No. 18-6286

IN THE

SUPREME COURT OF THE UNITED STATES

LISA JO CHAMBERLIN,
Petitioner

v.

MARSHALL FISHER,
Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. An appellate court reviewing a claim of discrimination in jury selection should consider *all* the evidence in the record that bears upon the issue.

2. There is no split of authority regarding the application of *Batson* that requires certiorari review.

PARTIES TO THE PROCEEDINGS

Respondent is Marshall Fisher, former Commissioner of the Mississippi Department of Corrections. Pelicia E. Hall is currently the Commissioner of the Mississippi Department of Corrections.

Petitioner, Lisa Jo Chamberlin, is an inmate in the custody of the Mississippi State Department of Corrections, who has been sentenced to death.

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BRIEF IN OPPOSITION

This matter is before the Court on the Petition of Lisa Jo Chamberlin ("Petitioner") for a Writ of Certiorari to United States Court of Appeals for the Fifth Circuit wherein she challenges her convictions for capital murder for which she was sentenced to death. Respondent respectfully prays this Court will deny her Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

Lisa Jo Chamberlin was convicted of two counts of capital murder and sentenced to death in August 2006. Her direct appeal was denied on July 17, 2008. *Chamberlin v. State*, 989 So.2d 320

(Miss. 2008). The Petitioner sought and was denied collateral relief. *Chamberlin v. State*, 55 So.3d 1046 (Miss. 2010) rehearing denied (Nov. 10, 2010). The Petitioner filed a federal habeas petition and was granted relief on a claim of juror discrimination in the United States District Court for the Southern District of Mississippi. *Chamberlin v. Fisher*, No. 2:11CV72, 2015 WL 148591 (Mar. 31, 2015); also Pet's App. 65a-103a.

The Respondent appealed from the judgement of the district court. The appeal was heard by a three judge panel which affirmed the grant of habeas relief in a split decision. *Chamberlin v. Fisher*, 855 F.3d 657 (Apr. 27, 2017); also Pet's App. 40a-64a. The Respondent was then granted rehearing en banc. The en banc court of the Fifth Circuit reversed the district court's grant of habeas relief. 885 F.3d 832 (Mar. 20, 2018); also Pet's App. 1a-39a. Rehearing was denied on May 7, 2018. The Petitioner is now seeking to challenge the Fifth Circuit's en banc opinion and order.

JURISDICTION

The Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254 but fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts a claim under the Fourteenth Amendment to the Constitution. Her claim fails.

STATEMENT OF THE CASE

Lisa Jo Chamberlin was convicted of two counts of capital murder with the underlying felony of robbery for which she was sentenced to death. The Petitioner perfected an appeal in which she raised six (6) issues for consideration including a claim based on a violation of *Batson v. Kentucky*,

476 U.S. 79 (1986). The Mississippi Supreme Court rejected each claim and issued a decision affirming Chamberlin's convictions and sentence. 989 So.2d 320. Chamberlin pursued collateral review by filing an application for post-conviction relief asserting four (4) grounds for relief, again including a *Batson* claim. The application was denied on the merits by the Mississippi Supreme Court. 55 So.3d at 1050. Chamberlin then filed her federal habeas petition that included thirteen (13) claims. The district court reviewed only the *Batson* claim and granted relief. 2015 WL 1485901; Pet's App. App. 65a-103a.

On appeal to the Fifth Circuit Court of Appeals, the majority of a three judge panel affirmed the grant of habeas relief. 855 F.3d 657. Rehearing was granted and the Fifth Circuit en banc reversed the district court's judgement granting habeas relief. 885 F.3d 832. The en banc Court held that the district court erred (1) by concluding that clearly established federal law required the Mississippi Supreme Court to conduct a comparative analysis; and, (2) by failing to address the comparative analysis the Mississippi Supreme Court did actual conduct. The en banc Court also concluded that the district court failed to grant proper AEDPA deference to the findings of the Mississippi Supreme Court and that those findings were not unreasonable. 885 F.3d at 840.

STATEMENT OF FACTS[1]

Lisa Jo Chamberlin was convicted of two counts of capital murder for the brutal and tortuous death of Vernon Hullett and Linda Heintzelman. Hullett was bludgeoned to death with a hammer. 989 So.2d at 328. Heintzelman's death, however, was more protracted. She eventually died from

[1] The specific facts of the gruesome double murder were accurately reflected in the district court's opinion. Pet's App. App. 66a-76a. For purposes of brevity they will not be reiterated here but are incorporated by reference.

stabbing injuries to the torso and the neck, blunt force trauma to the head and asphyxiation. *Id.* Chamberlin and her codefendant dismembered Hullett. *Id.* at 327. The couple put both victims in a freezer and drove to Kansas where they were later arrested. *Id.*

