No. _____

IN THE
Supreme Court of the United States

ERICA YVONNE SHEPPARD,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN M. BELL
KILPATRICK TOWNSEND & STOCKTON L.L.P.
Suite 600
1400 Wewatta Street
Denver, CO 80202
(303) 571-4321
kbell@kilpatricktownsend.com

WILLIAM ALAN WRIGHT
Counsel of Record
KILPATRICK TOWNSEND & STOCKTON L.L.P.
Suite 4400
2001 Ross Avenue
Dallas, TX 75201
(214) 922-7131
alan.wright@kilpatricktownsend.com

Counsel for Petitioner

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QUESTIONS PRESENTED (Capital Case)

The Texas Court of Criminal Appeals (TCCA) summarily rejected the trial court's recommendation to grant relief on Ms. Sheppard's sentencing phase ineffective assistance of counsel claim because the mitigating evidence presented in post-conviction proceedings was allegedly "cumulative" of the evidence presented at trial.

The federal district court concluded that trial counsel were constitutionally ineffective, and it further found that the post-conviction evidence was not "cumulative." It nonetheless denied relief pursuant to Fifth Circuit precedent requiring "extreme" deference to the state courts when applying 28 U.S.C. § 2254(d). As the majority below explained, courts in the Fifth Circuit applying 28 U.S.C. § 2254(d) will, "so long as a plausible argument exists to support the ruling, [] defer to the decision of a state court *even if its actual rationale was unreasonable*." (App. 10) (emphasis added) The Fifth Circuit's rule is irreconcilable with this Court's holding that when applying § 2254(d) "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

The majority below "observe[d], without deciding, that it is far from certain that *Wilson* overruled *sub silentio*" the Fifth Circuit's § 2254(d) methodology. Instead, the majority "assume[d] that *Wilson* permits [the court] to afford deference to only the state court's proffered reasoning—instead of its result." However, the majority deferred to the TCCA's cumulativeness finding without subjecting it to meaningful scrutiny of the state court record.

The questions presented with respect to Ms. Sheppard's ineffective assistance of counsel claim are:

1. Does the Fifth Circuit's application of § 2254(d)—which explicitly requires

deference to unreasonable state court opinions if the federal court can come up with a plausible replacement rationale—survive this Court's decision in *Wilson* and, if not, does identifying the state court reasoning and deferring to it without subjecting it to meaningful review in light of the state court record comply with the Court's rules for applying § 2254(d)?

2. When assessing whether counsel's deficient failure to discover and present mitigating evidence prejudiced the outcome of a trial, may the reviewing court entirely or partially discount the new evidence as "cumulative" if a generic equivalent or related evidence was before the jury; or must the court consider the impact of all the evidence?

The Fifth Circuit acknowledged that two of the prosecution's stated reasons for striking a black juror were "disingenuous," but denied Ms. Sheppard's claim without considering the probative weight of those false reasons, holding that "[A] *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons."

The question presented with respect to Ms. Sheppard's *Batson* claim is:

3. Whether a *Batson v. Kentucky* claim fails solely because the prosecutor has proffered at least one reason that is uncontradicted by the record, or whether reviewing courts must consider all of the evidence of racial motivation, including other proffered and indisputably disingenuous reasons.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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Petitioner Erica Yvonne Sheppard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit's opinion (App. 1-34) is reported at 967 F.3d 458.

JURISDICTION

The Fifth Circuit entered judgment on July 22, 2020. (App. 1-34) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the application of the Sixth Amendment to the Constitution of the United States, which provides in relevant part, "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Statement of Facts

A. Trial counsel failed to perform a professionally reasonable mitigation investigation in light of the numerous red flags they encountered.

Erica Sheppard was a nineteen-year-old, battered, single African-American mother of three with no prior criminal history and the mental-age equivalence of a fourteen-year-old in 1993 when Marilyn Sage Meagher was murdered during the course of a robbery. Although Sheppard assisted him, it was her co-defendant, James Dickerson, and not Sheppard, who killed Ms. Meagher. In separate trials, both Ms. Sheppard and Mr. Dickerson were sentenced to death.

Lead trial counsel Charles Brown admitted at the state habeas hearing that, prior to trial, he was aware of the following red flags for further investigation:

- Ms. Sheppard was physically and verbally threatened by Dickerson on the day of the incident;

- Ms. Sheppard was repeatedly sexually molested at five or six years of age by the boyfriend of a baby-sitter; Ms. Sheppard's mother disbelieved her outcry about the sexual assaults and thus failed to protect her;

- Ms. Sheppard's first pregnancy occurred when she was thirteen years old; her mother beat her upon hearing the news, and she then had an abortion;

- Ms. Sheppard was verbally and physically abused by her mother, including an incident where her mother attempted to strangle her with a phone cord, and repeatedly ran away to avoid abuse and protect her children;

- As a teenager, Ms. Sheppard was sexually assaulted at knifepoint while living on the streets;

- Ms. Sheppard had been admitted to the Covenant House, an emergency shelter for homeless and runaway youths, with her baby Haybert;

- Jerry Bryant, Jr., the father of Ms. Sheppard's third baby, physically abused and assaulted her and this abuse was documented in at least two Houston Police Department reports;

- Ms. Sheppard had been admitted to the Matagorda County Women's Crisis Center, a shelter for battered women, with her babies Haybert and Audria; and,

- Ms. Sheppard had reported a family history of depression in her mother to Dr. Priscilla Ray, the court-appointed psychiatrist who evaluated only Ms. Sheppard's sanity, competency to stand trial, and susceptibility to coercion.

(ROA.8674-87)

Despite learning before trial that Ms. Sheppard had been sexually assaulted as a young child and again as a teenager, physically abused until shortly before the crime, and had a family history of mental illness, trial counsel failed to investigate these issues. Counsel failed to interview family members and fact witnesses who could have testified about Ms. Sheppard's traumatic background and failed to adequately interview the few family members with whom they spoke. Counsel also failed to secure the assistance of any experts or qualified mental health professionals who could have assisted the defense by offering relevant, compelling testimony

about the profound mental health consequences from Ms. Sheppard's traumatic experiences.

Although Mr. Brown admitted that there were "things about Erica Sheppard that [he] thought only a . . . medical doctor[,] psychologist, or psychiatrist could talk about" (ROA.8720), he failed to engage a mitigation specialist, social worker, neurologist, neuropsychologist, a trauma or post-traumatic stress disorder ("PTSD") expert, or any other professional with medical or psychological training to assess Ms. Sheppard and assist the defense. (ROA.8716-23)

The only expert trial counsel consulted was Dr. Priscilla Ray, an expert appointed for the limited purposes of evaluating Ms. Sheppard's competence to stand trial, sanity at the time of the offense, and her susceptibility to coercion. Dr. Ray testified in the post-conviction proceedings that her work in the case was limited to the three referral questions; and her evaluation was based on only a review of Ms. Sheppard's pre-trial jail medical records and a single two-hour pre-trial interview with Ms. Sheppard. (ROA.6925-29; App. 174, 283) Brown subsequently testified to the mistaken assumption that, despite the narrow referral questions and limited material provided to Dr. Ray, it was "part of [Dr. Ray's] duties" to assess Ms. Sheppard for all mitigation-related purposes. (ROA.8717, 8720-21)

B. Trial counsel failed to present meaningful mitigation evidence in the sentencing phase.

Defense counsel called only five witnesses in the sentencing phase for a defense that—including the State's cross-examination—lasted just 71 minutes. (ROA.2807, 6752-6929) Two of the five witnesses merely authenticated Ms. Sheppard's records from the Matagorda County Women's Crisis Center[1] and the Covenant House.[2] Each records custodian was asked only two or three questions unrelated to her personal identification and authenticating the records. (ROA.6789-91, 6793-96) Additionally, the court redacted all information in the records that was

[1] Ms. Patricia Birdwell (ROA.6789-91).
[2] Ms. Ronda Robinson (ROA.6793, 6795).

supplied by Ms. Sheppard, including references to her disputes with her mother requiring her to "stay on the streets" and her abortion. (ROA.6765-74, 6777-87)

The third defense witness was Dr. Ray, the competency expert, who testified briefly about her five-page report after it was admitted into evidence. (ROA.6797-6827)

Patrice Green testified that Ms. Sheppard attended her church, that Ms. Sheppard lived with her grandmother in Markham, and that Ms. Sheppard worked for Ms. Green's husband, Judge Aaron Green, one summer. (ROA.6828-32)

Ms. Sheppard's grandmother, Annie Smith, was the last defense witness. (ROA.6833-36) Ms. Smith testified that Ms. Sheppard had lived with her "practically all her life" because her parents separated and her mother had to work; that Bryant had abused Ms. Sheppard; and that Ms. Sheppard "went to a Covenant home to stay until [Bryant] moved away." (ROA.6833-35)

Brown subsequently admitted that he did not elicit testimony about Ms. Sheppard's history of sexual abuse, teenage pregnancies and abortions, family history of mental illness, and other mitigating evidence of which he was aware from Dr. Ray or the four lay witnesses he called to testify. (ROA.8790-92) Likewise, Brown failed to even address Ms. Sheppard's social history in his sentencing-phase closing argument. Instead, he merely asked the jury to "look at the report" of Dr. Ray. (ROA.8793)

Trial counsel's anemic presentation empowered the prosecution to trivialize in closing argument the minimal mitigating evidence before the jury. The prosecution disparaged Dr. Ray's report, arguing that "based on the limitations in her examination of the defendant and her lack of familiarity with this case . . . her evaluation isn't worth the paper it's printed on." (ROA.6948-49)

Worse, based on the limited information before the jury, the prosecutor credibly painted a

false picture by arguing that all suggestions that Ms. Sheppard had ever been abused were false, thus assumedly fabricated by Ms. Sheppard:

> There have been suggestions that in the past the defendant was physically abused by men in her life. Okay? Hints is all you have been given. I submit to you there has been no proof of that. There have been no eyewitnesses who have come forward, no abuser who has given a tearful confession in court to abuse of Ms. Sheppard but you can assume that it occurred if you like. I submit to you that it doesn't make any difference. . . . She was not physically abused; but even if she was, what kind of excuse is that?

