

**In The
Supreme Court of the United States**

ERICA YVONNE SHEPPARD,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of
Criminal Justice, Correctional Institutions Division,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**AMICUS CURIAE BRIEF OF THE
CAPITAL PUNISHMENT CENTER AT THE
UNIVERSITY OF TEXAS SCHOOL OF LAW
IN SUPPORT OF THE PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Numerous Supreme Court decisions require contextualized assessment of discriminatory intent	6
II. The Fifth Circuit’s categorical rule—that a <i>Batson</i> claim must fail where the prosecution cites one ground that is not facially pretextual—contravenes this Court’s instructions to analyze discrimination contextually.....	8
III. Left undisturbed, the Fifth Circuit’s restriction on <i>Batson</i> will continue to thwart enforcement of the Court’s <i>Batson</i> jurisprudence and serve as a dangerous shield for discrimination	14
CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977).....	7
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	<i>passim</i>
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017).....	5, 6
<i>Chamberlin v. Fisher</i> , 885 F.3d 832 (5th Cir. 2018)	15
<i>Fields v. Thaler</i> , 588 F.3d 270 (5th Cir. 2009)	9
<i>Flowers v. Mississippi</i> , 139 S. Ct. 2228 (2019)	<i>passim</i>
<i>Foster v. Chatman</i> , 136 S. Ct. 1737 (2016)	<i>passim</i>
<i>Miller-El v. Johnson</i> , 261 F.3d 445 (5th Cir. 2001), <i>overruled by Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	17
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	<i>passim</i>
<i>Miller-El v. Dretke</i> , 361 F.3d 849 (5th Cir. 2004), <i>overruled by Miller-El v. Dretke</i> , 545 U.S. 231 (2005).....	15, 18
<i>Miller-El v. Dretke</i> , 545 U.S. 231 (2005)	<i>passim</i>
<i>Sheppard v. Davis</i> , 967 F.3d 458 (5th Cir. 2020)	4, 5, 8, 11
<i>Snyder v. Louisiana</i> , 552 U.S. 472 (2008)	<i>passim</i>
<i>Stevens v. Epps</i> , 618 F.3d 489 (5th Cir. 2010)	8, 14
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	7, 9
<i>United States v. Brown</i> , 553 F.3d 768 (5th Cir. 2008)	9, 14

TABLE OF AUTHORITIES—Continued

	Page
SECONDARY SOURCES	
Will Craft, <i>Peremptory Strikes in Mississippi's Fifth Circuit Court District</i> , APM Reports (2018) (available at https://features.apmreports.org/files/peremptory_strike_methodology.pdf).....	17
Adam Liptak, <i>Exclusion of Blacks from Juries Raises Renewed Scrutiny</i> , N.Y. TIMES, Aug. 16, 2015	16
Adam Liptak and Ralph Blumenthal, <i>Death Sentences in Texas Cases Try Supreme Court's Patience</i> , N.Y. TIMES, Dec. 5, 2004	18
Steve McGonigle et al., <i>A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors</i> , DALLAS MORNING NEWS, Aug. 21, 2005	16
Robert J. Smith and Bidish J. Sarma, <i>How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana</i> , 72 LA. L. REV. 361 (2012)	16

INTEREST OF AMICUS CURIAE¹

This amicus curiae brief is submitted by the Capital Punishment Center at the University of Texas School of Law. The Center was established in 2006 to promote research and training in death penalty law. The Center sponsors symposia and academic events; pursues research projects concerning the administration of the death penalty, particularly in Texas; provides training and assistance to Texas lawyers involved in capital cases; and houses the Capital Punishment Clinic, which has provided direct representation and assistance to indigent prisoners on Texas's death row since 1987.

The Center's interest in this case arises from its history litigating race discrimination claims and addressing racial discrimination in jury selection in our courses and symposia.

