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 a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Georgia Association of Criminal Defense Lawyers ("GACDL") is one of the country's largest member-funded statewide criminal defense organizations. It has been the most important organization for lawyers defending the accused in Georgia since its founding in 1974.

GACDL's members have an interest in this case because it is a conspicuous example of Georgia courts' longstanding failure to correctly apply *Batson*. The Georgia courts' *Batson* track record warrants this Court's attention, and the Georgia Supreme Court's misapplication of *Batson* in this case warrants review and reversal.

SUMMARY OF ARGUMENT

The Georgia Supreme Court has not reversed a trial court's ultimate *Batson* determination in over a quarter century. In fact, there have been only five such reversals since this Court decided *Batson* nearly forty years ago. These facts mean either that appellate enforcement of *Batson* is almost entirely unnecessary in Georgia or that *Batson* violations are going undetected.

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[1] Pursuant to S. Ct. Rule 37.6, counsel for *amicus* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, its members, or its counsel has made a monetary contribution to fund the preparation or submission of this brief. All parties have received timely notice of *amicus*'s intent to file.

There is strong evidence the latter proposition is true. Georgia prosecutors have routinely used peremptory strikes in a constitutionally suspect manner, including by striking all qualified black persons or by striking only qualified black persons.

Beyond the numbers, a qualitative analysis suggests that structural flaws distort Georgia courts' *Batson* analyses. Courts pay insufficient attention to prosecutors' strike patterns and all the relevant facts and circumstances when adjudicating purposeful discrimination. *Batson*'s second step, where prosecutors must articulate race-neutral reasons for their strikes, has consumed and preempted the proper analysis. Too often in Georgia this Court's demanding *Batson* framework has been reduced to a recitation of the prosecutor's proffered reasons followed by swift rejection of the defendant's challenge. The errors in Georgia courts' *Batson* applications have generated questionable results, and, even when *Batson* violations have been detected, Georgia courts have exhibited confusion about the consequences of their rulings.

This Court should grant certiorari and reverse. Warren King's case presents a manifest *Batson* error that warrants even summary reversal. And the Georgia Supreme Court's mistakes in this case are endemic in Georgia. There is scant reason to think that Georgia courts will correct their decades-long misapplication of *Batson* without this Court's intervention.

ARGUMENT

I. Enforcing the Constitution's prohibition on race-based peremptory strikes is critical, especially in Georgia.

The long history of racial discrimination infecting the criminal justice system, and the jury trial in particular, is well-documented by the Court. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 222 (2017) (quoting James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L. J. 895, 909–10 (2004)). "Time and again," the Court has therefore "enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id.*; *see, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879) (statute barring anyone but white men from jury service violated the Constitution).

But after *Strauder* the "problem of racial exclusion from jury service remained widespread and deeply entrenched." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2239 (2019) (quotation omitted). Exclusion of black jurors was accomplished with race-based peremptory strikes. *Id.* at 2240. The Court sought to curb such strikes in *Swain v. Alabama*, 380 U.S. 202 (1964), but *Swain* imposed a "crippling burden of proof" on defendants that effectively "immun[ized]" peremptory strikes from scrutiny. *Batson v. Kentucky*, 476 U.S. 79, 92–93 (1986) (discussing the understanding that *Swain* required proof of discriminatory strikes over numerous cases).

The Court thus recommitted itself in *Batson* to eradicating race-based strikes. It explained that race-based exclusion from juries was a "primary" evil targeted by the Fourteenth Amendment—a "most pernicious" harm extending to the defendant, the excluded juror, and the community. *Id.* at 85–88. The practice not only violates equal protection, but also subverts the petit jury, which is "central" to our criminal justice system. *Id*. at 86; *see also Flowers*, 139 S.Ct. at 2238.

Courts facing challenges to peremptory strikes under *Batson* must therefore undertake a three-step inquiry to uncover whether the prosecution's strikes were purposefully discriminatory:

First, the defendant must make a *prima facie* case that the prosecution's strikes were based on race. The defendant need not show that the strike was "more likely than not" discriminatory; the evidence need only "permit" that inference. *Johnson v. California*, 545 U.S. 162, 170 (2005).

Second, if the defendant has made a *prima facie* case, the prosecution must supply race-neutral reasons for its strikes. The prosecution satisfies this burden by tendering even "frivolous or utterly nonsensical" reasons. *Id.* at 171.

Third, the trial court must determine whether the defendant proved purposeful discrimination. It must evaluate whether the proferred reasons were legitimate or merely pretextual "in light of the arguments of the parties" and "all the relevant facts and circumstances," including:

- "statistical evidence" of the prosecutor's strikes "in the case;"
- the prosecution's "misrepresentations of the record" when defending strikes;
- the prosecution's "disparate questioning" of jurors;
- "side-by-side comparisons" of struck and not struck jurors; and
- the State's "past" use of peremptory strikes.

Flowers, 139 S.Ct. at 2243.

Batson's first two steps are thus decisional aids that inform its holistic third step. *Johnson*, 545 U.S. at 171 & n.7 ("The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim.").

This Court has "vigorously enforced and reinforced" that framework to guard against "any backsliding." *Flowers*, 139 S.Ct. at 2243. Such enforcement is particularly important in states like Georgia with a legacy of race-based peremptory strikes. *See, e.g.*, *Foster v. Chatman*, 578 U.S. 488 (2016); *State v. Gates*, 308 Ga. 238, 248, 265 n.22 (2020) (not reaching *Batson* issue but discussing the "very troubling" revelation that Georgia prosecutors had labeled and tracked prospective jurors by race in multiple cases, "sometimes labeling prospective white jurors with a 'W' and prospective African-American jurors with a 'B' or 'N'").

II. There is substantial evidence that Georgia's Supreme Court has failed to defend the constitutional principle underlying *Batson*.

