No.

In the Supreme Court of the United States

JAMES GARFIELD BROADNAX, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether, under 28 U.S.C. § 2254(d) and *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), a federal habeas petitioner may present evidence of a prosecutor's racially discriminatory intent in support of a *Batson* claim where the evidence was not available to the petitioner during state court *Batson* proceedings.

RELATED PROCEEDINGS

Criminal District Court of Texas (Dallas County):

State v. *Broadnax*, No. F-0824667-Y (Aug. 21, 2009)

Ex parte Broadnax, No. W08-24667-Y(A) (Sept. 17, 2014)

Texas Court of Criminal Appeals:

Broadnax v. *State*, No. AP-76,207 (Dec. 14, 2011)

Ex parte Broadnax, No. WR-81,573-01 (May 20, 2015)

United States District Court (N.D. Tex.):

Broadnax v. *Davis*, Civ. No. 15-1758 (July 23, 2019)

United States Court of Appeals (5th Cir.):

Broadnax v. *Lumpkin*, No. 19-70014 (Feb. 8, 2021)

United States Supreme Court:

Broadnax v. *Texas*, No. 11-9294 (Oct. 1, 2012)

Broadnax v. *Texas*, No. 14-9964 (Oct. 5, 2015)

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PETITION FOR A WRIT OF CERTIORARI

James Garfield Broadnax 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.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 987 F.3d 400. The court of appeals' opinion denying the petition for rehearing (App., *infra*, 218a) is unreported. The district court's opinion denying petitioner's federal habeas petition (App., *infra*, 28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2021. App., *infra*, 1a. A petition for rehearing was denied on March 23, 2021. App., *infra*, 218a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim * * * (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

In *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), this Court left open the question of when Section 2254(d) permits a federal habeas court to consider significant evidence that establishes a constitutional violation but was not presented to the state courts because that evidence was previously unavailable to the petitioner. This case provides the Court with an opportunity to resolve that exceptionally important question of federal law.

Petitioner James Broadnax is a Black man who was convicted and sentenced to death at 19 years old by a

nearly all-White jury in Dallas, Texas. His conviction and sentence came after the prosecution used peremptory strikes against all seven qualified Black jurors and one qualified Hispanic juror, and after a trial marked by appeals to racial prejudice. Petitioner challenged these strikes under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), but his objections were largely overruled.

After state court proceedings had concluded and during federal habeas corpus proceedings, the Dallas County District Attorney's Office disclosed a spreadsheet created by prosecutors in connection with petitioner's jury selection that both tracked qualified prospective jurors by race and identified Black jurors in particular. In addition to listing the race of every juror, the State's spreadsheet bolded the names of all Black qualified potential jurors but no other potential jurors. That spreadsheet confirms the State's focus on race during jury selection and mirrors the exact type of evidence that this Court has found probative of discriminatory intent. Despite petitioner's diligent efforts during state habeas proceedings to obtain evidence of the prosecutors' motivations at jury selection, the State refused to produce its files, releasing them only after state court proceedings concluded.

The federal district court and court of appeals, interpreting *Pinholster*, refused to consider this highly probative evidence because it had not been presented to the state courts. In *Pinholster*, this Court reserved judgment on this precise issue—namely, "where to draw the line between new claims and claims adjudicated on the merits" where a version of a claim had been asserted in state court but the State had withheld evidence establishing the merits of the claim. 563 U.S. at 186 n.10. The Court suggested that such evidence "may well present a new claim" but reserved decision for a future case. *Ibid.* The spreadsheet

at issue here is exactly the type of withheld evidence that gives rise to a new claim that was not previously "adjudicated on the merits": petitioner *could not* previously present the spreadsheet, which provides incontrovertible evidence of the kind of race consciousness prohibited by *Batson*, because it was withheld by the State until after the close of state court proceedings.

The Court's review is warranted here to clarify the application of Section 2254(d) in these circumstances, in particular to *Batson* and other claims where critical evidence may be withheld by prosecutors until after state proceedings have concluded. The petition for a writ of certiorari should be granted.