**SUMMARY OF ARGUMENT**

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court crafted a rule to address the widespread practice of racially discriminatory peremptory strikes. During the 35 years “since *Batson*, this Court’s cases have

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for both parties received timely notice, under Sup. Ct. R. 37.2(a), of the intent to file this brief and have consented to this filing.

vigorously enforced and reinforced the decision, and guarded against any backsliding.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). In a series of decisions beginning with *Miller-El v. Cockrell* (“*Miller-El I*”), 537 U.S. 322 (2003), and continuing through the Court’s recent decision in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), this Court has repeatedly insisted that the ultimate determination at *Batson*’s third step requires evaluation of the challenged peremptory strike “in the context of all the facts and circumstances.” *Id.* at 2250. This Court has cataloged some of the forms of evidence that may be relevant to assessing the prosecutor’s motive for a peremptory strike, *Flowers*, 139 S. Ct. at 2243, and repeatedly modeled the contextualized review that *Batson* requires. *See id.* at 2244–51; *Foster v. Chatman*, 136 S. Ct. 1737, 1748–55 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 477–86 (2008); *Miller-El v. Dretke* (“*Miller-El II*”), 545 U.S. 231, 240–66 (2005); *Miller-El I*, 537 U.S. at 341–48.

Despite this Court’s clear guidance and repeated efforts to enforce *Batson*, the United States Court of Appeals for the Fifth Circuit has adopted a screening test that precludes *Batson* relief if a prosecutor offers at least one race-neutral reason for a peremptory strike that survives a cursory comparative analysis. This rule forecloses the contextualized review that is at the heart of the *Batson* inquiry.

This Court’s intervention is once again necessary to reinforce *Batson* and to ensure that the Fifth Circuit’s rule no longer functions as a shield for racial discrimination. Failure to correct the decision below will

leave prosecutors free to exclude African-Americans from juries so long as they can offer one race-neutral reason inapplicable to an accepted white juror. Under the Fifth Circuit's rule, even Curtis Flowers would be denied *Batson* relief. Amicus respectfully urges this Court to bring the Fifth Circuit into compliance with this Court's *Batson* jurisprudence.

◆

ARGUMENT

The “[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.” *Batson*, 476 U.S. at 85. *Batson* articulated the familiar three-step process for deciding whether a peremptory challenge was exercised on the basis of race:

First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster, 136 S. Ct. at 1747 (quoting *Snyder*, 552 U.S. at 476–77) (quotation marks omitted).

In Ms. Sheppard's case, the prosecution used three of nine peremptory challenges to remove African-American prospective jurors, including Ronnie Simpson.

Pet. at 14. In response to Ms. Sheppard’s *Batson* objection, the prosecution gave four reasons for striking Mr. Simpson:

First, Simpson appeared reluctant to impose the death penalty based solely on the facts of the crime. Second, he suggested that he would consider, as a mitigating factor, whether a defendant had children. Third, as a victim of a false arrest, Simpson may have empathized with Sheppard’s situation. Fourth, he displayed “affinity” toward Sheppard by greeting only her and not the prosecution.

Sheppard v. Davis, 967 F.3d 458, 471 (5th Cir. 2020). Respondent concedes that the first two reasons applied with equal force to white jurors accepted by the prosecution, and the Fifth Circuit held that the prosecutors’ resort to “two reasons for striking Simpson [that] applied equally to [a white juror accepted by the State] . . . suggests that the explanations may have been a pretext for discrimination.” *Id.* at 472. The court of appeals rejected Ms. Sheppard’s comparative analysis with respect to the third reason—Mr. Simpson’s false arrest—because the seated white juror’s negative experience with law enforcement involved his son and not him personally. Additionally, the Fifth Circuit noted that Ms. Sheppard had failed to identify a seated white juror who exhibited the same “affinity” Mr. Simpson allegedly shared with Ms. Sheppard. Invoking circuit precedent, the Fifth Circuit held that “a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor’s legitimate reasons.” *Id.*