(ROA.6942)

C. Mitigation evidence developed and introduced in state habeas corpus.

Post-conviction counsel's investigation showed that there were numerous uncalled witnesses available to testify about the repeated and varied traumatic experiences Ms. Sheppard endured by the time she reached the age of 19. The post-conviction investigation also revealed that Ms. Sheppard suffered from borderline to low average intellectual disability, significant brain dysfunction, depression, PTSD, and dissociative disorder—much of which was the consequence of the multiple forms of repeated trauma inflicted on her.

1. Fact witnesses

Post-conviction counsel presented numerous social history witnesses who were available and willing to testify at Ms. Sheppard's trial. These witnesses included close family members—such as Ms. Sheppard's mother, brother, and grandmother—as well as family friends and other members of Ms. Sheppard's community who knew her growing up. Together, these witnesses provided a detailed and compelling picture of Ms. Sheppard's life that cannot be dismissed as mere "suggestions" or "hints" of abuse:

- Erica's brother, Jonathan, was a victim and available eyewitness to the physical and sexual assaults perpetrated on Erica and himself as small children by a babysitter and her boyfriend with whom they spent a summer. (ROA.1109-10, App. 272-78 (Jonathan); ROA.1072-73 (Erica)) The babysitter forced 5-year-old Erica to perform oral sex on the boyfriend several times while 7-year-old

Jonathan was forced to watch. The babysitter "constantly hit [Erica and Jonathan] with her hands or whip[ped] them with electrical cords. The babysitter engaged in other forms of cruelty, such as forcing the children to walk to the store barefoot over hot pavement that burned their feet. The "abuse happened almost every day." (ROA.1109) During that summer, Jonathan told his grandmother about the abuse and said he did not want to back anymore. Their mother told the grandmother that the kids were lying.

- Erica's mother and grandmother confirmed that Erica and Jonathan reported the abuse to them at the time, but Erica's mother did not believe it and sent the children back to their abusers. (ROA.1006, 8936-39 (Madelyn McNeil); ROA.1009-10 (Annie Smith); ROA.1109, App. 274-75 (Jonathan); ROA.1073 (Erica))

- Jonathan required counseling to deal with the abuse and his mother eventually apologized for not believing him. He suffers from depression and continues to struggle with what he went through, a process he describes as "slow and painstaking." Erica never received the counseling Jonathan did. (ROA.1110; App. 275)

- Erica's mother was alternately neglectful and physically abusive. She beat Erica and her brother with belts and wooden boards. (ROA.1006, 8943 (Mrs. McNeil); ROA.1112 (Jonathan); ROA.1074-76 (Erica); ROA.1136 (Tommi Eanes)) Erica ultimately moved out of her mother's house after her mother strangled her with a telephone cord. (ROA.1078)

- Erica's mother had a number of relationships, and some of these lovers were abusive to Erica and Jonathan. (ROA.8930-32 (Mrs. McNeil); ROA.1074-75 (Erica))

- Erica's first pregnancy occurred when she was thirteen years old; her mother beat her half to death upon hearing the news, and she then had an abortion. (ROA.1006, 8948-50 (Mrs. McNeil); ROA.1076 (Erica))

- As a teenager, Ms. Sheppard was sexually assaulted at knifepoint while living on the streets. (ROA.8979 (Mrs. McNeil); ROA.1076-77 (Erica); ROA.8686-87 (Brown))

- Jerry Bryant, the father of Erica's third child and from whom she was hiding at the time of the crime, physically abused Erica. He once ran Erica off the road while she was pregnant with his child. After the child was born, she became sick and required hospitalization for weeks. Erica stayed at the hospital with the child but Bryant came to the hospital to demand that she return home so he could have sex with her, then beat her into unconsciousness. Bryant repeatedly threatened Erica with knives and guns. Erica ultimately left Bryant after a beating that left her with a dented skull. (ROA.1078-82, 8950-56)

- Witnesses and police reports were available to prove up the abuse Erica suffered at the hands of Bryant. (ROA.9063-66 (Bay City Police Department Offense Report); ROA.8674-75 (Brown); ROA.1006-07, 8950-56 (Mrs. McNeil); ROA.1009-10 (Mrs. Smith); ROA.1078-82 (Erica); ROA.1112-13 (Jonathan); ROA.1114-16 (Isabel Rodriguez); ROA.1121 (Aaron Green))

2. Expert witnesses established that Ms. Sheppard suffered from significant mental and psychological impairments which, *inter alia*, impaired her decision-making.

Post-conviction counsel's investigation revealed that Ms. Sheppard suffered from borderline to low average intellectual disability, significant brain dysfunction, depression, PTSD, and dissociative disorder. Post-conviction counsel offered the following expert testimony:

a. Dr. Myla Young

Dr. Myla Young is a clinical psychologist specializing in neuropsychology and neuropsychological assessments of criminal offenders, medical patients, psychiatric patients, and medical-legal patients. (ROA.1149; App. 182) Dr. Young performed a neuropsychological evaluation of Ms. Sheppard to determine the presence and severity (if any) of organic deficits, and to render an opinion as to (1) whether and how any such impairments would have affected her cognitive functioning throughout her lifetime up to the time of the offense and (2) to determine whether Ms. Sheppard's deficits would have been measurable with neuropsychological testing available at the time of her arrest and trial. (ROA.1152; App. 185)

Dr. Young conducted approximately 18 hours of neuropsychological evaluation of Ms. Sheppard over the course of 3 days. (ROA.1154-55; App. 187) Dr. Young assessed Ms. Sheppard's neuropsychological functioning by administering two neuropsychological batteries, including a Detailed Assessment of Posttraumatic Stress (DAPS). (ROA.1157-58; App. 190-91)

Dr. Young summarized her findings and conclusions as follows:

i. Ms. Sheppard's general intellectual ability is in the Borderline to Low Average Range, and lower than 90% of individuals of her same her age and education. Her mental age equivalence is 14.0 years of age. (ROA.1171; App. 204)

ii. The brain dysfunction that Ms. Sheppard experiences is greater than can be accounted for by her limited general mental ability alone. Ms. Sheppard experiences impaired motor coordination, attention and concentration, memory and learning, visual-perceptual-motor, secondary language (arithmetic), and executive functioning. Her abilities on neuropsychological testing indicate brain dysfunction that affects all brain regions. (ROA.1172-73; App. 205)

iii. Ms. Sheppard's abilities across neuropsychological testing indicate that she experiences significant dysfunction of all brain systems (temporal, limbic and frontal). When presented with a complex, confusing, highly emotional and/or highly stressful situation, Ms. Sheppard would be vulnerable to confusion and misinterpretation, and vulnerable to the influence of others. In a confusing, emotional and/or complex situation, Ms. Sheppard would be vulnerable to responding in a non-thinking, automaton-like way rather than as a thinking and reasoning adult. Once action is initiated, Ms. Sheppard's ability to re-evaluate the situation, anticipate the consequences and change her actions would also be impaired. (ROA.1172-73; App. 205-06)

iv. The brain dysfunction that Ms. Sheppard experiences is, unfortunately, consistent with her life history. Without help from others, Ms. Sheppard would not be able to function independently or adequately. (ROA.1174; App. 204)

(ROA.1171-74; App. 179-236)

b. Dr. Rebekah Bradley

Dr. Rebekah Bradley is an expert on the impact of exposure to childhood abuse and other early adverse life events, the impact of trauma exposure across the life span, genetic and environmental predictors of posttraumatic stress disorder, and depression and other mental and physical outcomes of trauma exposure. She is the director of a Veteran's Administration, multidisciplinary, outpatient PTSD treatment team, which is responsible for providing assessment and treatment to veterans exposed to traumatic events while in military service. (ROA.1207; App. 240)

Dr. Bradley evaluated the impact on Ms. Sheppard of her family, developmental and social background, and her history of childhood abuse and exposure to other adverse and traumatic events in childhood and adolescence, "in terms of her psychological and behavioral

functioning with a particular focus on Posttraumatic Stress Disorder and associated symptoms." (ROA.1207; App. 240)

Dr. Bradley conducted a 12-hour clinical interview with Ms. Sheppard, and a 2-hour interview with Ms. Sheppard's mother. (ROA.1207; App. 240) Based on her interviews and her review of case records, Dr. Bradley determined that "across the course of Ms. Sheppard's childhood and adolescence she experienced repeated physical and emotional abuse as well as sexual abuse/assaults." (ROA.1210; App. 243) Dr. Bradley noted that this traumatic adolescent sexual abuse, including rape and other inappropriately coercive sexual relationships, resulted in several early pregnancies and more than one difficult termination. (App. 245, 259) Dr. Bradley further determined that:

> During critical developmental phases, she lived in an atmosphere of terror and fear that prevented her from experiencing and learning from healthy childhood experiences. In addition, while still an adolescent, at age 17, Ms. Sheppard experienced severe and repeated physical and verbal intimate partner violence. In addition to these multiple abusive and traumatic experiences, her early environment included a number of other adverse experiences and stressful circumstances. Due to their occurrence over the course of her neurobiological and psychological development, these events negatively impacted Ms. Sheppard's thoughts, beliefs, emotions and behaviors across the course of her lifespan.

