No. 17-9572

In The
Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Mississippi

PETITIONER'S BRIEF

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CAPITAL CASE

QUESTION PRESENTED

Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U. S. 79 (1986), in this case.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover of the brief.

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A prior decision of the Mississippi Supreme Court, reported as *Flowers v. State*, 158 So.3d 1009 (Miss. 2014), was vacated by this Court in *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016). The present decision of the Mississippi Supreme Court, issued on remand, is reported as *Flowers v. State*, 240 So.3d 1082 (Miss. 2017) (Joint Appendix ("J.A.") 299-526).[1] The order of the Circuit Court of Montgomery County, Mississippi, denying Flowers' motion for a new trial is unreported and appears at J.A. 247-298. The section of the transcript in which the Circuit Court of Montgomery County, Mississippi, denied Flowers' objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), appears at J.A. 202-241.

STATEMENT OF JURISDICTION

The Mississippi Supreme Court affirmed Flowers' convictions and sentence on November 2, 2017, and denied a timely request for rehearing on February 22, 2018. Pursuant to an extension of time granted by Justice Alito, Flowers' petition for a writ of certiorari was filed on June 22, 2018, and granted on November 2, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2012).

[1] "J.A." refers to the Joint Appendix. "C.P." and "Tr." refer to the Clerk's Papers and Trial Transcript, respectively, submitted to the Mississippi Supreme Court in connection with the appeal of the judgment entered at Flowers' sixth trial.

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . "

STATEMENT OF THE CASE

Since October 1997, petitioner Curtis Flowers, a black man, has stood trial six times as the alleged lone perpetrator of the 1996 murders of four people inside the Tardy Furniture store in Winona, Mississippi.[2] At the first two trials, the State peremptorily struck all ten black prospective jurors tendered for jury service; at the third and fourth trials, all 26 of the State's strikes were directed at black panelists; race information for strikes exercised at the fifth trial is not in the record; at the sixth trial, the State accepted the first black panelist, then struck the next five who came up for seats on the jury.

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[2] As explained in section A *infra*, the first two trials concerned the murder of only one of the four victims; the remaining trials concerned all four murders.

The first three trials each ended in convictions and death sentences later reversed by the Mississippi Supreme Court. *See Flowers v. State*, 773 So.2d 309 (Miss. 2000) (*Flowers I*); *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II*); *Flowers v. State*, 947 So.2d 910 (Miss. 2007) (*Flowers III*). The fourth and fifth trials "[b]oth resulted in mistrials when the jury was unable to reach a unanimous verdict during the culpability phase." J.A. 303 (*Flowers v. State*, 240 So.3d 1082, 1093 (Miss. 2017) (op. on remand)). The sixth trial produced the judgment challenged here.

District Attorney Doug Evans was the lead prosecutor at all six trials. He was also the reason the first three verdicts were reversed on appeal—the first two for willful, repeated misconduct during trial, and the third for intentionally "exclud[ing] African Americans from jury service." *Flowers III*, 947 So.2d at 937. The record and prior court decisions reveal that throughout the proceedings Evans disregarded established rules of fundamental fairness and was firmly committed to seating as few black jurors as possible.

A. The First Five Trials.

1. The first trial and *Flowers I*.

Although all four victims had been killed at the same time and place, Evans indicted each homicide separately. *Flowers I*, 773 So.2d at 313.[3] He then

[3] As the Mississippi Supreme Court later observed, "there is no mystery as to why the State might choose to proceed as it did against Flowers—the odds are much better from the State's

insisted, over defense objection, on proceeding to trial only on the murder of store owner Bertha Tardy. *Id.* After a venue change from Montgomery County—where the case originated—to Lee County, the trial was held before Judge C.E. Morgan, III, in October 1997. *Id.*; J.A. 10.

The jury selection process yielded 97 qualified individuals: 75 (77%) were white, 22 (23%) were black. J.A. 11. From that panel, 36 individuals were "tendered," *i.e.*, brought forward to be either seated as a juror or peremptorily struck by a party. *Id.* Five of those 36 were black; Evans struck them all. *Id.* Flowers' counsel objected under *Batson v. Kentucky*, 476 U.S. 79 (1986), but the trial court declined to find a *prima facie* case of discrimination. J.A. 12. The all-white jury convicted Flowers and sentenced him to death. *Flowers I*, 773 So.2d at 315.

Flowers' appellate counsel asserted a *Batson* claim as the first enumerated ground for reversal, but the Mississippi Supreme Court declined to reach it, focusing instead on other forms of Evans' misconduct. *Flowers I*, 773 So.2d at 317. The first was his use of a "trial tactic or strategy . . . to continuously bring in

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viewpoint as far as securing at least one conviction and what might be deemed to be an appropriate sentence." *Flowers II*, 842 So.2d at 549. Evans' incentive to improve "the odds" was substantial: no physical or forensic evidence connects Flowers to the crime; the motive and methods ascribed to him by the State are objectively improbable; and the witnesses available to make the circumstantial case for guilt have been plagued by consistency and credibility problems.

unnecessary evidence of the other three killings thereby trying Flowers for all four murders in the same proceeding." *Id.* at 321. The court had explicitly "condemned" a similar tactic as exceeding the bounds of fairness and of Miss. R. Evid. 404(b) more than a decade earlier in *Stringer v. State*, 500 So.2d 928 (Miss. 1986), *id.* at 322, and found Evans' version in this case "far more egregious," *id.* at 321, and sufficient to require reversal, *id.* at 325.[4]

The Mississippi Supreme Court went on to find "numerous instances of prosecutorial misconduct" beyond the *Stringer* violation. *Id.* at 327. For example, Evans acted "in bad faith" when he repeatedly disregarded Mississippi's prohibition against insinuating baseless grounds for impeachment.[5] He also misled and confused the jury when he "held up" an audio tape never admitted into evidence and misrepresented its contents—first on cross examination of Flowers and later in closing argument—as proof of "inconsistencies" in Flowers' statements to law enforcement. *Id.* at 330-331. After agreeing with Flowers that "the cumulative effect of all these errors" warranted relief, the court

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[4] *See also Flowers I*, 773 So.2d at 325 ("[T]he cumulative effect of the prosecutor's pattern of repeatedly citing to the killing of the other three victims throughout the guilt phase proceedings leads us to hold that Flowers was absolutely denied a fundamental right to a fair trial.").

[5] *See id.* at 328 (recounting cross examination in which Evans falsely attributed two detailed but non-existent prior inconsistent statements to defense witness Connie Moore); *id.* at 331 (condemning Evans' use of the same tactic against Flowers' mother at the penalty phase).

reversed his conviction for the murder of Bertha Tardy and remanded the case for a new trial.

2. The second trial and *Flowers II*.

The second trial, for the murder of Derrick "BoBo" Stewart, took place before the Mississippi Supreme Court's decision in *Flowers I*, and thus before that court's pointed disapproval of Evans' four-for-one trial tactic. *Flowers II*, 842 So.2d at 535.

After an unsuccessful attempt to select a "fair and impartial jury" in Montgomery County, venue was changed to Harrison County and the case proceeded to trial, again before Judge Morgan, in March 1999. *Id.* at 535. Initial screening and removals for case-related "cause" left 49 qualified panelists: 38 (78%) were white and 11 (22%) were black. J.A. 16. Of that group, 25 white and five black panelists were tendered for seats on the jury; once again, Evans used peremptory strikes to remove each black panelist. J.A. 16-17.

In response to a *Batson* objection, the trial judge found a *prima facie* case of discrimination and required Evans to proffer his reasons for striking all five black panelists. J.A. 17-18. After further arguments from the parties, the court focused on two of the strikes and found that, as to the first, one of Evans' two proffered reasons was pretextual, and as to the second, all three of his proffered reasons were pretexts for race discrimination. J.A. 18. The court then allowed the first strike (on the theory that one of the proffered reasons was not pretextual), but disallowed the second after

finding Evans had violated *Batson*. J.A. 19. The resulting jury, containing 11 white members and one black member seated by judicial mandate, J.A. 19, convicted Flowers of the murder of Derrick Stewart and sentenced him to death. *Flowers II*, 842 So.2d at 535.

The appeal in *Flowers II* was reminiscent of *Flowers I*. As in the first trial, Evans had made heavy use of evidence and argument concerning victims other than Mr. Stewart, and had added insult to injury by doing "that which the trial judge had specifically instructed [him] not to do, namely, to introduce extensive evidence beyond the 'establishment of the crime scene.'"[6] *Id.* at 546. Also similar to the first trial, Evans broke state law during cross examination and closing argument by insinuating "without evidentiary basis" that defense witnesses had improperly attempted to influence a prosecution witness. *Id.* at 553; *see also id.* at 555.

In addition, the Mississippi Supreme Court found that Evans misrepresented witness testimony during closing argument. In one example detailed by the court, he modified by half an hour the time at which witness Sam Jones said he received a call that led to his discovery of the victims. *Id.* at 555. When defense counsel objected, Evans doubled down, declaring, "'[Jones] said he received a call around 9:30. I recall; I wrote it down.'" *Id.* at 555. In fact, neither Evans' jury

[6] The Mississippi Supreme Court acknowledged that Evans had not had the benefit of the *Flowers I* decision by the time of the second trial, but added that he "should find little solace in th[at] fact . . . , because in *Flowers I* we made no new pronouncements of law. . . ." *Id.* at 543.

argument nor the contemporaneous notes he claimed to have made were consistent with Jones' testimony.[7] *See id.* at 556. After examining additional arguments and determining that the "cumulative effect" of the errors again required reversal, the Mississippi Supreme Court set aside Flowers' conviction for the murder of Derrick Stewart and remanded the case for another trial. *Id.* at 565.

