No. 20-6786

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Ms. Sheppard asks this Court to hold that *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), requires review of only the state court's actual reasoning. In Ms. Sheppard's case, the United States Court of Appeals for the Fifth Circuit explicitly declined to follow *Wilson* and, after paying lip service to this Court's decision, did not apply it. Three years after *Wilson*, adherence to the Court's unambiguous rule remains optional in the Fifth Circuit and courts may—and do—choose to disregard it. Ms. Sheppard notes that the question of whether lower courts must follow *Wilson* has created a circuit split and is currently pending in *Jenkins v. Dunn*, No. 20-6972 (petition filed January 25, 2021). The question presented is ripe for the Court's review.

In addition, according to the Fifth Circuit, "[A] *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." The Petition argues that this interpretation of *Batson* conflicts with this Court's precedents; that the Fifth Circuit has applied this impermissible interpretation in other cases; and that its erroneous interpretation handcuffs the effort to eradicate racial discrimination in the exercise of the peremptory challenge. The Brief in Opposition addresses none of these contentions.

ARGUMENT

I. This case squarely presents the question of whether the Fifth Circuit must adhere to *Wilson*'s command that courts applying 28 U.S.C. § 2254(d) to reasoned state court decisions must review the reasonableness of the state court's *actual* reasoning, and whether such review requires scrutiny of the state court's reasoning in light of the state court record.

In the decision below, the Fifth Circuit expressly reserved the right to disregard the Court's holding in *Wilson* but attempted to render its resistance moot by purporting to apply it. Pet. App. 11-12. Respondent thus correctly observes that the Fifth Circuit "pointedly decline[d] to address the question whether *Wilson* forbids lower courts, for purposes of § 2254(d), to 'consider not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision

but also all the arguments and theories it *could have* relied upon.'" Resp. Br. at 17 (internal quotations removed). But the court below not only resisted the conclusion that *Wilson* is a binding decision from a superior court, it failed to actually apply it in this case. Instead, the Fifth Circuit merely recited the Texas Court of Criminal Appeals' ("CCA") reasoning without subjecting it to any review *in light of the state court record*. Moreover, where the state court's reasoning was contrary to the state court record, the Fifth Circuit invented and deferred to a new basis for the state court denial of habeas relief. This is precisely what *Wilson* forbids, and why this case is an appropriate vehicle for reviewing the question presented.

First, reciting the state court's reasoning and deeming it reasonable is not the same thing as reviewing it in light of the state court record. Federal habeas courts must still do the latter: Even in the context of federal habeas, deference does not imply "abandonment or abdication of judicial review[;] [d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Federal habeas courts must measure the state court's reasonableness of the state court's reasoning against the totality of the state court record. *See, e.g. Brumfield v. Cain*, 576 U.S. 305, 314 (2015) ("Our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable."). "[R]eview under § 2254(d)(1) focuses on what a state court *knew and did*," and the scope of federal review includes "the record before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (emphasis added).

When the CCA rejected the lower court's recommendation to grant habeas relief, it narrowly focused on allegations that trial counsel failed to develop mitigating evidence from three lay witnesses, without mentioning Ms. Sheppard's other compelling new evidence. Pet. App. 105-06. The CCA held that the additional post-conviction testimony developed from those three lay witnesses was cumulative of the defense presentation at trial. *Id*. at 107. The CCA, however,

wholly failed to consider the bulk of Ms. Sheppard's post-conviction presentation, including her expert witnesses. As Judge King noted in dissent, the jury "did not hear … anything like" the new post-conviction evidence "that Sheppard had brain dysfunction and the mental development of a child, not to mention PTSD and dissociative disorder—and that, as a result, she had significantly impaired ability to make independent decisions in stressful and emotional situations," and this evidence "cannot be dismissed as simply 'cumulative' of the evidence that Sheppard 'experienced depression and mood swings and heard voices in her head.'" Pet. App. 24-25.

The proper § 2254(d) inquiry under *Wilson* is whether, in light of the whole state court record, the CCA reasonably concluded that Ms. Sheppard's post-conviction presentation was cumulative. The CCA's decision was based on a selective review of three lay witnesses' post-conviction testimony, and it failed to discuss or engage the bulk of Ms. Sheppard's post-conviction evidence. This Court has held that when a state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing," that court unreasonably applies *Strickland v. Washington*, 466 U.S. 668 (1984). *Porter v. McCollum*, 558 U.S. 30, 42 (2009). The majority below, however, shrugged off the CCA's unreasonable omissions with the observation that "we do not sit to grade the thoroughness of a state court's opinion." Pet. App. 14. The state court record flatly contradicts a finding that Ms. Sheppard's post-conviction evidence was cumulative of the defense case. The Fifth Circuit abdicated its obligation under *Wilson* and *Pinholster* to review what the state court *actually did* in light of what it *actually knew*.