A. The quantitative evidence alone suggests that unconstitutional peremptory strikes have gone undetected in Georgia.

The Georgia Supreme Court has issued 127 opinions ruling on *Batson*'s third step.[2] Appendix, Table 1. Of those cases, the Georgia high court has reversed the trial court's determination that the defendant failed to show intentional discrimination only five times. *Id.* (starred cases). In one of those five, *Ford v. State*, 262 Ga. 558 (1992), the court granted the defendant relief only after this Court unanimously rejected its use of a novel procedural bar to quash the defendant's *Batson* challenge. *Ford v. Georgia*, 498 U.S. 411 (1991).[3] The last instance was twenty-seven years ago, and that is the only case since the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") relaxed federal habeas oversight.

Of the 122 cases in this set where the defendant lost, the prosecution peremptorily struck all qualified black persons in at least twelve cases;[4] the prosecution

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[2] As discussed *infra* Part II.C, in many of these cases the court ruled on step three only implicitly, by accepting the prosecution's proffered race-neutral reasons.

[3] "The Supreme Court of Georgia's application [of the bar] does not even remotely satisfy the requirement . . . that an adequate and independent state procedural bar . . . must have been firmly established and regularly followed . . . [when] applied." *Id.* at 424 (quotation marks omitted).

[4] *See* Appendix, Table 2.

used its peremptory strikes only on qualified black persons in at least eight cases;[5] and the prosecution employed more than 70% (but less than 100%) of the peremptory strikes it used on black persons in at least twenty-three cases.[6] In many cases where the prosecution used a high percentage of strikes on black individuals, those individuals comprised a minority of the venire.

These figures understate the constitutionally suspect striking of black jurors by Georgia prosecutors for at least three reasons.

First, they are drawn primarily from Georgia Supreme Court opinions. But that court often does not discuss enough evidence to draw such conclusions about strike patterns. *See, e.g.*, *Suggs v. State*, 310 Ga. 762, 765–66 (2021); *Trigger v. State*, 275 Ga. 512, 514–15 (2002).

Second, these figures do not include cases where the prosecution employed more than 50% (but less than 70%) of the strikes it used on black individuals even though such individuals comprised a far smaller percentage of the pool. *See, e.g., Tharpe v. State*, 262 Ga. 110 (1992) (prosecutor used five of nine strikes on black jurors, who comprised 21% of the venire).[7]

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[5] *Id.*, Table 3.

[6] *Id.*, Table 4.

[7] Mr. Tharpe would later obtain a "remarkable" and unsettling affidavit from one of the white jurors who sentenced him to death. *Tharpe v. Sellers*, 583 U.S. 33, 34–35 (2018) ("[A]fter studying the Bible, I have wondered if black people even have souls.") (quoting affidavit).

Third, the figures do not include cases with suspect strike patterns where the Georgia Supreme Court ended the inquiry by holding that the defendant failed to make even a *prima facie* showing. *See, e.g.*, *Aldridge v. State*, 258 Ga. 75 (1988) (prosecution used 7 of 10 strikes to remove black jurors, who comprised less than 24% of the pool).

To be sure, these figures do not prove that Georgia courts have misapplied *Batson*. But they demonstrate that there is no shortage of *Batson* denials with suspect strike patterns. And they suggest that numerous *Batson* violations have gone undetected in Georgia.

B. There are strong reasons to suspect that Georgia courts inadequately account for strike patterns when applying *Batson*.

When a defendant has made a *prima facie* case under *Batson* and the prosecution provides race-neutral reasons for its strikes, courts still must assess the strike pattern when adjudicating whether there has been purposeful discrimination. *Flowers*, 139 S.Ct. at 2243–44, 2246; *see also Miller-El v. Cockrell*, 537 U.S. 322, 340–41 (2003) (*Miller-El I*) (it "goes without saying" that the "facts and circumstances that were adduced in support of the *prima facie* case" bear on step three).

Yet Georgia courts' *Batson* applications have not appropriately accounted for discriminatory strike patterns in at least two ways.

First, Georgia trial courts frequently do not resolve whether a defendant has made a *prima facie* case and

skip to the prosecution's reasons for the strikes.[8] Although *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion), explained that the "*prima facie* showing" becomes moot *on appeal*, nothing in this Court's jurisprudence justifies *trial courts'* bypassing step one.

Hernandez did not render optional *Batson*'s first step. *See, e.g.*, *Foster*, 578 U.S. at 499 (race-neutral reasons must be offered "if" *prima facie* showing "has been made") (quoting *Snyder v. Louisiana*, 522 U.S. 472, 476–77 (2008)). And requiring a trial-level ruling at step one makes sense: dispensing with that step masks any misunderstanding trial courts have of it; downplays the defendant's opening evidentiary salvo; and adds opacity to the analysis, which is then compounded by appellate deference. *See Mallory v. State*, 261 Ga. 625, 633 (1991) (Benham, J., concurring) (discussing "serious consequences" of trial courts' failure to decide step one).

Second, even in cases with suspect strike patterns, the Georgia Supreme Court often fails to acknowledge, much less grapple with, that evidence when adjudicating step three. *See, e.g.*, *Stacey v. State*, 292 Ga. 838, 886 (2013) (prosecution used nine of ten strikes on non-white jurors); *Hunt v. State*, 288 Ga. 794, 796–97 (2011) (all four black jurors struck).

Both errors reflect the tendency of Georgia courts to treat step one as an optional, hermetically sealed

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[8] *See Mallory v. State*, 261 Ga. 625, 633 (1991) (Benham, J., concurring) ("In many cases coming to this court with a *Batson* issue, including this case, no ruling is made by the trial court as to whether a *prima facie* case has been established under *Batson*); *see, e.g., Yorker v. State*, 266 Ga. 615, 616 (1996).

inquiry rather than a necessary, decisional aid that informs *Batson*'s holistic third step. *See Johnson*, 545 U.S. at 171 & n.7.

