No. 18-6286

IN THE
SUPREME COURT OF THE UNITED STATES

LISA JO CHAMBERLIN, Petitioner

v.

PELICIA E. HALL, Respondent

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

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

This Court has unequivocally instructed habeas courts reviewing *Batson* claims to focus solely on the plausibility of the reasons proffered by the prosecutor at trial for striking prospective jurors. "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). If a juror comparison shows that the prosecutor's "stated reason does not hold up, its pretextual significance does not fade because . . . an appeals court [] can imagine a reason that might not have been shown up as false." *Id.* Yet, this is precisely what the Fifth Circuit did here. It overturned a grant of habeas relief by allowing the State to present a reason for purportedly distinguishing a white panelist not struck by the prosecution from two Black panelists who were struck, even though that reason was not proffered by the prosecutor at trial. As explained in Chamberlin's petition, the Fifth Circuit thereby contravened this Court's precedent and created a split of authority about an important

issue of federal law. The State has no meaningful answer to these points, and certiorari is warranted.

I. The State Does Not Address *Miller-El*'s Holding that a Reviewing Court May Not Justify the Differential Treatment of Black and White Panelists Based on Reasons not Proffered by the Prosecutor at Trial.

At Lisa Jo Chamberlin's capital trial, a Black panelist had more than seven times the odds of being struck by the prosecutor as compared to a white panelist. App. 22a, 38a n.4 (Costa, J., dissenting). Far from a matter of "paltry statistics" as claimed by the State, *see* Brief in Opposition ("BIO") at 11, 12, the prosecution's strike pattern is in and of itself highly probative of discrimination. The State cannot dispute that "the random chance that so many black[panelists] would be struck is a remote 1 in a 100." App. 23a (Costa, J., dissenting). "'Happenstance is unlikely to explain this disparity.'" *Miller-El*, 545 U.S. at 241 (citation omitted). The State likewise cannot dispute that the prosecutor did not conduct any individual voir dire with respect to most of the Black panelists he struck, including panelists Thomas Sturgis and David Minor. That, too, is probative of discrimination. *See Miller-El*, 545 U.S. at 246 ("'[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is

concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination[.]'"). (citation omitted).

When asked to justify his strikes of Sturgis and Minor, the sole reason proffered by the prosecutor was their answers to questions 30, 34, and 35 on the jury questionnaire relating to the capital nature of Chamberlin's case. But, as the State acknowledges, "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." BIO at 16. The prosecution did so even though Minor had strong law enforcement connections, while Cooper did not. *See* Petition for Certiorari ("Pet.") at 10. And it did so even though Cooper had an arrest record, which neither Sturgis nor Minor had. *See id.* at 10. As the district court recognized in granting habeas relief, and as the Fifth Circuit panel recognized in affirming that grant of relief, this comparison is powerful evidence undermining the plausibility of the prosecutor's stated justification for striking Sturgis and Minor. App. 54a-57a (panel opinion); App. 99a-101a (district court opinion).

The en banc Fifth Circuit nonetheless discounted this comparison by allowing the State to present a new reason why Cooper was

supposedly more acceptable to the State—his answer to question 53. The Fifth Circuit asserted that there is a "crucial difference between asserting a new reason for *striking* one juror and an explanation for *keeping* another," and that *Miller-El* "is not implicated" in the latter scenario. App. 16a. In its Brief in Opposition, the State repeats this argument. It contends that "[t]he Respondent is not offering a new reason or post-hoc justification for the strikes of the black men but are [sic] simply pointing out a reason that Cooper was acceptable. . . ." BIO at 19.

But, as Chamberlin explained in the petition, *Miller-El* squarely holds that a habeas court considering a *Batson* claim may not consider *any* new justification for distinguishing between an accepted white panelist and an excluded Black panelist, whether that justification is a new reason for striking a Black panelist or a new reason for keeping a white one. *See* Pet. 22-27. In *Miller-El*, this Court found that the prosecutor's stated justification for striking Black panelist Billy Jean Fields—his belief about the "possibility of rehabilitation"—was pretextual because white panelists had expressed similar views but were not struck by the prosecutor. *See Miller-El*, 545 U.S. at 243-45; *see*

Pet. At 24. In so doing, the Court refused to consider other reasons offered by the State in federal habeas (and accepted by the Fifth Circuit and Justice Thomas in dissent) as to why those white panelists would have been more acceptable to the prosecution than Fields. *See* 545 U.S. at 245 n.4, *see* Pet. at 24. Those reasons included, just as in this case, the white panelists' making other statements expressing strong support for the death penalty. *See* 545 U.S. at 294-95 (Thomas, J., dissenting). The *Miller-El* majority held that such post-hoc explanations as to why the white panelists "were otherwise more acceptable to the prosecution than [Fields] was" could not be considered because they were "reasons the prosecution itself did not offer." *Id*. at 254 n.4 (further referring with an *infra* reference to the subsequent portion of the Court's opinion stating the prosecutor must "stand or fall" on the plausibility of the reasons proffered at trial).