Second, despite purporting to apply *Wilson*, the lower court went beyond the state court's articulated reasons to supply—and defer to—new reasoning justifying the state court result. To compensate for the CCA's obvious failure to engage with the post-conviction evidence, the court below suggested that the state court could have denied relief because the defense's trial expert

(who was appointed to address only sanity, competency to stand trial, and susceptibility to coercion) "previewed the salient points of the subsequent expert findings." Pet. App. 13. After inventing this new reasoning for the state court, the majority deferred to it as an "objectively unreasonable" application of *Strickland*. *Id*. at 14. Instead of adhering to *Wilson*, the Fifth Circuit considered "not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also . . . arguments and theories it *could have* relied upon." Pet. App. 10 (quoting *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) (internal quotation marks removed).

Respondent asserts "there is no conflict between *Wilson* and the Fifth Circuit's decision." Resp. Br. at 17. But the lower court's analysis is precluded by *Wilson* and the court explicitly refused to be bound by *Wilson*. Pet. App. 11 n.5. In fact, the decision below is circuit authority for the proposition that review under § 2254(d) is *not* limited to the reasons articulated by the state court: "the Fifth Circuit's *Neal* standard applies, and the theories and arguments that could have potentially supported the state habeas court's decision" will be considered"; a "federal court must defer to a state court's ultimate ruling rather than to its specific reasoning. *Sheppard v. Davis*, 967 F.3d 458, 467 (5th Cir. 2020) (relying on *Neal*, 286 F.3d at 246)." *Armstrong v. Lumpkin*, No. 7:18-CV-356, 2020 WL 8188422, at *11 n.13 (S.D. Tex. Sept. 8, 2020), *report and recommendation adopted*, No. 7:18-CV-00356, 2021 WL 179600 (S.D. Tex. Jan. 19, 2021). Notably, in *Armstrong* the state trial court held an evidentiary hearing and then provided 631 pages of reasoning for its decision. *Id*. at *7. Given the Fifth Circuit's resistance to adopting *Wilson*, it is unsurprising that district courts opt to follow binding circuit precedent contrary to *Wilson*. *See also Bess v. Davis*, No. 3:16-CV-1150-S, 2020 WL 2066732, at *1–2 (N.D. Tex. Apr. 28, 2020) (applying § 2254 to a reasoned state court decision in a death penalty case and holding "binding Fifth Circuit law [is] that the … AEDPA authorizes a federal habeas court to review only a state

court's decision and not the written opinion explaining that decision," and "*Wilson*, and the standard articulated therein, is inapplicable to this proceeding").

Finally, "[i]n the wake of *Wilson*, courts have grappled with whether AEDPA deference extends only to the reasons given by a state court (when they exist), or instead applies to other reasons that support a state court's decision." *Thompson v. Skipper*, 981 F.3d 476, 480 (6th Cir. 2020) (noting the the Ninth and Seventh Circuits position after *Wilson* and the *Sheppard* panel's deviation). Absent this Court's intervention, adherence to *Wilson* will remain, at best, optional in the Fifth Circuit thus deepening the split between the circuits.

II. Ms. Sheppard's case is an appropriate vehicle for correcting the Fifth Circuit's post-*Wilson* 28 U.S.C. § 2254(d) jurisprudence.

The failure to properly apply *Wilson* to Ms. Sheppard's case was outcome determinative. The district court concluded that Ms. Sheppard was prejudiced by counsel's deficient performance *and* that the state court's cumulativeness rationale for denying relief was "highly questionable in light of the trial and habeas records presented." Pet. at 13. The district court nonetheless concluded that the Fifth Circuit's § 2254(d) jurisprudence posed an insurmountable barrier to relief. *Id*. The Fifth Circuit then failed to properly apply *Wilson* by deferring to state court reasoning squarely contradicted by the state court record and invented a new rationale on behalf of the state court. Because the CCA's actual theory for denying relief was unreasonable in light of the state court record, and Ms. Sheppard's claim has merit, this case is an ideal vehicle for deciding the question the Fifth Circuit has declined to answer for the last three years: does *Wilson* overrule Fifth Circuit precedent holding that federal courts applying § 2254 to reasoned state court decisions review only the outcome and not the state court's "reasoning or written opinion"?

