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

REPLY FOR PETITIONER

ANNA M. ARCENEAUX
VICTORIA OLENDER HELLSTROM
MARCIA A. WIDDER
GEORGIA RESOURCE CENTER
104 Marietta Street NW
Suite 260
Atlanta, GA 30303
(404) 222-9202

MATTHEW S. HELLMAN
Counsel of Record
MARY E. MARSHALL
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3190

Counsel for Petitioner

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This is a case where the prosecutor struck 87.5% of the black jurors. It is a case where the prosecutor was found to have discriminated during jury selection. And it is a case where the prosecutor, when confronted with that discrimination, ranted against *Batson* and the authority of the judiciary to enforce it. Those facts are all but absent from the brief in opposition. Even the divided panel below acknowledged that this record is "troubling." Pet. App. 20a. Respondent barely acknowledges it exists.

Respondent instead devotes much of his brief to variations on the refrain that this is a federal habeas case subject to deferential review. King acknowledges that standard, Pet 16, but deference is not blind. Where it would be unreasonable not to find clear error, habeas relief is warranted, and this Court has accordingly granted *Batson* relief on habeas review where the record supports it. Respondent's definition of deference would nullify *Batson* on federal habeas review.

Indeed, Respondent's repeated assertion that "inferences" must be taken in the prosecution's favor is particularly misplaced because this is the unusual case in which the record shows express evidence of discrimination. The prosecutor's strike rate, adjudicated discrimination, and attack on *Batson* speak for themselves. So do the prosecutor's factually inaccurate reasons for striking jurors, his disparate treatment of similarly-situated black and white jurors, and the flimsy grounds on which he justified his strikes. The prosecutor struck every black juror who knew of King's family; yet he struck no white juror who knew King personally. The

prosecutor struck every black juror who had a leadership position in church; yet he accepted 14 white jurors who did. Respondent calls for deference to the Georgia Supreme Court, but even assuming that court silently assessed what it never mentioned, its determination was unreasonable in the face of a record that so clearly evinces discrimination.

Review is equally warranted because the Georgia Supreme Court unreasonably applied *Batson*. Respondent urges that a state court need not mention every conceivable consideration to comply with *Batson*'s mandate to evaluate all the relevant facts and circumstances. Petitioner agrees. But a state court cannot do what the Georgia Supreme Court did here: address only those facts and circumstances that counsel against a *Batson* violation while omitting any consideration of the highly significant facts that cut in the other direction.

In finding no *Batson* violation, the Georgia Supreme Court added to what has become a nearly 30-year unbroken streak of rejecting *Batson* claims. *See* Br. *Amicus Curiae* of Georgia Association of Criminal Defense Lawyers 6-7 ("GACDL Br."). This case should not have contributed to that troubling streak. The Court should grant the petition and reverse.

1. Respondent's lead contention is that the petition should be denied because it is "factbound," BIO 1, and thus its habeas posture requires this Court to defer to the Georgia Supreme Court's determinations in all circumstances. Respondent is wrong on both counts.

As to the "factbound" nature of the petition, this Court's *Batson* jurisprudence over the last two decades consists almost entirely of cases with egregious facts like this one. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), *Foster v. Chatman*, 578 U.S. 488 (2016), *Synder v. Louisiana*, 552 U.S. 472 (2008), and *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), all called upon the Court to address evidence of discrimination, just as this petition does. Where the facts of a *Batson* claim warrant review, this Court has granted that review.

Nor does the habeas posture of this case make it inappropriate for this Court's consideration on the merits. Respondent offers this Court a false syllogism that *Batson* cases are about credibility, and credibility cannot be assessed on habeas review, and thus this Court has no basis to evaluate the decision below. This Court's *Batson* jurisprudence proves otherwise. Federal habeas courts cannot merely "accept[] without question the state court's evaluation of the demeanor of the prosecutors and jurors." *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2002) ("*Miller-El I*").

