
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AARON WILSON,
PETITIONER,

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Petitioner, an African-American teenager, was convicted at a capital trial in Caddo Parish, Louisiana for the rape and murder of a white woman named Vickie McGraw.

At trial, the State deployed eight of the 11 peremptory strikes it used to exclude African-American women. The prosecutor proffered several reasons for these strikes that were either contradicted by the record or that the State failed to question jurors on during voir dire. After hearing extensive arguments from both parties, the trial court made the factual finding that the State had struck two of the eight African-American women for reasons that were “not race and/or gender neutral” and had offered justifications for the strikes that were “pretextual.” Yet, despite this factual finding, the trial court erroneously declined to grant the defendant a remedy based on its belief that “Louisiana caselaw standards” required denial of relief.

On direct appeal, the Louisiana Second Circuit Court of Appeal failed to correct this clear legal error. Instead, it reversed the trial court’s factual finding that the State’s proffered reasons were a pretext for discrimination. Its decision drew only upon the prosecutor’s stated reasons for its peremptory strikes and ignored trial court observations, credibility determinations made on the record, and other relevant circumstances. At the time Petitioner filed his federal habeas petition, the state appellate court’s ruling in his case was the only one of that court’s 71 opinions addressing a defendant’s *Batson* objection in which it reversed a trial court’s factual findings.

The Fifth Circuit affirmed the federal district court’s denial of Petitioner’s *Batson* claim, holding that the state trial court made “no finding” about the credibility or demeanor of the attorneys.

These circumstances give rise to the following questions:

- 1) Whether the Louisiana Second Circuit’s decision was based on an unreasonable application of clearly established federal law under

Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986), *Hernandez v. New York*, 500 U.S. 352, 364 (1991), and *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), which requires “great deference” to trial court findings regarding a party’s intent to discriminate against prospective jurors on the basis of race or gender.

- 2) Whether the Fifth Circuit’s deference to the Louisiana Second Circuit’s opinion constituted an “abandonment or abdication of judicial review,” *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015), or the appropriate application of 28 U.S.C. § 2254(d)(2), particularly given the federal constitutional requirement that deference be provided to the trial court’s factual findings under *Batson*.

PARTIES TO THE PROCEEDING

This petition stems from a habeas corpus proceeding in which Petitioner, Aaron Wilson, was the Petitioner before the United States District Court for the Western District of Louisiana, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit. Petitioner is a prisoner sentenced to life-without-parole and in the custody of Darrel Vannoy, the Warden of the Louisiana State Penitentiary. The Warden and his predecessor were the Respondents before the District Court for the Western District of Louisiana, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Aaron Wilson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

In September of 2017, the Fifth Circuit affirmed the partial denial of Petitioner's petition for a writ of habeas corpus. The opinion is reported at *Wilson v. Vannoy*, No. 16-30332, 2017 WL 3978445 (5th Cir. Sept. 8, 2017), and is attached as Appendix A. The opinion of the District Court of the Western District of Louisiana denying in part and granting in part Petitioner's petition for a writ of habeas corpus is reported at *Wilson v. Cain*, No. 5:12-cv-310, 2016 WL 1444466 (W.D. La. Apr. 8, 2016), and is attached as Appendix B. The report and recommendation made by the Magistrate Judge for the District Court of the Western District of Louisiana is reported at *Wilson v. Cain*, No. 5:12-cv-310, 2016 WL 1417808 (W.D. La. Feb. 4, 2016), and is attached as Appendix C.

Two state court judgments are directly relevant to the issues raised in this Petition. The opinion of the Louisiana Second Circuit Court of Appeal affirming Petitioner's conviction on direct appeal is reported at *State v. Wilson*, No. 40,767 (La. App. 2 Cir. 08/23/06); 938 So.2d 1111, and is attached as Appendix E. The state trial court's opinion finding that the State gave pretextual reasons for striking two prospective African-American female jurors, but denying a remedy under *Batson*, is part of the record of *State v. Wilson*, No. 213,012 (filed 08/15/02), and is attached as Appendix F.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the habeas case under 28 U.S.C. §§ 2241 and 2254. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2254(d), which states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

At Petitioner's capital trial, the trial court explicitly found that the prosecution peremptorily struck two African-American female prospective jurors on the basis of their race and gender. Yet, due to a misunderstanding of this Court's holding in *Batson v. Kentucky*, and its reading of unfavorable state court decisions made under *Batson*, the trial court failed to remedy the State's intentional race-based and gender-based discrimination.

The state and federal courts reviewing this decision subsequently failed to cure the *Batson* violations. On direct appeal, the Louisiana Second Circuit ignored the question before it—whether the trial court erred in failing to reseal the two African-American prospective jurors against whom the State discriminated—and instead reversed the trial court's well-reasoned factual finding that the State's justifications for the strikes were pretextual. The court provided no discernible deference to the trial court's credibility determinations or contemporaneous observations during voir dire. The federal courts compounded this failure to give deference to the trial court's factual findings; the Fifth Circuit erroneously held that trial court had made “no finding” about “credibility.” App. A at 3.

