—answering the same argument Respondent advances now (at 12)—such additional explanations

are "just the other side of the same coin" of post hoc justifications. 885 F.3d at 853-54 (Costa, J., dissenting); *cf. McGahee*, 560 F.3d at 1269-70 (treating "full[er] explanation" of same reason offered initially as post hoc reasoning).

II. The Decision Below Is Wrong.

The North Carolina Supreme Court's "clear error[s]" in applying *Batson* warrant this Court's intervention regardless of the existence of a split. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019).

A. The North Carolina Supreme Court erred by approving Respondent's "whole juror" analysis.

Respondent concedes that *Miller-El II* centers the *Batson* analysis on whether the "prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve." Opp. 14 (quoting *Miller-El II*, 545 U.S. at 240-41). And here, though the prosecutor's proffered reason for striking Black panelists applied to non-stricken comparators, the court adopted a so-called "whole juror approach" and held "other favorable characteristics in those not struck outweighed any alleged similar, unfavorable characteristic." Pet. App. A 19, 33, 47, 59 (trial court); *see* Pet. App. B 9 (North Carolina Supreme Court). As the Petition and dissent explained, that runs headlong into *Miller-El II* and subsequent cases. *See* Pet. 15-17; Pet. App. B 42 (Earls, J., dissenting) ("[The trial court] … applied 'the State's whole juror approach' and disregarded more than fifteen years of United States Supreme Court precedent."); *see also supra* 2-5.

Respondent first attempts to defend this error by urging that courts may consider "*all* of the circumstances" in reviewing a *Batson* claim. Opp. 14 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), emphasis Respondent's); *see* Opp. 5, 6-7, 15-16 (pressing "all relevant circumstances"). It misreads this Court's precedent in doing so. This Court first directed courts to consider "all relevant circumstances" in *Batson*, where it explained that such "relevant circumstances" might include, for instance, "a 'pattern' of strikes against black jurors." *Batson*, 476 U.S. at 96-97; *see Snyder*, 552 U.S. at 478 (providing strike of another juror as another example of a relevant circumstance). That authorizes courts to look to relevant context; it does not authorize Respondent to sneak in additional excuses for its strike through the back door. Under Respondent's broad reading, any record-based difference between jurors could be smuggled in as a "relevant circumstance," defeating this Court's direction to ask whether the "reason for striking a black panelist applies just as well" to a seated juror, *Miller-El II*, 545 U.S. at 241. *See also* Pet. App. B 43 (Earls, J., dissenting) ("By focusing on the differences between the jurors, the trial court foreclosed the possibility of any meaningful comparative juror analysis.").

Respondent's next, related argument—that a reviewing court is not required to "blind itself to evidence apparent in the record"—similarly overlooks this Court's law. Opp. 15. A *Batson* challenge "does not call for a mere exercise in thinking up any rational basis" for why a prosecutor might have struck a juror. *Miller-El II*, 545 U.S.

at 252. What matters is whether the specific reasons the prosecutor gave are true or false (and therefore pretextual). *See* Pet. 12-15; *see also, e.g.*, *Flowers*, 139 S. Ct. at 2241 ("The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination."). Other distinctions between the jurors are simply irrelevant. And in any case, "such differences will just about always exist when every possible characteristic is fair game." *Chamberlin*, 885 F.3d at 852 (Costa, J., dissenting).

As the dissent below already explained, neither *Miller-El II* nor *Foster* helps Respondent. Pet. App. B 42-43 (Earls, J., dissenting); *contra* Opp. 14-15. Those cases focused on portions of the record demonstrating stricken jurors were *similar to*—not different from—jurors the prosecutor accepted. For instance, in *Miller-El II*, the Court rejected the dissent's reliance on "other reasons why these [non-stricken] nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was." 545 U.S. at 245 n.4. And in *Foster*, the Court reasoned that certain "explanations given by the prosecution … are difficult to credit because the State willingly accepted white jurors with the same traits," 578 U.S. at 505-06, notwithstanding the dissent's emphasis on "distinction[s] … between [the stricken juror] and the other jurors," *id.* at 534-35 (Thomas, J., dissenting) (quotation marks omitted).

B. The North Carolina Supreme Court erred by approving Respondent's post hoc justifications.

Respondent does not deny that, under *Miller-El II* and its progeny, it is "improper for the states to offer belated or additional rationalizations for the strikes of Black potential jurors after trial." Opp. 10. It also admits the North Carolina courts went beyond "the State's stated reasons for the strikes." Opp. 15. Those concessions demonstrate the error in the decision below.

C. Respondent wrongly characterizes its reliance on post hoc justifications as permissible "rebuttal" of new arguments.

Finally, Respondent tries to justify the court's emphasis on favorable characteristics as a "rebutt[al]" to "new arguments made by Petitioner." Opp. 15. Whatever Respondent means by "new," Petitioner has argued from the start that the strikes violate *Batson*.[2] More importantly, whether or not new reasons are offered as "rebuttal," they violate *Miller-El II* in the same way: "[A]llowing new explanations years after trial turns the *Batson* inquiry into a 'mere exercise in thinking up any rational basis' as there is no way to ensure the post-trial justification is what actually motivated the decisions made during jury selection." *Chamberlin*, 885 F.3d at 854 (Costa, J., dissenting) (quoting *Miller-El II*, 545 U.S. at 252).

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[2] From the initial *Batson* challenge, Petitioner argued that James Stephens, the comparator highlighted by Respondent, held views similar to Humphrey regarding the death penalty and mental health treatment (the two stated reasons for Humphrey's strike). *See* Tpp. 1609.