C. The Georgia Supreme Court has placed too much weight on *Batson*'s second step.

Batson imposes only a minimal burden on prosecutors at step two. Nearly any proferred race-neutral reason suffices, so long as it is not effectively synonymous with discrimination (*e.g.*, the "intuition" that black jurors would favor a black defendant because of their shared race). *See id.* at 171; *Batson,* 476 U.S. at 97. That is because step two's purpose is the "production of evidence" that tees up step three. *Johnson*, 545 U.S. at 171. Thus, setting aside the prosecution's failure to offer any race-neutral reason, nothing at step two can discharge the trial court's "duty" to determine whether there has been purposeful discrimination in light of *all* the facts. *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*) (quoting *Batson*); *Flowers*, 139 S.Ct. at 2243.

The Georgia Supreme Court, however, has allowed *Batson*'s second step to dominate, and even subsume, the analysis. In *Whatley v. State*, 266 Ga. 568, 570 (1996), for example, the court affirmed a *Batson* denial based only on its conclusion that "[t]he explanations given for the state's strikes were concrete, tangible and race-neutral." And in *Russell v. State*, 267 Ga. 865, 867 & n.2 (1997), the sum of the court's analysis, apart from reciting the proffered reasons, was its conclusion that for each strike the prosecution "articulated concrete, tangible, and non-racial reasons"—one being that a struck black woman's husband "was a local politician, and there was concern that in response to his

constituency there would be bias in favor of the defendant." The court nowhere analyzed *Batson*'s first or third steps.

These cases are not outliers. The Georgia Supreme Court has routinely rejected *Batson* challenges after concluding only that the prosecutor proffered race-neutral reasons. *See, e.g., Smith v. State*, 268 Ga. 860, 862 (1998) ("[T]he trial court was not clearly erroneous *in finding that the state presented race-neutral reasons for all of its jury strikes*.") (emphasis added); *Hodnett v. State*, 269 Ga. 115, 116–17 & n.2 (1998); *Scott v. State*, 280 Ga. 466, 467 (2006); *Roberts v. State,* 282 Ga. 548, 550 (2007) ("Since the record establishes the State presented reasons for the strikes that have been recognized as valid, we conclude the trial court's determination that no discriminatory pattern had been shown was not clearly erroneous.").

The Georgia Supreme Court has thus adjudicated numerous cases as though a proper *Batson* analysis amounts to checking that the prosecutor articulated race-neutral reasons for the strikes. Georgia trial courts have, in turn, muddled or failed to properly undertake step three.[9]

Allowing step two to consume the analysis might be less concerning (albeit inconsistent with precedent) if step two were given any teeth. But Georgia's Supreme

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[9] *See, e.g.*, *Coleman v. State*, 301 Ga. 720, 723–24 (2017) (concluding that trial court "implicitly engaged in [*Batson*'s] third step," despite "us[ing] the term 'race neutral' in its ultimate findings"); *Johnson v. State*, 302 Ga. 774, 780 (2018) (observing that trial court "skipped step three at trial" but holding that this error was "cured" later).

Court has adhered to this Court's doctrine that step two is minimally exacting.

For example, in *Woolfolk v. State*, 282 Ga. 139, 142 (2007), the prosecution's proffered reason for striking a black woman was that "she was not stable in her life," in part because "she did not know where her husband, from whom she had been separated for two years, was located or what type of work he did." The high court afforded "great deference" to the trial court's determination that this reason was "not so wholly fantastic as to be pretextual"—even though the reason was "only questionably support[ed]" by the record. *Id.* at 142.

Roberts v. State, 278 Ga. 541, 543 (2004), further illustrates the ease of surmounting step two. A black prospective juror was in line at a water fountain when a white prospective juror drinking from it looked at him and then spit water back into the fountain. The black juror reported the incident to a bailiff. For that reason, the prosecution struck the black juror: his "decision to report" the incident "indicated an undue attention to issues of race." *Id.* The high court affirmed denial of the defendant's *Batson* challenge based on that rationale.

The Georgia Supreme Court has even held that appellate courts may consider a race-neutral explanation when "the words used to articulate the explanation [are] first uttered by the trial court." *Toomer v. State*, 292 Ga. 49, 57 (2012).[10] *Toomer* thus

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[10] This is the court's description of the colloquy:

> The prosecutor said that he struck Juror 28 because, "[I]f I recall correctly ... I felt some pattern of sympathy ... in responding to [defense counsel's] questions and just to my

undermined one of the few cases where the court *had* found a *Batson* violation. *See Walton v. State*, 267 Ga. 713, 719–20 (1997) (plurality opinion) (refusing to consider "reasons supplied by" or "emanat[ing] from" the trial judge).

Amicus has no quarrel with step two presenting a low bar. But adhering to that standard makes sense only if courts also hew to the rest of *Batson*'s framework. It is exceedingly easy to offer a reason that passes muster under step two for striking nearly any juror. Such reasons are often thin, intertwined with race, or smack of stereotyping.[11] Sometimes they turn

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> question I felt that it's hard to articulate it was just a feeling that this particular juror ... was perhaps more sympathetic to the defense." The court then asked, "Well, what do you base that on? I mean, was it—some body motion ... ?" The prosecutor replied, "[b]ody language." The court said, "body language, facial expressions," and the prosecutor said, "Yes, sir." The court said, "Got to tell me what you're basing it on," and the prosecutor responded, "what the court just said. It was body language, facial expressions. And among the jurors that I could see it's something that as a lawyer you just have to feel and that's what I felt."

Id. at 53.