As Ms. Sheppard’s case illustrates, the Fifth Circuit’s limitation on the application of *Batson* short-circuits the step-three analysis repeatedly mandated and modeled by the Court’s efforts to enforce *Batson*. Courts must assess the prosecutor’s motive for a peremptory strike in the context of *all* relevant evidence. In some cases, articulating a race-neutral reason inapplicable to any seated white juror may be sufficient to defeat an objection to the removal of an African-American juror. But the answer to *Batson*’s step-three inquiry may differ when, as here, the prosecutor’s first two efforts to justify striking an African-American prospective juror are indisputably “pretext[s] for discrimination.” *Id.* at 472. That a prosecutor eventually articulates a reason applicable only to that African-American juror—such as an alleged “affinity” with the African-American defendant—should not rule out the conclusion that the strike was “motivated in substantial part by discriminatory intent.” *Foster*, 136 S. Ct. at 1754. But it does in the Fifth Circuit. The lower court’s rule stymies *Batson*’s step-three inquiry by ignoring the totality of the evidence bearing on the prosecutor’s motive for striking the juror. The court applied its rule to Ms. Sheppard’s case, failing to consider how the prosecutor’s efforts to justify the strike with pretextual reasons bear on his credibility.

This Court has strongly rebuked lower court decisions tolerating transparent racial discrimination in the criminal justice system. Here, as in *Buck v. Davis*, 137 S. Ct. 759 (2017), the Fifth Circuit has let stand a capital sentence despite the impermissible influence of

race on the proceedings. And, worse than in *Buck*, the Fifth Circuit's rule, in a marked departure from this Court's decisions, allows for race-based considerations to become a routine part of jury selection so long as the prosecutor can identify one attribute of an African-American venireperson not shared by an accepted white juror. Given that racism is a toxin "deadly in small doses," *id.* at 777, it cannot be permitted to become an ordinary part of capital trials. The Court's intervention is required to correct the Fifth Circuit's misguided approach which undermines the fairness of capital trials and the public's confidence that race plays no part in the administration of the death penalty.

I. Numerous Supreme Court decisions require contextualized assessment of discriminatory intent.

This Court has "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478. The question is whether "all of the relevant facts and circumstances taken together establish that . . . the State's peremptory strike of [a] black prospective juror [] was [] 'motivated in substantial part by discriminatory intent.'" *Flowers*, 139 S. Ct. at 2235 (quoting *Foster*, 136 S. Ct. at 1754). The Court has "said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . .

evidence of intent as may be available.’” *Foster*, 136 S. Ct. at 1748 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

In the decades since *Batson*, this Court has also made clear that a defendant raising a *Batson* argument may present, and the courts must consider, a wide range of evidence: “Although the move from *Swain*^[2] to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*’s wide net, the net was not entirely consigned to history, for *Batson*’s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give.” *Miller-El II*, 545 U.S. 239–40. Thus, this Court has endorsed reliance on a broad range of evidence to show discrimination:

- statistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;

² *Swain v. Alabama*, 380 U.S. 202 (1965).

- a prosecutor’s misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State’s peremptory strikes in past cases; and
- other relevant circumstances that bear upon the issue of racial discrimination.

Flowers, 139 S. Ct. at 2243. The Court has never singled out one category of evidence as having talismanic significance or being a prerequisite to *Batson* relief. Instead, the Court considers whether “all of the relevant facts and circumstances taken together establish that the trial court . . . committed clear error in concluding that the State’s peremptory strike of [a] black prospective juror . . . was not motivated in substantial part by discriminatory intent.” *Id.* at 2251. The Fifth Circuit’s restrictive gloss on *Batson*, however, precludes plenary consideration of the relevant evidence.

II. The Fifth Circuit’s categorical rule—that a *Batson* claim must fail where the prosecution cites one ground that is not facially pretextual—contravenes this Court’s instructions to analyze discrimination contextually.

In the Fifth Circuit, “a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor’s legitimate reasons.” *Sheppard*, 967 F.3d at 472; see also *Stevens v. Epps*, 618 F.3d 489, 500 (5th Cir. 2010) (“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.”); *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009) (same); *United States v. Brown*, 553 F.3d 768, 796 (5th Cir. 2008) (same). The Fifth Circuit’s rule cannot be squared with *Batson*’s mandate—or its enforcement in *Flowers*, *Foster*, *Snyder*, *Miller-El I*, and *Miller-El II*—which requires consideration of all evidence relevant to the prosecution’s motive for the strike. As Ms. Sheppard’s case demonstrates, the lower court’s application of this rule has resulted in siloed consideration of each alleged reason for a peremptory strike that routinely ignores the discriminatory intent revealed by other evidence.