The central legal question at this juncture—the quality of deference owed to the trial court’s initial finding of pretext—also raises questions about how federal courts review state court decisions under 28 U.S.C. § 2254(d). Because § 2254(d) is not meant to preclude the possibility of federal habeas relief in all instances, this case gives rise to the substantial question of how the federal courts should decide whether a state court’s decision was based on “an unreasonable determination of the facts.” Without this Court’s intervention, federal courts will continue to struggle to review state court fact findings, awash in a body of case law that provides minimal guidance. More fundamentally, Petitioner’s case will forever remain an unnerving instance in which the federal judiciary permitted a prosecutor to engage in race and gender discrimination.

STATEMENT OF THE CASE

A. Background

On December 24, 2000, the body of Vickie McGraw was discovered along the side of Highway 169 in Caddo Parish, Louisiana. ROA.2859-61, 2865-67. The police arrested several adults and one juvenile, Petitioner Aaron Wilson, in connection with the crime. Petitioner, then 17 years old,

gave an inculpatory statement to the police, confessing his role in the rape and shooting of Ms. McGraw. He stated that he had not intended to kill the victim, but shot at her to impress his older co-defendant, Derrick “Monster” Bouya. ROA.1511-12, 1525. At trial, Petitioner testified that he did not shoot the victim, but had only confessed to doing so because he was afraid of Bouya. ROA.3026-27, 3035-37.

Petitioner was convicted of first degree murder and sentenced to death. Following this Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005), Petitioner was resentenced to life without the possibility of parole.¹

B. Jury Selection and the Trial Court’s Batson Ruling

During jury selection, the prosecution peremptorily struck eight qualified African-American women from the pool of jurors. The defense timely objected under *Batson*, 476 U.S. 79, and *J.E.B. v. Alabama*, 511 U.S. 127 (1994). The prosecutor then proffered reasons for the strikes against the

¹ Following this Court’s decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the State filed a notice of intent to again seek a sentence of life-without-parole for Mr. Wilson. Hearings regarding re-sentencing have not yet been scheduled in the state trial court.

eight prospective jurors.² Two of those prospective jurors were Yvonne Mitchell and Beatrice Maxile.

Juror Yvonne Mitchell

When asked to provide reasons for her peremptory strike against Juror Yvonne Mitchell, the prosecutor claimed that she struck Juror Mitchell from the jury pool because Ms. Mitchell had married a minister, and as a result would evidently feel pressured to vote against the death penalty because she would have to share her decision with her husband and the congregation. The trial court immediately questioned the credibility of this reason, stating, “That’s an assumption There’s nothing in the record regarding that.” ROA.2780-81. Indeed, not only did the State fail to ask Ms. Mitchell any questions about her church, her husband, or the church’s congregation, but the State also failed to establish what, if anything, the church’s members believed regarding the death penalty or what its leaders may have taught on the subject. Contrary to the State’s assertions, Ms. Mitchell stated during voir dire that she agreed with the death penalty and believed that its use should not be limited to the most horrific murders, but instead should depend

² The State also challenged the defense’s use of peremptory strikes to remove seven of the nine qualified white female prospective jurors.

on what happened during the course of the murder. ROA.2220. She stated that she could vote for the death penalty if the State proved that the murder occurred during a rape, robbery or kidnapping. ROA.2220-21. When asked if anything had affected her view on the death penalty over the years, Ms. Mitchell responded:

Nothing has happened in my life that has changed my feelings. I was raised being taught that there was consequences for things that you did, and if you did whatever, then you had to be willing to suffer those consequences. And believing that, I would be willing to listen, to evaluate everything I hear, and then hopefully make a fair judgment about what the consequences should be.

ROA.2248.

Ms. Mitchell did not have any religious, philosophical, ethical, or moral problems sitting in judgment of a person accused of a crime. ROA.2537-38. In fact, Ms. Mitchell had previously served as a juror on a rape case and had voted to convict. ROA.2560-61.

When the State attempted to compare its strike of Ms. Mitchell to its strike of a white juror, a minister named Mr. William Valentine, the trial court rejected that comparison, finding that "Mr. Valentine is different." ROA.2780. Indeed, Mr. Valentine was substantially less approving of the death penalty than Ms. Mitchell, as he had supported individuals convicted of

crimes before the parole board. Mr. Valentine showed hesitancy about imposing a death sentence, but ultimately conceded that he was “willing to follow the law.” ROA.2112. In explaining his attitude towards the death penalty, Mr. Valentine emphasized the need to reach the decision carefully, ROA.2142, and noted that individuals in the justice system make mistakes “so we need to be past careful in reaching that decision,” ROA.2143. As the trial court noted, Mr. Valentine was at the opposite end of the spectrum from Ms. Mitchell.