A. Background

1. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court reaffirmed its longstanding principle that the Equal Protection Clause of the U.S. Constitution forbids the State from engaging in racial discrimination in jury selection. The Court set forth the process by which "a defendant may establish a prima facie case of purposeful discrimination" in jury selection based on the prosecutor's exercise of peremptory strikes. *Id.* at 96. This process requires a defendant to show that "he is a member of a cognizable racial group" and that "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Ibid.* The Court instructed that the trial court evaluating a *Batson* objection "should consider all relevant circumstances," including, for example, a "'pattern' of strikes against black jurors" and "the prosecutor's questions and statements during *voir dire* examination and in exercising his [peremptory] challenges." *Id.* at 96–97.

This Court has reaffirmed these principles in subsequent decisions, and has found particularly relevant evidence that indicates prosecutors made efforts to track the race of potential jurors during jury selection. In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*") and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), for example, the Court relied on the fact that prosecutors had "marked the race of each prospective juror on the[] juror cards" bearing each juror's name. *Miller-El I*, 537 U.S. at 347. The Court cited this fact, coupled with the Dallas County District Attorney's Office's history of "systematically excluding" Black persons from juries, in concluding that a *Batson* violation had occurred.

Similarly, in *Foster* v. *Chatman*, 136 S. Ct. 1737, 1744 (2016), the prosecutors maintained a jury venire list on which "the names of the black prospective jurors were highlighted in bright green," with a code indicating that the "green highlighting 'represents Blacks.'" The Court rejected the state's claim that "race was not a factor" in jury selection and concluded that the "contents of the prosecution's file . . . plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." *Id.* at 1755.

2. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) with the objective of limiting but not foreclosing the power of federal courts to grant petitions for a writ of habeas corpus on behalf of state prisoners. *See Pinholster*, 563 U.S. at 180. AEDPA requires habeas petitioners to first "exhaust[] the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A), but allows federal courts to hold evidentiary hearings in certain circumstances, 28 U.S.C. § 2254(e). AEDPA also prescribes that if the petition concerns a "claim that was adjudicated on the merits in State

court," the petition "shall not be granted" unless, in pertinent part, such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

3. This Court interpreted the application of Section 2254(d) in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011). During the penalty phase of Pinholster's capital trial, defense counsel elected not to call a psychiatrist to testify about Pinholster's mental condition. *Id.* at 177. In Pinholster's state habeas proceedings, he alleged ineffective assistance of counsel for the failure to present mitigating evidence concerning his mental disorders. *Id.* The California Supreme Court denied his habeas petition. *Id.* at 177–78. After Pinholster filed a federal habeas petition, the district court granted an evidentiary hearing, at which Pinholster called two new medical experts who testified that Pinholster suffered from organic personality syndrome and brain injury due to epilepsy. *Id.* at 179.

This Court held that the federal courts could not consider the new expert testimony introduced during the district court's evidentiary proceeding. As the Court explained, the "backward-looking language" of Section 2254(d)(1) generally limited "the record under review" to "the record before the state court" for "any claim that was adjudicated on the merits in State court." *Pinholster*, 563 U.S. at 182.

The Court based its interpretation of Section 2254(d)(1) on both the text of the statute and the intent of Congress as understood by examining "the broader context of the [AEDPA] as a whole." *Ibid.* Congress intended for AEDPA "to channel prisoners' claims first to the state courts" to ensure that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and

issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.* at 182, 185.

The Court in *Pinholster*, however, left undetermined "where to draw the line between new claims"—claims not adjudicated on the merits and thus not subject to Section 2254(d)(1)—and claims subject to the evidentiary restrictions of Section 2254(d)(1), where the evidence not presented to the state courts was previously unavailable to the petitioner. *Pinholster*, 563 U.S. at 186 n.10.

B. Facts and Procedural History

Petitioner is a Black man who was convicted and sentenced to death at the age of 19 by a nearly all-White jury in Dallas County, Texas, for the murder of two White victims. During the course of the trial, the State made multiple references to the race of petitioner and the victims; for example, the State told the jury that petitioner went to the town where the murder took place "because that's where the rich white folks live," and the State cautioned the jurors that they would hear "quite a bit of street talk in this case." D. Ct. Dkt. 41-19, at 22.[1]

During jury selection, the State used peremptory strikes against all seven Black venire members on the panel and against one Hispanic venire member. D. Ct. Dkt. 49-1, at 2. Petitioner's venire contained 47 members qualified to serve, and the State used 53% of its peremptory strikes against qualified minority venire members. D. Ct. Dkt. 48, at 75.