(ROA.1210; App. 243) Dr. Bradley's report noted in detail the following aspects of Ms. Sheppard's life:

i. Childhood sexual abuse/sexual assault/rape (ROA.1210-12; App. 243-45);

ii. Childhood physical abuse (ROA.1212-14; App. 245-47);

iii. Witnessing violence between parents (ROA.1214-15; App. 247-48);

iv. Emotional neglect and abuse and unsafe and chaotic living arrangements (ROA.1215-16; App. 248-49);

v. Mental illness and alcohol and drug use in Ms. Sheppard's family (ROA.1216; App. 249);

vi. Neighborhood/school violence during childhood and adolescence (ROA.1216-17; App. 249-50); and

vii. Domestic violence and intimate partner violence experienced by Ms. Sheppard (ROA.1217-18; App. 250-51).

Based on her assessment of Ms. Sheppard and her review of the materials provided to her, Dr. Bradley diagnosed Ms. Sheppard with three psychiatric disorders:

i. Major depression, recurrent, severe with psychotic features, in partial remission (ROA.1223-24; App. 256-57);

ii. Posttraumatic stress disorder (PTSD), prolonged (ROA.1223-26; App. 256-59); and

iii. Dissociative disorder, not otherwise specified (ROA.1223, 1226-27; App. 256, 259-60).

c. Dr. Priscilla Ray

Dr. Ray's state habeas affidavit confirmed the limited scope of her work in this case. (ROA.1143; App. 283-84) Brown asked her to evaluate Ms. Sheppard's competency to stand trial, sanity at the time of the crime, and whether Ms. Sheppard was likely to be influenced by abusive men. (ROA.1143; App. 282) Because Brown did not request that Dr. Ray evaluate Ms. Sheppard for any other psychiatric issues, she limited the scope of her evaluation to those three referral questions. (ROA.1143; App. 283-84) Dr. Ray's examination of Ms. Sheppard consisted of a review of the medical records from Ms. Sheppard's treatment at the Harris County Jail as well as a clinical psychiatric interview lasting two hours. (ROA.1144; App. 174, 283) Because the scope of her assignment was limited, Dr. Ray deemed it unnecessary to conduct additional interviews or review other records. (ROA.1144; App. 283) Dr. Ray did not interview any family members, social workers, or other doctors who had provided previous medical attention. (ROA.1144; App. 283)

Dr. Ray's conclusion that Ms. Sheppard was more susceptible to threats by men who

were in positions to be abusive, is not inconsistent with a PTSD diagnosis. (ROA.1144; App. 283) If she had been asked to diagnose whether Ms. Sheppard suffered from PTSD or other trauma-related psychosis, Dr. Ray was qualified and able to do so at the time she conducted her clinical evaluation in 1994. (ROA.1144; App. 283)

HOW THE ISSUES WERE DECIDED BELOW

A. The state trial court recommended a new sentencing trial.

After receiving Ms. Sheppard's post-conviction evidence and conducting an evidentiary hearing, the state trial court recommended habeas corpus relief on Ms. Sheppard's claim that trial counsel failed to adequately investigate and present mitigating evidence regarding Ms. Sheppard's sexual abuse, physical abuse, neglect, and domestic violence. (ROA.1272-77, 1297; App. 142-47 at Findings 137-52, App. 167 at Conclusion 43) The trial court concluded that "the applicant demonstrated that trial counsel was deficient in the representation of the applicant at punishment, in failing to call or fully develop the testimony of" numerous available fact witnesses and "*any* expert witnesses as to the effect of the applicant's character, background, physical abuse, domestic abuse or the applicant's alleged evidence of PTSD or alleged evidence of brain dysfunction and how this would relate to the issues of mitigation." (App. 147 at Finding 152) (emphasis added)

The trial court found that "this failure resulted in a violation of the applicant's constitutional rights." (App. 137 at Finding 114) *See also* Conclusion 31 ("The applicant has demonstrated deficient performance and harm based on deficiencies in trial counsel's representation at the punishment phase of trial."). (App. 164 at Conclusion 31)

B. The TCCA rejected the state trial court's recommendation.

The TCCA rejected the state trial court's recommendation on the sole basis that the

habeas evidence from several witnesses was cumulative: "the testimony the trial court faults counsel for not developing through Robinson, Davenport, and Smith was actually before the jury through the testimony and report of Birdwell, Dr. Ray, and others." (ROA.1307; App. 107) The TCCA's rejection, however, failed to acknowledge or engage the bulk of Ms. Sheppard's post-conviction evidence, including the extensive testimony of Ms. Sheppard's post-conviction mental health experts. (ROA.1307) As a result, the TCCA unreasonably ignored critical mitigation evidence from Ms. Sheppard's family members and *all* of the expert testimony about Ms. Sheppard's intellectual disabilities, significant brain dysfunction, depression, PTSD, and dissociative disorder.

C. The district court held that trial counsel were deficient and noted that the TCCA's determination that the post-conviction evidence was cumulative was erroneous, but nevertheless denied relief because it was constrained by Fifth Circuit precedent requiring "extreme deference" to the TCCA's opinion.

The district court noted that Brown's representation was undermined by his admitted investigative failures:

> The Court questions, however, whether Brown's decisions were based on informed reasoning, given his flagrant lack of investigation and personal involvement in or follow up on his investigator's work. Indeed, to his credit, Brown acknowledges these matters in his affidavit submitted to the state habeas court.

(ROA.2238; App. 59) The court concluded that trial counsel was deficient in a number of critical respects, including the investigation and presentation of mitigating evidence:

> This Court finds that trial counsel Brown rendered deficient performance in investigating and presenting evidence on mitigation on behalf of Sheppard because of, collectively, gross inadequacies of his own factual mitigation investigation, such as his failure to interview key witnesses (including Sheppard, her grandmother, and brother), his failure to follow up with other potential witnesses uncovered by his investigator and to more assertively pursue potential mitigation witnesses, his failure to utilize appointed co-counsel for these purposes, and his failure to adequately frame the scope of work for psychiatrist Dr. Ray or retain other necessary experts to assess Sheppard.

(ROA.2237-38; App. 58-59)

The district court also recognized that the TCCA incorrectly determined that the extensive new evidence submitted in post-conviction proceedings was cumulative of the trial evidence: "the TCCA held [] the evidence Sheppard faults counsel for not presenting was cumulative of the evidence that was presented. . . . As explained hereafter, this Court disagrees with the TCCA's conclusion." (ROA.2227; App. 48); *id*. at (ROA.2228; App. 49) ("The TCCA's conclusions are highly questionable in light of the trial and habeas records presented."). The district court found that the additional evidence "may well" have affected the sentencing decision of at least one juror. (ROA.2239; App. 60)

Though the district court found trial counsel's deficient performance to be prejudicial, the court deemed itself constrained by the TCCA's mischaracterization of the record in light of the "extreme deference" due: "Nevertheless, given the extreme deference due to the state court findings and conclusions, this Court is not permitted to find unreasonable the TCCA's conclusion that this evidence was cumulative. . . ." (ROA.2238; App. 59) (citations omitted) The district court repeatedly emphasized that the Fifth Circuit's interpretation of 28 U.S.C. § 2254(d) posed an insurmountable obstacle to relief. *See, e.g.,* ROA.2227 ("However, under applicable Fifth Circuit authority, the Court concludes the Fifth Circuit would not find the TCCA was unreasonable."); ROA.2234 ("under Fifth Circuit precedent, the [TCCA's] conclusion [the trial counsel were not deficient] is not sufficiently incorrect to be deemed legally unreasonable.").