Instead, on § 2254(d)(2) review of a *Batson* claim, the question is whether it was unreasonable for the state appellate court not to have found clear error. That "standard is demanding but not insatiable." *Miller-El II*, 545 U.S. at 240. "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El I*, 537 U.S. at 340; *see also id.* at 350 (Scalia, J., concurring) (agreeing that deference is not warranted where there is "clear and

convincing evidence to the contrary"). Section 2254 insulates reasonable state court *Batson* determinations but directs that relief should be granted where a state court's analysis was unreasonable and its decision wrong. Respondent's characterization of the habeas standard effectively excises *Batson* from the purview of habeas review.

2. On the merits, the petition presents "categories of evidence," *Flowers*, 139 S. Ct. at 2244, equivalent to those in other cases where this Court has granted *Batson* relief. Respondent does not meaningfully address that evidence.

To begin, like the Georgia Supreme Court, Respondent does not even mention, let alone attempt to explain, the prosecutor's 87.5% strike rate for black jurors, a percentage almost ten times higher than his strike rate for white jurors. Pet 22. This Court has repeatedly cited strike rates in that range as evidence of discriminatory intent. *Flowers*, 139 S. Ct. at 2235; *Miller-El I*, 537 U.S. at 324.

It was the prosecutor's grossly disproportionate strike rate that led the trial court to find a prima facie *Batson* case, and ultimately to determine that the prosecutor discriminated in his first strike of a black person, against Jacqueline Alderman. Pet. App. 10a-11a. Prior discrimination or, in this case, contemporaneous discrimination is highly probative evidence of discrimination. Contrary to Respondent's contention, BIO 6, Alderman's race and sex were an express part of the prosecutor's stated rationale. The prosecutor explained his strike by telling the trial court that his "*main reason is that this lady is a black female*, she is

from [King's hometown of] Surrency, [and] she knows the defendant and his family." D.16-28:21 (emphasis added). The trial court found that the latter part of that rationale—knowing King from his hometown—was incorrect and pretextual.

Equally misguided is Respondent's contention that the adjudicated *Batson* violation in this case is less compelling proof than the prosecutor's past violations in *Flowers* because "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*." BIO 33 (Respondent's emphasis). *Batson* is not a mathematical formula, but proven discrimination in the very trial at issue is surely on par with a prosecutor's past instances of discrimination.

Only at the very end of his brief does Respondent engage with the prosecutor's rants against *Batson*. Quoting the panel majority below, Respondent asserts that the prosecutor merely was "attacking" the *Batson* decision, rather than signaling any intention to discriminate. BIO 35. But the prosecutor "attack[ed]" *Batson* after being challenged for striking black and female jurors at a grossly disproportionate rate, and after the court found him to have discriminated in striking one black female juror. The prosecutor was expressly arguing that the *Batson* decision was keeping him from making a strike that the trial court found discriminatory. While the prosecutor's rants may have been "futile," they reflected his disdain for the *Batson* decision and his discriminatory proclivities. *Id.* "Those rants were not mere complaints or objections about a

trial judge's ruling [the prosecutor] didn't like but instead rants demonstrating his hostility to *Batson* as a rule of law that he had to follow." Pet. App. 55a. (Wilson, J., dissenting).

Moreover, it was not just the content of the prosecutor's rant, but the "anger[]" with which he delivered it. Pet. App. 147a. "[T]he best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Snyder*, 552 U.S. at 477. The prosecution's demeanor here—first when asked to justify his strikes, and then again after the Alderman determination—was nothing but hostile towards the notion that his peremptory strikes should be exercised without race or gender discrimination.

Taken together, the prosecutor's grossly disproportionate strike rate, adjudicated discrimination, and hostility towards *Batson* provide powerful evidence of discriminatory intent.

3. Much like the Georgia Supreme Court's decision, Respondent does not take account of any of the above in parsing the prosecutor's specific justifications for his contested strikes. That of course is contrary to this Court's *Batson* teachings. *Flowers*, 139 S. Ct. at 2251. And those justifications are pretextual even on their own terms.

McCall. Respondent's attempt to justify the prosecution's strike of Sarah McCall fails. To begin, the prosecutor's supposedly dispositive rationale was objectively false. He stated, I did not make up my mind about Ms. McCall until after we voir-dired her husband … [who thought] she is against the death penalty or

would not consider it equally." D.16-28:24. But McCall's husband testified that he had never discussed the death penalty with his wife and did not know her views. D.16-20:73-74. Defense counsel brought the prosecutor's false statement to the trial court's attention, D.1-28:39, yet the trial court, without explanation, rejected the *Batson* challenge to the strike of McCall.