A. Trial counsel unreasonably failed to investigate numerous red flags they encountered.

No federal court has concluded that trial counsel conducted a professionally reasonable pre-trial mitigation investigation. Respondent offers two creative, but erroneous, arguments in defense of trial counsel's objectively deficient performance. First, Respondent repeatedly argues that trial counsel's omissions were strategic. *See* Resp. Br. at 20-21. But the record is clear that trial counsel could not have decided to withhold mitigating evidence he never sought or discovered. For example, counsel never asked Ms. Sheppard's brother Jonathan about their childhood—a basic life history investigative task which would have led to a trove of critical social history information—even though Jonathan was assisting the defense investigator with locating witnesses. Pet. at 24. Respondent suggests that this omission was strategic. Resp. Br. at 20. But failing to ask immediate family members basic life history questions is not a "strategy," it is objectively deficient life history investigation. Likewise, counsel encountered numerous red flags that—by their own admission, *see* Pet. at 22-23—should have triggered a thorough mental evaluation of their client. These red flags included the repeated sexual and physical abuse Ms. Sheppard endured as a child, her depression, her struggles in school, and her chaotic home life. *Id*. Yet counsel failed to procure the indicated assessments of their client. Ms. Sheppard is not alleging that trial counsel were deficient when making strategic decisions to withhold evidence from the jury. They were deficient for failing to reasonably investigate Ms. Sheppard's life history.

Second, Respondent suggests assessing trial counsel's 1995 pre-trial investigation by the prevailing norms in the 1970s. Citing the Court's decisions addressing capital cases tried in 1974,[1] 1976,[2] and 1978,[3] Respondent observes that the performance of Ms. Sheppard's counsel "compares well" to those cases. Resp. Br. at 22. Respondent acknowledges that the Court's

[1] *Darden v. Wainwright*, 477 U.S. 168 (1986).
[2] *Strickland v. Washington*, 466 U.S. 668 (1984).
[3] *Burger v. Kemp*, 483 U.S. 776 (1987).

decisions in *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005)—addressing capital cases tried in 1986, 1989, and 1988 respectively—"clarified the law regarding minimally adequate mitigation investigations," Resp. Br. at 21, but understandably seeks to avoid their application to Ms. Sheppard's case.

Review of counsel's performance is based on the prevailing norms at the time of trial. *See Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (counsel's performance is assessed according to "the professional norms prevailing when the representation took place"). Just as a decision in this case would reflect the prevailing norms in 1995, and not 2021, the Court's decisions in *Williams*, *Wiggins*, and *Rompilla* reflect the prevailing norms for "minimally adequate mitigation investigations" in the second half of the 1980s, well before Ms. Sheppard's trial. *See also Ex parte Kerr*, No. AP-75,500, 2009 WL 874005, at *1 (Tex. Crim. App. Apr. 1, 2009) (unpublished) (applying *Williams* and *Wiggins* to grant relief on a penalty-phase ineffective-assistance-of-counsel claim in a 1995 Texas capital trial); *Ex parte Gonzales,* 204 S.W.3d 391, 398 (Tex. Crim. App. 2006) (applying *Williams* and *Wiggins* to grant relief after a 1997 capital trial); *id*. at 400 (Cochran, J., concurring) ("Because this offense was committed, investigated, and tried between 1994 and 1997, the current statutory mitigation issue was applicable to the punishment phase, as was counsel's duty to investigate all facts which might be relevant to that special issue."). The pre-trial mitigation investigation in this case fell well short of the prevailing professional norm.

B. The CCA unreasonably applied *Strickland*'s prejudice prong in the same unreasonable manner as the state courts in *Porter* and *Williams*.

At the conclusion of the penalty phase, the State stood before the jurors and explicitly invited them to decide that Ms. Sheppard—a young Black woman who was a 19-year-old, homeless mother of three children at the time of the offense—was lying about her traumatic background. The State argued that "[t]here have been suggestions that in the past the defendant

was physically abused by men in her life," but "[h]ints is all you have been given." Pet. at 5. The State argued there was "there has been no proof of [abuse]," "no eyewitnesses who have come forward, no abuser who has given a tearful confession in court to abuse of Ms. Sheppard." *Id*. The State concluded "that it doesn't make any difference. . . . She was not physically abused; but even if she was, what kind of excuse is that?" *Id*.