Trial Court

The relevant facts to the disposition of this matter do not involve the crime itself. Rather, this case concerns events that occurred during jury selection. During selection of the jury, the State exercised seven (7) of twelve (12) peremptory strikes against African Americans.[2] Jury selection began with a pool of 42 jurors, thirteen or 31% of whom were black. The jury selection process employed is common practice. After challenges for cause and qualifying the venire, the parties were each allowed twelve (12) peremptory strikes for a twelve person jury or fourteen (14) strikes including the selection of two alternates. Initially, the State exercised three strikes, two of which were against blacks and then tendered twelve (12) people to the defense for consideration. Of the twelve (12) people tendered to the defense, one was black. The defense exercised six strikes removing the black prospective juror. The State then had to tender six more people. In doing so, the State exercised seven of its strikes, five of which were against blacks. The State tendered six people including two blacks, who ultimate served on the jury. The defense exercised three of its strikes. This process continued until there were twelve (12) jurors selected and two alternates. Ultimately, the State and defense considered 41 people for service on the jury. The State exercised twelve (12) strikes and seven (7) of those against blacks. The State tendered five (5) blacks to the

[2] The State exercised a total of eight (8) strikes against African Americans, one of which was against a proposed alternate juror. Chamberlin did not challenge the strike of the alternate juror. The district court, likewise, did not consider the peremptory strike of the alternate juror.

defense. The defense exercised all fourteen (14) strikes and removed three of the five blacks tendered. The final jury was comprised of twelve (12) regular jurors, two of which were black, and two white alternate jurors.

Chamberlin made several objections arguing that the pattern of strikes by the prosecution constituted a *prima facie* case of discrimination in violation of *Batson*. The trial judge allowed the prosecutor to offer reasons for the strikes of each African American. Defense counsel attempted to show that the reasons were pretextual. The trial court expressed doubt that the defense had demonstrated a *prima facie* case of discrimination but found the reasons given by the State were race neutral.

At the conclusion of the selection process, the trial court heard the defense's *Batson* challenge. The prosecutor gave race reasons for the strike of each black juror by referring to their respective responses to questions on the juror questionnaire.[3] For the two black prospective jury members (Sturgis[4] and Minor[5]) at issue in this case, the prosecutor pointed to their responses to three questions 30, 34, and 35 on the juror questionnaires as reasons for striking the men.[6] Both jurors gave the same response to these questions indicating that they were not sure if they were emotionally capable of announcing a verdict of death; that they were not sure if they would hold the state to a

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[3] The juror questionnaires consisted of eleven pages with fifty-six (56) questions that were complete by each venire member. *See* Respondent's Appendix (herein after "Resp. App.").

[4] Sturgis' questionnaire at 11a Resp. App.

[5] Minor questionnaire at 1a Resp. App.

[6] Paraphrasing, the questions were 30 "are you emotionally capable of standing up in court and announcing your verdict;" 34 "would you hold the state to a higher burden;" and, 35 "would you want to be a hundred percent certain?" R.E. 77-78.

higher burden because death was a possible sentence; and, that they would want to be 100% certain before finding the defendant guilty.

The defense attempted to rebut the race-neutral reasons given by the State arguing that there was a pattern of strikes that raised an inference of discrimination. The defense then argued reasons why Sturgis and Minor would be good jurors by reviewing their individual characteristics including their respective views on the death penalty which was given in response to question 53 on the questionnaire.[7] Importantly, defense counsel never pointed to a single juror for comparison but concluded by asking the court to consider "the totality of their questionnaire[s]." The trial court expressed doubt that the defense had made a *prima facie* case and denied the *Batson* challenge.

Direct Appeal

On appeal, Chamberlin asserted six grounds for relief to the Mississippi State Supreme Court including, a *Batson* claim. As to the *Batson* claim, the State Supreme Court held:

> [39]¶67. For the first four jurors challenged, jurors five, thirty-eight, eighty-one, and ninety-two, Chamberlin offered no rebuttal to the State's reasons. As the State asserts, Chamberlin is procedurally barred from arguing pretext as to the first four jurors, for whom she did not argue pretext to the trial court. *See Flowers*, 947 So.2d at 921–922 (citing *Evans v. State*, 725 So.2d 613, 632 (Miss. 1997) (finding that the defendant's argument of pretext was barred from consideration on appeal because the argument as to that particular juror was presented for the first time on appeal)).
>
> [40]¶ 68. On the remaining three challenged jurors, jurors 104, 106, and 117, Chamberlin argued reasons why they would make good jurors but failed to rebut the specific reasons proffered by the State for striking them. The objector must come forward with proof when given the opportunity for rebuttal. *Thomas v. State*, 818 So.2d at 344. "[I]f the defendant offers no rebuttal, the trial court is forced to examine only the reasons given by the State." *Thorson v. State*, 895 So.2d 85, 119 (Miss.2004) (quoting *Walker v. State*, 815 So.2d 1209, 1215 (Miss.2002) (quoting *Bush*, 585 at 1268)). *Because Chamberlin failed to offer any proof that the State's*

[7] Sturgis indicated he generally favored the death penalty. 20a Resp. Appx. Minor indicated he had no opinion about the death penalty. 8a Resp. App.

reasons were pretextual, the State's reasons for the challenges were the only considerations before the trial judge. See Thomas, 818 So.2d at 345.

