No. 23-668

In The Supreme Court of the United States

WARREN KING,

Petitioner,

v.

SHAWN EMMONS, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

CHRISTOPHER M. CARR
Attorney General

BETH A. BURTON
Deputy Attorney General

CLINT M. MALCOLM
Senior Assistant Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 694-7975
sgraham@law.ga.gov

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner Warren King erroneously presents his *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127 (1994) claims to this Court as if they were coming from direct review instead of falling under 28 U.S.C. § 2254 review. Besides failing to engage with the correct standard of review, King refuses to even give the appropriate deference to the fact findings of the state courts (both the trial court and the state supreme court) that they would receive on direct review. He continues his attack by either interpreting every action of the prosecutor in the most damaging light or blatant misrepresentations of the record. At bottom, the prosecutor gave race neutral reasons for his strikes, there were no similarly situated white or male jurors when the prosecutor's reasons were considered as a whole, and the Supreme Court of Georgia's determination that there was no discrimination was reasonable both under the facts of this case and this Court's precedent. The court of appeals did not err in holding that King failed to prove "that the Georgia courts generated an 'extreme malfunction' in his case." Pet. App. at 31a.

1. Whether the court of appeals correctly applied this Court's precedent when it determined the state court's denial of Petitioner Warren King's *Batson*/*J.E.B.* claims were based on a reasonable determination of facts and a reasonable application of clearly established federal law.

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INTRODUCTION

Petitioner Warren King asks this Court to grant review of his claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127 (1994), to embark on an exclusively factbound analysis that would, at most, be a case of narrow error correction. He asks this Court to simply disagree with the court of appeals' decision, and along the way he ignores the 28 U.S.C. § 2254 standard of review and asks the Court to also ignore any fact that supports the state court's decision. King failed to establish the state court decision "was so lacking in justification" it was "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). There is no reason to grant review of a purely factual question, where deference applies, and the decisions at issue are correct, to boot.

King's *Batson* claims are *entirely* about the credibility and factual determinations of the state court. King argues that the prosecutor's percentage of strikes, the trial court's determination that he did not give a race-neutral reason for striking one juror (who was reseated), and the prosecutor's disagreement with the *Batson* standard undermine the prosecutor's race- and gender-neutral reasons for striking the jurors. The state court disagreed, thoroughly examined the record, and found the prosecutor's reasons sufficient. The court of appeals, reviewing the state court decision under § 2254(d) and (e)(1), determined that King had failed to show by "clear and convincing evidence" that

the state court's factfindings were erroneous or that its conclusion was unreasonable.

Ignoring these standards, King repetitively attacks the prosecutor, but even when he is not misrepresenting the record, King fails to establish any error—at the *absolute most*, he puts forth evidence showing that courts could disagree, which means he cannot win. King also proposes a new standard for deference to state courts—one requiring them to specifically mention every part of the record an appellant deems important. To use King's standard of review would require the federal courts to assume facts not in evidence and, just as bad, require state courts to show their work to receive any credit.

A fair review of the record shows that the prosecutor's race-and gender-neutral reasons for the strikes at issue were supported by the record. And even if that conclusion were debatable, it is certainly not "unreasonable" nor based on factual determinations that are disproven by "clear and convincing" evidence. There is no reason for this Court to simply redo the work of the Eleventh Circuit on an undisputedly factbound issue, where King simply asks for error correction. King failed to establish "that the Georgia courts generated an 'extreme malfunction' in his case." Pet. App. at 31a (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)). This Court should deny review.

STATEMENT

A. Facts of the Crimes

At approximately 7:30 p.m. on September 13, 1994, Danny Smith brought dinner to his girlfriend, Karen Crosby, at the Quick Change 31 in Surrency, Georgia, where she was working as a clerk. Doc. 16-28 at 134-35. Shortly after midnight, Wayne Branch and Darin Crosby, who lived near the Quick Change, heard gunshots from the direction of the Quick Change. *Id.* at 141. Wayne and Darin drove to the store and found Ms. Crosby lying in the parking lot, bleeding. *Id.* at 141-42. Ms. Crosby died en route to the hospital from a gunshot wound to the back of the head. Doc. 17-3 at 14.

Walter Smith, King's cousin, left home on that evening, planning to go to Claxton, Georgia looking for "females." *Id.* at Doc. 17-3 at 79, 80-81. Smith testified he took his Uncle's gun with him for protection. *Id.* at 79-80. On his way to Claxton, Smith stopped off at the Quick Change for a drink. *Id.* at 81-82. Smith then drove around Surrency looking for King. *Id.* at 82. After he found King, the two proceeded toward Claxton. *Id.* at 83-84. As they passed the Quick Change, according to Smith, King said, "Let's hit the store tonight."[1] *Id.* at 84. Smith agreed and parked the truck on a nearby dirt road. *Id.* at 85.

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[1] King alleges that "It was undisputed, however, that Smith masterminded the crime." Pet. at 7-8. This is inaccurate as Smith testified that the robbery was King's idea. *See* Doc. 17-3 at 84.

They both got out of the truck and put on black skull caps. *Id.* at 87-88. Although Smith had left the gun in the truck, King took it with him. *Id.* at 88-89. The Quick Change was already closed, and the two waited for Ms. Crosby to come out of the store. When Ms. Crosby left the store, she did not immediately get into her car to leave, so King jumped out from where he and Smith had been hiding and told Ms. Crosby, while pointing a gun at her, to "give it up." *Id.* at 91, 93. Ms. Crosby said that she "ain't had none," called out King's name, and said "if you don't believe me, here come the keys." *Id.* at 92. Ms. Crosby threw the store keys at Smith, who used the keys to enter the store. *Id.* at 93.