Juror Beatrice Maxile

The prosecutor proffered two reasons for its strike against prospective juror Beatrice Maxile. First, that she had volunteered at Hamilton Terrace, a school for troubled adolescents that Petitioner had previously attended, ROA.2781-82, and second, that Ms. Maxile could only impose the death penalty in extreme circumstances. ROA.2782. As with Juror Mitchell, this latter justification is belied by the record. Ms. Maxile stated in voir dire that she supported the death penalty and found the allegations in Petitioner’s case disturbing. She testified that she believed the death penalty should be imposed for “brutal incidents,” and included rape and armed robbery in her

definition of “brutal.” ROA.2320. She assured the prosecutor that she would consider the death penalty if she found Petitioner guilty of intentionally killing the victim during a rape, robbery, or kidnapping, though she would also consider a life sentence depending on the circumstances. ROA.2320-21. She explained that if she found Petitioner guilty of the charged crime, she would try to consider the mitigating circumstances, but “[b]ecause . . . I’m a lady, . . . [i]t’s going to hard, but I would try.” ROA.2371. She said she could vote for a life sentence in this case only if she “was shown a good enough reason.” ROA.2372.

In addition, Ms. Maxile’s answers during voir dire suggest that her work at the Hamilton Terrace School would cause her to favor the State. Ms. Maxile indicated that she was aware that students at Hamilton Terrace had a history of misconduct. As she explained, a student (such as Petitioner) would not end up at the school “unless there’s some type of history,” ROA.2384. She said that she would try not to allow this to influence her, but “you can visualize in the back of your mind about situations that cause students to have to go to Hamilton Terrace.” *Id.*

The Trial Court's Ruling

At the conclusion of the *Batson*/reverse-*Batson* colloquy, the trial court indicated that it would take the matter under advisement and the parties went on to select two alternate jurors. The trial court then identified six jurors that the parties had peremptorily challenged, four African-American women—including Yvonne Mitchell and Beatrice Maxile—and two white women, and ordered that they be sequestered overnight along with the selected jurors so that the court could make a final ruling on the *Batson* and reverse-*Batson* challenges. Before recessing for the evening, the court asked both parties for further argument regarding the six struck jurors it had retained.

The next morning, the court issued a decision denying both parties' objections and entered into the record a written opinion. *See App. F.* Although the court denied relief, it explicitly found that the prosecutor had used peremptory challenges to remove jurors on the basis of their race and gender. According to the relevant parts of its written opinion:

The State's pattern of using peremptory challenges against African-American females was obviously greater than against other prospective jurors. . . . This Court became suspicious that

the State's . . . pattern[] of exercising peremptory challenges w[as] based upon race and gender respectively.

In addition to the State's pattern of using peremptory challenges based upon race, this Court is particularly disturbed with the State's explanation for the exclusion of prospective jurors Y.M. and B.M. * * *

[C]onsidering the explanations asserted by the State . . . for using their peremptory challenges, this Court readily concludes that, as to Y.M., B.M. . . . said explanations are not persuasive and/or plausible. This Court believes that the State was reluctant to have a jury composed of African-American females * * *

After having inquired and weighed the allegations presented . . . this Trial Court Judge finds that the State . . . ha[s] dismissed certain jurors for reasons which are not race and/or gender neutral. . . . Counsel for the . . . State have camouflaged their desires and intent to select a jury most favorable to their objectives among expressed reason(s) and arguments of neutrality which appear to be merely "pretextual". In view of the race and gender of the Defendant (African-American male) and victim (white female), this Trial Court Judge detects and senses a racial and gender bias in dismissing certain prospective jurors by using peremptory challenges.

App. F at 2-4.

The court denied relief, however, on the grounds that "this Court does not believe that the 'pretextual' explanations given by the . . . State . . . are significantly faulty under Louisiana case law standards to constitute a violation." *Id.* at 5. From the bench, the trial court observed: "If I thought

that the case law would agree with me, I would have granted both motions.”
ROA.2839.

C. The Louisiana Second Circuit’s Direct Appeal Decision

On direct appeal, Petitioner argued that the trial court erred in failing to provide a remedy despite its finding that the prosecutor struck Jurors Maxile and Mitchell on the basis of their race and gender. Rather than address this obvious legal error, the Louisiana Second Circuit reversed the trial court’s factual finding that the State intentionally discriminated against these jurors. App. E at 34. In its opinion, the state court of appeal failed to mention or credit the trial court’s credibility determinations, and largely ignored the grounds upon which that court based its finding of pretext. The Louisiana Second Circuit instead denied relief upon its own finding that the State’s proffered justifications were “facially race-neutral” and “common sense.” *Id.* This case marked the first and only time in the Louisiana Second Circuit’s history of reviewing *Batson* claims in which it overturned a trial court’s factual findings regarding pretext.

D. The Federal Courts' Opinions

The District Court upheld the state court of appeal's opinion, finding that the Louisiana Second Circuit's ruling constituted neither an unreasonable application of law nor an unreasonable determination of the facts. App. B at 4-5.

The Fifth Circuit Court of Appeals "agree[d] with the district court." App. A at 3. Despite the trial court's on-the-record observations and its subsequent written opinion, the Fifth Circuit wrote that the trial court made "no finding" about "credibility." *Id.* The Fifth Circuit found that the state court of appeal "carefully analyzed" the trial court's factual findings and concluded the prosecutor's stated reasons for striking Jurors Maxile and Mitchell were "facially race neutral." *Id.* at 4. Citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011), the Fifth Circuit affirmed, finding that "[m]any jurists" had "not disturbed the ultimate state trial court holding of no *Batson* violation." App. A at 5.