[41]¶ 69. This Court must then evaluate "the persuasiveness of the justification" proffered by the prosecutor, while keeping in mind that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice*, 546 U.S. at 338, 126 S.Ct. *969;Purkett*, 514 U.S. at 768, 115 S.Ct. 1769.

[42]¶ 70. The State exercised seven out of twelve peremptory strikes against blacks and five against venire persons who were not black. The State tendered a total of four potential black jurors, two of whom the defendant struck. The resulting jury included two black veniremen. The State offered reasons for the strikes that the trial court considered race-neutral, and the defense failed to rebut those reasons. *Therefore, the defense did not meet its burden to show "that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose." Considering the totality of the evidence, the trial court's ruling on Chamberlin's Batson challenge was neither clearly erroneous nor against the overwhelming weight of the evidence*.

Chamberlin, 989 So.2d at 339 (emphasis added).[8]

Post-Conviction Collateral Review

Importantly, Chamberlin never presented a single juror in comparison to Sturgis and Minor in the trial or appellate court.[9] Chamberlin modified her argument and for the first time in state post-conviction collateral review submitted a comparative juror analysis for consideration. Years after

[8] Despite the admitted fact that no other juror, much less a comparative analysis, was presented to the trial court or the State Supreme Court, this is the opinion with which the district court found constitutional error. The district court held that the State Court's failure to, *sua sponte*, conduct its own comparative analysis violated clearly established federal law. Pet's App. 93a. In other words, the district court interpreted *Batson* and its progeny as requiring a state court to conduct a comparative analysis even though one was not presented–a procedure which would relieve the proponent of her burden when asserting a *Batson* claim and shift the burden to the trial court to shift through the record without guidance or the prosecution to state why he accepted each juror.

[9] Chamberlin admitted as much in her Petition for Post-Conviction Relief filed with the Mississippi Supreme Court. Chamberlin faulted "trial counsel for failing to offer the court a single comparison."

her convictions, Chamberlin identified perspective juror Brannon Cooper,[10] a white man who was accepted by the State and later struck by the defense, as being similar to Sturgis and Minor. As to this claim, the Mississippi Supreme Court held:

> [12] ¶ 11. Chamberlin claims that defense counsel should have performed a comparative jury analysis, which would have demonstrated disparate treatment of the jurors, indicating that the State's strikes were pretextual. *But a thorough review of the record in this case, including the jury questionnaires provided by Chamberlin, discloses that each of the African– American jurors struck had at least one response in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the State. Therefore, we are unable to find disparate treatment of the struck jurors*. And because we find no disparate treatment and no other evidence of pretext, we cannot say that Chamberlin's defense counsel was deficient in this stage of the jury-selection process. This issue is without merit.

Chamberlin v. State, 55 So.3d 1046, 1051-52 (Miss. 2010) (emphasis added).[11]

District Court Federal Habeas

In habeas proceedings before the district court, Chamberlin again asserted a *Batson* claim supported with a comparative analysis which identified Sturgis and Minor as the two black men who were allegedly improperly struck when compared with Cooper, a white man who was accepted by the State. The district court held that the State Court's failure to, *sua sponte*, conduct its own comparative analysis, when reviewing the *Batson* claim, violated clearly established federal law. Pet's App. 93a. Based on this finding and without acknowledging the state court's post-conviction opinion, the district court reviewed the facts *de novo* without the requisite AEDPA deference. Through a purposefully limited review of the facts, the district court found that the prosecution violated *Batson* by striking Sturgis and Minor, granted Chamberlin habeas relief and ordered a new

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[10] Cooper's juror questionnaire at Resp. App. 22a Resp.

[11] The district court did not refer to the post-conviction opinion by the Mississippi Supreme Court other than to note its existence. Pet's App. 66a.

trial.

Contrary to this Court's precedent, the district court held that a state court must, *sua sponte*, conduct a comparative analysis during review of a *Batson* claim. Further, the district court reasoned that because the Mississippi Supreme Court failed to do so, its decision on the *Batson* claim was not entitled to deference under the AEDPA. The district court never acknowledged the comparative analysis conducted by the state court during post-conviction proceedings.

Panel of the Fifth Circuit Court of Appeals

On appeal, the Respondent set forth several issues for review including:

I. The District Court erred by finding fault with the State Court's failure to conduct a formal comparative analysis under *Batson v. Kentucky*.

II. The District Court erred by finding that the State Court's denial of the *Batson* claim was unreasonable in light of the evidence.