Immediately after Smith entered the store, the alarm sounded. *Id.* at 93. Smith ran out of the store and passed both King and Ms. Crosby. *Id.* "King testified, during the sentencing phase, that Smith yelled at him repeatedly to shoot Crosby but that he, instead, handed the gun to Smith." Pet. App. at 192a. "However, Smith testified that, as he was running from the store, he heard the two shots, turned, and saw Crosby falling to the ground." *Id.* King started running behind Smith and said, several times, according to Smith, "I hope I killed the bitch." Doc. 17-3 at 96.

B. Proceedings Below

1. Trial and Direct Appeal Proceedings

On September 24, 1998, "the jury found [King] guilty of malice murder, armed robbery, burglary,

aggravated assault, false imprisonment, and possession of a firearm during the commission of the felony of false imprisonment." Pet. App. at 173a. Following the sentencing phase of trial, "the jury fixed the sentence for the murder at death" after finding two statutory aggravating circumstances. *See id.* at 173a-74a.

Voir Dire. "After preliminary for-cause strikes of prospective jurors, the parties used peremptory strikes to select 12 jurors out of a pool of 42." Pet. App. at 8a. The prosecutor, Assistant District Attorney John Johnson, was provided with "10 peremptory strikes and the defense with 20." *Id.* For "the 12 potential alternate jurors, the State had three peremptory strikes, and the defense had six." *Id.* 8a-9a. First, the State would mark "accept" or "excused" for a juror; and if the State accepted, the defense could excuse the juror. *See id.* at 9a. "Selection stopped when 12 jurors had been selected." *Id.*

"[T]here were eight black potential jurors: one black man and seven black women." *Id.* The prosecutor struck seven black women and three white women from the petit jury and used one alternate strike for a black woman. *Id.* "The petit jury consisted of seven white men, four white women, and one black man. The three alternate jurors were two white women and one black man." *Id.* The defense objected to the prosecutor's strikes. *See id.* "The trial court found that the defense [] made a prima facie case of unlawful discrimination and required the State to provide race- and sex-neutral reasons for its strikes." *Id.*

The prosecutor strongly objected to the defense's motion, thought the *Batson* standard was unfair, and, although he admitted the law was against him, argued for the defense to have the burden of showing why it struck only white prospective jurors. *See* Doc. 16-28 at 18-20; *see also* Pet. App. at 26a. Nevertheless, the prosecutor "immediately proceeded to provide the required race-and sex-neutral justifications." Pet. App. at 26a; *see* Doc. 16-28 at 18-20.

The trial court determined that one of the prosecutor's strikes—that of Jacqueline Alderman, a black woman—violated *Batson*. *See id.* The prosecutor first explained that the "main reason . . . [for the strike was] that this lady is a black female,[2] she is from [King's hometown of] Surrency, [and] she knows the defendant and his family." *Id.* (brackets in original). However, "[a]t one point during his justification of the Alderman strike, [the prosecutor] mentioned that the State was investigating her husband in an unrelated case." *Id.* The prosecutor "quickly backed off of that statement and said it was not the main reason for the strike; the main reason was that she was from Surrency and knew King's family." *Id.* The trial found the prosecutor's "rationales were shifting and unreliable and that Alderman did not actually know King's family as Johnson had argued." *Id.*

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[2] The prosecutor gave the race and gender of each juror in his recitation of his reasons for his strikes. *See*, *e.g.*, Doc. 16-28 at 23 ("My sixth strike in the main panel was Sarah McCall. She is a black female."); *id.* at 27 ("My tenth strike dealt with Lillie Burkett. She is a black female.").

The prosecutor again objected to the standard imposed by *Batson*. As explained by the court of appeals:

> Johnson called it "improper" for the trial court to tell him that he could not exercise a strike based on where the juror was from. He said that "[i]f this lady were a white lady there . . . would not be a question in this case" and "that's the problem [he] ha[d] with all of this." Johnson criticized *Batson* as "not racially neutral." Before *Batson*, Johnson said, he "had to act . . . [in a racially neutral] way when [he] was in Brunswick because it was a physical impossibility if you wanted to strike every black off a jury for you to do that." But in Johnson's view, "*Batson* now makes us look whether people are black or not" and prevents legitimate strikes, so it was "improper and . . . wrong." Although Johnson was "very angry," he suggested seating Alderman on the jury to avoid restarting the striking process. The trial court agreed and seated Alderman.

Pet. App. at 10a-11a.

The prosecutor provided race-and gender-neutral strikes for the four jurors that are the subject of this appeal—jurors Sarah McCall, Lillie Burkett, Gwen Gillis, and Jane Ford.[3] The trial court upheld each of

[3] King did not raise a challenge to juror Patricia McTier on direct appeal, which King does not dispute. *See* Pet. at 25 n.4; *see also* Pet. App. at 191a-94a. The prosecutor explained that he struck McTier because his office had "prosecuted Wilma McTier for an aggravated assault"; however, the prosecutor "admitted there was some confusion about Patricia McTier's relation to Wilma McTier." Pet. App. at 11a.

the strikes. *See* Pet. App. at 191a-94a. "Johnson used his sixth strike on Sarah McCall," a black female. Pet. App. at 11a. The prosecutor explained that McCall "indicated that the death penalty was not her first choice. She had a lot of hesitancy about her." *Id.* Additionally, the prosecutor "mistakenly stated that her husband, also in the jury pool, said that she opposed the death penalty." *Id.*

For his eighth strike, the prosecutor struck Jane Ford, a white female. *Id.* The prosecutor gave two reasons. First, "she was a single mother, had no family here, [and] had children and no one to care for those children," and second, she said that she worked with special-education children and "enjoyed that work." *Id.*

The prosecutor struck Lillie Burkett, a black female, with his tenth strike. *Id.* Again, the prosecutor gave two reasons for his strike. *Id.* "[H]e said that '[s]he is a minister' and he 'do[es] not take people on juries who are ministers' because they emphasize forgiveness and tend to be overly lenient," and "she knew King's family, and King's family background would be relevant to the trial."[4] *Id.*