REASONS FOR GRANTING THE PETITION

This petition for certiorari presents the Court with the opportunity to cure an ongoing violation of the principles underlying

Batson. In particular, the state appellate court's complete lack of deference to the findings of pretext made by the trial court warrants habeas relief. Furthermore, the record in this case evidences the overwhelming need for this Court to provide the lower courts with guidance on how to apply the standard articulated under § 2254(d)(2) without abdicating or abandoning judicial review

I. THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR THAT THE STATE COURT OF APPEAL'S FAILURE TO DEFER TO THE TRIAL COURT'S FINDINGS OF PRETEXT WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

Because *Batson* requires courts to engage in the fact-intensive endeavor of determining whether parties have the intent to discriminate, trial courts are given substantial deference. Indeed, deference has long been a core principle. This Court wrote in *Batson*, “[s]ince the trial judge’s findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” 476 U.S. at 98 n.21; see also *Miller-El v. Cockrell*, 537 U.S. at 339 [hereinafter *Miller-El I*] (“Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the

trial court is to make credibility determinations.”). Under this Court’s precedent, the state court of appeal was required to “sustain[]” the “trial court’s ruling on the issue of discriminatory intent . . . unless it [wa]s clearly erroneous.” *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (citing *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion)). Here, the trial court’s factual findings that the State provided pretextual reasons for striking two African-American female jurors were amply supported in the record, and the Louisiana Second Circuit erred in setting them aside.

A. The State Court of Appeal’s Lopsided Application of Deference Turns Batson on Its Head

Although the trial court’s ultimate decision to deny Petitioner a remedy for the State’s *Batson* violation was contrary to clearly established federal law, the record fully supports its factual finding that the State’s reasons for striking prospective jurors Yvonne Mitchell and Beatrice Maxile were pretextual. The trial court’s factual findings were made after observing the entirety of voir dire, including the demeanor of each challenged juror and the demeanor of the attorneys exercising the challenges, and were thus entitled great deference.

Despite what federal law requires, the Louisiana Second Circuit provided no discernible deference to the trial court's finding that the prosecutor's reasons for striking jurors Mitchell and Maxile were pretextual. The Second Circuit failed to even address the trial court's contemporaneous observations regarding the prosecutor's credibility, including the trial court's comment that the proffered reasons for striking Juror Mitchell were not supported by the record.³

The state court of appeal's decision cited some of the relevant governing case law, *see* App. E at 19 (citing *Hernandez*), but did not show the same reverence for trial court decision-making as seen in so many of its other *Batson* opinions. In *State v. Heard*, for example, the Louisiana Second Circuit Court of Appeal wrote:

[I]t is the trial court which is in a position to observe firsthand the demeanor of the attorneys and venire persons, the nuances of questions asked, the racial composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold transcript. As a result, a trial judge's determination on a claim of purposeful discrimination rests largely on credibility evaluations, and the trial court's findings as

³ The Second Circuit also failed to acknowledge that the State had the opportunity to ask Ms. Mitchell follow-up questions—an opportunity it exercises with respect to other prospective jurors—and instead only noted that “the matter [of Ms. Mitchell's marriage to a minister] became known to the state after it had questioned her.” App. E at 36.

to the existence (or non-existence) of purposeful discriminatory intent is entitled to great deference by reviewing courts.

917 So. 2d 658, 663 (La. App. 2 Cir 2005) (citations omitted). No similar ode to the trial court's "firsthand" observations and the "nuances" it inherently perceives appears in the appellate decision here. *See* App. E. Indeed, the word "credibility" does not even appear in its discussion of the trial court's findings regarding Jurors Maxile and Mitchell. *See id.* Moreover, although the Fifth Circuit hinted that the state court of appeal relied on the *Miller-El* cases and conducted a comparative juror analysis, *see* App. A at 4 n.3, the Louisiana Second Circuit actually failed altogether to cite *Miller-El I* and *Miller-El v. Dretke*, 545 U.S. 231 (2005) [hereinafter *Miller-El II*], in an opinion that came down just over one year after this Court decided the latter case. *See* App. E.

The proof is in the pudding. Petitioner's case is the only one of 71 cases decided before the filing of the habeas petition in which the appellate court overturned trial court factual findings made under *Batson*. Brief of Petitioner-Appellant at 26, *Wilson v. Vannoy*, No. 16-30332 (5th Cir. June 1, 2016); Petition for Writ of Habeas Corpus at 21-22 n.9, *Wilson v. Cain*, No. 5:12-cv-310 (W.D. La. Jan. 3, 2012). It also happens to be only one of those

cases in which the appellate court would have been obligated to remand for a new trial if it bestowed proper deference to the trial court's findings. *See id.*