As the Fifth Circuit did below, the State simply ignores this portion of *Miller-El* prohibiting the consideration of reasons why a white panelist would have been more favorable to the prosecution that "the prosecution itself did not offer." *Id*. Instead, the State repeatedly invokes *Miller-El*'s requirement—reiterated in *Snyder* and *Foster*—that

a court consider all of the relevant evidence at *Batson* stage three. *See Miller-El*, 545 U.S. at 239-40, 252; *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El*); *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (citing *Snyder*).

But this Court's admonition that courts must consider of all of the relevant evidence to determine whether discrimination occurred does not allow the State to "imagine" new reasons for why the trial prosecutor struck Black jurors yet kept similarly-situated white jurors. *Miller-El*, 545 U.S. at 252. Post-hoc justifications are not "evidence" of the *trial prosecutor*'s intent. And, the purpose of considering all of the relevant evidence at *Batson* stage three is to assess the plausibility of the prosecutor's stated justifications in an attempt to discern his actual intent. *See id*. at 251-52.

Miller-El could not have been clearer about this: "the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess *the plausibility of that reason in light of all evidence with a bearing on it*." *Id*. (emphasis added). The Court made this point in the very same paragraph of the opinion explaining that "a prosecutor simply has got to state his reasons

as best he can and stand or fall on the plausibility of the reasons he gives," and if the prosecutor's "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." *Id.* at 252.

In sum, as Judge Costa explained, the language in *Miller-El* requiring consideration of all relevant evidence at *Batson* stage three "should not be read to provide an end run around the same opinion's emphatic prohibition on considering new reasons" for a strike, as *Miller-El* itself "refuse[d] to consider reasons for differential treatment" of panelists not proffered by the prosecutor at trial. App. 29a-30a. Instead, *Miller-El* "shows the way to reconcile these two principles. There is a difference between evidence bearing on the plausibility of the prosecutor's stated reason, which reviewing courts should consider, and new reasons, which they may not." App. 30a.

Unlike the Fifth Circuit below, the Seventh and Ninth Circuits have recognized that *Miller-El* forbids the government from providing post-hoc justifications for the prosecutor's striking of Black panelists while keeping similarly-situated white ones. *See United States v.*

Taylor, 636 F.3d 901, 905-06 (7th Cir. 2011) ("[W]hen the *Batson* challenge was made, the *only* reason offered by the prosecutor to justify striking Watson [the Black juror] was her response to the non-shooter question." The district court's acceptance of "new, unrelated reasons" as to why the prosecution accepted white jurors who shared Watson's view on the non-shooter question "amounts to clear error."); *Love v. Cate*, 449 F. App'x 570, 572 (9th Cir. 2011) (unpublished) (refusing to consider the newly offered reasons that purportedly "distinguished" the similarly-situated white jurors "from the black venire-member" because "the prosecutor never stated to the state trial court that he relied on this characteristics, even though *Batson* required him to articulate his reasons"). And the Missouri Supreme Court rejected the state's attempt to provide post-hoc justifications for the trial prosecutor's strikes even before *Miller-El* was handed down. *See State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002) (en banc) (where the State gave new reasons on appeal for keeping a white juror while striking a comparable Black panelist, holding that, because "these [were] not the prosecutor's justifications" at trial, they "are irrelevant").

The decision below is squarely inconsistent with this Court's precedent prohibiting consideration of reasons for distinguishing white panelists accepted by the prosecution from excluded Black panelists that "the prosecution itself did not offer." *Miller-El*, 545 U.S. at 245 n.4. This Court should grant certiorari to address the Fifth Circuit's departure from this Court's precedent, and the resulting split of appellate authority, with respect to this important issue of federal law.

II. The State's Remaining Arguments Are Both Irrelevant and Wrong.

Unable to address the Fifth Circuit's failure to apply the relevant holding from *Miller-El*, the State makes two additional arguments in urging this Court to deny certiorari. Those arguments do not relate to the inconsistency between the decision below and this Court's precedent or the resulting split of authority, and they are therefore irrelevant. Those arguments also fail on their own terms.