The State contended, in defending these strikes against petitioner's *Batson* challenges, that it struck those who were not in favor of the death penalty or who

[1] References to "D. Ct. Dkt." are to the docket in *Broadnax* v. *Davis*, Civ. No. 15-1758 (N.D. Tex.), where the state court record was filed.

might be disinclined to impose the death penalty. *See, e.g.*, D. Ct. Dkt. 73, at 74–75, 85–86. However, two of the Black venire members struck by the State answered the relevant juror selection questionnaire prompts identically to White venire members who were not struck.[2] Specifically, both Black venire members stated that they were in favor of the death penalty and, in response to a question about the panel member's attitude towards the death penalty, selected the option stating that they "believe[ed] the death penalty is appropriate in some murder cases" and that they "could return a verdict in a proper case which assessed the death penalty." RR57:103; RR57:122. All of the White jurors accepted by the State selected the same option. D. Ct. Dkt. 49-1, at 2. One of these Black venire members also ranked herself a "7" on a scale of how strongly she supported the death penalty, indicating equal or greater support than four of the White jurors the State accepted. *Compare* RR57:106 *with* RR56:122; RR55:181; RR55:124; RR55:276. Both of these Black venire members also made clear in their voir dire testimony that they were open-minded regarding the death penalty and could apply the law evenhandedly to the facts of the case. D. Ct. Dkt. 41-4, at 31–35; D. Ct. Dkt. 41-5, at 42–48.

The State also struck a third Black venire member who, like White venire members who were not struck, selected the option stating that she "believe[ed] the death penalty is appropriate in some murder cases" and that she "could return a verdict in a proper case which assessed the death penalty." RR55:159. This venire member also

[2] Certain documents in the district court record, such as sealed records, were not included in the Electronic Record on Appeal before the court of appeals. The juror questionnaires were filed in the district court under seal and are available in the Reporters Record ("RR") at volumes 55–57, under D. Ct. Dkt. 40-4–40-6.

clarified during voir dire that, despite indicating on her questionnaire that she was not in favor of the death penalty, the death penalty was appropriate under certain circumstances. D. Ct. Dkt. 39-10, at 121. She answered her questionnaire affirmatively that there are crimes for which the death penalty should be available and agreed with the Texas law allowing capital punishment for murder in the course of committing a robbery. RR55:162.

The State also provided a number of additional grounds for striking the minority venire members. The State contended that it struck one such minority venire member in part because she had "four children and no job," D. Ct. Dkt. 41-12, at 22; at the same time, the State struck another minority venire member because she was "a single woman with no children." *Id.* at 10. The State further noted that the mother of four "so desperately wanted to sound intelligent, but she absolutely could not give a straight answer," *Id.* at 22, and claimed that it struck yet another minority venire member because her questionnaire "was full of spelling errors and, of course, grammar." *Id.* at 17. The State failed to strike White venire members whose questionnaires similarly exhibited spelling and grammatical errors. *See, e.g.*, RR56:139, 141–146, 154.

In addition, the State engaged in race-based questioning of Black venire members. The prosecutor told one venire member—a 70-year-old Black woman—that the prosecutor's own mother would find it "very difficult" to "put aside the injustices that were done in her day" when it was "a young black man on trial." D. Ct. Dkt. 39-10, at 122. Having laid that groundwork, the prosecutor asked the venire member to look at petitioner, described the death penalty graphically, and asked her twice: "Do you really think in your heart of hearts that you can take part

in" this process? *Id.* at 123. The State similarly asked another Black venire member whether he felt he "owe[d] [Broadnax] any allegiance" because they were both Black men, and asked whether it was a problem that "somebody could potentially say to you [after rendering a verdict], how could you do that to another black man?" D. Ct. Dkt. 39-11, at 251–52. Both venire members unequivocally assured the prosecution that they could even-handedly render a verdict. D. Ct. Dkt. 39-10, at 122; D. Ct. Dkt. 39-11, at 252. The State struck them.