[11] *See, e.g.*, *Hall v. State*, 261 Ga. 778, 779–80 (1991) (prosecutor planned to strike a white juror whose arrest gave him "bad feelings toward the judicial system" but instead struck the final black juror because she entered the courtroom with, and sat behind, the defendant's family—even though "no one observed the juror actually talking to the defendant's family"); *Smith v. State*, 264 Ga. 449, 450 (1994) (black jurors struck for residing in public housing with gang problem because the prosecution's case "hinged upon the credibility of gang members"); *Raheem v. State*, 275 Ga. 87, 90 (2002) (prosecutor said he "had received reports" that the juror was "odd"); *Ehle v. State*, 275 Ga. 560, 563 n.15 (2002) (black

out to be patently false. *See Johnson v. State*, 302 Ga. 774, 780–81 (2018). Step two was never intended to be—and cannot function as—the sum of a proper *Batson* analysis; its dominance in Georgia is a form of "backsliding" that this Court must guard against. *Flowers*, 139 S.Ct. at 2243.

D. The Georgia Supreme Court's flawed *Batson* jurisprudence has generated questionable results.

These problems with Georgia's *Batson* jurisprudence often compound, and they are not merely formal. The following four cases illustrate how these problems generate unsatisfactory analyses and questionable results.

1. *Palmer v. State*, 271 Ga. 234 (1999).

In *Palmer*, the prosecution used all ten of its peremptory strikes, and all three of its alternate strikes, on black jurors. *See* Appellee-Attorney General's Br., 1998 WL 34187740, at *11. Less than 50% of the venire was black. *Id.*

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juror struck because she "had an unpleasant experience with the police" after she was the victim of a crime); *Taylor v. State*, 279 Ga. 706, 707–08 (2005) ("[S]he seemed odd"); *Daniels v. State*, 276 Ga. 632, 634 (2003) (each of the five struck jurors "had close friends or family members whom the State either mistreated or falsely accused of crimes"); *Hunt*, 288 Ga. at 796 (prosecutor thought it "suspicious" that black woman had no opinion when asked how she felt about her imprisoned cousin's treatment by the court system); *O'Connell v. State*, 294 Ga. 379, 380–81 (2014) (black woman was "bucking to get on the jury") (quoting prosecutor).

The Georgia Supreme Court rejected the defendant's *Batson* challenge. Despite reaching the merits of the claim, the court did not grapple with the the defendant's thorough juror-by-juror analysis, Appellant's Br., 1998 WL 34187737, at *9–19. *But see Flowers*, 139 S.Ct. at 2243. It did not discuss whether the state's proffered reasons were persuasive given the strong *prima facie* case. It did not acknowledge that the trial court never clearly ruled on whether there was a *prima facie* case. *See State of Georgia v. Palmer*, No. I-97-CR-122, (Washington Cnty. Sup. Ct.), Tr. Vol. V, 774:9–788:21. Nor did it recognize that the trial court's step three ruling did not acknowledge the strike pattern. *See id.* The high court said only that the trial court "did not abuse its discretion by finding that the reasons were race-neutral and sufficient." 271 Ga. at 237.[12]

2. *Johnson v. State*, 302 Ga. 774 (2018).

Johnson presented a cocktail of *Batson* problems. The prosecution used nine of its ten strikes on black jurors, and the trial court ruled that the defendant failed to make a *prima facie* case. Then, after the trial court elicited reasons for the strikes, the prosecutor said he struck seven of the nine "because they had family members who had been arrested or tried for criminal offenses." *Id.* at 777–78. The prosecutor had supposedly obtained those facts from conversations outside court; he "had not questioned any of these potential jurors about their family experiences with

[12] Mr. Palmer's convictions (and death sentence) were later vacated; the state had "deliberate[ly] suppress[ed]" that it paid a "key" witness against him and had "for years" "corrupt[ed] . . . the truth-seeking process." *Schofield v. Palmer*, 279 Ga. 848, 852–53 (2005).

law enforcement." *Id.* at 778. The trial court then "skipped" *Batson*'s third step and rejected the challenge based on the proffered reasons "without further argument from the parties or a finding regarding discriminatory intent." *Id.* at 780.

But the prosecutor's reasons for striking at least *four* of the black jurors were false. *Id.* at 778, 780–81. The defense proved at a hearing on a motion for new trial that the prosecution was wrong about the claims it had made about those jurors' family experiences. One juror whose son the prosecutor said had been charged with drug crimes in fact had no children. The trial court nonetheless denied the motion for new trial. *Id.*

The Georgia Supreme Court affirmed. In its view, the trial court's error in skipping step three was "cured" when that court resolved the post-trial motion because, in doing so, the court heard testimony and argument bearing on the prosecutor's credibility—over a year after the strikes. *Id.* at 780. As to the false reasons, the court called the revelation "troubling," but said it did not warrant reversal. *Id.* at 781. That the prosecution had not questioned any of the struck jurors about their (supposed) family relationships was insignificant to the court. The prosecutor "was not required to prolong voir dire and potentially embarrass the prospective jurors by interrogating them about their criminally inclined family members." *Id.* at 781; *but see Miller-El II* at 246 (prosecution's failure to meaningfully examine a topic at *voir dire* suggests invocation of the topic to justify a strike is "a sham and

a pretext for discrimination.") (quotation omitted; alteration adopted).[13]

3. *Lingo v. State*, 263 Ga. 664 (1993).

In *Lingo*, the state used all ten of its strikes against the first ten black people called; then, after two black jurors were seated, the state used its only alternate strike on the first black alternate called. *Id.* at 665.

The prosecution had struck one person based in part on his supposed "hostil[ity]." *Id.* at 667. The trial court concluded that this strike "got very close to the line, but . . . he did seem to be belligerent." *Id.* at 673 (Sears-Collins, J., dissenting) (quoting trial court). It then said: "I will be very candid about this, had there been no blacks on this jury, the court would have had real trouble with not possibly finding there might have been some type of pattern, just with this juror." *Id.* (alteration adopted).