Ms. Sheppard argued in her motion to alter or amend judgment (ROA.2273-301) that the TCCA's conclusion was unreasonable under 28 U.S.C. § 2254(d)(1) because the TCCA's limited analysis ignored the vast bulk of the post-conviction testimony and evidence from fact witnesses presented by habeas counsel and completely failed to address the evidence from expert witnesses

proffered in post-conviction proceedings. This was an unreasonable application of *Strickland* because the TCCA failed to engage with the post-conviction evidence, which Ms. Sheppard showed, and the district court found, was different in type and character from that presented in the limited mitigation case trial counsel presented to the jury. (ROA.2282) (citing *Porter*, 130 S. Ct. at 454) In its Memorandum and Order denying the motion to alter or amend (ROA.2343-52; App. 94-103), the district court acknowledged that the argument was "a legitimate argument to make," but it had been rejected by the court's finding that "the Court of Criminal Appeals was not unreasonable within the meaning of 28 U.S.C. § 2254(d)." (ROA.2345; App. 96)

D. Over a vigorous dissent, a panel of the Fifth Circuit affirmed the district court.

A panel of the Fifth Circuit affirmed the district court's denial of relief in a 2-1 decision. *Sheppard v. Davis*, 967 F.3d 458 (5th Cir. 2020) (King, J., dissenting). The panel majority found reasonable the TCCA's determination that mitigation evidence not discovered and presented by Ms. Sheppard's trial counsel was cumulative. *Id*. at 468-69. Judge King found this conclusion unreasonable. *Id*. at 475.

Judge King further determined that Ms. Sheppard's trial counsel was ineffective for failing to (i) obtain an expert evaluation of Ms. Sheppard's mental condition and (ii) sufficiently investigate Ms. Sheppard's life history. *Id*. at 476. Based on her conclusion that Ms. Sheppard showed a "reasonable probability that one juror, having heard about her immature mental state and grim history of abuse, would have changed his or her mind about condemning her to death," Judge King determined that the district court's judgment should be reversed. *Id*. at 480 (citing *Andrus v. Texas*, ___ U.S. ___, 140 S. Ct. 1875 (2020)).

E. Although acknowledging the State's pretextual reasons for striking a black prospective juror, the courts below denied relief under *Batson*.

Of its nine peremptory challenges, the State expended three on black prospective jurors:

Ronnie Simpson, Nathaniel Cherry, and Roy Qualls. When defense counsel challenged the strike of Simpson as racially motivated, the prosecution offered four justifications for the strike. Two of those reasons were plainly pretextual, as the Fifth Circuit ultimately acknowledged.[3] Nonetheless, the trial court denied Petitioner's peremptory challenge claim and the TCCA affirmed. Although the TCCA's opinion cites *Batson v. Kentucky*, 476 U.S. 79 (1986), it did not attempt, or even allude to, *Batson*'s mandated step three analysis of whether the race neutral reasons proffered by the prosecution were pretextual. Instead, it recited the four reasons the prosecutor offered as support for his strike, and without differentiating among those reasons or acknowledging the record evidence that plainly contradicts two of those stated reasons, concluded by merely asserting that "[t]he State's apprehensions are well-established in the record." (ROA.1087)

On habeas, after a two paragraph analysis of the evidence, the district court denied relief and a COA on the *Batson* claim. Despite its recognition—and the state's concession—that two of the prosecutor's reasons were disingenuous, the Fifth Circuit denied relief on the claim because not *all* of the reasons cited by the prosecutor were demonstrably false:

> Sheppard persuasively posits that the prosecutor's first two reasons appear disingenuous, given [seated white juror] Chambers's testimony on voir dire. As the state concedes on appeal, Chambers was likewise hesitant to give the death penalty based on the facts of the crime alone and admitted that he would consider a defendant's children when assessing punishment. But even though the first two reasons for striking Simpson applied equally to Chambers, the prosecutor removed only Simpson. The decision to do so therefore suggests that the explanation may have been a pretext for discrimination. *Nevertheless, a Batson claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons*.

Sheppard v. Davis, 967 F.3d at 472 (emphasis added). A footnote to the last sentence cites two

[3] Defense counsel challenged the strike when made, and then later renewed the challenge, pointing out two white jurors who were accepted by the State gave substantially similar answers. But the trial court again overruled the objection. (ROA.3634-40, 3812-13)

other Fifth Circuit cases that reject *Batson* claims on the same theory: That a petitioner may prevail on a *Batson* claim only where he or she has rebutted all of the prosecutor's stated reasons. *Id*. at 472 n. 12.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Has Yet To Adopt This Court's Rules For Reviewing Reasoned State Court Decisions Pursuant To § 2254(d); The Court Below Failed To Assess The Reasonableness of the TCCA's Reasons For Denying Relief Against The State Court Record.

For almost two decades, the Fifth Circuit has adhered to a rule that § 2254(d) review applies to only the result of the state court decision and not the reasoning for it. *See*, *e.g.*, *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) ("we have held that under the deferential standard of AEDPA, we review only the state court's decision, *not its reasoning or written opinion*, to determine whether it is contrary to or a misapplication of clearly established federal law.") (emphasis added). As the majority below explained, the Fifth Circuit will "defer to the decision of a state court *even if its actual rationale was unreasonable*" "so long as a plausible argument exists to support the ruling." (App. 10) Although this rule is untenable in light of this Court's command to "review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable," *Wilson*, 138 S. Ct. at 1192, the Fifth Circuit—including the panel below—has declined to abrogate it. Thus, more than two years later, it is unclear whether *Wilson* applies to habeas courts in the Fifth Circuit.

The court of appeals below expressed doubt that *Wilson* overturned circuit precedent but hedged by purporting to apply *Wilson*. However, the court's analysis fell significantly short of the mark. *Wilson* requires two analytical steps: (1) identify the specific legal and factual reasons for the state court's decision; and, (2) assess the reasonableness of the state court's reasons *before* deferring to them. The majority below correctly identified the TCCA's reasoning for

rejecting Ms. Sheppard's claim: the post-conviction mitigating evidence was allegedly cumulative of the evidence presented at trial. But the court of appeals failed to subject this characterization of the evidence to meaningful scrutiny in light of the record before the state court.

The TCCA held that trial counsel were not ineffective in their presentation of mitigation evidence because "the testimony the trial court faults counsel for not developing through Robinson, Davenport, and Smith was actually before the jury through the testimony and report of Birdwell, Dr. Ray, and others" and "[a] decision not to present cumulative testimony does not constitute ineffective assistance." (ROA.1307) This reasoning would be reasonable if in fact all of the evidence offered in post-conviction had been presented to the jury. As the dissent below noted, "Sheppard's trial counsel did present some evidence of Sheppard's horrific upbringing and the abuse that she had suffered in her life." (App. 23) Thus "the TCCA was not *unreasonable* in concluding that *that* additional testimony would have been cumulative. But trial counsel's failure to present mitigation testimony went further." (App. 23-24) (emphasis in original)

Ms. Sheppard's post-conviction submissions included evidence that was different in kind than anything presented at trial. Post-conviction counsel secured expert witnesses who could have testified at trial that Ms. Sheppard "had the cognitive ability of a fourteen-year-old and that she suffered from organic brain dysfunction, posttraumatic stress disorder, and dissociative disorder." 967 F.3d at 474. These expert witnesses could also have testified "to the impact that those mental defects had on Sheppard's decisionmaking processes." *Id*. For example, Dr. Young, a neuropsychiatrist who testified in habeas, opined that, "[i]n a confusing, emotional and/or complex situation, Ms. Sheppard would be vulnerable to responding in a non-thinking,

automaton-like way rather than as a thinking or reasoning adult. Once action is initiated, Ms. Sheppard's ability to re-evaluate the situation, anticipate the consequences and change her actions would also be impaired." *Id*. (App. 206; ROA.1172-73) As Judge King noted, because of Brown's deficient performance, the jury did not hear this testimony *or anything like it*. "In other words, the evidence that trial counsel failed to develop would in no sense have been 'cumulative.'" 967 F.3d at 474.

Yet the panel majority still found that the "same evidence was substantially before the jury," *id*. at 468, because it heard that: (i) "Sheppard experienced depression and mood swings and heard voices in her head" and (ii) "Sheppard was unlikely to pose a continuing threat of violence in the structured confines of prison." *Id.* Based on this evidence, the panel majority concluded that the evidence presented at the punishment phase of Ms. Sheppard's trial "previewed the salient points of the subsequent expert findings," and the TCCA was not unreasonable in finding the proposed expert testimony cumulative. *Id.*

As Judge King noted, evidence that Ms. Sheppard had brain dysfunction and the mental development of a child, PTSD, and dissociative disorder—and that, as a result, she had significantly impaired ability to make independent decisions in stressful and emotional situations, "cannot be dismissed as simply 'cumulative' of the evidence that Ms. Sheppard 'experienced depression and mood swings and heard voices in her head.'" *Id*. at 475. Among other things, Judge King noted, "the evidence of Sheppard's diminished decisionmaking ability would have bolstered her story, which was presented to the jury, that she committed the murder while in a state of 'shock' after her codefendant 'pulled a knife on her' and threatened to kill her baby daughter. Sheppard's trial counsel did not simply fail to elaborate on *depression and mood swings*; rather, counsel failed to present evidence that Sheppard had 'significant' mental and

psychological impairments.'" *Id*., *quoting Sears v. Upton*, 561 U.S. 945, 956 (2010). It was therefore unreasonable in light of the state court record for the TCCA and the panel majority to dismiss Ms. Sheppard's proposed mitigation evidence as merely cumulative.