The State also engaged in disparate questioning and treatment of White and nonwhite venire members. The State directed a Black venire member—whom the State later described as "nervous" in its justification for striking her—to look at petitioner while she was provided with a graphic description of the death penalty, D. Ct. Dkt. 39-9, at 8–10; Dkt. 41-12, at 11, yet three White venire members who expressed similar nervousness were neither asked to do the same nor struck. D. Ct. Dkt. 39-9, at 28–29; D. Ct. Dkt. 39-11, at 70–76; RR56:135.

The trial judge ultimately decided to reinstate one of the Black venire members the prosecution struck. The trial judge explained that "there [were] no African-American jurors on this jury and there was a disproportionate number of African-Americans who were struck." D. Ct. Dkt. 41-16, at 13. The judge, however, denied petitioner's other *Batson* objections and refused to restore the other seven nonwhite venire members. In restoring a single Black venire member to the jury out of the seven who had been struck, the judge expressed his "problem" with the whole line of *Batson* cases:

> The problem with all of these cases, of course, is that if you grant a *Batson* challenge it implies some sort of nefarious intent on the part of the prosecutors. When

> you say it's a pretext, you're essentially saying that the prosecutors are lying. That's the problem I have with the whole line of cases.

Ibid. (emphasis added).

Petitioner's trial proceeded with a nearly all-White jury. After the jury found petitioner guilty and returned its verdict on punishment, the trial court sentenced petitioner to death.

C. Appellate and Post-Conviction Proceedings

Petitioner filed a direct appeal to the Texas Court of Criminal Appeals, which affirmed his conviction and sentence in an unpublished opinion. *Broadnax* v. *State*, No. AP-76207, 2011 WL 6225399 (Tex. Crim. App. Dec. 14, 2011). This Court denied review. *Broadnax* v. *Texas*, 568 U.S. 828 (2012).

Following his direct appeal, petitioner filed a state post-conviction petition for a writ of habeas corpus. In connection with the state habeas proceedings, petitioner's counsel sought access to the Dallas County District Attorney's jury selection files from his case, but the records were withheld based on claimed work product privilege. App., *infra*, 4a; D. Ct. Dkt. 69-1, at 1–2.

The trial court entered findings of fact and conclusions of law recommending that habeas corpus relief be denied. D. Ct. Dkt. 42-6, at 39–72. The Court of Criminal Appeals adopted the trial court's findings and denied relief. *Ex parte Broadnax*, No. WR-81573–01, 2015 WL 2452758 (Tex. Ct. Crim. App. May 20, 2015). This Court again denied review. *Broadnax* v. *Texas*, 577 U.S. 842 (2015).

After exhausting his state appellate and post-conviction remedies, petitioner filed a petition for a writ of habeas corpus in the U.S. District Court for the Northern District of Texas. The following month, the Dallas County

District Attorney's Office informed petitioner that it would permit petitioner's counsel to review the previously withheld jury selection files from petitioner's trial. D. Ct. Dkt. 69-1, at 1–2; D. Ct. Dkt. 63-1, at 1–3. The files included a spreadsheet created during jury selection, listing all of the qualified jurors with their respective race. D. Ct. Dkt. 52, at 4. The names of potential Black jurors—and only potential Black jurors—were bolded, and each Black potential juror was eventually struck by the State. *Ibid.*

Petitioner filed an amended habeas petition based on the spreadsheet. The State initially argued that the spreadsheet had been prepared after jury selection, but then retreated from that position after evidence emerged indicating that the spreadsheet had been used during the selection process. *Compare* D. Ct. Dkt. 63, at 70–73 *and* Opp'n to Certificate of Appealability, at 36–37 ("COA Opp'n").

The district court denied petitioner's habeas petition on July 23, 2019. App., *infra*, 167a-168a. With respect to petitioner's *Batson* claims, the district court dismissed the voir dire evidence, including the similarities in answers given by venire members of color who were struck and White venire members who were not struck, as "hardly surprising -- or conclusive of anything." App., *infra*, 138a n.73.