That two black people reached the jury after the prosecution exhausted all of its strikes was, however, "irrelevant" to whether the prosecution had violated

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[13] After *Johnson* issued, the prosecutor in *State of Georgia v. Pearson*, No. 2016F-05-129 (Coffee Cnty. Sup. Ct., Feb. 2018) struck three black jurors on the same rationale. As to one, Mr. Tippins, the prosecutor said, "the district attorney's office over here has prosecuted a number of Tippins defendants here. Obviously, we don't know who—who's related to who, and the State isn't interested in putting on a jury people whose family members the State has prosecuted before." As to the other two, the prosecutor said one "might" have been, and there was "some question" about whether the other was, a felon, but that he "didn't get into it." The trial court rejected the defendant's argument that these reasons were too speculative; it denied her *Batson* motion. Jury Selection Tr. 2:5–7:17.

Batson. *Id.* at 674 (Sears-Collins, J., dissenting). Despite that legal error, which tainted the trial court's ruling by any measure, the high court afforded the trial court "great deference" and affirmed. *Id.* at 669 (quotation omitted). The high court's *Batson* analysis omitted the trial court's error and the dissent's argument about it. Nor did the high court confront the fact that the trial court's finding that the black juror was "belligerent" was itself plainly unreasonable. *Id.* at 670–74 & n.7 (Sears-Collins, J., dissenting).

4. *Sears v. State*, 268 Ga. 759 (1997).

In *Sears*, the prosecution used the first four of the six peremptory strikes it exercised against black jurors, who comprised approximately 20% of the pool. *Id.* at 763–64; Appellant's Br., 1997 WL 33631086, at *125 & n.44. The Georgia Supreme Court affirmed rejection of the defendant's *Batson* challenge. In doing so, it omitted that the prosecution twice misrepresented the record to justify its strikes.

First, the prosecution struck one black juror because he "stated very emphatically that he doesn't trust—as a matter of fact, the words he used—[the juror] uses—he has no trust and is concerned about attorneys in general." Appellee's Br., 1997 WL 33631087, at *121 (quoting transcript). But that assertion of what the juror had said was false; the juror harbored only a healthy skepticism for attorneys based on a negative experience with a particular attorney. *See id.* at *119–21.

Indeed, the state acknowledged on appeal that the trial prosecutor misrepresented the record, defending only the gist of his explanation. *See id.* at 122 ("Even though the prosecutor may have not accurately quoted

[the juror] . . . ."). The Georgia Supreme Court did not mention this misrepresentation.

Second, the prosecution struck a black woman with a 10-month old child. *Sears*, 268 Ga. at 763. To justify the strike the prosecutor told the trial court that "[t]he child would have to go on a bottle, and she has not started that." Appellee's Br. at *126 (quoting transcript). That was false. The juror testified during *voir dire* that her daughter was "bottle-fed during the day." *Id.* at *125–26. On appeal, the State was tied in knots by this misstatement: "The record supports the prosecutor's contention that [the juror] had not been apart from her child nor bottle-fed her child albeit only for the child's bedtime feeding." Appellee's Br. at *127. The Georgia Supreme Court did not mention this misrepresentation either.

Every misstatement of the record does not yield a successful *Batson* challenge. But *Sears*'s analysis was unacceptable. In addition to failing to acknowledge these misrepresentations, it did not mention the defendant's juror-by-juror analysis, whether the prosecution's proffered reasons were undermined by its questioning, or the persuasiveness of the prosecution's explanations given the strike pattern. *See* Appellant's Br. at *125–35. *Batson* requires more than perfunctory review and acceptance of proffered reasons.

E. Georgia courts have failed to properly address and remedy even the *Batson* problems they have detected.

Even when Georgia courts have detected *Batson* problems, they have failed to remedy the violations and understand the consequences of their rulings.

For example, in *Lewis v. State*, 262 Ga. 679, 679 (1993) ("*Lewis I*"), the prosecution exercised seven of eight peremptory strikes on black individuals. The jury was composed of eleven white persons and one black person. When the defendant challenged two of the strikes on black jurors, the prosecution's articulated reason was that the victim's widow, a black woman, did not want them on the jury—but it "never enunciated" why that was so. *Id.* The Georgia Supreme Court (after dodging step one) held that the prosecution "does not fulfill its burden" under step two when its reason is "deference to the wishes" of a third party. *Id.* at 680.

But rather than reverse the judgment because the prosecution failed to satisfy step two, the court remanded—giving the prosecution another chance to "fully explain" its strikes. *Id.* On remand, the victim's widow attempted to explain why eighteen months earlier she had wanted the black jurors struck. As to one, she "could not recall" the reason. *Lewis v. State*, 264 Ga. 101, 103 (1994) ("*Lewis II*"). She testified that she might have to see the juror again to "actually remember," that he "may have looked familiar for some reason," that she "may have seen him in her job or . . . something similar," but that it "had nothing to do with the fact that he was black." *Id.* at 103 (quoting widow) (alterations adopted).

Based on that testimony, the trial court again rejected the defendant's *Batson* challenge. The Georgia Supreme Court affirmed. *Id.* at 103. That ruling was absurd. As the dissenting justices observed, the widow "offered no explanation within the meaning of [*Batson*]." *Id.* at 104 (Sears-Collins, J., dissenting). "[She] did not really remember why she had recommended that the juror be stricken; she was

merely casting about for *possible* reasons." *Id.* A memory lapse is not a race-neutral reason; it certainly is not one that should have carried the day given the evidence adduced at step one.

Georgia trial courts have, moreover, failed to grasp that upon finding a *Batson* violation they (i) have necessarily found purposeful discrimination, *Hernandez*, 500 U.S. at 364; and (ii) must remedy the violation by reseating the juror or otherwise vindicating the constitutional interests at stake, including the juror's interest in participating in civic life, *see Batson*, 476 U.S. at 99, n.24; *Powers v. Ohio*, 499 U.S. 400, 406–10 (1991).