The panel majority replicated the TCCA's cumulativeness error because it did not engage with the evidence. *See Porter v. McCollum*, 558 U.S. 30, 42 (2009) (decision that the defendant "was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing."). The panel majority's failure to engage with the mitigating evidence and their discounting of it to inconsequential proportions unreasonably applies *Strickland v. Washington*, 466 U.S. 668 (1984).

II. This Court Should Clarify That Reviewing Courts May Not Discount Relevant Post-Conviction Mitigating Evidence As "Cumulative" Merely Because Generically Equivalent Or Related Evidence Was Presented At Trial.

The TCCA rejected Ms. Sheppard's claim because the post-conviction evidence was cumulative with respect to the evidence presented at trial, and the Fifth Circuit deemed the TCCA's rationale reasonable. Labeling Ms. Sheppard's new evidence as merely "cumulative," however, stretches the term well beyond its ordinary usage and, more importantly, is contrary to this Court's Sixth Amendment jurisprudence.

Trial counsel called five witnesses during their 71-minute penalty phase defense of Ms. Sheppard. Through these witnesses the jury learned in general terms that Ms. Sheppard had been sexually assaulted as child, physically abused by her mother and, later, by her boyfriend, and raped as a teenager. The jury also learned that Ms. Sheppard admitted to experiencing depression, mood swings, and heard voices in her head. Much of the significant mitigating evidence was not elicited from the witness stand but instead came from a five-page report

prepared by the competency expert after talking to Ms. Sheppard for two hours. Such was the quality of the evidence that the prosecutor argued in closing that there were only "hints" or "suggestions" that Ms. Sheppard had ever been physically abused. The prosecutor noted that no eyewitnesses had come forward and stated: "She was not physically abused; but even if she was, what kind of excuse is that?"

State post-conviction counsel submitted written or oral testimony from sixteen witnesses as well as several mental health experts. The new evidence was qualitatively and quantitatively stronger than the trial case in three respects: (1) it was significantly more persuasive and credible; and included, *inter alia*, eyewitness accounts of some of the sexual and physical abuse Ms. Sheppard endured; (2) it provided a more detailed and vivid description of the traumatic events in Ms. Sheppard's life; and as previously noted, (3) it included evidence that was different in kind from any of the evidence presented at trial: expert testimony about Ms. Sheppard's mental health issues—most of which were a consequence of her traumatic and chaotic background—and their relevance to her moral culpability for the crime.

Considered as a whole, the post-conviction evidence fundamentally altered the evidentiary landscape. Instead of hearing in general terms—mostly from a five-page printed report—that Ms. Sheppard had been abused, the jury would have heard, for example, Ms. Sheppard's brother describe how, as a 7-year-old, he was forced to watch his 5-year-old little sister being repeatedly sexually assaulted and his feelings of shame about being helpless to stop it, as well as his ongoing efforts to heal from the trauma they endured as children. Ms. Sheppard's brother and other fact witnesses would have painted a vivid and true account of Ms. Sheppard's traumatic life, after which experts would have explained how the ensuing serious mental health disorders have impaired her decisionmaking.

Moreover, because the prosecution attacked the truthfulness of the trial evidence by, *inter alia,* highlighting the absence of any eyewitnesses, the post-conviction eyewitness testimony corroborating the trial evidence cannot be deemed "merely cumulative." *See, e.g., Banks v. Dretke*, 540 U.S. 668, 702 (2004) (rejecting the state's argument that suppression of a witness's informant status was cumulative because he was impeached by other less credible means). Here, the prosecution stood before Ms. Sheppard's jury and argued that she had never been abused and, even if she had, it would not be relevant to her moral culpability. The post-conviction case provided the very proof and context that was fatally absent at trial.

This Court has emphasized that a reviewing court must consider "the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding." *Williams v. Taylor*, 529 U.S. 362, 397 (2000); *Wiggins v. Smith*, 539 U.S. 510, 534, 536 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence. . . . [W]e evaluate the totality of the evidence — 'both that adduced at trial, and the evidence adduced in the habeas proceeding[s].'"); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.") (citations omitted). *See also Porter*, 558 U.S. at 41; *Sears*, 561 U.S. at 956.

The TCCA and the panel majority did the opposite: instead of considering the totality of the evidence, they strained to find similarities between the two proceedings and then discounted any post-conviction evidence that was remotely related to evidence offered a trial.

This point alone is worthy of the Court's consideration because other courts employ the

same unreasonable analysis which poses an insurmountable hurdle to establishing prejudice. *See* Petition for Certiorari at 16–24, *Sigmon v. Stirling*, No. 20-6166 (U.S.).

III. This Case Is An Ideal Vehicle For Resolving The Questions Presented Because Ms. Sheppard Was Denied The Effective Assistance Of Counsel At The Penalty Phase Of Her Capital Trial.

In determining whether counsel's representation "fell below an objective standard of reasonableness," the court examines whether counsel violated his "duty to investigate." *Strickland*, 466 U.S. at 688, 690. Counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 691. This includes conducting an "adequate investigation in preparing for the sentencing phase ..., when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla*, 545 U.S. at 380-81. The reviewing court evaluating whether an attorney's investigation was reasonable "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527.

Ms. Sheppard's trial counsel, Charles Brown, unreasonably failed to investigate two different avenues of potential mitigation: first, he failed to obtain an expert evaluation of Ms. Sheppard's mental condition, and second, he failed to sufficiently investigate Ms. Sheppard's life history.

A. Counsel Was Deficient In Failing To Obtain An Expert Evaluation.

Brown knew from the investigation that was performed that Ms. Sheppard had been repeatedly sexually and physically abused as a child, that she suffered from depression, and that she struggled in school. *See* Maj. Op., 967 F.3d at 463-64. Brown also knew that there were "things about Erica Sheppard that [he] thought only a ... medical doctor[,] psychologist, or psychiatrist could talk about." (ROA.8720) Despite this, however, Brown failed to consult with a

neurologist, a neuropsychologist, an expert on the impact of trauma, or an expert on PTSD in preparation for the punishment phase of Sheppard's trial. (ROA.8720-23) Instead, Brown asked Dr. Ray to do nothing more than "to evaluate Ms. Sheppard's competency and sanity, as well as to evaluate whether Ms. Sheppard was likely to be influenced by men who were in a position to be abusive." (ROA.1143; App. 282) Brown did not ask Ray to conduct a "psychiatric diagnosis," and she admitted that she did not. (ROA.1143; App. 282) Although Brown later testified that he "believe[d]" that evaluating the impact of Sheppard's childhood abuse was part of Ray's assignment, it was clear at the time that Ray did not in fact conduct any such evaluation.

Brown's failure to obtain a more searching psychological evaluation of Ms. Sheppard was objectively unreasonable in light of then-prevailing professional norms. Under the American Bar Association Guidelines, Brown should have made "efforts to discover all reasonably available mitigating evidence," including by using "the assistance of experts where it is necessary or appropriate." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (1989). Although the ABA guidelines are not legally binding, this Court has "long ... referred [to them] as 'guides to determining what is reasonable,'" including this guideline specifically. *Wiggins*, 539 U.S. at 524. And this Court has confirmed that failing to obtain expert neuropsychological evaluation of a brain-damaged defendant can constitute constitutionally inadequate representation. *See, e.g., Sears*, 561 U.S. at 949-52; *see also Andrus*, 140 S. Ct. at 1882-83 (determining that counsel provided ineffective assistance where he failed to uncover evidence of trauma and PTSD despite knowing that defendant had a "seemingly serious mental health issue").

Brown's failure to investigate was in no sense a tactical decision. A failure to uncover and present mitigating evidence at sentencing cannot be justified as a tactical decision where

counsel has not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Wiggins*, 539 U.S. at 522. Without investigating, counsel cannot make an informed decision as to what to introduce or omit. *Williams*, 529 U.S. at 396.

B. Counsel Was Deficient In Failing To Sufficiently Investigate Ms. Sheppard's Life History.

Brown delegated the task of investigating Ms. Sheppard's life history to an investigator. The investigator interviewed Ms. Sheppard and discovered that she was molested as a five-year-old and that she suffered physical abuse from Jerry Bryant, the father of her third child. Although these accounts hinted at Ms. Sheppard's traumatic life history, Brown never asked Ms. Sheppard for more details or for a fuller account of her life. Brown also never interviewed Ms. Sheppard's brother, Jonathan Sheppard. (App. 278) Brown acknowledged that Jonathan could have helped Ms. Sheppard, but testified that he did not interview Jonathan because Jonathan "appeared" to be uninterested in assisting Ms. Sheppard's defense. (ROA.8731-32)

As noted by Judge King, the record belies any such appearance. 967 F.3d at 477. Brown knew that Jonathan willingly met with the investigator, and even accompanied the investigator as he searched for Bryant. The investigator did not ask Jonathan about Ms. Sheppard's life history, however. (App. 278) Second, Brown's impression of Jonathan's unwillingness to assist was based on Jonathan's failure to affirmatively "come forward" to help Brown when Brown attended the trial of Sheppard's codefendant. But Brown acknowledged that he didn't know whether Jonathan even knew who he was at that time. Brown thus demonstrated no strategic reason for failing to interview Jonathan about Ms. Sheppard's life history.