With respect to the spreadsheet, the district court interpreted *Pinholster*, 563 U.S. at 185, as barring its consideration because the spreadsheet constituted "new evidence that was not properly before the Texas Court of Criminal Appeals when it rejected [petitioner's] *Batson* claims on direct appeal." App, *infra*, 138a n.73. The district court held, therefore, that "[u]nder AEDPA, [the spreadsheet is] not properly before this Court in this habeas corpus proceeding." *Ibid.* The district court did not

fault petitioner for his inability to present the withheld spreadsheet to the state court.

The district court added that, in its view, the spreadsheet "does nothing more than indicate that the Dallas County District Attorney's Office made a point of memorializing the ethnicity and gender of the remaining members of the jury venire prior to the exercise of its peremptory challenges." App., *infra*, 138a–139a. "Having twice been criticized by the United States Supreme Court for its exercise of racially discriminatory peremptory strikes," the court stated, it would have been "professionally irresponsible" for the Office to fail "to identify the members of the remaining jury venire who were members of a protected class." *Ibid.* However, the State never defended the spreadsheet on that ground nor presented any evidence indicating that the spreadsheet was prepared for that purpose. *Compare* D. Ct. Dkt. 63, at 70–73 *and* COA Opp'n, at 36–37.

Petitioner timely moved for a certificate of appealability. The Fifth Circuit granted review on the issue of whether the district court erroneously concluded that consideration of the spreadsheet was barred by *Pinholster* and 28 U.S.C. § 2254(d). App., *infra*, 219a–220a. After briefing, the court of appeals affirmed the district court's interpretation of *Pinholster*, holding that Section 2254(d) limited its review to the record before the state court, which did not include the spreadsheet. *Id.* at 2a. Although the court of appeals acknowledged that the spreadsheet was not available to petitioner during the state court proceedings, the court of appeals found that fact to be irrelevant under *Pinholster*. *Id.* at 4a, 12a.

In denying petitioner's *Batson* claims, the court of appeals echoed the district court's suggestion that the spreadsheet might have been created in order to comply

with *Batson* by "identify[ing] which jury venire members belonged to a protected class when preparing to defend its use of peremptory challenges." App., *infra*, 14a. The court opined that the State "would have had considerable motivation" to preemptively identify jurors by race. The court also noted that "[a]t the time of [petitioner's] trial, Dallas had elected the first African-American District Attorney in Texas, and *his* office prosecuted" petitioner. App., *infra*, 13a –14a (emphasis in original).

The court of appeals denied a petition for rehearing.

REASONS FOR GRANTING THE PETITION

In *Pinholster*, this Court held that Section 2254(d) generally limits federal courts from considering evidence not in the state court record when reviewing claims adjudicated on the merits in state court. But the Court also made clear that there are circumstances where new evidence should be considered because it gives rise to a new claim that was not adjudicated on the merits. This case presents just such a circumstance. Here, the State asserted privilege over evidence of a clear *Batson* violation until after state court proceedings concluded, preventing petitioner from presenting that evidence to the state court. Petitioner's case is an optimal vehicle for the Court to clarify the "line" the Court identified but declined to draw in *Pinholster*, between new claims and claims adjudicated on the merits, and to make clear that federal courts need not remain blind to direct evidence of a constitutional violation where that evidence was unavailable to a habeas petitioner in state court.

In addressing this open issue, the Court has the opportunity to clarify that *Pinholster* does not contradict or limit the directives of *Batson* and its progeny, including *Miller-El* and *Foster*. Documentary evidence of prosecutors' actual intent during jury selection often becomes

available only after trial, and the Court should make clear that regardless of whether such indisputably relevant evidence first becomes available during state court proceedings (as in *Foster*), or only becomes available to a petitioner following state proceedings (as in *Miller-El* and this case), it may be considered by federal habeas courts in deciding whether, in light of all relevant circumstances, a *Batson* violation occurred.

For both of these reasons, the Petition for a writ of certiorari should be granted.