In *Jackson v. State*, 291 Ga. 25, 26 (2012), the trial court "granted [the defendant's] *Batson* challenge in part," and "seat[ed]" one of the struck jurors. But then it said it was "not making a finding that the State's strikes were racially motivated." *Id.* The Georgia Supreme Court rejected the defendant's *Batson* challenge as to another juror, affording "great deference" to the trial court, despite that court's misunderstanding of *Batson*.

And in *Kinlaw v. State*, 893 S.E.2d 712, 720 (2023), the trial court found that two of the prosecutor's strikes violated *Batson*. To remedy the violations, the trial court re-seated the first unconstitutionally struck juror, but then ruled that the parties would "redo" the strike process beginning with the next juror. *Id.* The prosecution *again* struck the second unconstitutionally struck juror. Although the defendant's counsel renewed the *Batson* challenge, the Georgia Supreme Court concluded that the defendant acquiesced to the jury's composition based on other comments his

attorney made. *Id.* at 720–21. It "express[ed] no opinion" on the propriety of the trial court's giving the prosecutor a mulligan. *Id.* at 721 n.11.

Such do-overs, at minimum, reduce *Batson*'s efficacy and undermine the reasons for deferring to trial courts. *See Miller-El II* at 252 (the prosecutor "simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives"); *see also Flowers*, 139 S.Ct. at 2244.

III. This case warrants review and reversal.

Warren King's case presents *Batson* errors so glaring that summary reversal is warranted. However accomplished, reversal would provide valuable guidance to Georgia courts and instruct lower federal courts that even under AEDPA they must meaningfully review *Batson* challenges. *Amicus* has been unable to locate any case since AEDPA's enactment where either the Court of Appeals or any district court within the Eleventh Circuit has granted habeas relief on a Georgia *Batson* claim.

Further, this case presents an excellent opportunity for the Court's intervention because the *Batson* errors here are symptomatic of the problems prevalent in Georgia:

First, the Georgia Supreme Court nowhere acknowledged the prosecution's strike pattern. No reasonable reader of the opinion would conclude that the court considered the evidence of discrimination adduced at step one. That evidence was potent: the prosecutor struck 87.5% of qualified black jurors; only 8.8% of qualified white jurors; all black women; and

zero white men, even though nineteen were present in the forty-two person pool. Pet. App. 9a.

Second, the Georgia Supreme Court nowhere acknowledged that the prosecutor's unconstitutional strike of Alderman was a factor—indeed a critical factor—in assessing Mr. King's other *Batson* challenges. The court nowhere appreciated that the trial court found that the prosecutor had been caught attempting to violate the Constitution by striking a black juror based on race, in part by misrepresenting the juror's *voir dire* testimony. *See* Pet. 11, 19–20. This would not be the first time a Georgia court failed to understand that a *Batson* violation necessarily means the prosecution engaged in purposeful discrimination. *See Jackson*, 291 Ga. at 26.

Third, the Georgia Supreme Court nowhere acknowledged the prosecutor's rants, which suggest he saw *voir dire* as a struggle in which each side should be permitted to, and will, strike members of their disfavored race to gain advantage. *See* Pet. App. 44a–45a (prosecutor arguing that defendants should not be heard to complain until they first show that their counsels' hands are "absolutely" clean); *but see Flowers*, 139 S.Ct. at 2242 (likening the notion that race discrimination against jurors can be cured by race discrimination against other jurors to the logic of *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The Georgia Supreme Court's analysis in this case bears more resemblance to a quick tour through the prosecution's proffered reasons than the inquiry *Batson* demands.

Fourth, the Georgia Supreme Court cast aside the prosecutor's misrepresentation that Sarah McCall's husband said that she opposed the death penalty. *See*

Pet. 22–23. This "mistake" did not "show" that the explanation for striking McCall was mere pretext. Pet. App. 192a–193a. Perhaps so. But such a misstatement, when coupled with other evidence of unconstitutional strikes, including the prosecutor's misstatement of the record to justify the Alderman strike, was strong evidence of discrimination. *See* Pet. 11, 19–27. This Court should reiterate that, where there is a weighty *prima facie* case, strikes predicated on demonstrably false reasons are strong indicators of *Batson* violations—particularly when other red flags exist. *See Flowers*, 139 S.Ct. at 2250.

CONCLUSION

The petition provides an opportunity for the Court to review Georgia courts' longstanding failure to adhere to *Batson*'s central teachings and analytic framework. The Court should grant review and reverse.

Respectfully submitted,

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APPENDIX

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TABLE 1

List of 127 Georgia Supreme Court opinions ruling on *Batson*'s third step. Asterisks denote cases where the defendant prevailed on *Batson*'s third step.

No.	Citation
1.	*Gamble v. State*, 257 Ga. 325 (1987)*
2.	*Henderson v. State,* 257 Ga. 434 (1987)
3.	*Mincey v. State*, 257 Ga. 500 (1987)
4.	*Lee v. State*, 258 Ga. 481 (1988)
5.	*Smith v. State*, 258 Ga. 676 (1988)
6.	*Foster v. State*, 258 Ga. 736 (1988)
7.	*Isaacs v. State*, 259 Ga. 717 (1989)
8.	*Hightower v. State*, 259 Ga. 770 (1989)
9.	*Pitts v. State*, 259 Ga. 745 (1989)
10.	*Batton v. State*, 260 Ga. 127 (1990)
11.	*Stripling v. State*, 261 Ga. 1 (1991)
12.	*Hayes v. State*, 261 Ga. 439 (1991)
13.	*Isom v. State*, 261 Ga. 596 (1991)
14.	*Hall v. State*, 261 Ga. 778 (1991)