First, while there is no question that “side-by-side comparisons of [] black venire panelists who were struck and white panelists allowed to serve” can be “powerful” evidence of discriminatory intent, *Miller-El II*, 545 U.S. at 241, this Court has never held that a comparative analysis with respect to *every* reason offered by the prosecution is a prerequisite to *Batson* relief. Yet, the Fifth Circuit’s rule precludes relief whenever a prosecutor manages to articulate a race-neutral fact about an African-American venireperson that is inapplicable to an accepted white venireperson, regardless of the import and weight of the other evidence relevant to the prosecution’s motive for the strike. This approach claws back the progress made by *Batson*: “If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*.” *Miller-El II*, 545 U.S. at

240. But this Court has repeatedly granted relief under *Batson* even when some of the prosecution’s proffered race-neutral reasons were un rebutted. *See infra*, Sec. III.

Second, the lower court’s siloed application of its rule routinely ignores evidence of discriminatory motive in the defendant’s own case. For example, Ms. Sheppard’s *Batson* argument relies in part on side-by-side comparisons of Mr. Simpson to white jurors who were not struck. And there is no dispute that at least half of the reasons the prosecution offered for striking Mr. Simpson were disingenuous and thus pretextual. When “pretext is the fair conclusion,” the proffered reasons are evidence of “the very discrimination the explanations were meant to deny.” *Miller-El II*, 545 U.S. at 265; *id.* at 241 (the prosecution’s use of pretextual reasons “is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step”); *see also Flowers*, 139 S. Ct. at 2248–49 (“When a prosecutor’s ‘proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.’”) (quoting *Foster*, 136 S. Ct. at 1754); *Snyder*, 552 U.S. at 485 (“The prosecution’s proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.”). The prosecutor’s discriminatory intent when striking Mr. Simpson is obviously relevant to assessing his credibility with respect to *all* of the reasons he offers even—or perhaps especially—when the

prosecutor generates “a laundry list of reasons.” *Foster*, 136 S. Ct. at 1748.

But the Fifth Circuit’s blinkered approach confines consideration of this “powerful” evidence of the State’s discriminatory intent to the prosecutor’s first two efforts to justify the strike. The lower court concluded that “Sheppard persuasively posits that the prosecutor’s first two reasons appear disingenuous,” which “suggests that the explanation may have been a pretext for discrimination.” *Sheppard*, 967 F.3d at 472. But, the lower court inexplicably continued, “[t]here is *no indication* that the prosecutor’s third reason was pretextual, because Sheppard has not identified a white juror who was the victim of a false arrest and yet was accepted by the State.” *Id.* (emphasis added). However, the prosecutor’s resort to two other “disingenuous” reasons *about the same juror* that were “pretext for discrimination” is unquestionably relevant. See *Miller-El II*, 545 U.S. at 252 (“The whole of the voir dire testimony subject to consideration casts the prosecution’s reasons for striking [a juror] in an implausible light.”). It defies reason to suggest that the prosecutor’s discriminatory motive wholly evaporates just because he articulates a reason inapplicable to an accepted white juror. Yet application of the Fifth Circuit’s rule meant that the lower court completely set aside this evidence when assessing the prosecutor’s credibility with respect to the third and fourth reasons.