"Finally, Johnson used his alternate-juror strike on Gwen Gillis, a black woman." *Id.* Two reasons were again provided. The prosecutor explained that Gillis "'lived very near' King's aunt and near Gary Andrews,

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[4] "The only other minister in the pool was Thomas Lightsey, a white minister whom the parties did not reach because he was the 41st in the lineup and the jury had been selected before he was called." Pet. App. at 12a.

who was Smith's uncle and was the owner of the house where the murder weapon was found." *Id.* As a second reason, Gillis was struck because the prosecutor wanted "to reach and accept the more favorable prospective alternate juror who followed her," a black male. *Id.*

Direct Appeal. On November 30, 2000, the Supreme Court of Georgia affirmed King's convictions and sentences. Pet. App. at 172a. On appeal, King challenged the prosecutor's peremptory strikes for jurors McCall, Burkett, Gillis, and Ford under *Batson* and *J.E.B*. *Id.* at 191a-94a. The state court reviewed the record and affirmed the trial court's denial of King's challenges. *Id.* The Supreme Court of Georgia noted that "[t]he trial court found that King had made a prima facie showing of discrimination and required the State to explain the reasons for the challenged strikes." *Id.* at 191a. While acknowledging that the trial court found the prosecutor's reasons for striking juror Alderman failed "to rebut the prima facie showing of discrimination" (who was reseated on the jury by the trial court), the Supreme Court of Georgia "f[ound] that the trial court did not abuse its discretion in finding that King failed to carry his burden of persuasion as to the jurors challenged [on] appeal." *Id.* In making this determination, the state court examined each challenged strike with a "review of the record." *See id.* at 192a-94a.[5]

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[5] King filed a petition for writ of certiorari with this Court but did not present a question regarding his *Batson*/*J.E.B.* claims.

"As to McCall, the Supreme Court of Georgia found that Johnson had misstated the record" regarding McCall's husband's testimony. Pet. App at 13a. However, the court upheld the trial court's ruling because "'this mistake does not show that the explanation was a mere pretext' for racial discrimination." *Id.* (quoting *id.* at 193a).

The state court also upheld the strike of Ford. The court "held it reasonable to credit Johnson's citation of Ford's positive relationship with intellectually disabled children" and that "'[a]lthough seven other jurors, four of them women and one an African-American male, described some exposure to mentally retarded persons,' Ford 'was the only person who indicated that she enjoyed that relationship.'" *Id.* at 13a-14a (quoting *id.* at 193a-94a).

Regarding Burkett, the minister, the Supreme Court of Georgia affirmed the trial court's decision. The court explained that the prosecutor "consistently questioned male and female jurors of all races during voir dire about the roles they served in their places of worship" and that "none of the other prospective jurors were ministers." *Id.* at 192a. Additionally, the court held it was permissible for the prosecutor to consider that Burkett "knew King's family." *Id.*

As for Gillis, the alternate juror, the state court "affirmed the trial court's ruling." *Id.* at 14a. The court considered the prosecutor's reason that Gillis lived

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See Doc. 18-16 at 2. The petition was denied. *King v. Georgia*, 536 U.S. 957 (2002).

"near someone involved in the case" and that while "'other jurors who knew him or members of his family were not stricken by the State'" the court "did not conclude from this fact that Johnson's strike was discriminatory." *Id.* (quoting *id.* at 194a). This was so because the court "found credible Johnson's argument that 'other factors, which did not apply to those other jurors, contributed to' his decision to strike Gillis." *Id.* (quoting *id.* at 194a).

2. State Habeas Proceedings

King filed his state habeas petition on October 28, 2002, and amended it on January 31, 2008. Doc. 25-3 at 2; Doc. 19-35 at 37. In his amended state habeas petition, King argued generally that "[t]he prosecution improperly used its peremptory strikes to systematically exclude jurors on the basis of race and/or gender." Doc. 19-35 at 30. King provided no argument in support of this claim in his briefing to the state habeas court. *See* Doc. 24-28; Doc. 24-29; Doc. 24-30. The court held that King's *Batson/J.E.B.* claims were barred by res judicata because they had been raised on direct appeal. Doc. 25-3 at 3. Alternatively, the state court held that "to the extent this claim raises any other issues not addressed by the Georgia Supreme Court on direct appeal, it is procedurally defaulted." *Id.*

King filed an application for certificate of probable cause to appeal with the Supreme Court of Georgia, which was denied in 2011. *See* Doc. 25-10. King did not challenge the lower state court's decisions regarding

his *Batson* claims. *See* Doc. 25-5. King petitioned this Court for certiorari review, which was denied in 2012. *See King v. Humphrey*, 567 U.S. 907 (2012). Again, he did not challenge the state habeas court's dismissal of his *Batson/J.E.B.* claims. *See* Doc. 25-11 at 2.

3. Federal Habeas Proceedings

District Court. King filed his federal habeas petition in June of 2012. In his amended petition, King generally alleged *Batson* and *J.E.B.* claims. *See* Doc. 29 at 43. In merits briefing to the district court, King posited the same arguments he presents in his petition to this Court that the Supreme Court of Georgia's *Batson* decision was unreasonable. *See* Doc. 62 at 30-109. Additionally, for the first time, King raised a *Batson* claim regarding the prosecutor's strike of juror Patricia McTier. *See id.* at 152a-53a; Doc. 62 at 86-90 n.37 (King admits that the "removal of Ms. McTier" was not raised on direct appeal). The district court determined that King failed to exhaust his challenge to the prosecutor's strike of juror McTier, although, as noted by the court of appeals, "it incorrectly labeled King's failure to exhaust as 'procedural default.'"[6] Pet. App. at 27a

[6] King disputes the exhaustion determination, but he did not obtain a certificate of appealability on that issue, thus it is not properly before this Court. *See* Pet. App. at 27a. Moreover, King's assertion that Respondent expressly waived the exhaustion bar to this claim in the amended answer to his federal petition was correctly rejected by the district court. *See* Pet. App. at 152a-53a n.16. King had never raised a *Batson* claim regarding juror McTier and did not mention McTier in his federal habeas petitions. Thus, Respondent's first opportunity to respond to this

(quoting Pet. App. at 152a). After thorough review, the district denied relief, but granted a certificate of appealability on the claim. *See* Pet. App. 137a-71a.