A fair reading of the Louisiana Second Circuit's opinion is that it reversed the trial court's factual finding of pretext because the prosecutor's proffered reasons were "facially race neutral." App. E at 34. In so doing, the court elevated the race-neutrality of the State's justifications over the trial court's explicit finding that these justifications were not actually credible. Indeed, the Fifth Circuit's decision reflects this reality. *See* App. A at 4 ("In so doing [its review of the trial court's factual determinations], it concluded that the prosecutor's proffered reasons for striking these prospective jurors [were] facially race neutral."). However, race-neutrality is not the ultimate question. The trial court answered what in fact is the ultimate question—whether the purported justifications were credible—after careful consideration. The state court of appeal did not properly address this issue.⁴

⁴ The Fifth Circuit, like the District Court (*see* App. B at 4), applauded the state court of appeal for dealing with the trial court's ruling "at length." App. A at 4. The length of the Louisiana Second Circuit's opinion is substantial, but a majority of its pages represent nothing more than a recitation of the *Batson*/reverse-*Batson* colloquy below, specifically the justifications the State gave for striking each of the eight African-American women it excluded. The federal courts' characterization of this as analysis is generous at best.

The state court of appeal did not uniformly assail the trial court's *Batson* decision-making; in fact, it actually deferred to the trial court's findings that the prosecution did not discriminate against six other prospective African-American female jurors. This selective application of deference provides proof within the opinion itself that the Second Circuit opinion unreasonably applied federal law.⁵

Although the state court of appeal correctly cited to *Hernandez*, the opinion reveals a proclivity to doubt the trial court. If there was ever a trial court that took seriously a *Batson* claim, it was this trial court. The court made explicit contemporaneous observations on the record during the colloquy. It noted when one of the State's purported justifications lacked record support. It considered how to best manage the proceedings, and retained six prospective jurors while it considered the parties *Batson* and

⁵ The prosecution claimed it struck prospective juror Margaret Scott because of a drastic change in her views on the death penalty and because her son was around the defendant's age and had experience in the criminal justice system. *See* App. E at 40. In fact, Ms. Scott had become a strong proponent of capital punishment after her brother had been murdered, and she believed the perpetrator had not been punished harshly enough. *See id.* at 39. Moreover, she had had "wonderful" experiences with the criminal justice system, which she credited for helping alleviate her son's bad behavior. *Id.* at 40. While the prosecution's decision to exclude a juror with these views and beliefs raises many questions (and maybe some eyebrows), the trial court found no pretext. On appeal, the Louisiana Second Circuit deferred while acknowledging that "going from the record alone, a different trial judge could reasonably have concluded contrarily from the judge in this case." *Id.* The restraint that the court of appeal showed in this instance stands in stark contrast to its finding that the trial court clearly erred in determining the State's explanations for striking Jurors Maxile and Mitchell were pretextual.

reverse-*Batson* objections. It took the matter under consideration overnight. It returned the following day with a written opinion.⁶ That opinion considered the race and gender of the defendant and victim, evaluated the parties' strike patterns, discussed the parties' respective claims, and ultimately determined that the State had actually discriminated against only two of the eight African-American women it struck. And, though it failed to provide the appropriate legal remedy, the court made clear findings on "the decisive question" of whether the State's justifications "should be believed," a question "peculiarly within [its] province." *Hernandez*, 500 U.S. at 365 (internal citation omitted).

B. Trial Court Findings of Racial Discrimination in Particular Deserve Meaningful Deference

When this Court decided *Batson*, it intended to make legitimate claims of racial discrimination redressable by removing the "crippling burden of proof" placed on defendants under the existing *Swain* regime. *Batson*, 476 U.S. at 92. It did so in part because "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded

⁶ It is remarkable that the trial court produced a written decision on a *Batson* claim. While it appears that no scholars have researched their prevalence, undersigned counsel believes that such written opinions are extraordinarily rare. Undersigned counsel has never otherwise encountered a written trial court opinion on a *Batson* challenge in nearly ten years of litigating *Batson* issues on appeal.

juror to touch the entire community.” *Id.* at 87. Racial discrimination is especially troubling, and, as a result, a trial court finding that a prosecutor actually discriminated on the basis of race is most deserving of the kind of deference that *Batson* and *Hernandez* envisioned. A finding that the prosecution violated *Batson*—on the assumption that the violation is remedied—vindicates our nation’s “overriding interest in eradicating discrimination from our civic institutions.” *Johnson v. California*, 545 U.S. 162, 172 (2005); see also *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

In the thirty-some years since *Batson* came down, the opinion has received substantial criticism, primarily on the grounds that the doctrine has developed along a path that enables bad actors to easily conceal their discriminatory motives. See, e.g., *Miller-El II*, 545 U.S. at 268 (Breyer, J., concurring) (reviewing “studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem”); Jon O. Newman, *To Save Our Justice System, End Racial Bias in Jury Selection*, N.Y. TIMES, May 27, 2016 (noting that “prosecutors can claim race-neutral reasons” to defeat *Batson* challenges); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More Than the*

Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075, 1077 (2011) (noting that “virtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials”). One particular enforcement challenge is that “judges have been hesitant to make rulings of *Batson* breaches,” likely because it is difficult to effectively call a lawyer a liar. Robin Charlow, *Batson “Blame” and Its Implications for Equal Protection Analysis*, 97 Iowa L. Rev. 1489, 1492 (2012); see also Bellin & Semitsu, *supra*, 96 Cornell L. Rev. at 1116 (describing “[a] trial court’s natural reluctance to make findings that, if taken seriously, will forever mar the professional reputation of the subject attorney”). Given the many inherent challenges that a trial court confronts when evaluating a *Batson* claim, an actual finding of pretext especially warrants deference. If an appellate court can cast aside proper deference as easily as the Louisiana Second Circuit Court of Appeal did here, trial courts will be further deterred from conducting meaningful inquiries in order to prevent racial and gender discrimination during jury selection.