Instead, the court adopted a too-finely parsed distinction between the African-American and white

venireperson’s negative experience with law enforcement. *Id.* In making this distinction, the court also ignored record evidence demonstrating that, if anything, the white juror’s experience should have made him a less desirable juror to the State. *See* Pet. at 34–35. Moreover, the lower court’s unduly narrow inquiry into whether another juror had been falsely arrested—as opposed to whether other jurors had negative experiences with law enforcement—contravenes this Court’s admonishment that a “*per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.” *Miller-El II*, 545 U.S. at 247. This Court recently rebuked a lower court for engaging in the same form of decontextualized review of State strikes:

Our disagreement with the Mississippi courts (and our agreement with Justice King’s dissent in the Mississippi Supreme Court) largely comes down to whether we look at the Wright strike in isolation or instead look at the Wright strike in the context of all the facts and circumstances. Our precedents require that we do the latter.

Flowers, 139 S. Ct. at 2250. The Fifth Circuit rule routinely requires the former.

Adherence to the Fifth Circuit’s rule likewise meant ignoring evidence relevant to the prosecutor’s discriminatory intent when crediting his invocation of an “affinity” between Mr. Simpson and Ms. Sheppard (as evidenced by Mr. Simpson allegedly saying “hello”

when introduced to Ms. Sheppard). This explanation is inherently suspicious:

In some of the most critical sentences in the *Batson* opinion, the Court emphasized that a prosecutor may not rebut a claim of discrimination “by stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.”

Id. at 2241 (quoting *Batson*, 476 U.S. at 97). It was all the more suspicious in this case because: (1) whether Mr. Simpson said anything to Ms. Sheppard was disputed by the parties, and the trial court notably failed to make any findings resolving the dispute; (2) the prosecutor asked Mr. Simpson no questions about the interaction; and (3) the same prosecutor who offered this reason also offered disingenuous reasons that were pretexts for discrimination. Pet. at 37–38. As this Court has repeatedly noted, the “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.” *Flowers*, 139 S. Ct. at 2249 (quoting *Miller-El II*, 545 U.S. at 246) (internal quotation marks omitted).

As Ms. Sheppard’s case illustrates, the Fifth Circuit rule credits as dispositive any race-neutral reason that does not apply to a white seated juror, without pausing to consider whether the proffer of pretextual reasons by the same prosecutor in the same case bears

on his motive for the strike. *See also Stevens*, 618 F.3d at 500; *Brown*, 553 F.3d at 795–97. Pretextual explanations for challenged strikes were not the only evidence of discriminatory motive rendered irrelevant by the Fifth Circuit’s screening test. For example, Ms. Sheppard demonstrated that the prosecutor had made misrepresentations about the record when defending the strikes, had failed to question Mr. Simpson about an area of professed concern, and had offered reasons that were implausible in light of the record. Pet. at 32–38. These are precisely the types of evidence this Court considers at *Batson*’s third step. *Flowers*, 139 S. Ct. at 2243.

III. Left undisturbed, the Fifth Circuit’s restriction on *Batson* will continue to thwart enforcement of the Court’s *Batson* jurisprudence and serve as a dangerous shield for discrimination.

The State may argue that the Fifth Circuit’s rule is merely a matter of phrasing. It is not. Thirty-five years ago, this Court adopted a “standard . . . under the Federal Constitution [] designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race.” *Batson*, 476 U.S. at 99 n.22. “In the decades since *Batson*, this Court’s cases have vigorously enforced and reinforced the decision, and guarded against any backsliding.” *Flowers*, 139 S. Ct. at 2243. But as five members of the Fifth Circuit recently observed, “[e]ven though a high proportion of the recent cases in which the Supreme Court has found

a *Batson* violation come from states in our circuit,” setting aside the handful of decisions reversed for procedural error, “[i]t appears that *only two* of the hundreds of *Batson* decisions in our 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., joined by Stewart, C.J., Davis, Dennis, and Prado, JJ., dissenting) (emphasis added).

There is no reason to believe that the rarity of *Batson* relief in the Fifth Circuit is attributable to the paucity of cases presenting strong evidence of racial discrimination in jury selection. Indeed, there are reasons to believe that such cases are common. As noted by the five dissenting judges in *Chamberlin*, “a high proportion of the recent cases” in which this Court intervened to reinforce *Batson* have arisen from jurisdictions within the Fifth Circuit. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (“*Miller-El II*”); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (“*Miller-El I*”).