3. The third trial and *Flowers III*.

The third trial occurred in Montgomery County in February 2004, with Judge Morgan presiding again. Pursuant to the Mississippi Supreme Court's mandate, the indictments relating to each of the four decedents were consolidated and tried together. *Flowers III*, 947 So.2d at 916.

Three hundred prospective jurors completed questionnaires, of whom 126 (42%) self-identified as black and 161 (54%) self-identified as white. J.A. 23; *see also Flowers III*, 947 So.2d at 936 ("At least 120 potential jurors indicated that they were of African-American descent. . . ."); *id.* (noting that in Montgomery County

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[7] The timing of this call to Jones and Jones' subsequent arrival at the furniture store was critical to Evans' theory of the case. Both of the prosecution witnesses who claimed to have seen Flowers near the store on the morning of the homicides said their sightings occurred shortly after 10:00 a.m. *See* J.A. 353-354; 455-456. If, as Jones actually testified, *Flowers II*, 842 So.2d at 556, the four victims had already been discovered at 9:30 a.m., an attentive jury might have wondered why the killer would have lingered for half an hour before fleeing the scene of his crime.

"African-American citizens comprise forty-five percent of the county's population"). While the record does not reflect the size of the panel that survived initial screening and qualification, it does indicate that a total of 45 panelists—17 black and 28 white—were tendered. J.A. 35.

Evans was allotted a total of 15 peremptory strikes: 12 for the main panel and three more for alternates. He used all 15 to remove black panelists. *Flowers III*, 947 So.2d at 917-918. When defense counsel raised a *Batson* challenge, the trial court found a *prima facie* case, but later overruled the objection because "the State had not exercised its peremptory challenges in a racially discriminatory manner." *Id.* at 916. The resulting jury consisted of 11 whites and one black person who "was seated after the State ran out of peremptory challenges." *Id.* at 936. Flowers was again convicted and sentenced to death. *Id.* at 916.

On appeal, the Mississippi Supreme Court characterized Evans' use of his peremptories as presenting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge. . . . " *Id.* at 935.[8] Individual analyses of the 11

[8] While the main opinion addressed only the *Batson* issue, Justice Cobb's concurring opinion noted that "there were many errors during the six day trial," including Evans' having once again chosen—as he did at the trials underlying both *Flowers I* and *Flowers II*—"to cross-examine a defense witness without ever establishing a factual basis for the line of questioning." *Flowers III*, 947 So.2d at 940 (Cobb, J., joined by Dickinson, J., concurring). Assessing all of the errors "in the aggregate (including the errors noted in the majority opinion with regard to the *Batson* issue),"

panelists whose removal Flowers specifically challenged on appeal led the court to conclude that two—Vickie Curry and Connie Pittman—were struck in clear violation of *Batson*, and that the strikes of three more—Golden, Reed, and Alexander Robinson—were "suspect." *Id.*

The Mississippi Supreme Court's analysis of the record revealed that the Curry and Pittman strikes shared a characteristic not found (or at least not as readily apparent) in any of the others: when required to justify each of the strikes, the only explanations Evans gave were demonstrably false. To support the Curry strike, he claimed the juror "said she could not vote for the death penalty," *id.* at 923; the state court, however, labeled that claim an "outright fabrication[]," *id.* at 924. Similarly, Evans insisted that Pittman was struck for the sole reason that "she didn't believe [Flowers] did it," *id.* at 927, but the state court found "nothing in the record to support [that] contention . . . ," *id.*; *see also id.* at 928 (rejecting State's claim of "honest mistake" in light of "having found other instances of the State's racially motivated actions during the *voir dire* process"). As to those two strikes, the court went on to conclude that "the State engaged in racially discriminatory practices," and that "the trial court committed reversible error in upholding" the prospective jurors' removal. *Id.* at 939.

Justice Cobb found "cumulative error sufficient to warrant reversal. . . ." *Id.*

If the confirmed falsehoods Evans gave to support the Curry and Pittman strikes exceeded the limits of the Mississippi Supreme Court's tolerance, the three other "suspect" strikes revealed that ample space remained within those limits. For example, while Evans' explanations for each applied at least as forcefully to one or more whites he accepted,[9] each survived with the benefit of the Mississippi Supreme Court's "great deference" to the trial court. *Id.* at 917. With respect to Golden, that deference led the court to assume the strike was justified by "physical mannerisms, vocal inflection, or demeanor" neither invoked by Evans nor otherwise noted in the record. *Id.* at 921. As to Reed and Robinson, whose removals comparative juror analysis revealed to be "problematic," *id.* at 927, and "highly suspect," *id.* at 929, respectively, Evans' proffer of at least one separate, facially race-neutral reason was enough—regardless of plausibility or logical connection to the prospective juror's desirability, and in spite of lingering suspicions of pretext.[10]

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[9] *See Flowers III*, 947 So.2d at 921 (finding that there was no "great difference, on paper, between" struck black panelist Golden and two whites accepted by Evans); *id.* at 926 (similar finding for struck black panelist Reed); *id.* at 928 (same for struck black panelist Robinson).

[10] *See Flowers III*, 947 So.2d at 926-927 (expressing "some doubts as to whether Reed actually had any connections with Flowers' family," observing that "the trial judge's wholesale acceptance of the State's proffered reasons is suspect," then concluding that, "because the trial court's findings under *Batson* are accorded great deference, even if some may be suspect, they do not rise to the point of being clearly erroneous"); *id.* at 928-929 (explaining that the "inference of pretext that can be drawn from the

4. The fourth and fifth trials.

Flowers' fourth trial took place before Judge Morgan in late 2007; like the third trial, this one was held in Montgomery County and involved all four indictments. J.A. 25; C.P. 1492-1493. It differed from the prior trials in that the prosecution elected not to seek the death penalty, and in that the juror qualification process yielded a relatively balanced pool of panelists—16 (44%) black and 20 (56%) white—tendered for seating or removal by the parties. J.A. 26. Evans exercised a total of 11 peremptory strikes, every one of which was directed at a black panelist. *Id.* Because of the makeup of the pool and the order in which panelists were tendered, however, the jury that heard the case was composed of seven whites and five blacks. *Id.* The proceeding ended with a mistrial after the jurors were "unable to reach a unanimous verdict. . . ." J.A. 303.

Several months later, Judge Morgan transferred the case to Circuit Judge Joseph Loper, who would preside over the fifth trial (and later, the sixth). C.P. 1492-1493. In advance of that proceeding, Flowers' defense counsel submitted a motion which detailed for the new judge Evans' systematic removal of otherwise qualified

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seeming disparity" between Evans' removal of Robinson and his acceptance of two similarly situated whites "is lessened by the fact that the State gave an additional race neutral reason," *i.e.*, Robinson's prior service on a civil jury that "voted not guilty"; adding later that, "While we do not find the trial court's ruling concerning the strike of Alexander [Robinson] to be clearly erroneous, the racial neutrality of the State's proffered reasons is highly suspect").

black citizens from the four previous juries, as well as the prior judicial determinations that Evans had violated *Batson* at the second and third trials. Based on that showing, defense counsel requested, *inter alia*, that Evans be barred from striking African Americans in the upcoming proceeding. J.A. 3-36. The motion was denied from the bench. Tr. 314.

The fifth trial was held in late September 2008. Like the fourth, this one ended in a mistrial after the jury announced its inability to "agree on a verdict." C.P. 1797. The available record indicates that Evans used five peremptory strikes, but does not reflect the race(s) of those he removed;[11] the jury that heard the case and hung was composed of nine whites and three blacks.[12]

B. The Sixth Trial.

Flowers' sixth trial occurred in June 2010, again before Judge Loper, and again in Montgomery County. The original special venire consisted of 600 individuals, Tr. 353; 55% self-identified as white, 42% self-identified as black, and the remaining 3% did not self-identify. J.A. 194-195. A total of 156 remained after initial qualification, Tr. 693-694, of whom approximately 72% were white and 28% were black, J.A. 195.

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[11] Evans' strikes are reflected at pp. A43-A45 of the Second Supplemental Clerk's Papers on file with the Mississippi Supreme Court.

[12] Race information for the seated jurors is drawn from their questionnaires, which are at pp. 1A-46A of the Supplemental Clerk's Papers on file with the Mississippi Supreme Court.

After additional removals for cause, the first 26 in the remaining venire were reached for tendering, striking and seating on the main panel. J.A. 202-241. Six of those 26 (23%) were black; Evans accepted the first one, Alexander Robinson, J.A. 203, then struck the next five black panelists as each came up for consideration.[13] J.A. 203-208.

As in the second and third trials, the resulting jury was comprised of 11 white members and one black member. The process by which that composition was achieved reflected the factors highlighted by the Mississippi Supreme Court as requiring—and *not* requiring—reversal in *Flowers III*.

1. *Voir dire.*

The strikes of jurors Reed and Robinson in *Flowers III* survived review because, for each, Evans had been able to point to some facially race-neutral fact or circumstance which, when combined with "great deference" to the trial court, was enough to satisfy the Mississippi Supreme Court. At the sixth trial, Evans' approach to the *voir dire* of black panelists facilitated development of facts or circumstances similarly useful

[13] Six more panelists came up for consideration as alternate jurors. The last of them, Beverly Williams, was black, and was accepted as the third and final alternate. J.A. 241. Because the *Batson* hearing was completed before the alternates were chosen, *see* J.A. 237-238, that portion of the jury selection process is not reflected in the description and arguments that follow.

for defeating a *Batson* challenge under the state supreme court's deferential standard.