First, the State incorrectly contends that the prosecutor "was never permitted to provide" an explanation for accepting Cooper while striking Sturgis and Minor because no juror comparison was raised at trial. BIO at 17. After the defense challenged the strikes of Sturgis and Minor on *Batson* grounds, the prosecutor was given a chance to explain

his strikes. At that point, the prosecutor was "permitted to provide" any nonracial explanation for striking Sturgis and Minor that would have not applied equally to Cooper. Specifically, the prosecutor could have proffered the justification the State has presented in habeas, that he was striking Sturgis and Minor because of their answers to questions 30, 34, 35, *and 53*. But the prosecutor made no reference to question 53. On the contrary, it was defense counsel who stressed that Sturgis had stated—in response to question 53—that he generally favors the death penalty. *See* Pet. at 7. Yet, even when given another opportunity to respond to defense counsel's argument, the prosecutor simply rested on his prior reference to questions 30, 34, and 35 as his reason for striking Sturgis and Minor. *See* Pet. At 9-10; Trial Transcript (Tr.) at 406-07.[1]

Distilled to its essence, the State's argument is yet another challenge to *Miller-El*, specifically the rule that a juror comparison may be undertaken for the first time on appeal or in federal habeas so long as the facts supporting that comparison were presented at trial. *See*

[1] The prosecutor did so without conducting any individual voir dire of either Sturgis and Minor, as he presumably would have done if their answers to these questions had actually motivated the strikes, particularly given Sturgis's expressing support for the death penalty in response to Question 53 and Minor's strong law enforcement connections. *See Miller-El*, 545 U.S. at 246.
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Miller-El, 545 U.S. at 241 n.2. The trial prosecutor here was in precisely the same posture as the prosecutor in *Miller-El*: in neither case was a juror comparison presented at the time of the *Batson* challenge in the trial court, and in neither case was the prosecutor expressly asked to provide reasons for keeping white comparators. *See id.*; *see also id.* 236-37; *id.* at 279-80, 294 n.4 (Thomas, J., dissenting). *Miller-El* forecloses the State's argument on this point.

Nor, in any event, is it unfair to require the prosecutor to consider white panelists with identical characteristics at the same time he provides purportedly race-neutral justifications for striking Black panelists. As Judge Costa explained below: "If a concern about a black juror was important enough to be cited as a reason for the challenged strike, a white juror with the same problematic characteristic should also be on the prosecutor's mind[.]" App. 34a.

Second, the State points to the prosecutor's acceptance of one African-American panelist, Stacey Carter, who gave answers to questions 30, 34, and 35 that were comparable or less-prosecution friendly than those provided by Sturgis, Minor, and Cooper. BIO at 19-20. But the prosecution's acceptance of Carter is hardly dispositive, as

this Court has recognized that a party need not prove that *every* strike of a Black panelist is discriminatory. Rather, the principle of *Batson* is so important that the strike of a single venireperson for a discriminatory reason requires reversal. *See Foster*, 136 S. Ct. at 1747 ("The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'") (quoting *Snyder*, 552 U.S. at 478). Here, just as in *Miller-El*, the prosecution's strike pattern was highly probative of discrimination even though the prosecutor did not strike every Black prospective juror. *See Miller-El*, 545 U.S. at 241; App. 23a.

If anything, the State's acceptance of Carter simply confirms the implausibility of its stated reason for striking Sturgis and Minor, their answers to questions 30, 34, and 35. The State assumes that Carter must have been kept because her answer to question 53 was in the State's view similar to Cooper's, *see* BIO at 19-20, but this argument simply highlights why such post-hoc speculation is impermissible. Carter is not similarly situated to any of the three panelists at issue here. Unlike Sturgis, Minor, or Cooper, Carter was given extensive individual voir dire (initiated by the defense). During that questioning, Carter first stated that if Chamberlin were found guilty of capital

murder, Carter would not consider giving her life and would only vote for the death penalty. *See* Tr. at 361-62. Only after Carter was rehabilitated by both the prosecution and the trial court did she change her answer and say that she would not "automatically say death" and that she would instead "think about it" and "consider other factors." *Id.* at 363.

III. Conclusion

The State essentially asks the Court to ignore a clear violation of the United States Constitution and allow the Fifth Circuit's disregard of this Court's precedent to remain unchecked. As the Court's recent grant of review in *Flowers v. Mississippi*, No. 17-9572 reflects, racial discrimination in jury selection is alive and well. *See* Brief for Retired State Court Judges as Amicus Curiae in Support of the Petitioner, at 7-9 (describing evidence of widespread and persistent discrimination in jury selection, including systematic efforts of prosecutors to avoid successful *Batson* challenges).

In *Flowers*, the Court will decide whether the court below accurately "assess[ed] the credibility of [the prosecutor's] proffered explanations for peremptory strikes against minority prospective

jurors." *See* Pet. for Cert., *Flowers v. Mississippi*, No. 17-9572, at i (June 21, 2018). Ms. Chamberlin is asking the Court to make a similar determination here: Should the Fifth Circuit have "assessed" the prosecutor's "proffered explanations" for its "peremptory strikes against minority prospective jurors" by requiring the State to "stand or fall" on reasons given by the prosecutor at trial, *Miller-El*, 545 U.S. at 252, or did the court of appeals erroneously allow the State to provide new explanations, *not* proffered at trial, to justify the prosecutor's disparate treatment of white and Black panelists? The Court should grant review to answer this question or, in the alternative, hold this case in abeyance pending its decision in *Flowers*.

Respectfully submitted,

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