Moreover, prior to *Batson* at least one district attorney’s office in a major Texas city had an open and notorious policy of excluding minorities from jury service:

An instruction book used by the prosecutor’s office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate “any member of a minority group.” In 100 felony trials in Dallas County in 1983–1984, prosecutors

peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.

Batson, 476 U.S. at 104 (Marshall, J., concurring) (footnotes omitted); *id.* at 104 n.3 (“An earlier jury-selection treatise circulated in the same county instructed prosecutors: Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.”) (internal quotation marks omitted). Discriminatory jury selection practices in Dallas continued unabated after *Batson*. See Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don’t Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors*, DALLAS MORNING NEWS, Aug. 21, 2005, at A1 (a 2002 study of 108 felony trials revealed that “prosecutors excluded eligible blacks from juries at more than twice the rate they rejected eligible whites” and that “being black was the most important personal trait affecting which jurors prosecutors rejected”).

Dallas County is by no means alone in the Fifth Circuit when it comes to racially discriminatory jury selection practices. See, e.g., Robert J. Smith and Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 386 (2012) (“Abundant empirical evidence indicates that peremptory strikes disproportionately exclude African Americans in criminal trials in Louisiana.”); Adam Liptak, *Exclusion of Blacks From Juries Raises Renewed Scrutiny*, N.Y. TIMES, Aug.

16, 2015 (“In Louisiana’s Caddo Parish, where Shreveport is the parish seat, a study . . . has found that prosecutors used peremptory challenges three times as often to strike black potential jurors as others during the last decade.”); Will Craft, *Peremptory Strikes in Mississippi’s Fifth Circuit Court District*, APM Reports at 2 (2018) (available at https://features.apmreports.org/files/peremptory_strike_methodology.pdf) (“Using race data from 225 trials from 1992 through 2017, APM Reports found that prosecutors in the Fifth Circuit Court District exercised a disproportionate number of their peremptory strikes against African-American venire members, striking them at a rate four and a half times that of white jurors. . . . Even when considering other race-neutral factors gathered from 89 voir dire proceedings, . . . race remained a powerful indicator of whether a juror would be accepted or struck.”). Thus, a lack of racial discrimination in jury selection cannot explain the remarkably low number—*two*—of Fifth Circuit decisions granting *Batson* relief.

Numbers are not the only basis for inferring that the Fifth Circuit underenforces *Batson*. The Fifth Circuit has, in the past, resisted the Court’s direct guidance in this area. Thomas Miller-El presented a compelling *Batson* claim supported by multiple forms of relevant evidence, yet the Fifth Circuit found that the claim did not even warrant a certificate of appealability.³ After this Court reversed and remanded the case in an opinion that provided detailed guidance for

³ *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001), *overruled by Miller-El I*, 537 U.S. at 348.

assessing Miller-El's claim, *Miller-El I*, 537 U.S. at 341–48, the Fifth Circuit failed to heed the Court's guidance. *Miller-El I* was decided by an 8–1 vote but, on remand, the Fifth Circuit denied relief in an opinion liberally cut-and-pasted from the dissent. *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004), *overruled by Miller-El II*, 545 U.S. at 266; *see also* Adam Liptak and Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, N.Y. TIMES, Dec. 5, 2004 (“Instead of considering much of the evidence recited by the Supreme Court majority, the appeals court engaged in something akin to plagiarism”: “it again rejected Mr. Miller-El's claims, in a decision that reproduced, virtually verbatim and without attribution, several paragraphs from the sole dissenting opinion in last year's Supreme Court decision”). This Court took the case a second time and noted that the Fifth Circuit's “conclusion [on remand was] as unsupportable as the ‘dismissive and strained interpretation’ of [Miller-El's] evidence that [the Court] disapproved when [it] decided Miller-El was entitled to a certificate of appealability.” *Miller-El II*, 545 U.S. at 265. The Court granted *Batson* relief in an opinion that painstakingly modeled how to weigh all relevant circumstances when assessing the credibility of the prosecutor's race-neutral justifications for striking African-American jurors. *Id.* at 240–66.