As the Mississippi Supreme Court majority later acknowledged on appeal, Evans asked "more questions of African-American jurors than of potential white jurors." *Flowers VI*, 158 So.3d at 1048. Apart from Alexander Robinson, who was the first black panelist tendered, and the only one seated,[14] Evans asked the other five tendered black panelists (all of whom he later struck) a total of 145 questions—an average of 29 each.[15] By contrast, Evans asked the 11 whites seated on the panel a total of 12 questions, for an average of just under 1.1 questions per juror.[16]

Evans' selection of topics to probe and the depth with which he probed them also differed between

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[14] Evans' *voir dire* of Robinson was minimal; he asked a total of five questions, four of which repeated inquiries already made by the judge. *See* Tr. 1147-1148. The record does not indicate whether the Alexander Robinson who served in the sixth trial was the same Alexander Robinson whom Evans struck in *Flowers III*.

[15] *See* J.A. 71-72; 104-105 (five questions to Carolyn Wright); J.A. 83-85; 130-133 (28 questions to Tashia Cunningham); J.A. 69-80; 139-145 (34 questions to Edith Burnside); J.A. 73-75; 86-88; 179-182 (34 questions to Flancie Jones); J.A. 75-79; 188-190 (46 questions to Dianne Copper).

[16] *See* Tr. 1123 (zero questions to Susan O'Quinn); Tr. 1155 (three questions to Janelle Johnson); Tr. 1178 (three questions to Lillie Mae Laney); Tr. 978 (three questions to Larry Blaylock); Tr. 1190-1191 (three questions to Suzanne Winstead); Tr. 1196 (zero questions to Jennifer Chatham); Tr. 1209 (zero questions to Jeffrey Whitfield); Tr. 1223 (two questions to Barron Davis); Tr. 1255 (zero questions to Marcus Fielder); Tr. 1385 (zero questions to Emily Branch); Tr. 1412-1413 (one question to James Hargrove).

struck blacks and seated whites. Although five seated white jurors acknowledged during group *voir dire* that they or a relative had been convicted of at least one criminal offense in Montgomery County or adjacent counties, Evans did not question three of them at all about those matters,[17] and posed only three superficial questions each to the other two.[18]

When the inquiry concerned facts or circumstances about a black panelist likely to be seen as "race-neutral" by the Mississippi Supreme Court, however, Evans was notably more engaged and aggressive. For example, in both group and individual *voir dire* of Tashia Cunningham, Evans posed multiple leading questions (including a reminder that she was "under oath," J.A. 132) about whether Cunningham and Flowers' sister worked "close to" each other at the facility where both were employed. J.A. 83-85; 132. When Cunningham maintained that they did not, Evans summoned a witness, Crystal Carpenter, to take the stand and provide extrinsic evidence to contradict her. J.A. 148-150. Although Carpenter pledged to obtain and

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[17] *See* Tr. 882-883; 1196 (Juror Jennifer Chatham, whose uncle was "incarcerated over in Parchman for rape"); Tr. 884; 1385 (Juror Emily Branch, whose mother "was put on parole for embezzlement, but then she got a D.U.I. and she got convicted because she violated parole"); Tr. 884-885; 1412-1413 (Juror James Hargrove, who pled to a misdemeanor after being "charged with felony possession" and later had an "aggravated assault" connected with discharging a firearm dismissed).

[18] *See* Tr. 978 (Juror Larry Blaylock, who "had a second or third cousin that was convicted of murder" by Evans' office); Tr. 882; 1190-1191 (Juror Suzanne Winstead, whose nephew was prosecuted on drug charges by Evans' office).

deliver personnel records specifying "the particular location of every person" on the line, J.A. 151, those documents were never produced. Nonetheless, Evans later persuaded the trial judge to accept Cunningham's "situation about working so closely with Mr. Flowers' sister" as a race-neutral reason for her removal. J.A. 225.[19]

2. The *Batson* hearing.

After accepting the first black panelist tendered, Evans struck the remaining five: Carolyn Wright, J.A. 203; Tashia Cunningham, J.A. 205; Edith Burnside, *id.*; Flancie Jones, J.A. 208; and Dianne Copper, *id.* Pursuant to Mississippi procedure, defense counsel noted her concern after the first strike, J.A. 203, and asserted that a *prima facie* case had materialized after the third strike, J.A. 205. Judge Loper agreed, noted that "five out of six strikes were African-American," and invited Evans to "put on race-neutral reasons. . . ." J.A. 209.

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[19] Evans was similarly persistent in a series of leading questions aimed at establishing that black panelist Dianne Copper could not be fair because she lived "about two blocks or so" from the Flowers family. J.A. 76. He also aggressively questioned black panelist Edith Burnside about having been "sued by Tardy Furniture," and became argumentative as she attempted to explain that the lawsuit arose from a misunderstanding and the debt had been paid. *See* J.A. 141-142 ("Q: So there was a dispute between you and her son-in-law? A: No. It wasn't a dispute. He just—Q: Well, did you agree that you owed it? A: Yes. We had no falling out about it. . . . Q: If it wasn't no misunderstanding, why did it have to go to court? A: I'm not quite sure about that.").

Evans proffered between two and four "reasons" for each black panelist he struck. As to each of the first four struck black panelists, however, at least one of his assertions materially misrepresented the facts. For example, to justify the strikes of Carolyn Wright and Edith Burnside, Evans noted that each had been "sued" by Tardy Furniture over credit accounts, then added a further claim that each woman's wages had been "garnish[ed]" to satisfy their debts. J.A. 209; 226. The historical fact of each lawsuit was accurate, but, as the Mississippi Supreme Court later found, the garnishment claims were not. J.A. 384 ("Nothing in the record supports the contention that Wright's wages were garnished"); J.A. 399 (garnishment claim concerning Burnside "was not supported by the record").[20] With one minor exception, none of Evans' misrepresentations drew scrutiny from Judge Loper.[21]

Evans' other proffered justifications focused largely on the black panelists' knowledge of or acquaintance with defense witnesses or Flowers' relatives. *See* J.A. 209 (asserting Wright "knows almost every defense

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[20] Evans' other misrepresentations included: a claim that Wright "worked with [Flowers'] sister, Cora," J.A. 218, which had no record support; a claim that Cunningham was "a close friend" of Flowers' sister, J.A. 220, which had no record support; a claim that Burnside had "tried to deny" the Tardy lawsuit during *voir dire*, J.A. 226, which was also "not supported by the record," J.A. 399; and a claim that Flowers was Jones' "nephew," J.A. 229, when in fact he was a distant relative by marriage about whom Jones knew nothing prior to *voir dire*, *see* J.A. 179-180.

[21] The exception was Evans' claim that Wright knew Flowers' sister Cora, which the trial court rejected but did not consider for what it said about pretext. J.A. 219.

witness" and "worked with [Flowers' father] Archie"); J.A. 220 (claiming without record basis that Cunningham "is a close friend of" Flowers' sister); J.A. 226 (arguing that Flowers was "very good friends with both of [Burnside's] sons"); J.A. 229 (inaccurately describing Flowers as Jones' "nephew"); J.A. 234 (asserting that Copper "worked with two of the Defendant's family members").

Defense counsel offered rebuttals for each of Evans' claims and reminded the court of "the history of race discrimination in jury selection . . . in this particular case." J.A. 210. She also requested consideration of the apparent racial disparities in Evans' investigations and questioning of white and black panelists, and the plausibility of the stated bases for his strikes. For example, in response to Evans' introduction of an abstract of Tardy's civil judgment against Wright, counsel pointed to "the differential level of investigation" and noted that while Evans "obviously felt it important enough to go get abstracts of judgment on this African-American juror," he had made no similar inquiries into white jurors known to have had "prior legal problems. . . ." J.A. 216-217.[22] Similarly, counsel urged the judge to "go behind the facial neutrality" of a proffered reason and assess the plausibility of its relationship "to what is really a material issue in this case. . . ." J.A. 212; *see also* J.A. 227.

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[22] *See also* J.A. 227 (similar); 236 (noting differential questioning on ability to set aside opinion).

Judge Loper expressed little interest in these arguments. As to Evans' record of striking black panelists in the prior trials, the judge said nothing. He was equally unresponsive to counsel's requests for scrutiny of the plausibility of Evans' proffered reasons. *See* J.A. 211; 227-228. And in response to counsel's concern over differential questioning and investigation of black and white panelists, he did not entertain the possibility that the differences could suggest discriminatory intent, but instead answered by quipping, "Well, reckon it might be that they don't have to prove a race neutral reason for striking [a white juror with a criminal record] since they didn't strike him?" J.A. 217; *see also* J.A. 227-228 (similar); J.A. 237-238.

Having rejected the considerations urged by defense counsel, the judge followed the example set by the Mississippi Supreme Court's analysis of the three "suspect" (but sustained) strikes in *Flowers III*. Consistent with that approach, the judge applied two criteria: whether one or more of Evans' proffered reasons was facially "race-neutral," *see* J.A. 219-220; 225; 228; 229-230; 236; and if so, whether defense counsel had failed to identify an identically situated white juror who had not been struck, *see* J.A. 211; 224; 228; 236. Once both questions were answered in the affirmative for each of the black panelists Evans had struck, Judge Loper's analysis was done, and all five strikes were upheld.

The jury of 11 whites and one African American convicted Flowers and sentenced him to death. J.A. 308.