II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE LOWER COURTS GUIDANCE ON HOW TO AVOID THE ABDICATION OR ABANDONMENT OF JUDICIAL REVIEW WHEN APPLYING 28 U.S.C. § 2254(d)(2)

A. The Federal Courts Have Insufficient Guidance on How to Determine Whether a State Court Decision was Based on an Unreasonable Determination of the Facts

The Fifth Circuit's opinion below is one that "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). The conflict between its opinion and this Court's precedent (as laid out in *Miller-El I* and *Brumfield*) can be attributed to the lack of guidance on how to determine whether a state court decision was based on an unreasonable determination of the facts. This Court should grant certiorari in order to provide clarity to federal courts grappling with how to analyze claims under 28 U.S.C. § 2254(d)(2).

This is an ideal time to take up a case involving § 2254(d)(2). Since Congress passed AEDPA in 1996, this Court has offered substantial guidance on the (d)(2) sister provision, § 2254(d)(1). But, as one habeas scholar has observed, "(d)(2) is so underutilized that there has been virtually no debate or explanation regarding the term 'unreasonable' as it applies to findings of fact under (d)(2)." Justin F. Marceau, *Deference and Doubt: The Interaction of*

AEDPA § 2254(d)(2) and (e)(1), 82 Tul. L. Rev. 385, 441 n.45 (2007). The dearth of precedent has left lower courts to struggle with the interpretation and implementation of (d)(2).

B. Some Courts Apply the Fairminded Jurists Standard Articulated in Harrington v. Richter Even Though this Court has Suggested it Governs § 2254(d)(1) and not (d)(2)

The lack of (d)(2) guidance has been complicated by this Court's opinion in *Harrington v. Richter*. In that case, the Court held that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." 562 U.S. at 101. While this fairminded jurists standard seems to have arisen specifically in reference to § 2254(d)(1) and not (d)(2), *see id.*, the language has crept into decisions regarding § 2254(d)(2). *See, e.g.*, App. A at 5 (citing *Harrington* in reference to both (d)(1) and (d)(2) issues). For instance, a Third Circuit decision from 2013 on a (d)(2) issue includes a reference to *Harrington* in both the majority and dissenting opinions. *See Lambert v. Beard*, 537 F. App'x 78, 85 (3d Cir. 2013); *id.* at 89 (Hardiman, J., dissenting) (arguing that although one interpretation of a document "may not be the most natural reading . . . fairminded jurists could disagree"). Several federal

courts of appeal have chosen to fill the (d)(2) jurisprudential void with a fairminded jurist standard. *See, e.g., Wilson v. Rader*, 619 F. App'x 369, 370 (5th Cir. 2015); *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013); *Holsey v. Warden*, 694 F.3d 1230, 1260 (11th Cir. 2012). Other courts have resisted that approach. *See, e.g., Barton v. Warden*, 786 F.3d 450, 460 (6th Cir. 2015) (“Only when fair-minded jurists could not disagree that a state court’s merits decision conflicts with Supreme Court precedent may a federal court issue a writ of habeas corpus.” (citing *Harrington*, 562 U.S. at 102)).

This Court’s recent decision in *Brumfield v. Cain*, however, suggests that the fairminded jurist standard is not applicable in (d)(2) cases. According to the opinion:

We may not characterize these state-court factual determinations as unreasonable merely because [we] would have reached a different conclusion in the first instance. Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference. If [r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court’s . . . determination. As we have also observed, however, [e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief. Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.

Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015) (internal citations and quotations omitted); *but see id.* at 2290 (Thomas, J., dissenting) (“Under any fairminded application of § 2254(d)(2), he would not be entitled to relief.”). In the (d)(2) context, the concept that deference does not “by definition preclude relief” is difficult to reconcile with the fairminded jurist standard because the very existence of an adverse determination below establishes that a jurist disagrees with a petitioner’s position. *Miller-El I*, 537 U.S. at 340. Thus, application of the *Harrington* standard would “unduly discourage[] the granting of relief insofar as it requires the federal habeas court to hold that the state court judges acted in a way that no reasonable jurists would under the circumstances.” *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 889 (3d Cir. 1999). Because the (d)(2) inquiry requires an objective review of all evidence in the state court record, it ultimately turns on the reasonableness of the factual determination, not the factfinder.⁷

⁷ This Court’s decision in *Brumfield* ultimately vindicated a District Court opinion that put forth an excellent formulation of the (d)(2) inquiry. The District Court held that where “a common sense appraisal of that evidence [in the state court record] convincingly shows” that the state court made the factual determination in an inappropriate manner, then there is a “convincing case” that the determination was unreasonable. *Brumfield v. Cain*, 854 F. Supp. 2d 366, 384 (M.D. La. 2012), *rev’d*, 740 F.3d 946 (5th Cir. 2014), *withdrawn from bound volume, opinion withdrawn and superseded*, 744 F.3d 918 (5th Cir. 2014), *vacated and remanded*, 135 S. Ct. 2269 (2015), and *aff’d*, 808 F.3d 1041 (5th Cir. 2015).