A. Review Is Warranted to Resolve the Question Left Open in *Cullen* v. *Pinholster*.

The Court should grant this Petition to clarify the circumstances in which *Pinholster* does and does not bar consideration of evidence that was unavailable to a petitioner in state court proceedings.

In *Pinholster*, the Court considered whether a petitioner could use new evidence to satisfy the exception, specified in 28 U.S.C. § 2254(d)(1), to the otherwise-applicable bar on relitigation of claims "adjudicated on the merits" in state court proceedings. 563 U.S. at 180–81. In order to satisfy the exception specified in Section 2254(d)(1), the petitioner in *Pinholster* attempted to introduce, for the first time, mitigation evidence in support of a claim that his counsel was ineffective during the penalty phase of trial. *Id.* at 179–80. Although this mitigation evidence was available during state court proceedings, he failed to present it to the state court in support of his claim of ineffective assistance of counsel. The Court rejected Pinholster's attempt to introduce new evidence for the purpose of satisfying Section 2254(d)(1), finding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181.

The Court recognized, however, that "state prisoners may sometimes submit new evidence in federal court, [although] AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Id.* at 186. The Court acknowledged that 28 U.S.C. § 2254(e)(2), which governs evidentiary hearings in federal court, "continues to have force where § 2254(d)(1) does not bar federal habeas relief" and where a claim was "not adjudicated on the merits in state court." *Id.* at 185–86.

The scope of the Court's holding in *Pinholster* was the subject of a spirited discussion between the majority and dissent where the Court discussed, but did not resolve, the question presented in this Petition. "The problem with" the majority's holding, Justice Sotomayor emphasized in her dissent, "is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court." *Id.* at 214 (Sotomayor, J., dissenting). Justice Sotomayor outlined a hypothetical example, where a petitioner who diligently developed and pursued a *Brady* claim in state court proceedings, but who only learned of additional, withheld evidence supporting that claim *after* state court proceedings concluded, would be barred from presenting the new evidence in federal habeas proceedings. *Id.* at 214–215. The Court's holding, she posited, could disadvantage the *Brady* petitioner for having diligently pursued his claim in state court—which would consequently bar the petitioner from presenting new, exculpatory evidence to the federal habeas court on a claim that was "adjudicated on the merits in state court." *Ibid.* This would differ from the result for a petitioner who, by altogether failing to pursue a *Brady* claim in state court, would be allowed to introduce this new exculpatory evidence in federal court on a "new claim" upon showing

cause and prejudice for the default. *Id.* at 214–16. In Justice Sotomayor's hypothetical scenario, she recognized the potential paradox resulting from the Court's holding, where the hypothetical *Brady* petitioner would, in effect, be faulted for his diligence.

The majority rejected that interpretation of its holding and acknowledged that Justice Sotomayor's hypothetical petitioner "may well present a new claim" that was not "adjudicated on the merits," which would mean that Section 2254(d) would not limit the introduction of new evidence. *Id.* at 186 n.10. The majority's response therefore made clear that there is a critical distinction between petitioners like Pinholster, who fail to develop a claim and present evidence available to them during state court proceedings, and petitioners whose claims were not "adjudicated on the merits" because critical evidence was not available to them despite their reasonable diligence. *Ibid.*; *see also id. at* 203 (Alito, J., concurring in part) (the limitations on fact development imposed by section 2254(d) are intended to prevent "a petitioner [from] obtain[ing] federal habeas relief on the basis of evidence that could have been but was not offered in state court"). But the majority in *Pinholster* declined at that time to "draw a line between new claims and claims adjudicated on the merits." *Id.* at 186 n.10.

This case presents an ideal vehicle for the Court to answer this open question by clarifying the scope of *Pinholster*'s holding in the scenario envisioned by the majority, concurrence, and dissent: namely, where a diligent petitioner seeks to present compelling evidence of a constitutional violation that was not available to him during state proceedings. Here, petitioner diligently pursued his *Batson* claims with the evidence available to him at trial and

on direct appeal. To demonstrate the State's discriminatory intent, petitioner highlighted that prosecutors in his case exercised peremptory strikes on every qualified Black potential juror and one Hispanic juror; that when challenged, the State offered facially neutral reasons for these strikes, many of which did not apply equally to White jurors, and others which reinforced racial stereotypes; and that the ultimate makeup of his jury consisted of eleven White jurors and one Black juror whom the State attempted to strike. D. Ct. Dkt. 38-1, at 4; TCCA App. Br. at 24–42. But the state courts found this evidence and argument insufficient to establish a *Batson* violation.