C. *Flowers VI* Before and After GVR.

On appeal to the Mississippi Supreme Court, Flowers contended that Evans had once again engaged in race discrimination during jury selection. In support of that claim, Flowers argued, *inter alia*, that disparities in Evans' questioning and treatment of black and white panelists, and misrepresentations of the record proffered in defense of his strikes, showed that Evans' history of *Batson* violations had repeated itself. *See Flowers VI*, 158 So.3d at 1047.

Emphasizing the "great deference" accorded to the trial judge, and saying nothing about Evans' history or the Mississippi Supreme Court's own decision in *Flowers III*, a majority rejected Flowers' *Batson* claim. *Id.* at 1058. With regard to both the numbers of questions posed to black and white panelists, and the nature of the questions asked and not asked, the majority acknowledged some disparities in each category, but maintained that neither "alone" proved discrimination. *Id.* at 1048-1049, 1057.

The remainder of the majority's analysis consisted of a panelist-by-panelist assessment of each strike. As with the "suspect" strikes in *Flowers III*, the majority's touchstone remained whether Evans had proffered at least one facially race-neutral reason, not contradicted by the record, that did not also apply to an identically situated white juror;[23] individual indicators of pretext

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[23] *See, e.g.*, *id.* at 1049 (noting that, like black panelist Wright, several white jurors "knew" many witnesses, but discounting the comparison because "the number of acquaintances was not the

were noted but never aggregated;[24] and, where necessary, reasons not proffered by Evans were invoked to support his strikes.[25] Three justices dissented.[26] *See id.* at 1088-1100.

Flowers petitioned for certiorari, contending that the Mississippi Supreme Court's failure to consider Evans' history of adjudicated purposeful discrimination during its *Batson* analysis conflicted with settled law. This Court granted certiorari, vacated the state court's judgment, and remanded "for further consideration in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016)." *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016) (Mem.).

On remand, a majority of the Mississippi Supreme Court determined that neither *Foster* nor *Miller-El v.*

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sole reason given by the State, so the basis is not an automatic showing of pretext").

[24] *See*, *e.g.*, *id.* at 1050, 1055-1056 (noting, but drawing no inferences from, Evans' false garnishment claims concerning Wright and Burnside).

[25] *See*, *e.g.*, *id.* at 1050 (invoking questionnaire response by Wright that was not included among Evans' proffered justifications); *id.* at 1052 (finding fact that Copper "lived in the same neighborhood as the Flowers family" supported her removal, though Evans made no similar argument).

[26] In addition to the *Batson* violation, the three dissenters also found "three instances of the prosecution arguing facts not in evidence" which were "notably similar" to those condemned in *Flowers II*. *Id.* at 1083 (King, J., joined by Dickinson, P.J., and Kitchens, J., dissenting). A separate dissenting opinion further found error in the trial court's exclusion of a defense expert intended to challenge the cross-racial identification testimony of State's witness Porky Collins. *Id.* at 1076-1080.

Dretke, 545 U.S. 231 (2005), offered any pertinent lessons on the relevance of a prosecutor's history to the assessment of a *Batson* claim. *See* J.A. 362-371; 377-378. The majority further declared that "the historical evidence of past discrimination [in this case] does not alter our analysis," J.A. 379, then reproduced, verbatim, the merits discussion set forth in its pre-GVR opinion.

This Court granted certiorari.

SUMMARY OF ARGUMENT

The prohibition against racial discrimination in jury selection serves multiple ends. It shields individual defendants from discriminatory and arbitrary enforcement of the law; it protects potential jurors' right to participate in the administration of justice, and to be treated with respect while doing so; and it prevents the undermining of public confidence in the criminal justice system. All of those values were diminished by the Mississippi Supreme Court's perfunctory treatment of the evidence of discrimination in this case.

The first four times Evans prosecuted Flowers, he struck every black panelist that he could, 36 in all. At two of those trials, Evans was found to have discriminated in his use of peremptory challenges. At the sixth trial, Evans accepted the first black panelist, then struck the remaining five, proffering facially neutral reasons for his strikes that the Mississippi Supreme Court sanguinely accepted. *Batson* requires a

"sensitive inquiry" into all of the indicia of discriminatory intent, and a cumulative assessment of the evidence uncovered by that inquiry. Nonetheless, the Mississippi Supreme Court ignored Evans' history in determining whether the race-neutral reasons Evans proffered were pretextual; deferentially reviewed each proffered reason; and never considered the totality of the evidence of racial motivation. After this Court vacated the state court's decision and remanded for further consideration in light of *Foster*, the state court insisted that Evans' history was irrelevant, and adhered to its prior analysis. That decision, like the pre-GVR decision, cannot be squared with *Batson*.

The Mississippi Supreme Court limited its inquiry to a very narrow question: Whether Evans stated a race-neutral reason for each of his strikes that was neither directly contradicted by the record nor squarely applicable to a white juror he did not strike. This he had managed to do. But because some stated reasons are pretextual, *Batson* requires more. Evans had already shown himself, at least twice in this same case, to be willing both to violate the Constitution and to try to conceal his racial motivation. Given that very proximate history of discrimination and dissembling, any court reviewing the evidence of discrimination was obliged to be skeptical of Evans' stated reasons.

Examination of the cumulative evidence of racial motivation in light of Evans' history compels the conclusion that race, once more, was the determining factor in both his questioning and his strikes. From the reversal in *Flowers III*, Evans should have learned the

constitutional mandate of racial neutrality. Instead, he learned how to avoid what, in its limited review, the Mississippi Supreme Court regarded as the markers of racial motivation.

Rather than renouncing racial discrimination, Evans took some pains to conceal it. Because *Flowers III* focused on the strength of the *prima facie* case made when he used all 15 of his strikes against black panelists, Evans created a slightly weaker *prima facie* case by accepting the first black panelist and striking one white panelist. Similarly, because the Mississippi Supreme Court had accepted without scrutiny strikes Evans claimed were based upon acquaintance with Flowers' family, he focused his *voir dire* questions on such relationships. That effort, however, revealed its own disparities as Evans ignored the relationships suggested by the *voir dire* responses of white panelists but aggressively probed black panelists (and, in one instance, summoned an outside witness to provide extrinsic evidence) for relationship information capable of supporting a strike.

Flowers III also taught that while demonstrably false reasons for strikes might be rejected, their falsity would neither damage Evans' overall credibility, nor cast doubt on the sincerity of other stated reasons. That guidance, too, was reflected in the proceedings below; Evans offered at least four assertions of fact—one each for four different black panelists—that were devoid of record support, and the state court drew no adverse inferences from those misrepresentations.

Finally, *Flowers III* made plain that in the eyes of the state court, the implausibility of stated reasons would not impeach them. One would expect that a lawyer concerned about possible bias against his side would have pursued the most troubling suggestions of such bias and paid little or no attention to possibilities far less likely to produce antipathy, but Evans did the opposite. He made no effort to follow up when white panelists disclosed facts or circumstances suggestive of bias (*e.g.*, their or their relatives' own criminal convictions by Evans' office or other prosecutors). But when he discovered that two black panelists had been sued over credit accounts by an heir of one of the four victims, he worked hard (and again resorted to extrinsic evidence) to establish that the long-resolved, non-contentious lawsuits justified the panelists' removal.

The Mississippi Supreme Court majority rejected Flowers' *Batson* claim after ignoring many of these indicia of discrimination and failing to draw ready inferences about pretext and Evans' credibility from those it did recognize. Proper assessment of the totality of the record, however, dictates a different result. Evans' history of striking black panelists in the Flowers trials—including the most recent one—is lengthy and stark, and his conduct before the trial court below bears numerous hallmarks of a prosecutor still bent on seating as few black jurors as possible. Though his methods show signs of refinement after a half-dozen trials, the evidence, "viewed cumulatively," is still "too

powerful to conclude anything but discrimination." *Miller-El*, 545 U.S. at 265.

ARGUMENT

I. Courts must be vigilant in ferreting out racial discrimination in the exercise of the peremptory challenge.

A. Racial discrimination in the administration of justice is intolerable.

Racial discrimination in the administration of justice "strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979). Because "the power of the State weighs most heavily upon the individual" in criminal cases, *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964), "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious" in that context, *Rose*, 443 U.S. at 555; *see also Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017) (quoting this language from *Rose*); *Buck v. Davis*, 137 S.Ct. 759, 778 (2017) (same).

Therefore, in criminal cases courts "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin*, 379 U.S. at 192. This is nowhere more true than in jury selection. The jury's indispensable role as "'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice,"'" *Pena-Rodriguz*, 137 S.Ct. at 868 (quoting *McClesky v. Kemp*, 481 U.S. 279, 310 (1987) (quoting,

in turn, *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879))), means that racial discrimination in jury selection threatens the gravest of harms to criminal defendants.[27]

Prospective jurors, too, stand to be harmed by racial discrimination. For that reason, prohibitions against it were "designed 'to serve multiple ends,' only one of which was to protect individual defendants from discrimination in the selection of jurors." *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (internal citations omitted).

> The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority. . . .

Strauder, 100 U.S. at 308.

More broadly still, the harm from discrimination affecting the composition of the jury "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87. Such discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the

[27] This reality, true in any criminal case, is especially pertinent in capital cases due to the "complete finality of the death sentence," and the "unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35, 45 (1986).

judicial process." *Rose*, 443 U.S. at 556; *Buck*, 137 S.Ct. at 778 ("[Such discrimination] injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.' ") (quoting *Rose*). Such doubt, in turn, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been "given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413.[28] In short, "[a]ctive discrimination by a prosecutor" during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law," and it "cannot be tolerated." *Id.* at 412.