Court of Appeals. In affirming the district court's denial of relief, the court of appeals first addressed King's argument that the Supreme Court of Georgia had not reasonably applied *Batson*. As he does in his petition to this Court, King argued that the state court did not consider "all relevant circumstances" (as required under *Batson*) because "the court did not explicitly discuss" every portion of the record King mentioned on direct appeal. Pet. App. at 21a-22a. The court of appeals rejected this argument, explaining that "[n]othing in the Supreme Court of Georgia's opinion suggests that it did not consider" all of the relevant circumstances"; thus, the court had to "presume that the court did consider the circumstances King cites." *Id.* at 23a. The majority also rejected the dissent's view of the state court's *Batson* application explaining: "The dissent purports to review whether the Supreme Court of Georgia properly applied the *Batson* framework, but in substance it *only disagrees with the factual determination about Johnson's credibility*." *Id.* at 25a (emphasis added).

The court of appeals next examined whether, "in the light of all the relevant circumstances," the state court's determination that the trial court did not abuse its discretion in accepting the prosecutor's race-and

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specific *Batson* claim was in response to King's merits brief, which Respondent did. *See id.*

gender-neutral reasons for striking jurors McCall, Burkett, Gillis, and Ford was reasonable. Pet. App. at 26a. King argued the state court accepted "demonstrably false reasons" from the prosecutor but, as pointed out by the court appeals, it could not review "King's arguments *de novo* unless he [] provided 'clear and convincing evidence' that the state court was wrong to credit Johnson's non-discriminatory justifications for his strikes." *Id.* at 25a (quoting 28 U.S.C.§ 2254(e)(1)). After examining each of the strikes in question, the court of appeals determined that King failed to meet his burden.

REASONS FOR DENYING THE PETITION

I. King's petition seeks purely factbound error correction.

Batson (and *J.E.B.*) employ a three-part test to decide whether the prosecutor has discriminatorily struck a juror. "*First*, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; *second*, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and *third*, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quotation omitted). In this case, only the last two parts of the test are at issue, whether the prosecutor provided a "race-neutral basis" for striking a

juror and whether the state court should have found "purposeful discrimination." *See Ayala*, 135 S. Ct. at 2199.

Here, these questions turn *entirely* on credibility and factual determinations made by the state courts. King does not even purport to identify a split of authority or any confusion in the law that requires clarification. Indeed, he can't even seriously maintain that anyone applied the law incorrectly—all the courts at issue here explicitly applied the correct test. Instead, King wants this Court to reexamine state court credibility determinations. If there were a *less* suitable petition for review, it is hard to imagine what it would be.

But King's petition is more extreme still, because this is not just a credibility question, it is a credibility question where federal courts owe strong deference to the state court's determinations. The question is not whether a federal court might even come to a different conclusion on the facts, the question is whether "it was *unreasonable* to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (emphasis added); *see also* 28 U.S.C. § 2254(d)(2). The state-court factual findings "are presumed correct, and the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id*. at 339 (quoting 28 U.S.C. § 2254(e)(1)). And the "burden . . . rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). King wants this Court to reexamine a state court's credibility findings

under extreme deference—the Court should reject his invitation.

II. The court of appeals' decision was correct.

In addition to identifying no reason for this Court to review the decision below, King also fails to identify any *error* in the decision below. To succeed on his claims, King had to prove that the state court's determinations—that the prosecutor's reasons for striking jurors McCall, Burkett, Gillis, and Ford were not pretextual—were unreasonable. 28 U.S.C. § 2254(d)(2). And to do that he would have to prove, by "clear and convincing evidence," that any factual findings of the state court—and everything relevant here is a factual finding—were erroneous. *Id.* § 2254(e)(1). Moreover, "[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (quotation omitted). King utterly fails to carry his burden of proof because the record supports the state court's decision.

A. The state court's determinations regarding the challenged strikes were reasonable.

King argues that the prosecutor struck four jurors for pretextual reasons. The state court found otherwise. And the court of appeals correctly granted deference to those decisions. At *most*, King identifies

evidence from which a factfinder *could* come to a contrary conclusion. He does not come anywhere near identifying a factfinding that is wrong by "clear and convincing evidence" or a conclusion that is "unreasonable."

1. *Juror Sarah McCall*. The prosecutor gave three reasons for striking juror Sarah McCall, a black female: "that the death penalty was 'not her first choice'"; "that she 'had a lot of hesitancy about her'"; and "that her husband (who was in the venire in a different panel) felt that she was opposed to the death penalty." Pet. App. at 159a (quoting Doc. 16-28 at 23-24). The Supreme Court of Georgia reiterated these reasons on appeal; it determined that the prosecutor "was mistaken in his recollection of [juror Sarah McCall's husband's] voir dire, but this mistake does not show that the explanation was a mere pretext." Pet. App. at 193a (citing *Smith v. State*, 264 Ga. 449, 453 (1994) (holding that a reason for a strike may be mistaken so long as it is race-neutral)). The state court held "the trial court did not abuse its discretion in finding no discrimination." *Id.*

During voir dire, when asked if she was conscientiously opposed to the death penalty, McCall replied:

> Your Honor, I have questions about that. Because of my religious beliefs, the Bible plainly states that I shall not kill. Okay. If the defendant has killed someone and you in turn, if that defendant is found guilty, then you kill him. I mean I have questions about that, but I really

> do believe in some cases that the death penalty should be given.