The panel majority opinion refused to address the first issue, "We need not reach the section 2254(d)(1) question whether the state court contravened *Miller-El II* in failing to conduct a comparative juror analysis." 855 F.3d at 662-63. The majority even side-stepped whether or not the district court applied AEDPA deference. *Id.* at 663. The panel majority ultimately held that habeas relief was warranted under section 2254(d)(2) based on a finding that the State Court's determination of facts was unreasonable. *Id.* The panel opinion held that there was compelling evidence of discrimination based on paltry statistics which indicated black jurors were more than three times likely to be struck by the prosecution than whites. The majority also conducted a side-by-side comparison of the three jurors (Sturgis, Minor and Cooper) that showed the men gave identical responses to three questions on the juror questionnaire so, reasoned the court, the obvious distinction

among them must be their race. *Id.* at 663-70. The majority, however, refused to consider as a distinguishing characteristic the mens' views on the death penalty as stated on their questionnaires and as relied upon by defense counsel at trial. Because, according to the majority, even though the defendant relied on the mens' views, the prosecution did not use that as a reason for striking the black men. Two judges of the panel found this to be sufficient evidence of discrimination. One judge issued a strong dissent arguing that the majority disregarded facts, relied on paltry statistics, and misread precedent to find racial discrimination where none existed. 855 F.3d at 671 (dissent). The dissent correctly pointed out that the practical application of the majority's ruling would require a prosecutor not only to explain reasons for striking a particular juror but also to explain why he kept every white juror which has never been a dictate of *Batson*. *Id.* at 674.

En Banc Fifth Circuit Court of Appeals

En banc rehearing was granted. The full court found that neither of the AEDPA's grounds for habeas relief existed in this case. 885 F.3d at 838. The appeals court reviewed the district court's opinion and found that the district court's reasoning was erroneous.

First, the court of appeals correctly concluded that law clearly established by *Miller El II*, 545 U.S. 265-66, does not demand a state court to *sua sponte* or otherwise conduct a comparative analysis. Rather, the court held that comparative analysis is but one factor of the entire record that may be considered when reviewing a *Batson* challenge.[12] 885 F.3d at 838. The court then noted that the Mississippi Supreme Court did conduct a comparative analysis during post-conviction review which the district court failed to address or afford AEDPA deference. *Id.* at 839.

[12] In her Petition for Writ of Certiorari, the Petitioner has abandon her assertion that a court is required to conduct a comparative analysis when considering a *Batson* claim.

The en banc court next considered whether Chamberlin was entitled to relief under 2254(d)(2)'s unreasonable determination of facts. *Id.* at 840. Again, the court correctly recognized that the district court failed to grant proper deference, under the AEDPA, to the Mississippi Supreme Court's factual findings during post-conviction review. *Id.* Further, the court explained that when reviewing a *Batson* claim, the court is to consider all the evidence bearing on this issue of discrimination in the third step of the analysis. *Id.* at 841-42.

The court drew a distinction between creating post-hoc reasons for the strike of a juror and pointing to record evidence that might explain the veracity of the prosecutions's stated reasons for a strike.

> (1) inventing a new reason for a strike after the fact (not allowed); and (2) reviewing the record to test the veracity of the prosecution's reasons already given in their proper time (required). Cooper's answer to question 53 is an example of the latter, because it goes directly to the key issue of whether Sturgis' and Minor's responses to questions 30, 34, and 35 were the real reasons they were struck.
>
> There is, accordingly, a crucial difference between asserting a new reason for striking one juror and an explanation for keeping another.
>
> * * *
>
> The prosecution in Chamberlin's case did what it was supposed to do: it rejected some black prospective jurors and accepted others, accepted some white prospective jurors and rejected others. When asked why it struck individual black prospective jurors, it gave specific race-neutral reasons for the strikes. The Mississippi Supreme Court found on multiple occasions that the prosecution did not invidiously discriminate against black prospective jurors. Then, on federal habeas—where AEDPA deference is the rule—the prosecution was asked to explain years later why it kept a white juror. Yet, when it tried to answer that question with reference to record evidence it would have identified had the defense timely objected, the district court concluded it could not do so. No case—not *Batson*, *Miller-El II*, or any other—has ever suggested, let alone mandated, this distortion of the *Batson* regime.

Id. at 842, 844. The grant of habeas relief was reversed. This is the opinion which the Petitioner

now challenges.

ARGUMENT

I. An Appellate Court Reviewing a Claim of Discrimination in Jury Selection should consider *All* the Evidence in the Record that Bears upon the Issue.

There is no dispute that discrimination in all forms is unacceptable. It is particularly injurious to the entire legal system when discrimination occurs in the context of jury selection. *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Such discrimination, however, did not occur in this case.