B. Courts must diligently review evidence that a peremptory strike was racially discriminatory.

More than a century ago, *Strauder* held that a state denies an African-American defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Batson* held that a potential juror may not be excluded from jury service through a peremptory challenge based on racial animosity or stereotypes any more than he may be excluded from the

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[28] *See also id.* ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in those terms if the jury is chosen by unlawful means at the outset.").

venire for such reasons. *Batson*, 476 U.S. at 88. Nor may he be struck based on an assumption that a black juror "will be biased in a particular case simply because the defendant is black." *Id.* at 97.

To give effect to these prohibitions, *Batson* established a three-step procedure for detecting racial motivation in peremptory strikes: *first* the defendant must establish a *prima facie* case of racial discrimination; *second*, the prosecutor may offer race-neutral reasons for the strike(s); and *third*, the court must determine whether the defendant has met his burden of proving purposeful discrimination. *Id.* at 96-97; 98.

1. *Batson* requires careful consideration of all evidence of racial discrimination.

"In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). As *Miller-El v. Dretke*, 545 U.S. 231 (2005), observed, *Batson*'s individualized focus was susceptible to weakening because of its emphasis on the particular reasons a prosecutor might give: "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965)]." *Miller-El*, 545 U.S. at 239-240. *Batson*'s third step was intended to address the

possibility that a prosecutor's stated reasons are false, and *Batson* invites a defendant to rely upon "all relevant circumstances" to meet his burden. *Id.* at 240 (citing *Batson*, 476 U.S. at 96-97).

Among the indicia *Miller-El* identified as "bear[ing] upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El*, 545 U.S. at 240; "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," *id.* at 241; failure to *voir dire* on the reasons purportedly grounding a strike, *id.* at 244; "how reasonable, or how improbable, the explanations are . . . and [] whether the proffered rationale has some basis in accepted trial strategy," *id.* at 247; "contrasting *voir dire* questions posed respectively to black and nonblack panel members," *id.* at 255; mischaracterization of the evidence, *id.* at 244; and a history of racial discrimination by the prosecuting office, *id.* at 263.

2. The persuasiveness of all the evidence of racial discrimination must be assessed cumulatively.

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . ." *Washington v. Davis*, 426 U.S. 229, 242 (1976). *Miller-El* did just that: "It is true . . . that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination."

Miller-El, 545 U.S. at 265. *Foster* took the same approach: "Considering all of the [] evidence that bears upon the issue of racial animosity, we are left with the firm conviction that the strikes of [two panelists] were motivated in substantial part by discriminatory intent." *Foster*, 136 S.Ct. at 1754 (quotations omitted); *see also id.* at 1760 (Alito, J., concurring) ("I agree with the Court that the totality of the evidence now adduced by Foster is sufficient to make out a *Batson* violation.").

II. The Mississippi Supreme Court failed to consider an important indicium of discriminatory intent and failed to evaluate the cumulative evidence of racial discrimination.

A. Evans' history of prior discrimination was proximate, repeated, and egregious.

Across the five trials for which the numbers are available, Evans faced a total of 43 black prospective jurors while he had peremptory strikes at his disposal. He struck 41 of them and allowed only one, Robinson, to serve. In the third trial alone, Evans exercised all 15 of his strikes against African Americans—12 against prospective members of the main panel, and three more against potential alternates. *Flowers III*, 947 So.2d at 916. On appeal from that proceeding, the Mississippi Supreme Court found two clear *Batson* violations, and three more "suspect" strikes. *Id.* at 936 ("[T]hese strikes are also suspect, as an undertone of disparate treatment exists in the State's *voir dire* of these individuals."). The court went on to declare that the record presented "as strong a *prima facie* case of

racial discrimination as we have ever seen in the context of a *Batson* challenge," *id.* at 935, and characterized Evans' conduct as "evinc[ing] an effort by the State to exclude African Americans from jury service," *id.* at 937.

Moreover, *Flowers III* was not the first time Evans was adjudicated to have violated *Batson*. The trial judge in *Flowers II* had also caught him discriminating in jury selection, and responded by seating one of the black panelists Evans had struck. Thus, by the time of the trial at issue here, Evans had already amassed a remarkable record of removing black prospective jurors, and had been twice adjudicated—in this same case—for violating the rule against racially discriminatory peremptory strikes.

B. The Mississippi Supreme Court failed to consider Evans' history of discrimination.

Despite the judicially-determined fact of repeated prior discrimination and deception, and despite the clarity of this Court's instruction that all relevant circumstances must be considered in evaluating discriminatory purpose, the Mississippi Supreme Court has twice refused to consider that history in evaluating the race-neutral reasons Evans proffered at Flowers' sixth trial. When first presented with the proof that Evans had again discriminated, that court failed to even *mention* the discrimination it had emphatically condemned in *Flowers III*, let alone assign it any weight in the assessment of Evans' conduct at the trial under review.

After this Court remanded *Flowers VI* for reconsideration in light of *Foster*, one member of the original majority, Chief Justice Waller, changed his opinion on the *Batson* issue; the remainder rationalized why they need not do so.

1. Perseverative error.

The post-GVR *Flowers VI* majority acknowledged the historical fact of Evans' past discrimination, *see* J.A. 378-379, but only long enough to dismiss its current relevance: "[T]he historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in [pre-GVR] *Flowers VI*." J.A. 379. Then, proving it meant its dismissal, the majority reproduced, word for word, its pre-GVR analysis. That analysis did not evaluate the likelihood that Evans would again violate the Constitution, as he had (at least) twice before; it did not register any skepticism of Evans' trustworthiness, despite his record of offering courts pretextual explanations; and it did not assess any of the other signs of discrimination in light of either Evans' established propensity to discriminate or his demonstrated lack of candor.

2. The majority's reasons for perseveration.

The post-GVR majority gave three reasons for attaching no probative value to Evans' history of discrimination and willingness to offer false explanations for his strikes. One is unsupported by the record, and all

three reflect a crabbed view of *Batson* that conflicts with this Court's precedents.

First, the majority credited the trial judge for having taken Evans' history into account, J.A. 373-377, but the record shows otherwise. It is true, as emphasized by the majority, that "the trial court was asked on several occasions to consider historical evidence of *Batson* violations committed by Evans in previous trials of the case." J.A. 373; *see also* J.A. 373-376 (quoting four lengthy excerpts from defense counsel's arguments). That the court was *asked* to consider those factors, however, does not mean that it did so. And while the majority also reproduced two quotes from the trial judge, neither supports its assertion that his *Batson* step-three assessment took account of Evans' history. On the contrary, both statements quoted by the majority were made before the *Batson* hearing even occurred.[29] Moreover, when the judge was asked to

[29] The first came as the judge denied a defense request to bar Evans from using peremptory strikes, and carried the clear message that, at least on that matter, history was irrelevant. *See* J.A. 374 (state court majority quoting trial judge: " 'But because *Flowers III* was reversed on *Batson* is certainly no grounds for saying that they should now be denied the right to use peremptory.' "); J.A. 200 (transcript of hearing from which quote was drawn). The second conveyed the judge's observation that many black citizens were eliminated from past venires, not because of race, but because they were acquainted with Flowers or his family. *See* J.A. 376-377 (state court majority quoting trial judge: " 'But you know full well from past experiences in this county because of the number of people that know Mr. Flowers. . . . [T]here is nothing that has—that has—no discrimination that's occurred that has caused this, what you call, statistical abnormality now.

consider Evans' history *during* the *Batson* hearing, his response—not quoted by the majority below—took the form of a non-sequitur.[30] Thus, rather than justifying "great deference to the trial court's determinations," J.A. 370, the portions of the record cited by the majority provide no basis for confidence that the trial judge took due account of Evans' history of discrimination and untrustworthiness. *See Miller-El*, 545 U.S. at 254 (noting "amplified" concern created by evidence "that the state court also had before it, and apparently ignored").

Second, while the post-GVR majority acknowledged that *Miller-El* attaches probative value to history, it quickly dismissed that precedent with a remarkable comparison: "The Court does not have evidence before it of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." J.A. 378. True, the prior policy of an office is not the same as adjudicated discrimination by the prosecutor himself. But on every plausible point of comparison, Evans' personal history is *more* probative of discriminatory intent than was the office

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It is strictly because of the prominence of his family.' "); J.A. 199-200 (transcript of hearing from which quote was drawn).

[30] *See* J.A. 210-211 (Defense counsel: "And we think it is, therefore, pretextual specific and particularly in light under—of the history of race discrimination in jury selection in this district and in this particular case found by the Mississippi Supreme Court in *State v. Flowers* after the third trial, the first one in this district." The court: "Have you found any white jurors who were not struck who had been sued by Tardy Furniture? And have you found any who have worked with Mr. Archie Flowers?").

policy in *Miller-El*: A *policy* is less probative than a confirmed *action*, particularly an action taken more than once; a practice used against the *same defendant* in a trial of the *same case* is more probative than a practice in an unrelated case; a policy adopted by an *office* is less probative than an action taken by the same *person* whose credibility is at issue; and an action taken *after a practice is declared illegal* is more probative of willingness to break the law than is an action taken before such a declaration.