Doc. 17-1 at 44. When asked "after considering all of the evidence, that the most appropriate penalty was death, could you recommend to the Court that it impose that sentence[,]" McCall replied "I *think* I could." *Id.* at 46 (emphasis added). However, when asked whether she could recommend a life sentence or life without parole sentence, McCall's response to both questions was "I could." *Id.* at 45-46. When questioned by the prosecutor, as correctly found by the district court, McCall "continued to show hesitancy toward the death penalty." Pet. App. at 161a. Although she "affirm[ed] that she could vote to recommend the death penalty, she also agreed that 'because of [her] religion and [her] beliefs' she had problems with the death penalty and that if given other choices of punishment she would 'lean toward those other choices before [she] would consider the death penalty.'" *Id.* (quoting Doc. 17-1 at 50-51).

The court of appeals determined "[i]t was reasonable for the Supreme Court of Georgia to conclude that, although Johnson was mistaken about an aspect of the record regarding McCall's husband's voir dire, he was not inventing a pretext for a racial motive." Pet. App. at 27a. While King may disagree (and that's all his argument amounts to), he failed to show with "clear and convincing evidence" that any state court factfinding was erroneous or that its determination was unreasonable. *See* Pet. at 22-23.

King also argues that pretext can be shown because the prosecutor did not strike juror Martha Vaughn, among others unidentified in his petition, who King purports gave answers that were "no different" than McCall's. Pet. at 22. First, King did not raise this argument in the trial court or on direct appeal, thus it should not be considered in the federal habeas arena.[7] Second, even assuming the argument was properly before the federal courts, both the district court and the court of appeals rejected it. Doc. 83 at 97. The district court correctly found this assertion was "not supported by the record," indeed, it is a complete misrepresentation of the record. Pet. App. at 161a.

In his petition to this Court, King discusses only juror Vaughn's voir dire testimony, which King alleges was "nearly identical" to McCall's testimony. Pet. at 29; *see also* Pet. at 22. It is not. When Vaughn was asked by the trial court whether she could recommend a death sentence she stated that: "It may be hard, but I believe so, yes sir." Doc. 17-1 at 18. First, from the cold record it is impossible to tell Vaughn's demeanor. Second, Vaughn did not qualify her response with a religious objection, but merely noted that this would be a "hard" decision. *Id.* Obviously, giving a death sentence would be a difficult decision for a vast majority of the population—as it should be. However, Vaughn's

[7] At no time during the voir dire proceedings did King identify any other allegedly similarly situated jurors to McCall who were accepted by the State. Doc. 16-28 at 39. Moreover, King did not identify any other allegedly similarly situated juror to McCall on direct appeal. Doc. 18-8 at 50-51.

response, contrary to King's arguments, is qualitatively different, and certainly not "nearly identical" to being concerned with giving a death sentence based upon religious beliefs. Pet. at 29.

The other two jurors that King referenced in the courts below—jurors Rebecca Griffin and James Sellers—also did not provide "views on the death penalty that were no different" than McCall's. Pet. at 22. Neither gave answers suggesting hesitancy, much less religious objection, to recommending a death sentence. Instead, when they were asked "what kind of [mitigation] information you would want to know" before deciding between "life or death" they responded respectively "history" and "background" information about King. Doc. 16-17 at 84-85; Doc. 16-24 at 26. Thus, the district court was correct in determining King's arguments were "not supported," and the court of appeals correctly decided that "the prospective jurors [King] identifies said little more than that they would want to see all the evidence in a case before imposing the death penalty." Pet. App. at 27a, 161a.

King has not shown by "clear and convincing" evidence that the state court's factfinding was erroneous or that its ultimate determination was unreasonable. Instead, King's arguments are based on his disagreement with the state court's credibility determination—which King props up with a largely unsupported rendition of the record.

2. *Juror Lillie Burkett*. The prosecutor gave two race-neutral reasons for striking juror Lillie Burkett, a

black female: Burkett "was a minister" and "the prosecutor explained he 'do[es] not take people on juries who are Ministers' because '[t]hey have a particular point of view about trying to forgive people and look to the best in them'"; and Burkett knew "'[King's] family in this case, and the fact that the family situation, the background situation, will be an issue in the psychological testimony that will come, made [him] feel that she would not be a fair juror in that respect.'" Pet. App. 163a (quoting Doc. 16-28 at 27) (brackets in original).

For the first reason, the Supreme Court of Georgia determined that "the record reveals that the State consistently questioned male and female jurors of all races during voir dire about the roles they served in their places of worship and that none of the other prospective jurors were ministers, factors that support the State's contention that its explanation was not pretextual." Pet. App. at 192a. As for the second reason, the state court found that a "review of the record also confirms that Burkett stated that she knew King's family, a factor that was not unique to the juror but which the State was permitted to consider as part of its final decision to strike the juror." *Id.* The court found no abuse of the trial court's discretion in affirming the strike. *Id.*

King complains that the prosecutor did not further question Burkett about "her role in the church" and "how that might affect her role as a juror." Pet. at 23. But this complaint is a red herring because it completely ignores the prosecutor's stated reason that he did not want ministers on the jury because of their

forgiving nature. Burkett had already stated her role in the church and, even if she stated she could be fair and impartial, that would not have negated the prosecutor's opinion that ministers are instinctually forgiving. Moreover, as found by the district court, and not disputed by King, the record shows "the prosecution's questioning of others regarding their role in the church was equally as limited to that person's title/role and did not probe into the specifics of the role."[8] Pet. App. at 164a. This complaint is nowhere near "clear and convincing" evidence that the state court's factfindings were erroneous or its determination unreasonable.