This Court is all too familiar with the steps employed when a *Batson* challenge is made: (1) the defendant must make a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race; (2) the prosecutor then must articulate a race neutral reason for the strike(s); and, (3) the court must determine whether the defendant has carried her burden of proving purposeful discrimination. *Batson v. Kentucky*, 746 U.S. 79, 79, 106 S.Ct. 1712 90 L.Ed.2d 69 (1986). This Court has squarely placed the burden on the defendant who alleges discriminatory selection of the venire to "prove the existence of purposeful discrimination." *Id.* To determine if the defendant has carried this burden, a court must undertake "a sensitive inquiry into such *circumstantial and direct evidence of intent as may be available*." *Id.* at 93 (emphasis added); *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 265, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("but when this evidence on the issues raised is *viewed cumulatively* its direction is too powerful to conclude anything but discrimination.").

Once the *Batson* analysis reaches the third step, this Court has directed that the reviewing court must consider "*all of the circumstances* that bear upon the issue of racial animosity." *Snyder*

v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (emphasis added). In *Miller-El II*, the Court explained, "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination *to be considered at Baton's third step*." 545 U.S. at 240-41 (emphasis added). The Court recently reiterated this requirement in *Foster v. Chapman*, 136 S.Ct. 1737 (2016). *See also*, *Davis v. Ayala*, __ U.S. __, 135 S.Ct. 2187, 2199-2201, 192 L.Ed.2d 323 (Jun. 18, 2015) (reversing the grant of habeas relief based on, *inter alia*, insufficient similarities in prospective juror's opinions on the death penalty).

This case is not complex. The parties are in agreement about the facts of case with respect to the mechanics of jury selection. Essentially, the only issue presented for resolution is what evidence may a reviewing court properly consider at the third step of a *Batson* analysis to determine whether purposeful discrimination occurred during jury selection. The Mississippi Supreme Court and the Fifth Circuit Court of Appeals en banc considered *all* record evidence and found that there was no purposeful discrimination in the prosecution's use of strikes against two black panelists, Sturgis and Minor, when compared with white panelist Cooper. The district court (one judge) and the dissent from the en banc Court of Appeals (five judges) refused to consider all the evidence bearing on the issue but rather purposely limited review of the record to only the prospective jurors' responses to three questions, while refusing to acknowledge others, in order to find discrimination occurred.

In *Foster*, a death penalty case, the Court the Supreme Court reinforced the command that *all* evidence should be considered when a court is asked to review a *Batson* claim to determine whether discrimination was a motivating factor for striking a juror. Briefly, in *Foster*, the state

argued against the admission of certain damning documents because they had not been authenticated through testimony. As to consideration of that evidence, this Court held,

> "we cannot accept the State's invitation to *blind ourselves to [the notes'] existence*. We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all of the circumstances that bear upon the issue of racial animosity must be consulted*. *Synder*, 552 U.S., at 478, 128 S.Ct. 1203. As we have said in a related context, "*determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.*" *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

Foster, 136 S.Ct. at 1748 (emphasis added). After reviewing all the evidence, the Court found that the prosecution had engaged in purposeful discrimination.[13] *See also*, *Davis*, 135 S.Ct. at 2201-02 (conducting a side-by-side comparison of jurors by reviewing the questionnaires of all the jurors who sat and all the alternates were in the record).

In direct contradiction of United States Supreme Court precedent, the approach as urged by the Petitioner, the district court and the dissent would refused to give any consideration to readily available record facts and evidence beyond that articulated by the prosecutor's stated reasons for striking Sturgis and Minor. The Petitioner's approach urges and would require a reviewing court to blind itself to evidence in the record. Specifically, the prosecutor, in Chamblerin's case, stated that he struck Sturgis and Minor for their responses to questions 30, 34, and 35 on the juror questionnaires. Admittedly, Cooper–the white comparator–gave exactly the same answers to those three questions as both Sturgis and Minor but Cooper was accepted by the State. Thus, the Petitioner *assumes* the real reason for the strikes of Sturgis and Minor must have been their race. The fallacy

[13] It is curious that the Petitioner does not cite to much less discuss *Foster* which was this Court's most recent comment on *Batson*.

of this approach is it *assumes* discrimination was the motive for the strike and completely ignores contradictory proof; proof that the Respondent was never permitted to provide because the Petitioner did not identify Cooper as a being similar for comparison at trial or on direct appeal. Moreover, the law requires actual proof racial discrimination occurred–not assumptions. *Batson,* 106 S.Ct. at 1712 (burden is on the defendant who alleges discriminatory selection of the venire to "prove the existence of purposeful discrimination.").