No.	Citation
15.	*Tharpe v. State*, 262 Ga. 110 (1992)
16.	*Roker v. State*, 262 Ga. 220 (1992)
17.	*Taylor v. State*, 262 Ga. 429 (1992)
18.	*George v. State*, 262 Ga. 436 (1992)
19.	*Ford v. State*, 262 Ga. 558 (1992)*
20.	*Congdon v. State*, 262 Ga. 683 (1993)*
21.	*Williams v. State*, 262 Ga. 732 (1993)*
22.	*Davis v. State*, 263 Ga. 5 (1993)
23.	*Moore v. State*, 263 Ga. 11 (1993)
24.	*Hill v. State*, 263 Ga. 37 (1993)
25.	*Osborne v. State*, 263 Ga. 214 (1993)
26.	*Berry v. State*, 263 Ga. 909 (1993)
27.	*Caldwell v. State*, 263 Ga. 560 (1993)
28.	*Lingo v. State*, 263 Ga. 664 (1993)
29.	*Smiley v. State*, 263 Ga. 716 (1994)
30.	*Cost v. State*, 263 Ga. 720 (1994)
31.	*Zant v. Moon*, 264 Ga. 93 (1994)

No.	Citation
32.	*Lewis v. State*, 264 Ga. 101 (1994)
33.	*Mejia v. State*, 264 Ga. 230 (1994)
34.	*Smith v. State*, 264 Ga. 449 (1994)
35.	*Henry v. State*, 265 Ga. 732 (1995)
36.	*Tedder v. State*, 265 Ga. 900 (1995)
37.	*Wellons v. State*, 266 Ga. 77 (1995)
38.	*Trice v. State*, 266 Ga. 102 (1995)
39.	*Greene v. State*, 266 Ga. 439 (1996)
40.	*Whatley v. State*, 266 Ga. 568 (1996)
41.	*Yorker v. State*, 266 Ga. 615 (1996)
42.	*Johnson v. State*, 266 Ga. 775 (1996)
43.	*Turner v. State*, 267 Ga. 149 (1996)
44.	*Berry v. State*, 267 Ga. 605 (1997)
45.	*Barber v. State*, 267 Ga. 521 (1997)
46.	*Walton v. State*, 267 Ga. 713 (1997)*
47.	*Russell v. State*, 267 Ga. 865 (1997)
48.	*Freeman v. State*, 268 Ga. 181 (1997)

No.	Citation
49.	*Crowder v. State*, 268 Ga. 517 (1997)
50.	*Berry v. State*, 268 Ga. 437 (1997)
51.	*Sears v. State*, 268 Ga. 759 (1997)
52.	*Smith v. State*, 268 Ga. 860 (1998)
53.	*Jenkins v. State*, 269 Ga. 282 (1998)
54.	*Hodnett v. State*, 269 Ga. 115 (1998)
55.	*Barnes v. State*, 269 Ga. 345 (1998)
56.	*Pye v. State*, 269 Ga. 779 (1998)
57.	*Slade v. State*, 270 Ga. 305 (1998)
58.	*Speed v. State*, 270 Ga. 688 (1999)
59.	*Palmer v. State*, 271 Ga. 234 (1999)
60.	*Williams v. State*, 271 Ga. 323 (1999)
61.	*Walker v. State*, 271 Ga. 328 (1999)
62.	*Drane v. State*, 271 Ga. 849 (1999)
63.	*Livingston v. State*, 271 Ga. 714 (1999)
64.	*Holsey v. State*, 271 Ga. 856 (1999)
65.	*Foster v. State*, 272 Ga. 69 (2000)

No.	Citation
66.	*Williams v. State*, 272 Ga. 335 (2000)
67.	*Pickren v. State*, 272 Ga. 421 (2000)
68.	*King v. State*, 273 Ga. 258 (2000)
69.	*Alexander v. State*, 273 Ga. 311 (2001)
70.	*Dukes v. State*, 273 Ga. 890 (2001)
71.	*Pace v. State*, 274 Ga. 69 (2001)
72.	*Thomas v. State*, 274 Ga. 156 (2001)
73.	*Lance v. State*, 275 Ga. 11 (2002)
74.	*Raheem v. State*, 275 Ga. 87 (2002)
75.	*Brannan v. State*, 275 Ga. 70 (2002)
76.	*Trigger v. State*, 275 Ga. 512 (2002)
77.	*Ehle v. State*, 275 Ga. 560 (2002)
78.	*Spickler v. State*, 276 Ga. 164 (2003)
79.	*Sallie v. State*, 276 Ga. 506 (2003)
80.	*Chinn v. State*, 276 Ga. 387 (2003)
81.	*Daniels v. State*, 276 Ga. 632 (2003)
82.	*Oliver v. State*, 276 Ga. 665 (2003)

No.	Citation
83.	*Ivey v. State*, 277 Ga. 875 (2004)
84.	*Roberts v. State*, 278 Ga. 541 (2004)
85.	*Wicks v. State*, 278 Ga. 550 (2004)
86.	*Brown v. State*, 278 Ga. 724 (2004)
87.	*Rakestrau v. State*, 278 Ga. 872 (2005)
88.	*Flanders v. State*, 279 Ga. 35 (2005)
89.	*Reed v. State*, 279 Ga. 81 (2005)
90.	*Taylor v. State*, 279 Ga. 706 (2005)
91.	*Scott v. State*, 280 Ga. 466 (2006)
92.	*Walker v. State*, 281 Ga. 521 (2007)
93.	*Chandler v. State*, 281 Ga. 712 (2007)
94.	*Woolfolk v. State*, 282 Ga. 139 (2007)
95.	*Roberts v. State*, 282 Ga. 548 (2007)
96.	*Henley v. State*, 285 Ga. 500 (2009)
97.	*Blackshear v. State*, 285 Ga. 619 (2009)
98.	*Arrington v. State*, 286 Ga. 335 (2009)
99.	*Stovall v. State*, 287 Ga. 415 (2010)