King also argues that the prosecutor "accepted several white and male jurors whose roles in their churches were comparable to Burkett's, including one who also described himself as a minister." Pet. at 24. Again, King misrepresents the record. King and the dissent below decided that serving as a leader in church was "comparable" to being a minister. *See* Pet. at 30; Pet. App. at 61a. But, for example, being a deacon in a church is vastly different than serving a community as a minister—or at least it's not unreasonable to think so (and King doesn't explain otherwise). Additionally, "the prosecution's questioning of others

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[8] *See*, *e.g.*, Doc. 16-13 at 94-95 (questioning Samantha Drew); Doc. 16-14 at 5-6 (questioning Connie Arnold); Doc. 16-15 at 137-38 (questioning Jacqueline Alderman); Doc. 16-16 at 97- 98 (questioning Alnorris Butler); *id.* at 140-41 (questioning James Orvin); Doc. 16-17 at 16-18 (questioning Tamela Folsom); *id.* at 79-80 (questioning Rebecca Griffin); Doc. 16-23 at 56-57 (questioning Eddie Vann); Doc. 16-24 at 37 (questioning Brandy DeLoach); Doc. 16-25 at 17-18 (questioning Carzell Rooks).

regarding their role in the church was equally as limited to that person's title/role and did not probe into the specifics of the role." Pet. App. at 163a-64a.

The only other potential juror than McCall that identified as a minister was Thomas Lightsey. King argues that the prosecutor "accepted" Lightsey as a juror but that is not accurate. Pet. at 24. The prosecutor had only ten strikes, and as noted by the court of appeals, "Lightsey was the 41st juror in the venire list, the second to last, so it was highly unlikely that he would be reached before 12 jurors were selected. And he was not reached." Pet. App. at 29a. So, it was not that the prosecutor "accepted" Lightsey as a juror, but that the prosecutor had a limited number of strikes and chose to use them on other potential jurors with the understanding that Lightsey would likely not be a potential juror. Given this record, the court of appeals gave the "Supreme Court of Georgia the benefit of the doubt," as required, and determined that the state court "might not have considered Lightsey a 'prospective' juror because of how unlikely it was that he would be reached and selected." *Id.*

Regarding Burkett's familiarity with King's family, as pointed out by the court of appeals, King could "not provide any evidence that the family connections played no role in the strike; he [could] only prove what the Georgia court acknowledged: that Burkett's connections were not unique enough, standing alone, to explain striking her." Pet. App. at 29a. King's attack on the prosecutor's reason fails to acknowledge the actual decision of the state court—familiarity with King's

family was only *part* of the equation. For King's attack to have any teeth, he would have to show the allegedly similarly situated jurors were both familiar with King's family *and* ministers. None of the jurors fit that bill, and King's argument does nothing to show the state court's decision was unreasonable. *See* Doc. 16-16 at 27-28, 132-43; Doc. 16-17 at 1-2, 80; Doc. 16-18 at 29; Doc. 16-20 at 7; Doc.17-1 at 20.

3. *Juror Gwen Gillis*. The prosecutor struck Gwen Gillis, a black female, because "she lived near King's aunt, . . . she was a neighbor of the family of King's co-defendant, and . . . she lived close to 'one of the relatives, Gary Andrews,' in whose house the murder weapon was found." Pet. App. at 165a (citing Doc. 16-28 at 27).[9] The prosecutor also stated that Gillis was struck to reach a more favorable juror, Carzell Rooks, a black male. Doc. 16-28 at 28.

The Supreme Court of Georgia explained that "[a]lthough 'mere place of residence or any other factor closely related to race' cannot by itself serve as the basis for explaining a challenged peremptory strike, juror Gillis was shown to have specific personal acquaintances that might have tended to make her sympathetic to the defense." Pet. App. at 194a (quotation mark omitted). Additionally, the court "carefully noted King's argument that other jurors who knew him or members of his family were not stricken by the State, but, . . . the State's argument that other factors, which

[9] Gary Andrews is King's cousin through marriage, and the uncle of the co-defendant by marriage. Doc. 17-3 at 18.

did not apply to those other jurors, contributed to its final decision to strike juror Gillis was credible." *Id.*

King argues that the prosecutor "accepted several white and male jurors who had closer relationships with not just King's family, but King himself."[10] Pet. at 24. But as explained by the court of appeals, the other prospective jurors in question, "respectively, ran a video store at which King was a customer, conducted a [CT scan] on King, went to school with King's sister but had no contact with King, worked at the lunchroom at King's middle school, and possibly taught King and his sister in middle school." *Id.* at 30a; *see also* Doc. 16-15 at 80-87; Doc. 16-17 at 80; Doc. 16-20 at 7-8; Doc. 17-1 at 20-21. The court of appeals "consider[ed] it reasonable to distinguish between, on the one hand, living close to King's close family member and a close family member of his co-defendant and, on the other hand, any of the acquaintances the other prospective jurors had."[11] *Id.* All King can offer is a disagreement with the state court's findings.

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[10] King implies that being neighbors with King's family and the co-defendant's family was inconsequential because Gillis testified that being neighbors with King's aunt and the co-defendant's uncle would not affect her vote. *See* Pet. at 31. However, it was not unreasonable for the prosecutor to believe, notwithstanding Gillis's testimony, that her familiarity with a member of King's family and living in close proximity with the co-defendant's uncle could impact her ability to be a fair juror. More importantly, the prosecutor was not required to abandon his concerns despite Gillis's testimony, and the failure to do so does not tend to show pretext.

[11] King states that these are just a "subset of the white jurors that knew King." Pet. at 24. King provides no citation in support

King also complains that the prosecutor did not ask the other allegedly similarly situated white jurors "how their relationship with King or his family might affect their jury service" as the prosecutor did with Gillis. Pet. at 25. But none of the jurors in question stated they had a "relationship" with King, merely that they had, or possibly had, contact with him. *See* Doc. 16-15 at 80-87; Doc. 16-17 at 80; Doc. 16-20 at 7-8; Doc. 17-1 at 20-21. Based on the answers given by these jurors, it was reasonable for the prosecutor not to ask follow-up questions regarding their ability to be impartial and, once again, King overreaches in his rendition of the record. And he certainly hasn't shown asking a juror who "lived close to King's close relative" if this would affect jury service was racially motivated.