The CCA held that Ms. Sheppard's post-conviction evidence was cumulative of the trial evidence and thus failed to alter the evidentiary landscape in any meaningful way. In other words, when considering the totality of the current record, the State could still persuasively argue there was no credible proof that Ms. Sheppard was abused and, even if she was, there is still no reason to conclude this evidence has any bearing on her moral culpability. The Fifth Circuit held that this was a reasonable application of *Strickland*'s prejudice prong.

But federal courts applying § 2254(d) to a state court determination regarding *Strickland* prejudice do not write on a blank slate.[4] In the 25 years since the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court has identified several specific ways in which state courts have unreasonably erred when assessing *Strickland* prejudice, two of which apply here.

First, a state court unreasonably applies *Strickland* when it does "not consider or unreasonably discount[s] the mitigation evidence adduced in the postconviction hearing." *Porter v. McCollum*, 558 U.S. at 42. Second, a "prejudice determination [is] unreasonable insofar as it

[4] Respondent suggests that the mere fact some judges below agreed with the state court's decision precludes relief under § 2254(d). Resp. Br. at 24. This Court's seminal opinion construing § 2254(d) explicitly rejected Respondent's formulation of the § 2254(d) inquiry: "The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Williams v. Taylor*, 529 U.S. at 409-10. Respondent's formulation would have precluded habeas relief in virtually every post-AEDPA case in which this Court has granted it. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting relief after every federal judge in the lower federal courts—and three Justices of this Court—agreed with the state court decision to deny relief).

fail[s] to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. at 362 (2000). The CCA's determination that all of Ms. Sheppard's post-conviction evidence is cumulative of the trial evidence was unreasonable under both *Porter* and *Williams*.

Ms. Sheppard presented credible, detailed post-conviction evidence about the abuse she endured as child. For example, her brother testified that at the age of seven he was made to watch five-year-old Erica being forced to perform oral sex on their babysitter's boyfriend. Pet. App. 274. Erica was repeatedly molested. The same babysitter whipped Jonathan and Erica with electrical cords. *Id*. Erica alternately endured physical abuse and neglect from her mother, who beat her with wooden boards. Pet. at 5-6. Ms. Sheppard also presented credible, detailed post-conviction evidence about the intimate partner violence she endured. Beatings from Jerry Bryant, the father of Ms. Sheppard's third child and from whom she was hiding at the time of the crime, left Ms. Sheppard unconscious and with a dented skull. Witness testimony and police reports corroborate the assaults she suffered at the hands of Mr. Bryant. *Id*. at 6-7.

None of this evidence was cumulative of the trial presentation. First, as the State argued, there were no eyewitnesses to, or proof of, the abuse and assaults Erica suffered. Eyewitness testimony and police reports provide new, credible evidence and bolster the credibility of the trial evidence. As noted by the amici, many women who report abuse are "met with disbelief or blame," Br. for Amici Curiae Domestic Violence Advocates at 14, and "Black women like Erica Sheppard are further doubly disbelieved when they report intimate partner violence." *Id*. at 17. "Studies have shown that negative labels continue," and that these "stereotypes include aggression, dishonesty, and untrustworthiness—all stereotypes that would increase moral culpability in a capital case." *Id*.

The State encouraged the jury to disbelieve and dismiss Ms. Sheppard's evidence. The post-conviction evidence would have bolstered the credibility of trial evidence and prevented the State from—consciously or not—tapping into harmful stereotypes during the sentencing phase closing arguments.

The post-conviction expert testimony demonstrates that Ms. Sheppard's multiple traumas left indelible scars. Ms. Sheppard suffers from PTSD, significant dysfunction of all brain systems—including executive functioning, major depression, and she has the mental age equivalence of a 14-year-old. Ms. Sheppard's impairments render her vulnerable to the influence of others. Pet. at 7-8. The "brain dysfunction that Ms. Sheppard experiences is, unfortunately, consistent with her life history," "[w]ithout help from others, Ms. Sheppard would not be able to function independently or adequately." Pet. at 8. The court below held that the CCA could have reasoned that this evidence was cumulative of Dr. Ray's testimony and report because she "previewed the salient points of the subsequent expert findings" when she observed that Ms. Sheppard "experienced depression and mood swings and heard voices in her head." Pet. App. 13. But these are merely *symptoms* that Dr. Ray observed. The post-conviction experts assessed Ms. Sheppard and described her severe mental illness, cognitive functioning and much more. Dr. Ray conveyed the salient points of the post-conviction experts' findings to the same extent a doctor who observes that a patient has a backache and some bloating has conveyed the salient facts of a subsequent diagnosis of pancreatic cancer.