The Petitioner finds solace in her purposefully narrow review of the record by relying on *Miller-El II's* comment that the prosecution must "stand or fall on the plausibility of the reasons he gives." 545 U.S. at 252, 125 S.Ct. at 2331. But as noted by the Court of Appeals, the Respondent is not providing post-hoc justification for the use of strikes against Sturgis and Minor. Rather, the Respondent is pointing to facts in the record that show why the men are comparatively unlike Cooper–who the Petitioner never identified at trial. By failing to identify Cooper during jury selection, the prosecutor was denied the opportunity to explain why Cooper was acceptable in comparison to Sturgis and Minor.

Nevertheless, only by purposefully disregarding record evidence, can a reviewing court find discrimination here. For example, question 53 on the juror questionnaire asked for the jurors' opinions on the death penalty. Sturgis indicated that he "generally favored" the death penalty and Minor indicated he had no opinion about the death penalty, while Cooper indicated he "strongly favored" the death penalty and wrote separately "for rape, murder, child abuse and spousal abuse." Their opinions regarding the death penalty are clearly a significant distinction when the prosecutor

was selecting a jury for a capital murder trial.[14] Nonetheless, the Petitioner argues that the Respondent is prohibited from justifying strikes based on reasons not offered at trial.

However, the Petitioner's reading of *Miller-El II* and *Batson* cases is incomplete. Even *Miller-El II* made clear that "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, *that is evidence tending to prove purposeful discrimination to be considered at Baton's third step."* 125 S.Ct. at 2325 (emphasis added). The inquiry does not end if the prosecutor's reasons are shown to be false. Rather, *Miller-El II* plainly states that, if the reasons are deemed pretextual, then *that is evidence that is to be considered at the third step* of the *Batson* analysis–whether or not the defendant has proven purposeful discrimination. *Miller-El II* does not prohibit a reviewing court from considering other evidence in the record to reach the ultimate determination of whether discrimination occurred. To the contrary, *Miller-El II*, *Snyder*, *Ayala*, and *Foster* opinions considered the entire record–not just portions related to the prosecutor's stated reasons–to determine if there had been purposeful discrimination.

To avoid the command that courts are to evaluate the plausibility of the prosecutor's states reasons "in light of all the evidence with a bearing on it," the Petitioner relies on the dissent's logic which viewed this as creating an end run around the prohibition against consideration of new justifications for a strike. The proposition might have more appeal if the facts of this case were

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[14] The Respondent does not suggest that for purposes of a comparative analysis the jurors must be identical in all respects. *Miller El II*, at 247 n.6. Rather, the prospective juror's opinions on the death penalty, alone, are significant for this capital case. The differences among the panelists are not irrelevant facts. For example, it would make little difference for this case whether or not jurors subscribe to a news paper or magazine, how many children they have or their hobbies.

different. Here, however, the facts and the record show that there are important differences among the men that, when considered in context, explain why Cooper was accepted. The Respondent is not offering a new or post-hoc justification for the strikes of the black men but are simply pointing out a reason that Cooper was acceptable– an exercise that was not required of the prosecution at trial. In fact, there is no law or precedent that requires a prosecutor to state reasons he accepted a particular juror.[15]

The difference among the prospective juror's opinions on the death penalty is not a new justification but a fact contained in the record. It is also a fact relied upon by defense counsel, at trial, when he argued why Sturgis and Minor should have been accepted and the *Batson* challenge should have been sustained. A fact that the dissent and district court purposefully refused to consider.

The Court of Appeals pointed out this inconsistency in the Petitioner's assumption that discrimination must have been the reason for the strikes of Sturgis and Minor. For example, the prosecution accepted another black juror, Carter.[16] Carter gave answers to questions 30 and 34 that were less desirable to the prosecution than Sturgis and Minor and the same answer to question 35. But Carter answered question 53 in the same manner as Cooper indicating she strongly favored the death penalty and wrote in additional crimes for which she thought the ultimate penalty should apply. Resp. App. at 42a. Again, Carter, a black panelist, was accepted by the prosecution. A fact contained in the record which undermines the "assumption of discrimination" asserted by the

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[15] Importantly, Cooper was never identified for comparison in the trial court or on direct appeal. The prosecution, therefore, never had the opportunity to explain why Cooper was acceptable until the Petitioner identified him in post-conviction proceedings.

[16] Carter's questionnaire at 33a Resp. Appx.

Petitioner. A fact the Petitioner insists a reviewing court may not consider under *Miller-El*.

In order to find discriminatory intent on this entire record, the Court has to pretend that any comparison among the jurors must be narrow in scope and actually ignore significant relevant facts. In order to find discriminatory intent on this record, the Court has to find that an incomplete comparative analysis constitutes clear and convincing evidence sufficient to overcome AEDPA deference owed to the State Court decision. The Respondent submits that when the entire record in this matter is considered, the Court would find the absence of any discriminatory intent in the strikes of two black prospective jurors. The Respondent further submits that the en banc opinion of the Fifth Circuit was a correct application of *Batson* and that the writ or certiorari should not be granted.