Most importantly, King ignores the other reason given by the prosecutor—to reach the more favorable juror Rooks, a black male—which was the basis for the Supreme Court of Georgia upholding the strike. *See* Pet. App. at 194a; Doc. 16-28 at 28. The state court found that "as with juror Burkett," the prosecutor's reason was two-fold—familiarity with King's family and the co-defendants' family *and* being able to reach a more favorable juror. Pet. App. at 194a. As correctly found by the state court, and not disputed by King, the second "factor[] . . . did not apply to those other jurors." *Id.*

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of this allegation. Looking back at what King argued on direct appeal, he did not identify any other "white jurors that knew King" than those addressed in the court of appeals. *See* Doc. 18-8 at (42-43, 58-59).

King's arguments, weighed down with misrepresentations and a refusal to acknowledge the state court's full factfindings, fail to meet to the clear and convincing standard nor do they show the state court's decision was unreasonable, and the court of appeals was correct to reject them.

4. *Juror Jane Ford*. The prosecutor also struck Jane Ford, a white female, for two reasons: "'she was a single mother, had no family here, had children and no one to care for those children'"; and "the 'primary reason' was because of her 'relationship with [intellectually disabled] kids at school'" and that she was "the only person that indicated that she enjoyed the relationship with intellectually disabled persons." Pet. App. at 166a-67a (quoting Doc. 16-28 at 25). The Supreme Court of Georgia found that the prosecutor "had stricken Ford because she was a single mother who would be financially burdened by jury service and because of 'her relationship with [mentally disabled] kids at school.'" *Id.* at 193a.

King argues that the decision was unreasonable because the prosecutor did not state that he struck Ford because she "would be financially burdened by jury service." Pet. App. at 193a. The court of appeals agreed that "King [was] correct that at the *Batson* hearing Johnson focused on the burdens of jury service on Ford's childcare, not the financial concerns that the Supreme Court of Georgia identified." *Id.* at 28a. However, the court decided that the "difference d[id] not make the Georgia court's decision unreasonable" because "[i]t was reasonable for the court to infer that the

financial burdens of jury service would affect a single parent disproportionally." *Id.* Although King complains that Ford's children were 17 and 20 years old respectively, this does not prove that Ford did not still care for her children or shoulder the greater financial burden as the single parent. And she testified that she would not be compensated if she did not work, and that the loss of income would make it hard for her to "make ends meet" because she was a "single mother with two children." Doc. 16-19 at 14. Anyone with children knows that they do not necessarily become less of a financial burden the older they become.

Regardless, as with jurors Burkett and Gillis, there was a more substantial reason given by the prosecutor for the strike. As noted by the court of appeals, "Johnson's primary rationale for the strike [] was that Ford enjoyed her work with special-needs children." Pet. App. at 28a. King again asserts that there were similarly situated jurors who also worked with intellectually disabled individuals, which King argues should call into question the neutrality of the prosecutor's strikes. But again, King ignores the prosecutor's full statement and changes it to something he can attack. As correctly found by the state court, and not disputed by King, "[a]lthough seven other jurors, four of them women and one an African-American male, described some exposure to mentally retarded persons, the State explained that juror Ford '*was the only person who indicated that she enjoyed that relationship*.'" *Id.* at 193a (emphasis added). As explained by the prosecutor, this was important because he was "unsure how

[Ford] would react to information that showed that the defendant in this case was either borderline mentally retarded or borderline intellectually slow." Doc. 16-28 at 25. Again, King is nowhere close to establishing by clear and convincing evidence that any factfinding was wrong or that the state court's decision was unreasonable.

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"Federal courts may not disturb the judgments of state courts unless '*each* ground supporting the state court decision is examined and found to be unreasonable.'" *Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) (quoting *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam)). And "a federal court must carefully consider all the reasons and evidence supporting the state court's decision" because "there is no way to hold that a decision was 'lacking in justification' without identifying—let alone rebutting—all of the justifications." *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (quoting *Richter*, 562 U.S. at 103).

King has not satisfied these requirements. He argues that the Supreme Court of Georgia should have assumed that the prosecutor lied at every turn. But ultimately, what weight to give the prosecutor's reasons and the other relevant factors is a credibility determination. And as the record does on the whole *support* the state court's decision, King has certainly fallen short of proving there is "*no* reasonable basis" for the state court's decision. *Richter*, 562 U.S. at 98 (emphasis added).

B. The court of appeals rightly rejected King's assertion that the state court did not reasonably apply *Batson*.

Throughout his petition, King asserts that the Supreme Court of Georgia failed to consider certain portions of the record in determining whether there was discriminatory intent because they were not explicitly mentioned in the state court opinion. *See* Pet. at 6, 11, 14, 27, 28, 29, 34. He twists this assertion into an argument that the state court must have considered the prosecutor's strikes in "isolation" instead of reviewing the record as a whole in determining no purposeful discrimination. Pet. at 6, 28, 34. The court of appeals correctly rejected King's arguments because they are not supported by the record and require a standard of review that has been rejected by this Court more than once.

In examining King's *Batson* claim, the state court explicitly acknowledged that "[t]he trial court found that King had made a prima facie showing of discrimination and required the State to explain the reasons for the challenged strikes." *King v. State*, 273 Ga. at 268. Throughout its discussion of the third step of King's *Batson* claim, the Supreme Court of Georgia repeatedly stated it had reviewed the record, noted that the trial court found the prosecutor's reasons for striking one juror were discriminatory, recognized when the prosecutor was "mistaken" about the record, and specifically stated it had "carefully noted King's argument" with respect to the similarly situated white and male jurors. *King*, 273 Ga. at 267-70. So King's

argument that the state court "fail[ed] to address any circumstances that bear upon the issue of racial animosity" and "focused solely on evidence that would defeat a claim of discrimination" is simply false. Pet. at 34. While the state court may not have explicitly mentioned every minute aspect of every fact or argument King deems relevant, that hardly means the state court failed to consider the whole record.