Third, rather than drawing guidance from *Foster* in accordance with this Court's GVR mandate, the majority opted for an obvious but unhelpful distinction: "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations." J.A. 362. While that much was true (as demonstrated by the majority's lengthy description of *Foster*'s facts, *see* J.A. 362-368), neither that observation nor anything else in the majority's discussion explains its declaration later in the opinion that the prior *Batson* violations in this case "do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." J.A. 377. Nor is that declaration explainable any other way, for regardless of whether one marker of propensity to discriminate (*e.g.*, a history of violating *Batson*) "undermine[s]" a prosecutor's credibility in exactly the same way "as" another (*e.g.*, the prosecutor's notes in *Foster*),

the fact remains that *both* markers are highly probative on the real question of discriminatory intent.[31]

Taken together, the majority's attempts to distinguish this case from *Miller-El* and trivialize *Foster* suggest a fundamental error: It read this Court as more concerned with prohibiting certain specific markers of racial discrimination than with eradicating the discrimination itself. But the Equal Protection Clause of the Fourteenth Amendment does not command discreet racial discrimination, it forbids racial discrimination. *Batson*, *Miller-El*, and *Foster* all reflect that mandate, and direct that courts carry it out by examining all of the relevant and probative evidence.

C. The Mississippi Supreme Court failed to consider the cumulative evidence of discrimination.

The post-GVR majority acknowledged Flowers' complaint that the previous majority's analysis "did not follow the 'totality-of-the-circumstances approach' used in *Foster*," but instead "confined itself to evaluating each piece of evidence of pretext in isolation,

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[31] It is also far from obvious that the jury selection file in *Foster* was more "despicable" than is Evans' record of violating *Batson* in at least two prior trials. The "B" notations in *Foster* were a telltale sign that unconstitutional racial bias was afoot; Evans' prior adjudications in this case are firm proof that he repeatedly acted in service of such bias. To suggest that the former matters in a *Batson* step-three analysis but the latter does not, as the majority below did, is to misunderstand the object and operation of that analysis completely.

affording the prosecutor the benefit of the doubt where the evidence was ambiguous." J.A. 368-369. The majority's answer to that complaint, however, was not that it was wrong, *i.e.*, that the original opinion *had* included the requisite cumulative analysis. Instead, its answer was that Flowers had received all he was due because defense counsel had been heard to *argue* for consideration of the "totality of the circumstances," and because the trial judge "also considered other circumstances showing that Evans *did not have* discriminatory intent." J.A. 376 (emphasis added). Needless to say, neither of these observations can substitute for a proper *Batson* analysis.

In sum, trial counsel urged the trial court to assess the totality of the circumstances just as appellate counsel urged the appellate court to do the same. Neither heeded those requests, nor, more importantly, the precedent of this Court.

III. Abundant evidence supports an inference of purposeful discrimination.

At trial, Flowers made the "*prima facie* showing that race was the criteria for the exercise of the peremptory strike," and Evans "c[a]me forward with [] neutral explanation[s] for challenging black jurors." *Batson*, 476 U.S. at 96-97. The only question, therefore, was whether the race-neutral explanations were pretexts for racial discrimination. *Id.*

From the reversal in *Flowers III*, Evans should have learned the constitutional mandate of racial

neutrality. He did not. Instead, he learned the limited lesson he wanted to learn: how to avoid what the Mississippi Supreme Court regarded as the most obvious markers of racial motivation. Close examination of "all of the circumstances that bear upon the issue of racial animosity," *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (citing *Miller-El*, 545 U.S. at 239), reveals a surfeit of evidence that in his sixth trial of Flowers, Evans did not renounce racial discrimination, but merely made more efforts to conceal it.

A. The strength of the *prima facie* case.

The strength of the *prima facie* case is often the first indicium of discriminatory motive. *Miller-El*, 545 U.S. at 240-241; *see also*, *Arlington Heights*, 429 U.S. at 266 ("The impact of the official action whether it bears more heavily on one race than another, may provide an important starting point.") (internal citations omitted). As in *Miller-El*, one black juror and 11 white jurors served at Flowers' sixth trial. After for-cause challenges, more than a quarter of the venire was black; after peremptory challenges, one twelfth of the jury was black. Another reflection of Evans' actions "bear[ing] more heavily on one race than another," *id.*, is the rate at which he struck black and white panelists; he removed 83% (5 out of 6) of the black prospective jurors tendered, but a mere 5% (1 out of 20) of the whites.

The *Flowers III* reversal castigated Evans for "as strong a *prima facie* case of racial discrimination as we

have ever seen in the context of a *Batson* challenge," *Flowers III*, 947 So.2d at 935; it told Evans he could not strike every black panelist tendered, and that he should not spend all of his strikes on black panelists. So, in *Flowers VI* he kept one black juror and struck one white panelist.

B. The history of discrimination.

Miller-El highlighted the Dallas County District Attorney's Office's specific, antecedent policy of systematically excluding black prospective jurors as "a final body of evidence that confirms th[e] conclusion" of race discrimination. *Miller-El*, 545 U.S. at 263; *see also Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."). On the question of propensity to discriminate, Evans' history must be given significantly more weight than the history of the office was given in *Miller-El*, because on every relevant point—the identity of the actor, the similarity of the action, and the legality at the time of the prior action—it is more probative.

Evans' history also bears on the question of purposeful discrimination in a way the history in *Miller-El* did not: it affects his credibility. The object of the step-three inquiry is to evaluate whether a prosecutor's proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). To that end, it is hard to imagine a better predictor of

willingness to deceive than a documented history of dishonesty on the very matter at issue. Reams of impeachment law rest upon the firmly established proposition that propensity to be untruthful matters. Indeed, were Evans himself on trial, his history of cloaking discriminatory jury selection practices in bogus explanations would be admissible as *substantive* evidence of his "motive," "intent," "plan," or "absence of mistake." Fed. R. Evid. 404(b)(2); Miss. R. Evid. 404(b)(2).

To be sure, Evans' past discrimination does not by itself prove either present discrimination or categorical unfitness to participate in jury selection, nor does it modify the allocation of the burden at *Batson*'s third step. It does, however, inform the assessment of whether his proffered explanations for peremptory strikes should be accepted as truthful or rejected as pretexts for discrimination. Both law and life teach that a history of dishonesty on a closely related issue is highly probative of truthfulness, and that a declarant with such a history has no claim to the benefit of the doubt on close questions. For a prosecutor like Evans, those maxims require that his stated reasons be read with a skepticism that would not be appropriate absent his history.

C. Demeanor.

In support of "great deference to the trial court's determinations under *Batson*," the state court quoted *Snyder*'s observation that "[t]he best evidence of discriminatory intent often will be the demeanor of the

attorney who exercises the challenge[.]" J.A. 371 (quoting *Snyder*, 552 U.S. at 477). But "often" is not always, and this case presents strong reasons why deference is not the most important—or even a significant—factor in evaluating Evans' motives.

Two kinds of demeanor evidence may be relevant at *Batson*'s third step: first, "the demeanor of the attorney who exercises the challenge," and, second, because "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), [] the trial court's firsthand observations [may be] of even greater importance." *Snyder*, 552 U.S. at 477. In this case, deference to judgments regarding prospective juror demeanor is not at stake; Evans never sought to "invoke" a panelist's demeanor, and the trial court made no "observations" of a panelist's demeanor before crediting Evans' explanations for his strikes.[32] *Cf. Snyder*, 552 U.S. at 479 (declining to impute to the trial court a determination of prospective juror demeanor consistent with the prosecutor's stated reason where the court did not address that stated reason). Likewise, the trial judge here never addressed or expressed reliance upon Evans' demeanor. Instead, he mechanistically checked for the presence of a stated reason that was neither completely contradicted by the record nor belied by the existence of an unchallenged white juror possessing precisely the

[32] On several occasions the trial court did cite demeanor when ruling on challenges for cause, thus demonstrating that it was willing to do so when demeanor mattered. Tr. 1717; 1719-1720; 1731.

same characteristic—a methodology that bore no evident reliance on demeanor.

Moreover, even if the trial court *had* made a finding that Evans' demeanor supported confidence in his truthfulness, such a finding would have to be severely discounted. It is unreasonable to rely upon an open countenance or a sincere tone of voice when the subject whose credibility is in question has previously shown himself willing and able to maintain an earnest demeanor while making statements later determined to be false. That very sequence unfolded in *Flowers III*: the trial court was taken in by Evans' explanations—presumably delivered with a reassuring demeanor—but the Mississippi Supreme Court later held in no uncertain terms that they were pretextual, *i.e.*, false.

D. Disparate questioning.

As the Mississippi Supreme Court majority chose to phrase it, Evans asked "more questions of African-American jurors than of potential white jurors." J.A. 404. This phrasing, however, obscures the degree of disproportion. As detailed *supra* at 15, Evans asked the five struck black panelists a total of 145 questions, but posed only a total of 12 questions to the 11 seated whites. No struck black panelist faced less than five questions, and no seated white juror faced more than three.[33]

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[33] Although there are various ways to quantify the disparity in Evans' questioning—*e.g.*, all panelists subjected to *voir dire*; all who survived challenges for cause; all who were either seated or

Without noting the size of this disparity, calculating disparity in some other way, or responding to the dissent's assertions about disparity, the state court majority was content to cite the State's response "that more questions were asked only when a potential juror's answers to *voir dire* questions were unclear or needed further elaboration." J.A. 379. That explanation is not supported by the record. Four white panelists tendered by the State—Blaylock, Waller, Fielder, and Lester—each volunteered that they had relationships with defense witnesses,[34] yet none were questioned by Evans; black panelists with similar relationships were always questioned, sometimes exhaustively, *see*, *e.g.*, J.A. 189-190 (Dianne Copper). The only deviation from this pattern was Alexander Robinson, the first black panelist to be tendered, and the

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struck—any numerical comparison leads to the same conclusion: Evans' interest in questioning white panelists was trivial compared to his interest in black panelists. The above analysis focuses on struck black panelists as compared to seated white jurors because considering a broader swath risks the criticism that Evans may have questioned panelists further down the list less because he knew they would not be reached. However, a broader perspective does not eliminate disparity. As the dissent calculated, Evans asked white panelists an average of less than three questions, and black panelists an average of 10 questions. Indeed, nine white panelists were asked no questions by the prosecution on individual *voir dire*, and 23 white panelists were asked no questions by the State other than generic inquiries related to bias and their understanding of a bifurcated trial. J.A. 467-468.