II. There is No Split of Authority Regarding the Application of *Batson* that Warrants This Court's Review.

In an attempt to artificially elevate the significance of this case, the Petitioner claims that the Fifth Circuit's opinion creates a split of authority. The Petitioner cites to several federal cases and one state court case for support. Each is distinguished below.

Petitioner first cites *Love v. Cate*, 449 App'x 570, 572-73 (9th Cir. 2011), an unpublished case, for the proposition that a state cannot attempt to proffer new reasons why a prospective juror was kept after-the-fact. The prosecution in *Love* struck the only black venire member. In response to the *Batson* challenge, the prosecutor justified the strike by stating he thought teachers and social workers did not make good jurors. However, the prosecution accepted three other jurors who were teachers. The court held that prosecutor's justification lacked credibility which was substantial evidence of discrimination. But that did not end the inquiry. The defendant asked the trial court to explore whether or not all teachers and social workers were dismissed by the prosecution, the trial

court refused which rendered its factual determination erroneous. Importantly and similar to the approach urged by the Petitioner and the dissent, the *Love* trial court refused to consider all the evidence in the record which later rendered its factual determination unreasonable under the AEDPA.

In this case, no such comparison was ever presented to or requested from the trial court. The Petitioner never pointed to other jurors for the trial court's consideration, such as Cooper, who might have been similar to Sturgis and Minor. Unlike *Love*, the prosecutor in Chamberlin's case had no reason to and, indeed, no duty to explain why he kept Cooper.

Next the Petitioner cites to *United States v. Taylor*, 636 F.3d 901 (7th Cir. 2011). Taylor involved a direct appeal from a federal conviction and not review under the deferential standards of the AEDPA. The appeals court remanded the matter for the limited purpose of developing the record regarding the strikes of two black jurors. The prosecutor explained that he struck the black jurors on the basis that they could not impose the death penalty on a non-shooter but the prosecutor had accepted a white juror with the same view. On remand, the prosecution added seven additional reasons for removing one of the black jurors. The Court of Appeals held that the new after-the-fact justifications for the strike are not permissible considerations to determine if discrimination occurred at the time of trial.

That is simply not the case here. At Chamberlin's trial, the prosecution was tasked with articulating race-neutral reasons for striking black jurors Sturgis and Minor. The prosecution had no duty to explain why Cooper was acceptable which is a completely different question. In other words, when faced with a *Batson* challenge, a prosecutor must answer why he struck a particular juror *not* why he kept all others. The Respondent, herein, is not articulating any new or post-hoc

reasons to justify the strikes of Sturgis and Minor. The Respondent is simply pointing to evidence in the record of why Cooper was acceptable–his strong favorable views of the death penalty.

Even the *Taylor* court explained the inquiry as follows,

> It is apparent that an evidentiary hearing is needed for the court to properly develop the record and address this *Batson* challenge. That will allow the court to question the prosecutor as to why the government eliminated Watson based on the non-shooter question but chose not to challenge similarly-situated white jurors.

636 F.3d at 904. The court wanted to know why a similarly situated white juror was acceptable. When the Respondent in this case was presented with this same question years later in collateral proceedings, the district court and the dissent refused to consider the answer or the evidence. The prosecutor, in Chamberlin's trial, was never allowed the opportunity to explain why he kept the alleged similarly situated white juror Cooper because Chamberlin waited years to support the allegation of discrimination with proof.

In *McGahee v. Alabama Department of Corrections*, 580 F.3d 1252 (11th Cir. 2009), the prosecution struck all black panelists from the jury. When challenged the state cited only general reasons and good faith for the exercise of the strikes and the trial court denied the claim. After the defendant was convicted and sentenced, the state proffered specific reasons for its use of strikes. The trial court never made any ruling as to whether the reasons stated were race-neutral. On appeal, the circuit court faulted the trial court's application of *Batson* and the state appellate court's refusal to consider all the evidence available on the issue of discrimination. For example, the prosecution cited low intelligence as a reason to strike some of the panelists. The prosecution also explained that it did not want to leave the last remaining black panelist "alone" which strongly indicated racial motivations. The state appellate court failed to acknowledge these racially motivated justifications

and direct proof of discrimination.

The Petitioner's reliance on *McGahee* is interesting because it contradicts her theory that a *Batson* review is limited to certain facts. The *McGahee* court specifically faulted the lower court's refusal to consider all the evidence touching on the issue of discrimination. The court expressly held, "Because the [appellate] court omitted from step three of its analysis crucial facts which McGahee raised in his brief to that court, we find that the Court of Criminal Appeals did not review 'all relevant circumstances' as required by *Batson*." 560 F.3d at 1263.

This is precisely the approach urged by the Respondent here and applied by the Fifth Circuit–a reviewing court should consider all the evidence as commanded by *Batson*. The Fifth Circuit's review of the *Batson* claim included all evidence not just the answers to three questions. After considering all of the facts in the record, the court properly concluded that discrimination did not occur in the removal of Sturgis and Minor.