Because petitioner attempted to obtain the jury selection files from the State during state habeas proceedings, he cannot be said to have made "insufficient effort" to pursue this claim or seek this evidence. *Pinholster*, 563 U.S. at 186 (underscoring that AEDPA was enacted to "ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues *which a prisoner made insufficient effort to pursue in state proceedings*,'" (emphasis added) (quoting *Williams* v. *Taylor*, 529 U.S. 420, 437 (2000))); *id.* at 203 (Alito, J., concurring) (to qualify for an evidentiary hearing in federal court, the "petitioner generally must have made a diligent effort to produce in state court the new evidence on which he seeks to rely").

The evidence at issue here is transformative for petitioner's *Batson* claim, which renders this case an optimal vehicle for the Court to address the issue left open in *Pinholster*. The evidence provides direct insight into the State's intent at the time of jury selection, which is the crux of the *Batson* inquiry. And the evidence flatly contradicts the State's assertions in the state courts that their

reasons for striking nonwhite jurors were lawfully race-neutral.[3] Indeed, the spreadsheet parallels evidence that this Court recently found probative of a *Batson* violation. *See Foster*, 136 S. Ct. at 1755. Moreover, the State's shifting explanations for this spreadsheet—initially claiming that the spreadsheet was prepared only in *response* to petitioner's *Batson* challenges, but abandoning that explanation when confronted with contrary evidence—provide further evidence of the State's improper intent. *Compare* D. Ct. Dkt. 63, at 70–73 *and* COA Opp'n, at 36–37.

Petitioner's case thus falls squarely within the scenario posited by the majority in *Pinholster*, where new evidence "may well present a new claim" that was not "adjudicated on the merits" when the evidence was withheld from the petitioner, despite his diligent attempts to obtain it. 563 U.S. at 186 n.10. This Court should thus grant the Petition to answer the open question of when federal habeas courts can consider evidence of a constitutional violation that a petitioner could not have presented to the state courts.[4]

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[3] Justice Kagan recognized the transformative nature of such evidence during oral argument in *Foster*, noting that "in a lot of these *Batson* cases, you'll have purported justifications, which [] could support a valid peremptory strike, right? But that the question for a court is, well, but did they support this valid peremptory strike? In other words, what was the prosecutor thinking? *Batson* is a rule about purposeful discrimination, about intent. And so it doesn't really matter that there might have been a bunch of valid reasons out there, if the -- if it was clear that the prosecutor was thinking about race." Transcript of Oral Argument at 49, *Foster* v. *Chatman*, 136 S. Ct. 1737 (2016) (No. 14-8349).

[4] The courts of appeals have articulated different standards for considering whether new evidence can give rise to a "new claim," albeit not in the same posture as petitioner's case. In *Dickens* v. *Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), the Ninth Circuit held that new

B. Review Is Warranted to Ensure that *Pinholster* Does Not Bar Consideration of Evidence Establishing a *Batson* Violation.

Resolving the question presented is particularly important as applied to *Batson* claims. This Court should make clear that *Pinholster* should not be applied to bar evidence of a prosecutor's discriminatory intent in jury selection, where such evidence was requested by, and withheld from, the petitioner in state court proceedings. This resolution is necessary to fulfill the promise of the Court to "vigorously enforc[e] and reinforc[e]" *Batson* and "guard[] against any backsliding." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2243 (2019) (collecting cases).