Despite this history of correction by the Court, the Fifth Circuit has created a categorical rule that wholly discounts relevant evidence of discrimination: “a *Batson* claim will not succeed where the defendant fails to

rebut each of the prosecutor’s legitimate reasons.” 967 F.3d at 472. Put differently, if a prosecutor cites at least one race-neutral reason that is not applicable to a seated white juror, the *Batson* claim fails. This rule cannot be squared with *Batson* and reflects the same dismissiveness condemned in *Miller-El I* and *Miller-El II*. By deeming an un rebutted reason *dispositive*, the Fifth Circuit renders irrelevant evidence this Court has specifically identified as indicia of discriminatory intent. Ultimately, the rule allows discrimination to go undetected as long as the prosecutor can manufacture at least one reason that is neither contradicted by the record nor applicable to an accepted white juror. The Fifth Circuit’s categorical rule provides a blueprint for a prosecutor determined to discriminate.

Applying the Fifth Circuit’s rule to cases this Court has adjudicated underscores its illegitimacy and its devastating impact on the *Batson* inquiry. For example, in *Foster*, the State gave “a laundry list” of reasons for each of the two strikes against African-American prospective jurors at issue. *Foster*, 136 S. Ct. at 1748 (reciting eleven reasons for striking Marilyn Garrett); *id.* at 1751 (reciting eight reasons for striking Eddie Hood). As this Court’s review demonstrated, some of the reasons applied to white jurors accepted by the State, *id.* at 1750–54, but many did not. Yet, the totality of the evidence—including the invocation of pretextual reasons—“left [this Court] with the firm conviction that the strikes of Garrett and Hood were ‘motivated in substantial part by discriminatory intent.’” *Id.* at 1754 (quoting *Snyder*, 552 U.S. at 478); *id.* at

1760 (Alito, J., concurring) (agreeing “that the totality of the evidence now adduced by Foster is sufficient to make out a *Batson* violation”). In the Fifth Circuit, however, the existence of multiple un rebutted race-neutral reasons for each strike would have doomed Mr. Foster’s *Batson* claim.

Curtis Flowers presented an uncommonly-strong *Batson* claim based on multiple categories of evidence proving that the prosecutor’s peremptory challenges were race-based, including evidence that (1) over six trials, the state struck 41 of 42 African-American prospective jurors; (2) the State exercised peremptory strikes against five of six African-American prospective jurors in his most recent trial; (3) the State engaged in disparate questioning of African-American and white prospective jurors in an apparent effort to manufacture pretextual reasons; and (4) the State struck at least one African-American prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors not struck by the State. *Flowers*, 139 S. Ct. at 2235. However, it is undisputed that *two* of the reasons the prosecutor offered for striking Wright—that she worked at the same Wal-Mart where a member of Flowers’ family worked and that she had once been sued by Tardy Furniture—were both true and inapplicable to any white juror accepted by the State. *Id.* at 2249.

Applying the Fifth Circuit’s rule to these facts, the presence of facially race-neutral reasons unique to Wright would terminate the *Batson* inquiry and Mr. Flowers would be denied relief. This Court, however,

evaluated the strike in the context of all relevant evidence:

The side-by-side comparison of Wright to white prospective jurors whom the State accepted for the jury cannot be considered in isolation in this case. In a different context, the Wright strike might be deemed permissible. But we must examine the whole picture. . . . As we see it, the overall context here requires skepticism of the State's strike of Carolyn Wright. . . . We cannot just look away. Nor can we focus on the Wright strike in isolation.

Id. at 2250–51. After plenary consideration of the evidence, this Court concluded 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.*

The Fifth Circuit rule that “a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor’s legitimate reasons” ensures that courts not only can but must always “just look away” from evidence of racial discrimination.



CONCLUSION

For the reasons stated above, amicus urges the Court to grant the petition for *certiorari* and reverse the judgment below. In the alternative, amicus respectfully asks that the Court grant *certiorari* and allow full briefing and argument.

Respectfully submitted,

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