Properly reviewed against the state court record, the CCA's theory for denying relief was unreasonable.[5] Ms. Sheppard's case is thus an ideal vehicle for addressing the question presented.

[5] The Fifth Circuit purported to conduct a one-paragraph *de novo* review of Ms. Sheppard's claim. Pet. App. 14-15. However, the court once again uncritically adopted the CCA's unreasonably erroneous cumulativeness rationale. If the CCA's *de novo* review was unreasonable, adopting the same reasoning in a *de novo* federal proceeding is no less unreasonably erroneous.

III. Respondent fails to respond to the argument that the Fifth Circuit's rogue interpretation of *Batson* cannot be squared with this Court's precedents.

A. Respondent ignores the Question Presented.

The Question Presented asks "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." This question stems from the Fifth Circuit's statement, essential to its holding in this case, that "[A] *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." The Fifth Circuit has applied this impermissible interpretation of *Batson* in other cases, and its erroneous — and destructive — interpretation requires correction.

Respondent acknowledges Petitioner's claim that "the Fifth Circuit employed a 'novel interpretation of *Batson*,'" Resp. Br. at 27, but it entirely ignores the Question Presented. Nowhere does it discuss — or even quote — the Fifth Circuit's rule. It does not dispute, discuss, quote or even allude to Petitioner's interpretation of that language as articulated in the Question Presented. Nor does it contend that the rule articulated in *Sheppard* does not characterize other Fifth Circuit cases. Most remarkably — given that it does not dispute Petitioner's interpretation of the Fifth Circuit's rule — the Respondent's Brief does not explicitly endorse or otherwise comment upon the permissibility of such a rule.

B. Respondent fails to reconcile the Fifth Circuit's interpretation of *Batson* with this Court's precedents.

The premise of the second Question Presented is that instead of comparing the state court decision to the results of the "sensitive inquiry," *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) this Court has mandated, the Fifth Circuit tested the state court decision against its own

failure-to-rebut-all-stated-reasons rule. After asserting that the Fifth Circuit's wrong turn permitted it to find the state court decision neither an unreasonable application of Supreme Court precedent nor an unreasonable determination of the facts, the Petition sets forth the indicia this Court has insisted that lower courts consider. It then provides the sensitive inquiry the Fifth Circuit abjured and applies this Court's indicia to the evidence in the record. It argues that had the Fifth Circuit performed the requisite inquiry, it would have concluded that "the state court decision was an unreasonable application of this Court's precedents," Pet. at 32, thus satisfying § 2254(d)(1), and further contends that upon consideration of all the relevant facts, "any determination that the prosecutor's strike was not racially motivated was unreasonable." Pet. at 38; Resp. Br. at 28; § 2254(d)(2).

Respondent neither responds to these contentions nor discusses the applicability of the cases Petitioner cites to the facts of Ms. Sheppard's claim. Respondent's sole comment on the Supreme Court precedent Ms. Sheppard claims renders the Fifth Circuit's rule impermissible is to point out that three of the cases cited in the Petition, *Flowers v. Mississippi,* __ U.S. __, 139 S. Ct. 2228 (2019), *Foster v. Chatman,* 578 U.S. __, 136 S. Ct. 1737 (2016), and *Snyder v. Louisiana*, 552 U.S. 472 (2008), all "involved direct review of state court decisions; none involved a federal habeas petition." Resp. Br. at 29. However, while the standard of review in this case is significantly stricter than that governing *Snyder*, *Foster* or *Flowers*, it is the same standard applied in *Miller-El v. Dretke*, 545 U.S. 231 (2005) (holding that the state court determination that the prosecutor's strikes were not racially motivated was unreasonable). More importantly, the substantive law in none of those cases is new. *See Flowers,* 139 S.Ct. at 2235 ("[W]e break no new legal ground"); *id*. at 2251. Therefore in determining whether the state court decision was either "an unreasonable application of" this Court's precedents, or involved "an unreasonable determination of the facts," the Fifth Circuit was obliged to evaluate the state court decision in light of "all of the circumstances

that bear upon the issue of racial animosity," *Snyder*, 552 U.S. at 478, that have been identified by this Court — and not against an arbitrary rule of its own creation.

C. Respondent's cursory treatment of the *Batson* issue digresses from the Question Presented and the reasons this Court should grant the Writ.

Rather than attempting to defend the Fifth Circuit's rule, Respondent offers three obfuscations, none of which bear on the cert-worthiness of the *Batson* issue.