Respondent contends that the Georgia Supreme Court appropriately labeled the prosecutor's false statement a mere mistake, but when "a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent," *Flowers*, 139 S. Ct. at 2250, particularly when that prosecutor was striking black jurors at a rate ten times higher than white jurors. Nor was it his only misstatement in making strikes. Pet. 11, 25-27 (recounting false statements regarding Alderman, Ford, and McTier).

Respondent contends the prosecutor was justified in striking McCall due to her supposed hesitancy about imposing the death penalty. BIO 17-18. But McCall expressly told the judge that "I really do believe in some cases that the death penalty should be given." D.17-1:44, 46. McCall was thus no differently situated than the white juror, Martha Vaughn, struck by the defense, who told the trial court that "it may be hard [to vote for the death penalty] but I think I can."[1] D:17-1:18.

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[1] Respondent states that King did not identify Vaughn as a comparator to McCall in the Batson hearing at trial or on direct appeal. But he does not dispute that King argued McCall was

Respondent urges that Vaughn's statement that "I think I can" was less concerning than McCall's statement that "I think I could" because McCall said she would "lean toward … other choices before [she] would consider the death penalty." BIO 18. But McCall made that statement only because the prosecutor pressed her with a series of follow-up questions about her religious beliefs (and McCall again reaffirmed that she could impose the death penalty). D.17-1:50-51. The prosecutor asked no such questions of Vaughn to probe why it would "be hard" for her to vote for the death penalty. "[T]he failure to ask [about a purported ground for the strike] undermines the persuasiveness of the claimed concern." *Miller-El II*, 545 U.S. at 250 n.8.

Burkett. Respondent argues that Burkett's strike was reasonable because the prosecutor contended that Burkett was "familiar[] with King's family" and because, as a minister in her church, she must have "a particular point of view about trying to forgive people and look to the best in them." Pet 21, 23; D. 16-28:27. Neither rationale withstands scrutiny.

As to "familiarity," Burkett had stated in response to the trial court's questioning only that she "knew" King's "family." D.16-22:70-71. The prosecutor made no attempt to probe the nature of her "knowing" the family, or King himself. Several white jurors not only knew of King's family, but also knew King himself, yet the prosecutor struck none of them. Pet. App. 56a (Wilson, J., dissenting). As the dissent below put it, "[n]o white

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improperly struck in both courts. King was not required to identify an exact comparator to make that argument. *Miller-El II*, 545 U.S. at 247 n.2.

jurors who were familiar with King were struck, but all black jurors who were familiar with King were struck." *Id.*

Respondent contends that Burkett's role as a minister differentiates her, BIO 22-23, but, in what is the common theme of the prosecutor's strike patterns, the prosecutor did not strike fourteen white jurors who had leadership roles in church. Pet. App. 43a (Wilson, J., dissenting); *Miller-El II*, 545 U.S. at 247 n.6. Respondent contends that a ministerial position is different, but the prosecutor did not strike white juror, Lightsey, who also identified himself as a minister during voir dire. And it was the defense, not the prosecutor, that elicited his leadership role. Respondent maintains that Lightsey was unlikely to have been selected for the jury due to his position on the list, but Lightsey easily could have been empaneled, and would have been, had the defense used two more of its remaining peremptory strikes (which the prosecutor had no way of knowing in advance). *Cf. Foster*, 578 U.S. at 504 (prosecution's strike decisions indicated who they were uncomfortable with because defense might not strike remaining jurors). Again, the prosecutor employed two different standards: for black jurors, a leadership role in the church meant automatic exclusion, whereas white church leaders could serve. The prosecutor's "acceptance" of more than a dozen white jurors with church positions "necessarily informs [the] assessment of the [prosecution's] intent in striking similarly situated black prospective jurors such as" Burkett. *Flowers*, 139 S. Ct. at 2249.