C. Especially Considering that Batson Mandates Deference to the Trial Court, the Fifth Circuit's Finding that the State Court of Appeal Did Not Base Its Decision on an Unreasonable Determination of the Facts Ignores Overwhelming Record Evidence to the Contrary

The need for clarity on the standard governing (d)(2) review is at its apex in this case. In the *Batson* context, trial court determinations about credibility and pretext demand “great deference.” 476 U.S. at 98 n.21; *see also Hernandez*, 500 U.S. at 364; *Miller-El I*, 537 U.S. at 339. Yet, the state court of appeal disregarded the trial court’s well-supported findings with respect to Jurors Mitchell and Maxile. In these circumstances, the federal courts’ affirmation of the state appellate court’s decision entails a wholesale rejection of the findings that are most deserving of deference. The result is that the court that should have received the most deference—the trial court—actually received the least.

The Louisiana Second Circuit selectively reviewed and relied upon certain parts of the record without acknowledging others. *See supra* pp. 16 n.3, 19. That selectivity, in turn, heavily informed the federal courts’ subsequent decisions. Had a federal court engaged the entire state court record—particularly the trial court’s contemporaneous observations and

credibility determinations—the incongruity of the state court of appeal’s determination on pretext would have become clear. *See also Rice v. White*, 660 F.3d 242, 257 (6th Cir. 2011) (“Accordingly, the Michigan Supreme Court unreasonably determined, in light of the record, that the trial court did not discredit the prosecutor’s proffered race-neutral reasons for striking the challenged jurors, within the meaning of § 2254(d)(2).”).

The Fifth Circuit’s decision ignores overwhelming evidence in the record suggesting that the state court of appeal’s decision was based on an unreasonable determination of the facts. This section highlights several aspects of the state court of appeal’s decision that undermine the purported reasonableness of its factual determinations and underscore the importance of trial court deference in the *Batson* context.

Despite abundant evidence to the contrary, the Louisiana Second Circuit found that the prosecution was excluding jurors based on their views about the death penalty. According to the state court of appeal, “[t]he record demonstrates . . . that the prosecutor struck those jurors whom it believed would be less inclined to impose the death penalty.” App. E at 34. The record certainly demonstrates that the

prosecutors *claimed* they struck African-American women based on their views on the death penalty, but the record also shows that several of those women actually favored capital punishment. Indeed, Ms. Mitchell supported the death penalty and could have returned a death sentence for someone convicted of the crimes for which Petitioner was charged. ROA.2220-21. Ms. Maxile, too, supported the death penalty, especially under the aggravating circumstances alleged in Petitioner's case, and even went so far as to hesitate in affirming that she could consider a defendant's mitigating circumstances. ROA.2371. Out of the eight African-American women the State struck, five—including Jurors Mitchell and Maxile—were strong proponents of capital punishment.⁸ Brief of Petitioner-Appellant at 32, *Wilson v. Vannoy*, No. 16-30332 (5th Cir. June 1, 2016). To credit the prosecutor's purported beliefs about prospective jurors' views on the death penalty, the state court of appeal had to ignore the record entirely.⁹ On habeas review, the federal courts

⁸ One prospective juror the State struck, Margaret Scott, explained that she became a death penalty proponent because her brother had been murdered and, in her view, the perpetrator had not been sufficiently punished for the crime. App. E at 39. Another, Rose Bogan, stated that "[e]very kind of murder deserves the death penalty." ROA.2213. And another, Dameshia Fuller, said, "I'm for the death penalty." ROA.2337. Nonetheless, the state court of appeal broadly credited the prosecution's claim that it based its strikes on these jurors' views about capital punishment.

⁹ Likely because it is not equipped to make the type of credibility determinations the trial court made, the Second Circuit repeatedly credited the fact that the State (somewhat) consistently cited to the same concerns when justifying its strikes. See App. E at 35 ("[E]very race-neutral explanation with exception

followed suit. *See, e.g.*, App. A at 4-5 & n.4 (quoting the relevant portion of the state court of appeal opinion).