1. Respondent's quibble about the pretextual nature of two of the stated reasons.

According to the Respondent's Brief, "Contrary to Sheppard's representation in the petition, the Fifth Circuit did not find that two of the reasons proffered for striking Simpson were 'demonstrably disingenuous,' nor did the Director concede as much." Resp. Br. at 30. True, the Fifth Circuit phrased it differently: "Sheppard *persuasively posits* that the prosecutor's first two reasons appear disingenuous," Pet. App. 18-19 (emphasis added), but this is a distinction without a difference; the Fifth Circuit found the assertion that reasons were disingenuous *persuasive*. It was, therefore *persuaded.* But, no matter. Whether the reasons were "demonstrably disingenuous" or Sheppard "persuasively posit[ed]" that they were, what the Fifth Circuit did with the persuasive evidence of pretext was to *ignore* it. It ignored that evidence because, as it stated, "Nevertheless, a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." As the Petition argues, that hurdle is too high, a rogue articulation of *Batson* that cannot be reconciled with this Court's twenty-first century *Batson* jurisprudence.

2. Respondent's recitation of the Fifth Circuit's list of indicia of discrimination that are not present in this case.

Respondent emphasizes the *absence* of two indicia of discrimination that this Court found significant in *Miller-El* and two other indicia of discrimination that this Court considered relevant in *Flowers*, Resp. Br. at 30, and then faults Petitioner for "fail[ing] to account . . .for the full range

of relevant facts." Resp. Br. at 31. But this Court has never held that a *Batson* claimant must establish every possible indicium of discriminatory intent or even that the absence of a particular indicium weighs against a finding of purposeful discrimination. Thus, for example, *Flowers* does not discuss the absence of "B"s by the names of black jurors, or the shifting explanations of the prosecutor, two facts this Court found very probative in *Foster*. More pertinently, *Foster* itself attaches no weight to the absence of "the lack of 'manipulative questioning' or 'jury shuffles' to remove African-Americans," two of the facts Respondent chastises Petitioner for failing to address because they were important to this Court's analysis in *Miller-El*. Resp. Br. at 30.

This Court's precedents do not command accounting for what is absent. Rather, they command consideration of the totality of the circumstances. Those precedents also plainly establish that in evaluating the totality of the circumstances, seated white jurors' similarity to struck black jurors, mischaracterizations of the record, and the implausibility of stated reasons are among the facts probative of racial motivation; the presence of these indicia in this case are facts the Petition addresses at length and the Respondent's Brief ignores.

3. Respondent's complaint that Petitioner did not discuss § 2254(e)(1).

Finally Respondent offers a triple-barreled remonstrance that Sheppard "does not address AEDPA's relitigation bar[,] . . . does not even cite § 2254(e)(1) [, and has not] identified clear and convincing evidence to rebut the presumption of correctness." Resp. Br. at 29. Two of these protests are groundless and the third is no more than a whine, entirely beside the point.

The Petition *does* address what Respondent denominates *"*AEPDA's relitigation bar," *i.e.*, § 2254(d).[6] Indeed, the section addressing § 2254(d) occupies more than six pages of the Petition,

[6] Respondent uses the term "relitigation bar" as though it were synonymous with § 2254(e)(1). But in fact this Court has used that term only twice, both times in reference to § 2254(d). *Greene v. Fisher*, 566 U.S. 34, 39 (2011); *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

and painstakingly goes through all of the reasons proffered by the prosecutor, along with the evidence that those reasons were pretexual. And in so doing, it *was "*identif[ying] clear and convincing evidence to rebut the presumption of correctness."

True, the Petition did not separately discuss the application of § 2254(e)(1) to Petitioner's *Batson* claim. But neither did the Fifth Circuit's opinion, nor even Respondent's own Fifth Circuit brief. Most importantly, neither have this Court's *Batson* opinions. Though this Court has expressly left the question open, *see Wood v. Allen*, 558 U.S. 290, 300-301 (2010), it is likely that the requirements of § 2254(d) and § 2254(e)(1) do not both apply in every case. In any event, *Miller-El v. Dretke*, 545 U.S. 231 (2005), makes plain that with respect to the ultimate determination of racial motivation in the exercise of the peremptory challenge, the two are co-extensive. *Id*. at 266 ("The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous."). What AEDPA does require, what the Petition does assert, and what it does establish, is that "upon consideration of all the relevant facts, any determination that the prosecutor's strike was not racially motivated was unreasonable." Pet. at 39. Absent its rogue interpretation of *Batson*, the Fifth Circuit would have so concluded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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