[34] *See* J.A. 54-64 (group *voir dire* responses indicating Blaylock, Waller, Fielder, and Lester each knew one or more of the following defense witnesses: Wayne Miller; James Taylor Williams; Liz Van Horn; Rev. Billy Little; Latarsha Blisset; Nelson Forrest).

only one Evans accepted. Why Robinson was exempted from scrutiny is not apparent from the record, unless it was because Evans was determined to thwart a *prima facie* case by accepting a single black juror, and Robinson came up first.[35]

Moreover, when a seemingly acceptable black panelist was in the box, Evans posed highly leading questions obviously designed to justify a strike. His *voir dire* of Dianne Copper was particularly suggestive of "fishing" for a facially neutral pretext. Copper had volunteered during group *voir dire* that she lived a couple of blocks from the Flowers residence, but stated that her house was not on the same street. J.A. 75-76. Evans did not ask other panelists about proximity to the Flowers residence, but after Copper offered this information, he prodded her with questions implying concern that she was a "neighbor" of the Flowers family. J.A. 77-78. Defense counsel objected to that characterization because Copper only said she lived in the general vicinity, an insignificant trait considering the small size of Winona. When urged by Evans to consider whether the proximity of her residence would affect her thinking, Copper said, "No. No it wouldn't be a problem." J.A. 77. Nonetheless, the next day, Evans

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[35] Robinson raised his hand during group *voir dire* to indicate he knew Flowers' brother Archie, Jr., but Evans did not question him on this relationship. J.A. 61. In contrast, when Evans offered race-neutral reasons for striking black juror Dianne Copper, he pointed to Copper's acknowledgement that she knew Archie, Jr. J.A. 234, 236.

asked Copper several more questions about her residence. J.A. 188-189.

Evans' *voir dire* of Copper regarding a working relationship with Flowers' sister Cora provides another example of an unusually pushy effort to secure an admission of bias after a panelist declared she had none. *See* J.A 77-78. That exchange ended with Copper responding, "Yes sir, it's possible," to Evans' leading question whether the relationship "may cause you to lean toward the defendant in the case?" J.A. 78. If there were any doubt that Copper was actually biased rather than being led to consider what was "possible," what she next volunteered—a potentially significant relationship with one of the victims—made clear that she harbored no bias favoring Flowers. *See* J.A. 78-79. But Evans declined to ask whether *that* relationship would cause her to "lean toward" the prosecution; instead, he asked a leading question that minimized the association. J.A. 79. Moreover, Copper had previously admitted numerous relationships with prosecution witnesses[36] that might just as well have led to bias toward the prosecution, but Evans did not question her about them because he did not care about her true feelings; he just wanted to manufacture a reason to strike her.

Evans' treatment of black panelist Tashia Cunningham presented an even more extreme "procedural

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[36] *See* Tr. 904 (Chief Johnny Hargrove); Tr. 906 (Clemmie Flemming); J.A. 50 (Patricia Hallmon Sullivan Odom); J.A. 51 (Odell Hallmon); J.A. 51-52 (Jerry Dale Bridges); J.A. 56 (Liz Van Horn); J.A. 67 (Danny Joe Lott).

departure," *Arlington Heights*, 429 U.S. at 267, for it involved both disparate questioning and disparate investigation—and, quite likely, an attempt to mislead the trial court. Cunningham raised her hand in group *voir dire* to state that she worked in the same place that Flowers' sister, Sherita Baskin, worked. Evans then posed multiple, aggressively leading questions about whether Cunningham and Sherita worked "close to" each other. *See* J.A. 83-85. Despite Cunningham's clear description of their working relationship as insignificant, Evans returned to the subject on individual *voir dire*. Cunningham again maintained that she did not work in close proximity to Sherita despite Evans' insistence that Cunningham "think about that for a minute," and a reminder that she was "saying that under oath[.]" J.A. 132. He followed that insinuation of perjury by summoning a witness, Crystal Carpenter, to give extrinsic evidence that Cunningham and Sherita worked "Nine or 10 inches" apart. J.A. 149. Carpenter went on to pledge that she would obtain and provide company documentation backing her account, J.A. 151-152, but that never happened, and Evans never explained the omission. He also never explained why he investigated the facially credible responses of a panelist who had otherwise been candid with him. And when challenged about that extraordinary step, he did not claim to have done comparable investigations into any white panelists. *See* J.A. 221.

While the probative value of Evans' differential questioning and investigation is obvious and substantial, the Mississippi Supreme Court majority had little

to say beyond a declaration that "evidence of disparate questioning alone is not dispositive of racial discrimination." J.A. 379.

E. Factual misrepresentations.

In defending his strike of Carolyn Wright, Evans first cited Wright's relationships with "almost every Defense witness in this case." J.A. 209. This purported reason was produced by one of several instances of disparate questioning of black and white panelists, but it was also a half-truth, because Wright also knew many prosecution witnesses; in fact, Wright acknowledged she knew nearly as many prosecution witnesses as defense witnesses.[37] Evans then proffered a complete fabrication, declaring that Wright "knows [Flowers'] sister, Sherita," J.A. 209; that claim had no support in the record.

Evans also sought to support the removal of Wright by citing her involvement in litigation with Tardy Furniture and embellishing that otherwise innocuous fact with the false claim that "[t]hey had to garnish her wages. . . ." J.A. 209. Wright made no secret of the lawsuit, and had reported both that her debt was paid and that she harbored no "ill will" toward the Tardy family, J.A. 90-91. Evans posed no questions to her about garnishment. Instead, he waited until the *Batson* hearing to add that allegation, and when

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[37] *See* Tr. 904-906; 910-911; 917; J.A. 49-55 (Wright volunteering acquaintance with 16 prosecution witnesses); Tr. 909; J.A. 55-67 (Wright volunteering acquaintance with 19 defense witnesses).

challenged by defense counsel, attempted to bolster his claim by proffering "an abstract of justice court." J.A. 215. As the Mississippi Supreme Court later found, however, "[n]othing in the record supports the contention that Wright's wages were garnished." J.A. 384.[38]

Evans later repeated the false garnishment claim while defending the removal of a second panelist, Edith Burnside, this time adding a further claim that Burnside had "tried to deny" involvement in the suit. J.A. 226. Although the Mississippi Supreme Court found both claims were "not supported by the record," J.A. 399, it failed to recognize that Evans' false garnishment claims were "not some off the cuff remark," but were akin to the kind of "intricate story"—this one requiring specific measures to obtain external documentation to be offered as support—that this Court noted in *Foster*, 136 S.Ct. at 1750. Rather than evaluating the twice-told falsehood for what it said about Evans' real motives for removing Wright and Burnside, the state court majority was satisfied with the part of what Evans had said that was true. *See* J.A. 399 ("However, prior litigation is a race neutral basis for a peremptory strike.").

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[38] Evans went on to add one more inaccurate claim in defense of striking Wright: that she "also worked with [Flowers'] sister Cora." J.A. 218. The trial court quickly agreed with defense counsel that the record did not support Evans' assertion, stating, "I don't think this one worked with Cora at Shoe World." J.A. 219. If this was not a deliberate misrepresentation, it was likely an invidious "mistake." The "one" who worked with Cora at Shoe World was a different black panelist, Dianne Copper. *Id.*

The misrepresentations continued as Evans defended the strikes of Flancie Jones and Tashia Cunningham. For Jones, he asserted that she "is related to the Defendant . . . He would be her nephew." J.A. 229. The testimony, however, showed that Flowers was Jones' "sister-in-law's sister's son," and that Jones "didn't even know" about the relationship until she came to court and "could completely set it aside." Tr. 754; J.A. 180. And for Cunningham, Evans supplemented the unverified charge that she had "lied" about working near Sherita Baskin (Flowers' sister) with a further assertion—supported by nothing in the record—that she was also "a close friend" to Baskin. J.A. 220.

In sum, Evans gave at least one demonstrably false reason as support for removing four of the five black panelists he struck. While the state courts acknowledged some (and failed to see other) misrepresentations, none had any apparent influence on their assessment of Evans' credibility or the genuineness of the stated reasons for his strikes.

F. Implausible reasons.

Putting aside the falsity of Evans' assertions that Tardy Furniture garnished the wages of prospective black jurors Wright and Burnside, his disproportionate interest in the subject of civil suits by the Tardys was itself indicative of pretext. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*) ("At [the third] stage, implausible or fantastic justifications may (and probably

will) be found to be pretexts for purposeful discrimination."). Evans did not merely ask about the lawsuits—which the prospective jurors admitted—he went to get the resulting judgments. True, one of the victims was the then-owner of Tardy Furniture, and it would have been her son who, after her death, sued two of the struck black panelists. But both explained that the debts were paid and no ill will existed. Moreover, even if there had been *some* ill will toward Tardy's *son*, it is not plausible that any rational juror would be inclined to acquit (or even treat leniently) someone whom the evidence showed had committed *quadruple murder* merely because that juror later became engaged in a minor property dispute with a relative of one of the four victims. And if that concern were genuine rather than pretext, Evans would have made at least some effort to search out similar disputes among prospective jurors and the other three victims. As defense counsel pointed out to the trial judge, Evans made no such effort. J.A. 227. Finally, a prosecutor truly concerned with bias born of litigation surely would have probed white panelists who themselves or whose relatives had been prosecuted by his own or nearby offices. As defense counsel also argued at the *Batson* hearing, Evans did not do that either, J.A. 216; instead, he seated five such individuals on the jury. *See Snyder*, 552 U.S. at 483 ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks.").