State courts do not have to mention this Court's law, provide a rationale, state whether the claim was denied on the merits or procedurally barred, or even mention a petitioner's arguments to receive AEDPA deference. "[F]ederal courts have no authority" to "impose mandatory opinion-writing standards on state courts' as the price of federal respect for their procedural rules." *Johnson v. Lee*, 578 U.S. 605, 611 (2016) (citation omitted); *see also Williams*, 568 U.S. at 300 ("While it is preferable for an appellate court in a criminal case to list all of the arguments that the court recognizes as having been properly presented, [] federal courts have no authority to impose mandatory opinion-writing standards on state courts."); *Richter*, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."); *id.* (a "state court need not cite or even be aware of [this Court's] cases under § 2254(d)").

King admits that he cannot require a state court to specifically mention every fact with even an arguable bearing to demonstrate that it addressed the entire

record.[12] *See* Pet. at 28. That should be sufficient, on its own, to establish that his argument holds no merit.

King attempts to circumvent this problem by arguing that the circumstances in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Flowers*, in which this Court granted relief under *Batson*, are comparable to the ones of his case. *See* Pet. at 17. Yet even a brief glance at these cases dispels this notion.

In *Flowers*, the *Batson* claim was not analyzed under § 2254, but direct review, which is enough to distinguish the cases. *See Flowers*, 139 S. Ct. at 2235. But the facts of *Flowers* are also distinguishable. Flowers was tried six times by the same prosecutor, and in the first three trials, the convictions were reversed for "prosecutorial misconduct." *Id.* In the second and third trials, the Mississippi Supreme Court determined that the prosecutor discriminatorily struck black jurors from the jury pool. *Id.* In the sixth trial, this Court determined that "in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors" and the State also "struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck." *Id.* The Court was

[12] He later backtracks this admission and argues that the circumstances not mentioned by the state court were too important not to discuss. *See* Pet. at 34. In doing so, King creates a nonsensical standard in which a state court's silence on certain facts can't be used against it unless a petitioner deems the facts too important for the state court not to mention.

clear that it did not decide that "any one of the [] facts alone would require reversal" but that taken together they did. *Id.*

Here, while *one* of the prosecutor's strikes was found to be pretextual by the trial court, there were not two previous trials where the same prosecutor was found to have violated *Batson* and the convictions reversed. King argues that the prosecutor struck Alderman "'main[ly]" because she was a 'black female,'" but this is an inaccurate interpretation of the record. Pet. at 4 (quoting Pet. App. 10a). When providing reasons for each of his strikes, the prosecutor gave the race and gender of each juror, obviously to perfect the record. A reasonable reading of the prosecutor's explanation was that he was merely stating her race and gender for the record. *See*, *e.g.*, Doc. 16-28 at 23, 25, 27. Moreover, the trial court did not find that the prosecutor struck Alderman because he stated she was a "black female." Instead, the court found the prosecutor's reason that she knew King was not supported by the record. *See id.* at 54.

Additionally, in this case, the prosecutor did not engage in "dramatically disparate questioning of black and white prospective jurors." *Id.* Nor were there several white prospective jurors not struck that were similarly situated to a black prospective juror. *Id.* Thus, even if King's argument fell outside § 2254 review—whether the decision was "an unreasonable application of" *Batson*—given the disparity in facts between the cases, King has not shown the state court "managed to blunder so badly that every fairminded jurist

would disagree." *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021).

The facts of *Miller-El* are also distinguishable. After extensive analysis, this Court decided that at least two of the black jurors that were struck in *Miller-El* had comparable white jurors who were not struck and the state court's decision to the contrary was not supported by the record. *Miller-El*, 545 U.S. at 242-53. This Court also determined that the "case for discrimination [went] beyond [the similarly situated juror] comparisons to include broader patterns of practice during the jury selection" which were the "shuffling of the venire panel" and certain questioning regarding opinions about the death penalty and minimum sentencing that indicated racial concerns. *Id.* at 253. Finally, "the appearance of discrimination [was] confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." *Id.*

Try as he might, King has not shown that the facts of his case are "on par" with those in *Miller-El*. Pet. at 17. King likens the manual that identified "the general policy of the Dallas County District Attorney's Office to exclude black venire members" to the prosecutor's statements in this case about the *Batson* standard. But they are in no way comparable. As correctly explained by the court of appeals, the prosecutor's statements "while inappropriate, do not prove that [the prosecutor] wanted to discriminate based on race." Pet. App. at 26a. Instead, the prosecutor "complained that

statistics should be used evenhandedly to show discrimination by both the prosecution and the defense" and "that *Batson* required him to focus on a juror's race to address a potential *Batson* challenge, though before *Batson* he could ignore race." *Id.* The court of appeals recognized the arguments as "misplaced and futile" but rightly surmised that they were "arguments attack[ing] the procedures that [this Court] has crafted to detect and remedy racial discrimination in jury selection" rather than arguments that "necessarily support an inference that the prosecutor wanted to be free to racially discriminate in jury selection." *Id.*

Neither the state courts nor the federal courts have gone astray in deciding King's *Batson* claims. The prosecutor's race-and gender-neutral reasons were fairly supported by the record and while his views on the *Batson* standard were "misguided," they were not racially motivated. Indeed, he explicitly argued that he disliked the *Batson* standard because it *forced* him to consider race. That erroneous understanding of *Batson* is hardly evidence of discrimination. At the very least, that is a *reasonable* view of the record. King disagrees, but he has identified no reason this Court should grant review of his request for intensively factbound error correct.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted,

CHRISTOPHER M. CARR
Attorney General

BETH A. BURTON
Deputy Attorney General

CLINT M. MALCOLM
Senior Assistant Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE GEORGIA
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 694-7975
sgraham@law.ga.gov

Counsel for Respondent