Next the Petitioner cites *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004), a pre-AEDPA case. The prosecution exercised eleven of twelve strikes to remove blacks from the jury. The defendant challenged the strikes and the prosecution gave explanations for three of them. The trial court did not expressly rule but implicitly rejected the *Batson* claim by letting the matter proceed to trial.[17] Years later, the Third Circuit found strong proof of discrimination with respect to one of the jurors, Hackley who was removed by the prosecution. The prosecutor attempted to justify his strike by saying, Hackley "is a black male, black male juror approximately the same age as the defendant." *Id.* at 724. The Court looked at all the other jurors who were accepted and found others within the same age range which indicated that race was the motivating factor behind the strike.

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[17] *Batson* issued two weeks before jury selection began in *Halloway*. 355 F.3d at n.7.

Again, the Petitioner's citation to *Holloway* is interesting. The *Holloway* court, like the Eleventh Circuit in *McGahee* and the Fifth Circuit below, reviewed all the available evidence and acknowledged "We find nothing in the prosecutors [sic] explanation of the Hackely strike, *or in the record as a whole*, to indicate that he harbored anything but a discriminatory intent to remove Hackley because of race." *Id.* at 724-25 (emphasis added).

Finally, the Petitioner calls attention to a state court opinion to support her proposition that there will be a split of authority worthy of certiorari review. *State v. Marlow*, 89 S.W.3d 464 (Mo. 2002) is an appeal from a state court conviction for resisting arrest. At trial, the prosecution struck the only black on the jury panel. When challenged, the prosecutor stated that he used the strike because the juror was involved in a class action lawsuit. Unlike Chamberlin's case, there were two other jurors identified as part of a class action lawsuit who were accepted by the state. The prosecutor distinguished only one by pointing to stronger more pro-prosecution responses.

On appeal, the prosecution attempted to offer clearly post-hoc justifications it failed to provide at trial despite having been given the opportunity. As to those justifications, the court held post-hoc justifications are irrelevant. *Id.* at 469; *see also, State v. Carter*, 415 S.W.3d 685, 689-90 (Mo. 2013) (defendant's claim of pretext fails because, *inter alia*, it was not raised before the trial court); *State v. Livingston*, 220 S.W.3d 783, 789 (W.D. Ct. App. 2007) ("*Marlowe* stands for the proposition that the State's post-hoc justifications for a peremptory strike are irrelevant . . . This court may consider facts and arguments related to a *Batson* challenge not presented to the trial court when the defense presents evidence at trial that the State's justifications were pretext."); *State v. Burnett*, 492 S.W.3d 646, 656 (E.D. Ct. App 2016) (finding no discrimination where the defendant failed establish a record of pretext by failing to, *inter alia*, present a similarly situated juror to the

trial court).

Marlowe, while closer to the mark, is also distinguishable from Chamberlin's *Batson* claim. When the defendant in Marlowe lodged a *Batson* objection, a contemporaneous comparison among prospective jurors was proffered to which the prosecutor responded. The prosecutor, to his own peril, failed to differentiate one of the comparators. Here, the prosecutor was not given the opportunity to provide reasons why Cooper was acceptable because Chamberlin never identified him for comparison. Stated differently, Chamberlin failed to carry her burden of demonstrating pretext.

The prosecutor in *Marlowe* years later offered additional reasons for the strikes which the appellate court properly considered to be after-thought. Here, unlike *Marlow*, the Respondent has not offered new or additional reasons for the strikes of Sturgis and Minor. The Respondent has only identified facts in the record as to why Cooper was acceptable to the prosecution. Even Missouri courts seemingly would not allow Chamberlin to present a comparative analysis for the first time on appeal. *Burnett*, 492 S.W.3d at 654-55 (declining to consider arguments not presented to the trial court including a juror presented for comparison; "We determine wither a race-neutral explanation is pretextrual by considering the plausibility of the explanation in light of the totality of the facts and circumstances."). The *Marlowe* court also recognized that a comparison among the stricken jurors is not dispositive. Rather, the Missouri court recognized that pretext is determined by considering "the totality of the facts and circumstances surrounding the case." 89 S.W.3d. at 470.

CONCLUSION

There is nothing new or novel about the facts of this that warrant the extraordinary relief of certiorari review. This is not a complex case but, rather, involves factual findings of the state court and court of appeals below related to their review of a *Batson* claim–review that is entitled to

deference under the AEDPA. For these and each of the reasons discussed *supra*, the writ should be denied.

Respectfully submitted,

s/ *Cameron L. Benton*

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CERTIFICATE OF SERVICE

I, Cameron L. Benton, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day electronically filed the foregoing BRIEF IN OPPOSITION with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This, the 19th day of December, 2018.

BY: **s/** *Cameron L. Benton*

CAMERON L. BENTON