G. Comparison with accepted white jurors.

Because Evans' disparate questioning both failed to probe white panelists' possible bias and failed to disclose facts about them that might facilitate a more detailed assessment, comparative juror analysis cannot fully reveal the extent to which his stated reasons for striking black prospective jurors were pretextual.

Nevertheless, comparative analysis is possible on at least one measure, and it reinforces the other evidence of pretext. For all five of the black prospective jurors he struck, Evans cited their relationships with the Flowers family or with defense witnesses as a reason grounding his strike. However, that reason is not credible because Evans accepted white panelist Chesteen, who knew both of Flowers' parents, Flowers' sisters, and his brother; he also accepted four other white panelists who volunteered that they knew defense witnesses. *See supra* at n.34 (connections acknowledged by white panelists Blaylock, Waller, Fielder and Lester). The black panelists were aggressively probed for potential bias with leading questions and accusations about their honesty, but the white panelists were not.

IV. Consideration of the totality of the circumstances compels the conclusion that Evans' facially race-neutral reasons were pretextual.

A. Reason by reason, strike by strike.

For each of the challenged strikes, the Mississippi Supreme Court majority found at least one reason that

was neither completely contradicted by the record nor exactly applicable to a seated white juror. That other reasons Evans gave were false did not matter. That the reasons not contradicted by the record were produced by disparate questioning did not matter. That the cited differences between struck black and seated white jurors were insignificant did not matter. That the reasons were implausible did not matter. In short, the state court's analysis did not assess the likelihood that the stated, uncontradicted reasons were *genuine* rather than pretexts for discrimination.

The majority's treatment of Carolyn Wright is the most extreme, since there was evidence impeaching *all* of Evans' stated reasons for striking her. According to the majority, "Flowers's claim that the State provided 'no convincing reasons' for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture."[39] J.A. 385. However, facts indicating his *true* motivation were ignored. Regarding the purported "working relationship" with Flowers' father, the dissent noted:

> [T]he State made no effort during *voir dire* to question Wright about the working relationship

[39] The majority also noted Wright's juror questionnaire stated that she had previously served as a juror in a criminal case involving the "Tardy Furniture trial." Evans, however, did not state this as a reason for striking Wright, and it therefore cannot support the strike. *See Miller-El*, 545 U.S. at 252 ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

> beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in different departments and during different shifts. Further, Wright stated during group *voir dire* that she was unaware of whether Archie Flowers still worked at Wal-Mart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of questioning related to this basis is suspect.

J.A. 473-474. Despite details suggesting no real working "relationship" (and despite this Court's admonition that jurors are not "cookie cutters," *Miller-El*, 545 U.S. at 247 n.6), the state court majority dismissed as "distinguishable" the work-related connection of white panelist Chesteen, a teller in the bank at which Flowers' father (and other family members) were customers. J.A. 385.

The second cited reason, Wright's acquaintance with potential witnesses, is discredited by facts about comparable white panelists Chesteen, Waller, and Lester. This discredited assertion was first put aside by the majority as not *sufficient* to show pretext, *see* J.A. 383 ("However, the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext."), and three paragraphs later, in the statement quoted above, cited as one of three *legitimate* reasons supporting the strike. J.A. 385.

Evans' third stated reason—that Wright had been sued and had her wages garnished by Tardy's—lacks credibility on at least two accounts. First, it is implausible; as discussed above, such a suit was inherently unlikely to create bias, particularly given Wright's statements that her debt was paid, and that the litigation would not affect her. J.A. 71-72. And second, Evans coupled the lawsuit excuse with the decidedly false claim that Wright's wages had been garnished. Thus, half of this stated reason was untrue and the other half was implausible; both facts are strong evidence of pretext, yet neither mattered to the majority below.

Finally, a court "sensitively" weighing the evidence of racial motivation would have found yet one more ground for doubting Evans' stated reasons for striking Wright: her juror questionnaire indicated that she "strongly favor[ed]" the death penalty. Supp. C.P. 78. At least in the eyes of a colorblind prosecutor, that response should have made Wright highly desirable; that Evans nonetheless struck her suggests that he saw races rather than individuals. *See Miller-El*, 545 U.S. at 247 ("Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted.").

The state court majority's treatment of the four other struck black panelists was similarly indifferent to evidence of pretext. The majority was correct that for each of them Evans cited at least one reason with record support that did not precisely apply to a white juror he had accepted. However, given the backdrop of

Flowers III, only the most unsophisticated prosecutor would not have had such a reason at hand. And given that backdrop, facile inquiry was insufficient: "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Miller-El*, 545 U.S. at 240 (citing *Batson*, 476 U.S. at 96-97). Nonetheless, for none of the panelists did the majority look beyond the case at hand—or even beyond the reason at hand.

For each of those prospective jurors, powerful evidence of pretext was also present, evidence that the court dismissed simply because it found a reason that was not obviously pretextual. Moreover, the majority below invented additional reasons to bolster the strike of Dianne Copper, citing both that she "lived in the same neighborhood as the Flowers family" and that "she would rather not serve as a juror," neither of which was mentioned by Evans at the *Batson* hearing. All told, nothing about the state court's analysis of the evidence of discriminatory motive for the individual panelists matched the "sensitive inquiry" mandated by this Court.

Finally, at no point did the state court consider whether the evidence of racial animus related to one panelist might contribute to the likelihood that Evans was discriminating when he struck another. Even if the strikes of Jones, Cunningham and Burnside were *all* legitimate, the misrepresentations of the record, disparate questioning, disrespectful treatment, and implausible additional reasons that marked Evans'

treatment of them all add to the cumulative evidence of racial animus that should have been considered in evaluating the removal of Wright and Copper. *See Snyder*, 552 U.S. at 478.

B. The whole story.

> "If anything more is needed for an undeniable explanation of what was going on, history supplies it."

Miller-El, 545 U.S. at 266.

Three different stories might be told to weave together the numerous, factually complicated indicia of discrimination this case presents. The first is simple denial. The State's Brief in Opposition maintained that there was no reason to believe that Evans ever discriminated, simply omitting *Flowers II* from its recitation of the facts, and reinterpreting *Flowers III* in a way that the Mississippi Supreme Court itself has never done. This is not a plausible account of the facts. But the State's choice to push a total fiction suggests the difficulty of coming up with a persuasive account of what happened that both acknowledges Evans' history of willingness to violate the Constitution and willingness to try to deceive a trial court, yet still manages to conclude that he did not again engage in purposeful discrimination.

A second take would admit that Evans twice discriminated in previous trials of the case against Flowers, but that—for some reason—he changed his ways. Perhaps he was remorseful, or perhaps he was shamed,

though there is no evidence of either in the voluminous record of this case. Or perhaps he was merely deterred by reversals. Then, however, it is hard to explain why the record of the sixth trial is littered with disparate questioning, repeated mischaracterizations, attention to substantively unimportant matters, an unusual and apparently unwarranted investigation of a black panelist, and unquestioning acceptance of white panelists who shared a characteristic cited for striking black panelists. Because if Evans were either sorry or scared, he would have been careful to treat prospective jurors the same regardless of race. Moreover, sheer carelessness would not explain why all of the errors run in the same direction.

The third and best explanation of the facts—the only explanation supported by the record and the only one a watchful community would accept—is that Evans was of a mind to discriminate. Why he was of such a mind the record does not reveal. Maybe because his case was weak enough that he also felt the need to mischaracterize evidence before the jury in at least two trials. Maybe because he thought black jurors would be skeptical of a cross-racial identification that amounted to "All blacks look alike." Maybe because he feared the ramifications of his own record of racial discrimination. Maybe because he believed all black jurors would favor a black defendant.

Whatever his reason, Evans had previously won convictions of Flowers only by breaking the rules, and in this sixth trial he broke the rules again. But this time he tried to be a little more careful to cover his

tracks. Close examination shows greater cunning, but the same purposeful discrimination on the basis of race. *See Foster*, 136 S.Ct. at 1749 ("On their face, Lanier's justifications for the strike seem reasonable enough[, but o]ur independent examination of the record [] reveals that much of the reasoning provided by Lanier has no grounding in fact."). He asked questions, not for their value in revealing bias, but for the cover their answers might give. He asked leading questions to produce answers he could cite. He did not ask white panelists as many, or as probing questions because he did not plan to strike them. He relied on differences between black and white panelists' responses that were trivial, or were produced by his own disinterest in questioning the white panelists. He went outside the courtroom to chase down remote connections in the hopes that the chase would produce a reason he could cite. And he mischaracterized the record on numerous occasions, always in the same direction: to justify the strikes of black prospective jurors.

As in *Foster*, "[c]onsidering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,'" it is impossible to avoid "the firm conviction that the strikes of [black panelists] were 'motivated in substantial part by discriminatory intent.'" *Foster*, 136 S.Ct. at 1754 (quoting *Snyder*, 552 U.S. at 478).

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CONCLUSION

For the foregoing reasons, petitioner Flowers respectfully requests that this Court reverse the decision of the Mississippi Supreme Court.

Respectfully submitted,

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