No.	Citation
100.	*Willis v. State*, 287 Ga. 703 (2010)
101.	*Guzman v. State*, 287 Ga. 759 (2010)
102.	*Demery v. State*, 287 Ga. 805 (2010)
103.	*Younger v. State*, 288 Ga. 195 (2010)
104.	*Hunt v. State*, 288 Ga. 794 (2011)
105.	*Bryant v. State*, 288 Ga. 876 (2011)
106.	*Ledford v. State*, 289 Ga. 70 (2011)
107.	*Watkins v. State*, 289 Ga. 359 (2011)
108.	*Jackson v. State*, 291 Ga. 25 (2012)
109.	*Wilkins v. State*, 291 Ga. 483 (2012)
110.	*Toomer v. State*, 292 Ga. 49 (2012)
111.	*Stacey v. State*, 292 Ga. 838 (2013)
112.	*Edenfield v. State*, 293 Ga. 370 (2013)
113.	*Bester v. State*, 294 Ga. 195 (2013)
114.	*O'Connell v. State*, 294 Ga. 379 (2014)
115.	*Woodall v. State*, 294 Ga. 624 (2014)
116.	*Heard v. State*, 295 Ga. 559 (2014)

No.	Citation
117.	*O'Connell v. State*, 297 Ga. 410 (2015)
118.	*Ford v. State*, 298 Ga. 560 (2016)
119.	*Coleman v. State*, 301 Ga. 720 (2017)
120.	*Brown v. State*, 301 Ga. 728 (2017)
121.	*Johnson v. State*, 302 Ga. 774 (2018)
122.	*Taylor v. State*, 303 Ga. 624 (2018)
123.	*Lord v. State*, 304 Ga. 532 (2018)
124.	*Myrick v. State*, 306 Ga. 894 (2019)
125.	*Thomas v. State*, 309 Ga. 488 (2020)
126.	*Suggs v. State*, 310 Ga. 762 (2021)
127.	*Lofton v. State*, 310 Ga. 770 (2021)

TABLE 2

List of twelve cases from Table 1 where the defendant's *Batson* challenge failed, and the prosecution peremptorily struck all qualified black prospective jurors.

No.	Citation
1.	*Henderson v. State*, 257 Ga. 434 (1987)
2.	*Foster v. State*, 258 Ga. 736 (1988)
3.	*Isom v. State*, 261 Ga. 596 (1991)
4.	*Hall v. State*, 261 Ga. 778 (1991)
5.	*Zant v. Moon*, 264 Ga. 93 (1994)
6.	*Oliver v. State*, 276 Ga. 665 (2003)
7.	*Flanders v. State*, 279 Ga. 35 (2005)
8.	*Stovall v. State*, 287 Ga. 415 (2010)
9.	*Willis v. State*, 287 Ga. 703 (2010)
10.	*Younger v. State*, 288 Ga. 195 (2010)
11.	*Hunt v. State*, 288 Ga. 794 (2011)
12.	*Ledford v. State*, 289 Ga. 70 (2011)

TABLE 3

List of eight cases from Table 1 where the defendant's *Batson* challenge failed, and the prosecution used its peremptory strikes only on qualified black prospective jurors.

No.	Citation
1.	*Lingo v. State*, 263 Ga. 664 (1993) (10 strikes on 10 black jurors)
2.	*Smith v. State*, 264 Ga. 449 (1994) (9 on 9)
3.	*Hodnett v. State*, 269 Ga. 115 (1998) (6 on 6)
4.	*Slade v. State*, 270 Ga. 305 (1998) (4 on 4)
5.	*Palmer v. State*, 271 Ga. 234 (1999) (10 on 10)
6.	*Rakestrau v. State*, 278 Ga. 872 (2005) (6 on 6)
7.	*Taylor v. State*, 279 Ga. 706 (2005) (5 on 5)
8.	*Lord v. State,* 304 Ga. 532 (2018) (2 on 2)

TABLE 4

List of twenty-three cases from Table 1 where the defendant's *Batson* challenge failed, and the prosecution employed more than 70% (but less than 100%) of the peremptory strikes it used on qualified black prospective jurors.

No.	Citation
1.	*Mincey v. State*, 257 Ga. 500 (1987) (70%)
2.	*Smith v. State*, 258 Ga. 676 (1988) (90%)
3.	*Hightower v. State*, 259 Ga. 770 (1989) (86%)
4.	*Hayes v. State*, 261 Ga. 439 (1993) (70% or greater)
5.	*George v. State*, 262 Ga. 436 (1992) (90%)
6.	*Davis v. State*, 263 Ga. 5 (1993) (80%)
7.	*Berry v. State*, 263 Ga. 909 (1993) (90%)
8.	*Caldwell v. State*, 263 Ga. 560 (1993) (90%)

No.	Citation
9.	*Lewis v. State*, 264 Ga. 101 (1994) (88%)
10.	*Whatley v. State*, 266 Ga. 568 (1996) (80%)
11.	*Turner v. State*, 267 Ga. 149 (1996) (78%)
12.	*Sears v. State*, 268 Ga. 759 (1997) (71%)
13.	*Barnes v. State*, 269 Ga. 345 (1998) (71%)
14.	*Walker v. State*, 271 Ga. 328 (1999) (83%)
15.	*Brannan v. State*, 275 Ga. 70 (2002) (70%)
16.	*Chinn v. State*, 276 Ga. 387 (2003) (80%)
17.	*Daniels v. State*, 276 Ga. 632 (2003) (83% or greater)
18.	*Wicks v. State*, 278 Ga. 550 (2004) (80%)
19.	*Stacey v. State*, 292 Ga. 838 (2013) (80–90%)

No.	Citation
20.	*Johnson v. State*, 302 Ga. 774 (2018) (90%)
21.	*Myrick v. State*, 306 Ga. 894 (2019) (80%)
22.	*Thomas v. State*, 309 Ga. 488 (2020) (78%)
23.	*Lofton v. State*, 310 Ga. 770 (2021) (78%)