Although Brown did speak with Ms. Sheppard's mother, he did not interview her about Ms. Sheppard's life history. Brown did not ask Ms. McNeil about the abuse Ms. Sheppard experienced as a child or about Ms. Sheppard's pregnancies and trouble in school. The only

explanation that Brown offered for why he failed to interview Ms. McNeil on these topics is that speaking to her "wasn't very pleasant." (ROA.8787) That is not a strategic rationale.

Brown thus knew, among other things, that Ms. Sheppard had an abusive and traumatic upbringing, but he failed to pursue the details of her life history. *Cf. Wiggins*, 539 U.S. at 527-28 ("[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."). These facts are similar to those in *Andrus*, where this Court determined that counsel provided ineffective assistance when he "abandoned [his] investigation of [Andrus'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 140 S. Ct. at 1882 (alterations in original) (citation omitted); *see also id*. ("Aside from Andrus' mother and biological father, counsel did not meet with any of Andrus' close family members, all of whom had disturbing stories about Andrus' upbringing."). In much the same way, Brown's representation at the sentencing phase of Sheppard's trial was constitutionally deficient. *See, e.g., Porter*, 558 U.S. at 40 (ruling counsel ineffective where he "ignored pertinent avenues for investigation of which he should have been aware").

C. Ms. Sheppard Was Prejudiced By Her Counsel's Failures.

"In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced [her] defense." *Wiggins*, 539 U.S. at 534. "Under *Strickland*, a defendant is prejudiced by [her] counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter*, 558 U.S. at 40 (quoting *Strickland*, 466 U.S. at 694). "Here, prejudice exists if there is a reasonable probability that, but for [her] counsel's ineffectiveness, the jury would have made a different judgment about whether [Ms.

Sheppard] deserved the death penalty as opposed to a lesser sentence." *Andrus*, 140 S. Ct. at 1885-86.

Had Brown pursued a neuropsychological evaluation of Ms. Sheppard, he would have uncovered evidence that she had organic brain dysfunction, PTSD, dissociative disorder, and the cognitive ability of a fourteen-year-old. (ROA.1171-74, 1223-27; App. 204-07, 240-65) And had he obtained this information, it would have been reasonable for him to present it to the jury, particularly considering his stated strategy of trying to convince the jury to "[t]ake mercy upon [Sheppard]." (ROA.8773)

This Court has recognized that evidence of this type is precisely the type of mitigation evidence that might sway death-penalty jurors. In *Rompilla*, defense counsel unreasonably failed to uncover evidence that the defendant suffered from "organic brain damage" and had "a third grade level of cognition." 545 U.S. at 391-92 (citation omitted). Combining this with unpresented evidence of the defendant's abusive and traumatic childhood, the Court determined that the defendant had "shown beyond any doubt that counsel's lapse was prejudicial." *Id*. at 390. Similarly here, Brown's failure to uncover and present this evidence prejudiced Ms. Sheppard.

Had Brown discussed Ms. Sheppard's life history with Jonathan, Ms. McNeil, or Ms. Sheppard herself, he would have discovered—and then presented to the jury—substantially more information about Ms. Sheppard's traumatic life. *Cf*. Maj. Op., 967 F.3d at 464-65. Ms. Sheppard, for instance, could have testified that, when she was as young as three, she was physically abused by her regular babysitter, who beat her with extension cords, belts, and "whatever else [she] could get her hands on." (ROA.1072) This babysitter also forced Ms. Sheppard to walk to the store barefoot, causing her to burn her feet on the blacktop and cut her feet on broken glass. Ms. Sheppard could also have provided detailed testimony into her

mother's physical abuse. She could have testified that her mother sometimes beat her so severely that her grandmother would physically intervene. (ROA.1076) And when she first became pregnant, at age thirteen, her mother "beat [her] half to death." (ROA.1076)

Ms. Sheppard could have testified that her mother took various lovers, some of whom also physically abused Ms. Sheppard and her brother. And she could have testified that she ultimately moved out of her mother's house after her mother strangled her with a telephone cord. Ms. Sheppard could have testified that, at around age sixteen, she was drugged and raped at a party.

Ms. Sheppard could have provided detailed testimony about Bryant's abuse as well: For example, he once ran her car off the road while she was pregnant with his child. Later, after their child was born, the child became very sick and had to be hospitalized for weeks. Ms. Sheppard stayed with the child at the hospital, and Bryant came to the hospital, demanded that she come home so that he could have sex with her, and beat her until she lost consciousness. Bryant also repeatedly threatened Ms. Sheppard with knives and guns. Ms. Sheppard ultimately left Bryant after another beating, during which he dented her skull. (ROA.1081-82)

Ms. Sheppard's brother Jonathan also could have testified to her lifetime of abuse. He could have testified that their babysitter beat them, whipped them with electrical cords, and made them walk barefoot to the store. He could have testified that their grandmother beat them with a belt or with switches, and that their mother would beat them with "whatever she could find." And he could have testified about the time that Bryant attacked Sheppard at the hospital. (ROA.1107-13; App. 274-78)

Ms. McNeil could also have testified to her daughter's traumatic life history. She could have testified that, from a young age, Ms. Sheppard witnessed physical fights between her father

and McNeil. She could have testified that, at thirteen years old, Ms. Sheppard was sexually involved with a man in his twenties, and she could have corroborated that she whipped Ms. Sheppard when Ms. Sheppard first got pregnant. She also could have testified about the incident at the hospital and that Ms. Sheppard repeatedly fled to McNeil's home for fear of Bryant. (ROA.1005-07, 8922-26, 8948-50, 8954-56)

Because of Brown's failure to investigate, none of the foregoing information was presented to the jury. The same is true here.

The state argues that Ms. Sheppard was not prejudiced by Brown's failure to present this additional mitigation evidence because there is "no reasonable probability" that the evidence "would have persuaded the jury that Sheppard would not be dangerous in the future." But "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. For instance, in a case where evidence showed that the defendant, convicted of murder, had also committed "two separate violent assaults on elderly victims" and had "set[ ] a fire in the jail while awaiting trial," this Court observed that a "graphic description" of his "childhood[ ] filled with abuse and privation" might nevertheless change the jury's mind as to his "moral culpability." *Id*. at 368, 398.

The panel majority determined that "Sheppard has not shown that, but for her counsel's failure ..., 'the result of the proceeding would have been different.'" 967 F.3d at 469 (quoting *Andrus*, 140 S. Ct. at 1881). But Ms. Sheppard does not need to prove that Brown's ineffective assistance "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. As this Court recently made clear, due to Texas' requirement that a jury may impose the death penalty only by a unanimous vote, the bar for showing prejudice is low: "[B]ecause [the

defendant's] death sentence required a unanimous jury recommendation, prejudice here requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding [her] 'moral culpability.'" *Andrus*, 140 S.Ct. at 1886.

The state trial court and the district court, having heard extensive evidence not presented to the jury about Ms. Sheppard's mental condition and history of abuse, found that Ms. Sheppard made this showing. The Fifth Circuit's contrary decision is unreasonable under applicable law.

IV. The Fifth Circuit Has Erected An Additional Obstacle For *Batson* Claimants To Surmount, Dispositive In This Case, Which Cannot Be Reconciled With This Court's *Batson* Jurisprudence, And Requires Correction.

A. The Fifth Circuit's Requirement That A *Batson* Claimant Demonstrate The Falsity Of Every One Of A Prosecutor's Stated Reasons Cannot Be Reconciled With This Court's Precedents.

In *Batson*, this Court held that the Equal Protection Clause of the Fourteenth Amendment is violated by a racially motivated exercise of the peremptory challenge, *Batson*, 476 U.S. at 85; striking even a single juror because of his or her race violates the Fourteenth Amendment. *Id.* at 95 *Batson* established a three-step test for analyzing whether a prosecutor has peremptorily struck a potential juror on the basis of race. *Id.* at 96-98. First, the defendant must make a prima facie showing of the prosecution's purposeful discrimination in their use of peremptory strikes. *Id.* at 96. Then, the burden shifts to the prosecution to provide race-neutral reasons for having peremptorily challenged black jurors. *Id.* at 97. However, the provision of a race-neutral reason is not the end of the inquiry. Rather, a court must then determine whether purposeful racial discrimination has been established. *Id.* at 98. "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)); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[I]n 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.")