In *Batson*, this Court held that when evaluating whether the exercise of a peremptory strike was motivated by race, courts must "consider all relevant circumstances," *Batson*, 476 U.S. at 96. In *Miller-El II*, the Court held that a defendant raising a *Batson* challenge "may rely 'on all relevant circumstances' to raise an inference of purposeful discrimination." 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96–97). Similarly, in *Snyder* v. *Louisiana*, this Court reiterated that "in considering a *Batson* objection, or in reviewing a ruling claimed to be a *Batson* error, all of the circumstances that bear upon the

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evidence can be considered to create a new claim if it "fundamentally alters" the previously asserted claim, and places the claim in a "'significantly different' and 'substantially improved' evidentiary posture." (citations omitted). The Fourth Circuit has held that a new claim may be asserted if there is "new evidence [that] fundamentally alter[s] the substance of the claim so as to make it a new one," and if the new evidence "change[s] the heart" or the "nature" of the previously asserted claim. *Vandross* v. *Stirling*, 986 F.3d 442, 451 (4th Cir. 2021); *Moore* v. *Stirling,* 952 F.3d 174, 183 (4th Cir. 2020), cert. denied, 141 S. Ct. 680 (2020).

issue of racial animosity must be consulted." 552 U.S. 472, 478 (2008).

In *Miller-El I*, the Court emphasized the fact that the prosecutors had "marked the race of each prospective juror on their juror cards" as evidence of a *Batson* violation. 537 U.S. at 347. The Court explained that in light of the history of the Dallas County District Attorney's office of excluding Black venire members from juries—the same office that prosecuted petitioner—the contention that "race was a factor" in the prosecution's use of strikes was "reinforced" by the notation of race on juror cards. *Ibid.* Further, the juror cards were only introduced for the first time during federal habeas proceedings. *See Miller-El II*, 545 U.S. at 279 (Thomas, J., dissenting) (noting that the documents were "unearthed during [Miller-El]'s federal habeas proceedings and [] never presented to the state courts").

In *Foster*, this Court again held that *Batson* demands "a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." 136 S. Ct. at 1748 (citation omitted). The *Foster* Court granted relief based, in part, on the fact that the prosecutors had prepared a jury venire list on which the name of each Black venire member was highlighted, with a legend noting that the highlighting "represents Blacks." 136 S. Ct. at 1744. The Court found that such a "focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." *Id.* at 1755. In so holding, this Court refused to "blind [it]sel[f]" to relevant evidence revealing "*all* of the circumstances that bear on the issue of racial animosity," *id.* at 1749 (quoting *Snyder*, 552 U.S. at 478) (emphasis added), and rejected the State's explanation for the venire list as "reek[ing] of afterthought," *id.* at 1755 (citing *Miller-El II*, 545 U.S. at 246). In *Foster*,

this evidence became available and was presented during state habeas proceedings. *Id.* at 1744–45.

Cases like petitioner's, *Miller-El*, and *Foster* illustrate that compelling evidence of *Batson* violations can emerge at a later stage in the proceedings, as documentary evidence of a prosecutor's discriminatory intent is typically unavailable at the time of jury selection. The Fifth Circuit's reading of *Pinholster* would prohibit a petitioner from introducing such evidence of a *Batson* violation if the petitioner did not present that evidence during state proceedings—even if the State refused access to that evidence. This rule would permit a district court to grant relief in a case like *Foster*, where such evidence was discovered at the state habeas stage, but bar relief for *Batson* violations in cases like petitioner's and *Miller-El*, simply because the State obstructed access to the evidence for a longer period of time. A framework that compels courts to "blind [them]selves to [the] existence" of such evidence where it is not presented in state proceedings, notwithstanding the significance of the evidence, perversely incentivizes prosecutors to withhold material evidence until state proceedings have concluded. *Foster*, 136 S. Ct. at 1748. Such a system not only penalizes petitioners who seek to vindicate their constitutional rights, but also rewards gamesmanship by the state, contrary to the purpose of AEDPA. *See Magwood* v. *Patterson*, 561 U.S. 320, 334 (2010) (noting "AEDPA's purpose" in "preventing piecemeal litigation and gamesmanship"); *Cf. Williams*, 529 U.S. at 436 (AEDPA "does not equate prisoners who exercise diligence in pursuing their claims with those who do not."). Such a result further deprives state courts of the ability to fully review prisoners' claims. *Ibid.*

Review is warranted here to ensure that *Pinholster* does not mandate such arbitrary results, but in fact permits a petitioner to introduce compelling evidence of a *Batson* violation where such evidence was previously unavailable to the petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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