Thus this Court has repeatedly recognized *Batson* violations even where there was "*no* invocation of comparative analysis at … trial." *Chamberlin*, 885 F.3d at 856-59 (Costa, J., dissenting) (emphasis added). For instance, in *Miller-El II*, the defense first raised a comparative juror analysis on habeas review to support the *Batson* claim preserved at trial. *Miller-El II*, 545 U.S. at 241 n.2 (rejecting dissent's argument that comparative juror analysis was not properly before the court because it was not raised before the state courts); *id.* at 278 (Thomas, J., dissenting) ("Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing."). And this Court in *Snyder* acknowledged that the defendant had not raised certain similarities between the jurors at trial, yet went on to consider them anyway, over the dissent's protests. 552 U.S. at 483 & n.2; *see id.* at 489 (Thomas, J., dissenting) (arguing that the majority erred by relying on two comparators that the defense "never mentioned in the argument before the trial court.").

Respondent frets that this approach "would also require the [prosecutor] *sua sponte* to conduct full-scale comparative juror analysis at trial, even when no comparisons were advanced by the defendant in the first instance." Opp. 16. But this has always been the prosecutor's burden: "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can," including by anticipating possible counterarguments. *Miller-El II*, 545 U.S. at 252; *see Chamberlin*, 885 F.3d at 859 (Costa, J., dissenting).

III. This Case Is An Excellent Vehicle.

This case is an excellent vehicle. The question is cleanly presented, there is a well-developed record, and the issues have been fully litigated before the trial court and the North Carolina Supreme Court. Pet. 21. Moreover, unlike with other recent petitions, the question is presented here without any procedural obstacles to review. *Cf.* Br. in Opp. at 27-29, *Harper v. Lumpkin* (No. 23-5089) (U.S. Oct. 12, 2023) (noting review of Batson claim was doubly constrained by AEDPA deference and the heightened standard for issuing a certificate of appealability); Br. in Opp. at 11, *Chamberlin v. Hall* (No. 18-6286) (U.S. Dec. 19, 2018) (urging AEDPA deference). The State's purported vehicle objections (Opp. 13) are thus baseless.

Respondent argues that the validity of its "whole juror analysis" was raised before the North Carolina Supreme Court only "in a cursory fashion." Opp. 13; *see* Opp. 7-8. Respondent has an odd definition of "cursory," as the brief it cites spent over 20 pages developing this argument. *See* Supp. Brief for Appellant at 83-105, *State v. Hobbs*, 884 S.E.2d 639 (N.C. 2023) (No. 263PA18-2). Respondent merely cherry-picks isolated paragraphs in the brief as though that were the whole analysis. In reality, Petitioner described the trial court's focus on the differences between jurors, *id.* at 83-84; provided an overview of relevant Supreme Court precedents on comparative juror analysis, *id.* at 84-88; and explained in detail how the trial court's order failed to conform to these precedents, *id.* at 88-97 (separately analyzing McNeill, Layden,

and Humphrey). The North Carolina Supreme Court then heard extensive argument on the issue at the post-remand oral argument. *See* Oral Argument at 11:47-16:00 (defense); 26:08-27:19 (State's response); 49:27-51:07 (defense rebuttal), *State v. Hobbs*, 884 S.E.2d 639 (N.C. 2023) (No. 263PA18-2), http://tinyurl.com/3khezs2t.

The North Carolina Supreme Court had no trouble understanding that Petitioner raised the issue. The majority "expressly rule[d] on" the question presented. *Contra* Opp. 13. It set out to "determine whether the trial court clearly erred in concluding there was no violation of *Batson v. Kentucky*," including through detailed review of the trial court's extensive "side-by-side juror comparisons." Pet. App. B 1, 9-20. Relying on the same erroneous interpretation of *Flowers* as Respondent, the Court then approved the trial court's "'whole juror' approach in its comparisons" on the ground that a court should "look[] at the 'overall record' of a *Batson* case and make[] a determination '[i]n light of all of the circumstances.'" Pet. App. B 9; *see also* Opp. 8 (acknowledging that "[t]he state high court credited the trial court's approach"). The dissent, too, carefully set out the errors with the majority's "whole juror" analysis. Pet. App. B 42-44. In sum, there is no obstacle to this Court's complete review.

IV. The Question Presented Is Concededly Important And Recurring.

Respondent does not dispute that the question presented is important and recurring. *See* Pet. i, 20-21. Nor could it. "[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's

neutrality,' and undermines public confidence in adjudication." *Miller-El II*, 545 U.S. at 238 (citations omitted). As the Petition explained, *Batson*'s protections have been an empty promise in North Carolina for the 37 years since *Batson* issued, precisely because of workarounds like the "whole juror" analysis of the decision below. Pet. 2, 20-21; *cf. State v. Tucker*, 895 S.E.2d 532 (N.C. 2023) (declining to hear *Batson* claim as procedurally barred); *State v. Richardson*, 891 S.E.2d 132 (N.C. 2023) (affirming trial court's determination that defendant failed to raise prima facie case of discrimination). And the problem is national in scale, warranting this Court's review. *See* Br. for Retired State Court Judges as Amici Curiae Supporting Pet'r at 7-12, *Chamberlin v. Hall* (No. 18-6286) (U.S. Nov. 9, 2018) (documenting that "racial discrimination persists in juror selection" nationwide); Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1624-25 (2018) (citing empirical studies across jurisdictions that "[a]ll concur in the basic finding … that prosecutors disproportionately use peremptory strikes to exclude black jurors").

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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