Among the factors this Court has found to "bear upon the issue of racial animosity" is the strength of the prima facie case, *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), but even "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of [] black venire panelists who were struck and white panelists allowed to serve." *Id*. at 241. Also important are "contrasting voir dire questions posed respectively to black and nonblack panel members," *id*. at 255; failure to *voir dire* on the reasons purportedly grounding a strike, *id*. at 244; mischaracterization of the evidence, *id*. at 244, and "how reasonable, or how improbable, the explanations are ... and [] whether the proffered rationale has some basis in accepted trial strategy," *id*. at 247.

"Necessarily, an invidious discriminatory purpose may often be inferred from the *totality of the relevant facts*. . . ." *Arlington Heights,* 429 U.S. at 242 (emphasis added). *Miller-El* makes plain that even if "at some points the significance of [a particular piece of] evidence is open to judgment calls," the question is whether when the evidence "is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Miller-El,* 545 U.S. at 265. *See also Foster v. Chatman*, 136 S. Ct. 1737 (2016), where the Court likewise insisted on "[c]onsidering all of the evidence that bears upon the issue of racial animosity," and upon doing so, concluded that "the strikes of [two jurors] were motivated in substantial part by discriminatory intent." *Foster*, 136 S. Ct. at 1754; *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."). Most recently, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) analogously held that "All that we need to decide and all we do decide is that all of the relevant facts and

circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. Thus, the Fifth Circuit's categorical rule that "[A] *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons," both abjures the totality of the circumstances approach mandated by *Batson*, *Miller-El*, *Snyder*, *Foster*, and *Flowers*, and creates out of whole cloth an additional impediment to eliminating racial discrimination in jury selection.

Not only did the Fifth Circuit cite no language from any of this Court's *Batson* cases that would require—or even permit—imposing additional requirements on *Batson* claimants, but its rule is impossible to square with the outcomes in any of the last three *Batson* cases this Court has decided.[4] In every one of them, the prosecutor proffered at least one reason that was not "rebutted" by the defendant, yet in each case, this Court concluded that considering all of the circumstances, the defendant had established racial motivation.

For example, Snyder's prosecutor proffered two reasons for the strike of black prospective juror Jeffrey Brooks, one of them being his demeanor. *Snyder v. Louisiana*, 552 U.S. at 485. Because the trial court had simply upheld the strike, this Court was unwilling to assume that the trial court had relied upon the demeanor reason, and, focusing on the other stated reason, found it pretextual, and then concluded that "the prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." *Id.* The prosecutor in

[4] The outcome in *Miller-El* is also in tension with the Fifth Circuit's rule. Miller-El's prosecutor offered several reasons for the strike of Billy Fields that were rebutted by the defense, but also a reason that was neither contradicted by the record nor impeached by an accepted white juror possessing the same characteristic: that Fields had a brother who had previously been convicted of a crime. This Court rejected the Court of Appeals' reliance on the fact that "no seated juror was in Fields's position with respect to his brother," instead reasoning that reliance on that stated reason "ignores not only its pretextual timing but the other reasons rendering it implausible." *Miller-El*, 545 U.S. at 246.

Foster offered *eight* reasons as justification of the strike of prospective black juror Marilyn Garrett, many of which this Court did not even discuss, despite the fact that they were "unrebutted," *Foster*, 136 S.Ct. at 1751; rather than concluding that those unrebutted reasons required affirmance of the state court's decision, this Court determined that the impeachment of several of the stated reasons was sufficient to require a finding that the prosecutor's strike of Garrett was racially motivated. And in *Flowers*, the prosecutor cited two facts not "rebutted" by Flowers: that prospective black juror Carolyn Wright was that she had been sued by the store owned by one of the four victims, and that she had been employed at the same place as had the defendant's father. *Flowers*, 139 S. Ct. at 2249. Nonetheless, this Court reasoned that "[i]n light of all the facts and circumstances, we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent." *Id.* at 2251.

Thus, the Fifth Circuit's novel interpretation of *Batson* both departs from this Court's mandated procedures and cannot be reconciled with this Court's recent decisions.

B. The Fifth Circuit's Impermissible Interpretation Of *Batson* Caused It To Err In Determining That The State Court's Determination Was Not Contrary To Or An Unreasonable Application Of Federal Law Under 28 U.S.C. § 2254(d)(1).

Instead of comparing the state court decision to the results of a "sensitive inquiry" into all of the indicia of racial motivation, the Fifth Circuit tested the state court decision against its own failure-to-rebut-all-stated-reasons rule, and found the state court decision neither contrary to nor an unreasonable application of that rule. While that determination may be correct, it has no relevance, for the question is not whether the state court rule is contrary to or an unreasonable application of the Fifth Circuit's invention, but how it compares to and complies with *this Court's* precedents. Had the Fifth Circuit evaluated the state court decision against the correct

standard, it would have considered many factors it ignored, and concluded that the state court decision was an unreasonable application of this Court's precedents.

The prosecutor cited four reasons for his strike of Simpson, which the TCCA summarized as follows:

> The State noted that Simpson testified he had been falsely accused and arrested for a crime and hard not been well treated by law enforcement during the ordeal. Simpson further testified that if a female capital murder defendant had children, he might consider that as a factor militating against the imposition of the death penalty. Simpson also testified that it would be difficult for him to vote for the death penalty on the facts of a charged offense alone. While Simpson looked at the defendant and said "hello" when he was introduced to the parties at the beginning of his voir dire examination, he did not greet the State.

(ROA.1087) The state court then asserted, without discussing either what Mr. Simpson actually said or what other jurors had said, and without distinguishing among the stated reasons, that "The State's race neutral apprehensions are well established in the record." (ROA.1087)

As the Fifth Circuit recognized, two of those reasons were demonstrably "disingenuous." However, that court's failure-to-rebut-all-stated-reasons rule short-circuited analysis of the probative value of those disingenuous reasons, as well as other evidence of discrimination, including reliance on insignificant differences between black and white jurors, misstatement of the record, reliance on factors of dubious plausibility, and failure to voir dire on a purported area of concern.

1. Comparisons to seated white jurors

As the Fifth Circuit did acknowledge - and as the state conceded, though only upon appeal to the Fifth Circuit – two of the reasons cited by the prosecutor must be deemed "disingenuous" because they characterized seated white juror Larry Chambers. *Sheppard*, 967 F.3d at 471. Under the Fifth Circuit's approach, this dishonesty played no role other than knocking out two of the stated reasons -- reluctance to impose the death penalty based solely on the facts of the crime

and willingness to consider, as a mitigating factor that defendant had children. However, that the prosecutor's willingness to make false statements in support of his strikes should cast doubt on the credibility of other reasons he states does not register in the Fifth Circuit's calculus; this is clear not only because the Fifth Circuit fails to address this consideration, but because immediately following its discussion of the two disingenuous reasons, it states "*Nevertheless*, a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." *Id*. at 472 (emphasis added).

Moreover, the Fifth Circuit fails to acknowledge that a third reason—Simpson's false arrest—is likewise quite suspicious when viewed in light of the characteristics of seated white jurors. The opinion recites the fact that "Sheppard had not identified a white juror who was the victim of a false arrest and yet was accepted by the State," *id. at 472*, which is literally true. But, as this Court has held, jurors are not cookie cutters, *Miller-El II*, 545 U.S. at 247, n. 6, and the question is not whether a reason can be phrased in such a way that it applies to no seated white jurors, but whether a seated white juror has a characteristic similar enough to the one cited by the prosecution that the motivation to strike would be similar. *See Flowers*, 139 S. Ct. at 2249 ("[A] defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent.").

Here, the prosecution did not strike seated white juror David Herd, whose son had been prosecuted, but the Fifth Circuit dismissed that comparison as "unavailing" because "Herd stated that his son had been lawfully prosecuted for an incident with his girlfriend, Simpson himself was falsely arrested." *Sheppard*, 967 F.3d at 472. But if the basis for the strike was a fear that negative personal interactions with the police or judicial system would prejudice a juror's view of the State's case, it had *at least* as much to fear from Herd as from Simpson. Simpson was

arrested in another state, whereas Herd's son had been prosecuted in Houston, and much more recently than Simpson had been arrested. (ROA.3772) Moreover, Simpson explicitly stated that he *did not* harbor any hard feelings towards police or prosecutors, and that he felt he had been treated well by the judicial process. (ROA.3604-06) In contrast, Herd expressed negative feelings towards local prosecutors after his son was arrested for domestic issues with his girlfriend because he believed that his son's actions did not warrant a felony charge (ROA.3771-73), and he described the experience as "quite an ordeal" for his family. (ROA.3773)

Moreover, the Fifth Circuit failed entirely to address the comparison to white accepted juror Larry Chambers, who admitted that he himself received deferred adjudication for a DWI in Brazoria County. (ROA.3671-72) Thus, even if a prosecutor might see a juror's own run-in with the criminal justice system as critically different than his son's, the prosecution's acceptance of Chambers gives the lie to a race-neutral application of that more particularized concern. Thus, three of the four reasons stated by the prosecutor are impeached by comparisons to white jurors.