Gillis. Respondent maintains that Gwen Gillis was permissibly struck because of her relationship with

King's family. BIO 24. But several accepted white jurors personally knew King. Respondent claims that Gillis was different because none of those jurors stated they had a "relationship" with King. BIO 26. But neither did Gillis. She had never met King, and did not know "the kid's name." D.16-25:6. When questioned about her relationship with King's "auntie," Gillis clarified that she knew that "she was a neighbor" and that she did not really "know her, know her." D.16-25:3.

Respondent also maintains that the prosecutor struck Gillis to reach a more favorable black juror. BIO 26. But the prosecutor never gave that reason for striking Gillis. His proffered reason was that "she would have lived in the neighborhood where both of the co-defendants' family lived, and I was not willing to accept her as a juror. I don't think she can be fair in that aspect." D.16-28: 27-28. The prosecutor tried to justify his strike of Gillis by pointing out that he accepted another prospective black alternate. D.16-28:27-28. But he could not have struck both because they were in the same cluster, 14-21:60, and accepting one alternate black juror does not mitigate the prosecutor's discriminatory intent in striking Gillis.

Ford. Respondent's attempt to justify the strike of Ford also falls short. The prosecutor's first proffered reason for striking Ford was that jury service would impose a hardship because she was a single mother who would have no one to care for her children. But Ford's children were 17 and 20, and she stated that they could look after themselves. D 16-19:14-15. Respondent calls for deference to the Georgia Supreme Court's assertion that the prosecutor reasonably struck Ford because she

said jury service would be a financial hardship because she would not get paid if she did not work. But that was not the prosecutor's proffered reason and deserves no consideration. The *Batson* inquiry looks to the prosecutor's stated reasons for striking, not another reason a reviewing court can imagine. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

Respondent also maintains that the prosecutor's strike of Ford was not pretextual because she was the only person who said she "enjoyed" working with people with intellectual disabilities. BIO 27. But Ford was the only one who was *asked* whether she enjoyed that work—by the defense. The prosecutor's complete lack of interest in Ford—he did not ask her a single question—belies his concerns about her former part-time special education job. *Miller-El II*, 545 U.S. at 246 (lack of questioning on purported race-neutral reason can be evidence of discriminatory intent).

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For all the above reasons, the Georgia Supreme Court made an unreasonable determination in rejecting King's *Batson* claim.

4. Review is also warranted under 28 U.S.C. § 2254(d)(1) because the Georgia Supreme Court unreasonably applied this Court's *Batson* case law. Respondent maintains that "[w]hile the [Georgia Supreme Court] may not have explicitly mentioned every minute aspect of every fact or argument …, that hardly means [it] failed to consider the whole record." BIO 31. But the Georgia Supreme Court did not just fail to consider "every minute aspect of every fact"—it

wholly ignored the evidence that bore directly on the prosecutor's motivations and credibility, while explaining away the prosecutor's misrepresentations of the record. *Id.* King does not contend that an appellate court must set out all its reasoning to reasonably apply this Court's precedents. But when an appellate court justifies a ruling by invoking only those parts of the record that support an affirmance while remaining silent about vast swaths of the record that show otherwise, it has not reasonably applied *Batson*.

Review is particularly warranted because this decision is part of the Georgia Supreme Court's decades-long pattern of refusing to find *Batson* violations, or indeed even to address significant evidence of a violation. GACDL Br. 6-7. The Georgia Supreme Court "routinely rejects *Batson* challenges after concluding only that the prosecutor proffered race neutral reasons." *Id.* at 11. This is exactly what happened here: Appellate review involved only endorsing as race neutral the prosecutor's reasons for striking each juror, rather than engaging with the evidence that would prove otherwise. This case warrants the Court's review to make clear that is an unreasonable application of *Batson*.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

ANNA M. ARCENEAUX
VICTORIA OLENDER HELLSTROM
MARCIA A. WIDDER
GEORGIA RESOURCE CENTER
104 Marietta Street NW
Suite 260
Atlanta, GA 30303
(404) 222-9202

MATTHEW S. HELLMAN
Counsel of Record
MARY E. MARSHALL
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3190