Despite the presence of similarly-situated white jurors whom the prosecution did not strike, the state court of appeal failed to undertake a meaningful comparative juror analysis. Rather than consider the record as a whole, the state court of appeal predominately cited to the comparisons between jurors that the prosecutor raised in defense of its strikes. For example, the Louisiana Second Circuit discussed the State's claim that its justification for striking Ms. Mitchell was legitimate because it also struck a white minister named Mr. Valentine. App. E at 25, 28. However, its opinion never mentions potential jurors William Leech or Karen Scott. Mr. Leech was a deacon at his church and stated under oath that he would put "quite a bit of weight" on mitigating circumstances. ROA.1855. Ms. Scott had attended a school of ministry, earned a certificate of ministry, and was actively involved in her church. ROA.2706. Oddly enough, these similarly-situated white jurors with demonstrated religious commitments

of Ms. Theus and perhaps Ms. Lewis, demonstrated that the prosecutor's intent or purpose for the strikes was to exclude those jurors that it believed might hurt its prosecution of the death-penalty case in the sense of being less inclined to vote for a death sentence."). As shown, to ignore ample evidence in the record that the prosecution's beliefs were unfounded was unreasonable.

were of no concern to the prosecution, despite the fact that it purportedly believed that Ms. Mitchell “would be inclined also to th[e] view” of Mr. Valentine to “consider and encourage forgiveness.” App. E at 28.

On the only occasion that the state court of appeal considered a comparable white juror whom the prosecution treated differently, it relied on selective and irrelevant characteristics to distinguish him from the excluded black juror. The prosecution purportedly struck Ms. Maxile because of her role as a teacher, claiming that characteristic would have made her sympathetic to the defendant. However, inexplicably, the State did not strike a high school athletic coach named Mr. Alden Reeves, who happened to be a white male. In refusing to analyze the State’s disparate treatment of Ms. Maxile as compared to Mr. Reeves, the Louisiana Second Circuit seized on the prosecution’s attempt to draw a distinction between a teacher and a coach. App. E at 37. That court also referred to Mr. Reeves’s support for the death penalty, *see id.*, conspicuously ignoring the fact that Ms. Maxile also supported the death penalty. Remarkably, the state court of appeal did not even mention that Mr. Reeves had once before testified as a character

witness on behalf of a student who was tried for first-degree murder. ROA.1749-50.

Despite the interracial nature of the offense and the clear pattern of State strikes against African-American women, the state court of appeal gave no weight to the racial implications in reviewing the trial court's finding of pretext. Appropriately, the trial court specifically considered the races and genders of the defendant and the victim when assessing the credibility of the State's purported justifications for peremptory strikes. See App. F at 4. It also evaluated the "pattern" of State strikes against African-American women. *Id.* at 2. Yet, nowhere did the state court of appeal acknowledge that the interracial nature of the crime is a critical part of the inquiry. *Cf. Turner v. Murray*, 476 U.S. 28, 36-37 (1986). And, with regards to the States' pattern, the state court of appeal engaged in inaccurate statistical computations and generous mathematical rounding in drawing the unsupported conclusion that "perhaps one" fewer African-American female juror served on the jury than would have been expected

from a random selection process. App. E at 34. Neither the District Court nor the Fifth Circuit mentioned this fuzzy math.¹⁰

Taking account of all the record evidence that calls into question the reasonableness of the state court of appeal's factual determinations, the Fifth Circuit misapplied 28 U.S.C. § 2254(d)(2). "[T]he evidence in the state-court record provided substantial grounds to question" the legitimacy of the prosecution's reasons for striking Jurors Mitchell and Maxile. *Brumfield v. Cain*, 135 S. Ct. at 2280. Yet, the Fifth Circuit erroneously determined that the state court of appeal's decision was not based on an unreasonable determination of the facts in light of that record. In instances such as this—when the state court was required to consider "all relevant circumstances," *Batson*, 476 U.S. at 96, but failed to do so—§ 2254(d)(2) does not present an obstacle to federal habeas relief. *See Williams v. Taylor*, 529 U.S. 362, 397 (2000) (finding the prejudice determination by a state supreme court on an ineffective assistance of counsel claim—which requires a view of all relevant evidence—unreasonable where the court "failed to evaluate the totality of the

¹⁰ See Brief of Petitioner-Appellant at 32 n.14, *Wilson v. Vannoy*, No. 16-30332 (5th Cir. June 1, 2016) (explaining how the Second Circuit's finding that the jury selection process yielded "perhaps one" fewer African-American female juror than a random process was inaccurate, as well as provides additional evidence that the court of appeal failed to give deference to the trial court's findings).

available [] evidence”); *see also Miller–El I*, 537 U.S. at 346 (“Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney’s Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past.”); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (“[T]he state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner’s claim.”).¹¹

Courts need additional guidance on what standard to use when deciding if a state court’s determination of fact was unreasonable. This Court should grant certiorari in order to clarify the standard and resolve clearly a “threshold question of habeas procedure.” Marceau, *supra*, 82 Tul. L. Rev. at 391.

¹¹ This conclusion is reinforced by the parts of the Louisiana Second Circuit opinion that relied in part “on an erroneous factual finding.” *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (noting that “[t]h[e] partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court’s decision”). These portions of the opinion include the finding that prosecutors struck jurors on the basis of their death penalty views and the finding that the jury selection resulted in “perhaps one” fewer African-American female juror than expected from a random selection process. *See supra* pp. 29-30, 33 n. 10.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to address the issues presented herein.

Respectfully submitted,



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Dated: February 23, 2018

PROOF OF SERVICE

I swear that on this date, the 23rd day of February, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid and by email to the following names and addresses.

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I declare under penalty of perjury that the foregoing is true and correct.



Blythe Taplin