2. Mischaracterization of the record

The Fifth Circuit rejected the prosecution's second proffered reason for striking Simpson—that he would consider that the defendant had children a mitigating circumstance—because of the prosecution's failure to strike a white juror who had hesitations about imposing the death penalty on a woman with children rendered that reason disingenuous. That determination was correct, but beyond that comparison, this stated reason was probative of discriminatory motive because it mischaracterized Simpson's responses. At the *Batson* hearing, the prosecutor stated: "[W]hen I asked him towards the end of my portion of the voir dire how he felt about a defendant who had kids facing the death penalty he said he definitely—said that was a factor he would consider in answering Special Issue No. 3 which caused [the other prosecutor] and I a great deal of concern because this defendant has young children." (ROA.3636) However,

this is an inaccurate characterization of Simpson's views. Simpson responded on his questionnaire that women should not be treated differently than men in the criminal justice system. His questionnaire also stated that the death penalty could be an acceptable punishment for women, and in particular, for women with children. (ROA.3619-20) When asked whether the fact that a capital murder defendant had children would affect him in any way deliberating, Simpson first responded "I don't think that it would affect me but I think that under item three if that was the case I think that it would be something I would have to think about and look at for sure." (ROA.3620)

The prosecutor followed up by directly asking "In other words do you think that the fact that a woman had children might be mitigating?" Simpson then responded negatively, "I can't really say that it would…without hearing what the evidence or situation was that caused the murder." (ROA.3620) It is therefore not a fair characterization of the record to say that Simpson "definitely…said it would be factor he would consider," nor is Simpson's response one that would cause a "great deal of concern" in a racially neutral evaluation of a juror. More generally, Simpson affirmed that he was in favor of capital punishment except for the few cases where it may not be appropriate (ROA.3607), and went so far as to answer that capital punishment should be available as a punishment for *more* crimes than it currently is. (ROA.3631) He further reported that he identified as a Christian and found support in the Bible for the death penalty in certain situations (ROA.3619) Thus, none of Simpson's responses would led a reasonable prosecutor to have "great concern" about Simpson's likely willingness to impose the death penalty on a mother.[5]

[5] The voir dire of black prospective juror Roy Qualls further supports an inference that the prosecution's interest in willingness to impose the death penalty on a mother was racially selective. Qualls' initial response on this topic was "I think that [men and women] should be treated equal." (ROA.4166) Nonetheless, he was asked twenty-six unique questions about whether he could sentence a woman to death. (ROA.4166-78) White juror Herd, however, was

3. Implausibility of stated reasons

Both of the two reasons credited by the Fifth Circuit are of dubious plausibility. As discussed above, the prosecutor's argument that, because Simpson was a victim of a false arrest, he might have sympathy for Sheppard that reason is impeached by virtue of the prosecution's failure to strike a white juror whose son was prosecuted. But in addition, the facts surrounding Simpson's arrest make it a highly implausible basis for a strike, and the implausibility of stated reasons is also evidence of discriminatory purpose. The arrest occurred almost seventeen years prior to Sheppard's trial (ROA.3639), and in a different state—Tennessee (ROA.3606), making it extremely unlikely that Simpson would be biased against the Sheppard prosecution.

Moreover, Simpson explicitly said that he *would not* harbor any hard feelings towards police or prosecutors, and that he felt he had been treated well by the judicial process. (ROA.3604-06) He further stated that he could not think of anything about the experience that would affect him sitting on Sheppard's jury, but instead "took [the experience] as a learning tool and went on". (ROA.3631) Finally, Simpson had no family members who had served time, and no acquaintances who had been convicted of serious, violent offenses such as the one with which Sheppard charged. (ROA.3606) To imagine that a juror with such responses would be biased against the prosecution is a huge stretch, and one that requires a racially skewed view of desirable jurors.

The final reason cited by the prosecutors was that Simpson said "hello" to Sheppard when defense counsel introduced her, which led them to fear "a little bit of affinity" existed between the two. (ROA.3637) This fact is disputed; defense counsel described the interaction as

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asked only two questions on this topic and then seated. (ROA.3774) The prosecution also lacked interested in seated white juror Chambers' hesitation about sentencing a mother to death; he was asked only three questions on the topic despite his response that if asked to sentence a woman to death, the knowledge that she had children would "probably be a concern." (ROA.3667-70)

Simpson "looked and made some kind of direct eye-to-eye contact" (ROA.3639), and the trial court made no findings as to which account was accurate. But even if Simpson did say "hello" to Sheppard, all of the evidence suggests this proffered reason was implausible. First, the ordinary interpretation of a brief hello (or acknowledgement) upon introduction to a new person is *politeness,* which hardly constitutes a reason to fear "a little bit of affinity." Second, the prosecution did not ask Simpson any questions about brief interaction; this is the ordinary response to opportunity to probe issues that are of genuine concern, and the very point of voir dire. Third, this was the final reason, and one cited after three that were pretextual. And finally, citing a "feared affinity" with the defendant treads perilously close to the very reason *Batson* deems impermissible: an assumption that black people, even when they do not know each other, will be biased in favor of other black people.

4. The totality of the circumstances

The Fifth Circuit's approach – like that of the Mississippi Supreme Court in *Flowers* – boiled down to asking whether the prosecutor stated at least one reason that was neither completely contradicted by the record nor exactly applicable to a seated white juror. Here, that two of the four reasons cited by the prosecutor were disingenuous did not matter – nor did it matter that the state court had credited those reasons without examination. That the prosecutor made statements that were false did not matter. That another black juror was subjected to wildly disparate questioning did not matter. That the cited difference between the struck black juror's experience with the police and that of a seated white juror was *insignificant* did not matter. That purported reliance upon the juror's nod to the defendant was disputed, unexamined in voir dire, fairly implausible, and closely related to racial stereotypes did not matter.

Neither the state court's analysis nor that of the Fifth Circuit assessed the likelihood that likelihood that the stated, uncontradicted reasons were *true* rather than pretexts for

discrimination. Upon that analysis – required by this Court's precedents – and upon consideration of all the relevant facts, any determination that the prosecutor's strike was not racially motivated was unreasonable.

C. The Fifth Circuit's Impermissible Interpretation Of *Batson* Must Be Corrected.

The decision in this case is not idiosyncratic, and therefore requires correction of a mistaken – and destructive – interpretation of the law of constraining peremptory challenges. Instead of turning to this Court's decisions for direction, the Fifth Circuit followed its own precedent, citing two prior circuit cases that employed a similar approach. Those cases, though they do not state the rule as categorically as does the opinion in this case, also require a defendant to rebut all stated reasons. *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009), rejects defense counsel's argument that the prosecutor's acceptance of three white jurors with relatives who had criminal involvement served on the jury created an inference of pretext because "the defense offered nothing-either at trial or on appeal-to rebut the second reasons for the prosecutor's strikes or to show that those reasons were pretextual."

In *Stevens v. Epps*, 618 F.3d 489, 500 (5th Cir. 2010), faced with two cited reasons, one of which was false, the Fifth Circuit presumes that the state court must have credited the unrebutted reason, pointing out that counsel did not dispute it. Moreover, both *Fields* and *Stevens* cases cite additional that employ this approach. *Id.* at 500 ("This court has rejected *Batson* claims involving similar circumstances, where more than one reason is given for a strike, and the *Batson* challenger fails to rebut one of the reasons.").

"Even though a high proportion of the recent cases in which [this Court] has found a *Batson* violation come from states in [the Fifth] circuit, . . . [i]t appears that only two of the hundreds of *Batson* decisions in [the Fifth Circuit] have ever found that a strike was

discriminatory . . .” *Chamberlin v. Fisher*, 885 F.3d 832, 845-46 (5th Cir. 2018) (en banc) (Costa, J. dissenting, joined by Stewart, Davis, Dennis, and Prado) (emphasis added). The Fifth Circuit’s rule, now clearly articulated and categorical, will perpetuate lax enforcement of this Court’s prohibition of racially motivated peremptory challenges.

Uncorrected, the Fifth Circuit’s approach permits a prosecutor with a desire to discriminate an easy path to accomplish an unconstitutional end. If a prosecutor merely provides a laundry list of facts that characterize a black juror as the “reasons” for his strike, he can evade comparative juror analysis by making it impossible to find a seated white juror who is similarly situated with respect to all of the cited characteristics. Moreover, even if he is careless with respect to whether all of the facts he cites are true, it will not matter so long as at least one cited characteristic is either true or not falsifiable. If every *Batson* claim can be defeated by existence of an unrebutted legitimate reason, this Court’s efforts to eradicate discrimination in jury selection would be grossly undermined. Concomitantly, if the Fifth Circuit’s rule is not rejected, the equal protection rights of defendants and jurors, as well as confidence of the community in racially unbiased jury selection, will be eroded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN M. BELL
KILPATRICK TOWNSEND & STOCKTON, L.L.P.
Suite 600
1400 Wewatta Street
Denver, CO 80202
(303) 571-4321
kbell@kilpatricktownsend.com

WILLIAM ALAN WRIGHT
Counsel of Record
KILPATRICK TOWNSEND & STOCKTON, L.L.P.
Suite 4400
2001 Ross Avenue
Dallas, TX 75201
(214) 922-7131
alan.wright@kilpatricktownsend.com

Counsel for Petitioner