CAPITAL CASE

No. 23-

In The Supreme Court of the United States

GARLAND BERNELL HARPER
Petitioner,

v.

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Divisions*
Respondent.

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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QUESTIONS PRESENTED

Capital Case

This case arises from the State's peremptory challenge to a Black juror which Mr. Harper challenged as purposefully discriminatory. At trial, the *Batson* challenge reached the second step of analysis, and the State gave facially race-neutral reasons for the peremptory strike. The trial court denied the *Batson* challenge and the appeals court upheld the denial.

In state habeas proceedings, Mr. Harper raised an ineffective-assistance-of-appellate-counsel claim based on appellate counsel's failure to make all arguments supporting the *Batson* violation on appeal.

Mr. Harper raised both claims in federal habeas proceedings. The district court denied habeas relief and both the district court and Fifth Circuit Court of Appeals denied a Certificate of Appealability to appeal the two claims. The following questions arise:

1) Does the Fifth Circuit Court of Appeals' methodology for evaluating a prosecutor's facially race-neutral reasons for purposeful discrimination—a methodology this Court has specifically rejected and that other circuit courts do not apply—violate the constitutional right to equal protection in jury selection?

2) Would application of the correct constitutional standard have resulted in the Fifth Circuit granting a Certificate of Appealability to appeal the district court's denial of Mr. Harper's *Batson*-related claims?

PARTIES TO THE PROCEEDING

Garland Bernell Harper is the Petitioner herein and was the Appellant below.

Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, is the Respondent here and was Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Garland Bernell Harper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The ruling denying Petitioner's Motion for Rehearing and Motion for Rehearing En Banc and opinion of the United States Court of Appeal for the Fifth Circuit substituting its withdrawn opinion is published at 64 F.4th 683 (5th Cir. 2023) and is set forth at Appendix A.

The opinion of the district court for the Southern District of Texas denying Section 2254 relief is set forth at Appendix C.

The opinion of the Texas Court of Criminal Appeals denying state habeas relief is set forth at Appendix D.

The relevant portion of the opinion of the 182nd District Court of Harris County Texas denying state habeas relief is attached as Appendix E.

The opinion of the Texas Court of Criminal Appeals upholding the trial verdicts is attached as Appendix F.

JURISDICTION

On April 5, 2023, the United States Court of Appeals for the Fifth Circuit issued its opinion denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc, withdrawing its previous opinion, and substituting a new opinion denying Petitioner's Certificate of Appealability (COA).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Amendment XIV to the U.S. Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property without the due process of law . . . nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1) and (d)(2) provide in relevant part:

> **(d)**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 OF THE CASE

Garland Bernell Harper was tried and convicted of capital murder on October 7, 2010. Following the sentencing phase, he was sentenced to death on October 18, 2010, for the murders of his girlfriend and her two children.

Mr. Harper is an African-American male with severe and debilitating mental illness. The state's own expert agreed that hallucinations had a significant impact on Mr. Harper's functioning in general as well as on the day of the crime. In a

mental health assessment done shortly after his arrest and immediately following his confession, Mr. Harper reported hearing voices that were telling him what to do, ROA.1310-1311, and his Global Assessment of Functioning score was 35 on a scale of 100. ROA.1314.[1] This crime stemmed from his paranoid and delusional thinking, and he continues to this day to cycle into paranoid and delusional thinking on a regular basis.[2]

This petition arises from the State's use of a peremptory strike which was purposefully discriminatory. During jury selection, the State used nine peremptory strikes, four of them against Black prospective jurors. The defense used ten peremptory strikes. ROA.2420 (district court fact-findings).[3] From trial through state habeas, through federal habeas, Mr. Harper has challenged the State's peremptory strike of the fourth Black juror in violation of the right to equal protection. In state and federal habeas proceedings, Mr. Harper has also raised appellate counsel's ineffective assistance based on counsel's failure to argue all available facts to establish the *Batson* violation.[4]

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[1] The Fifth Circuit record on appeal will be cited as "ROA.[page number]."

[2] At the time of his arrest, within 24 hours of the crime, Mr. Harper was evaluated by a psychiatrist who noted hallucinations and delusions to be present. ROA.1682. The doctor prescribed psychotropic drugs which treat schizophrenia, bipolar disorder and hallucinations. ROA.1683. November 2022 mental health records from TDCJ indicate that Mr. Harper still receives treatment for severe mental illness.

[3] When denying Mr. Harper's habeas appeal, the Texas Court of Criminal Appeals (CCA) rejected district court fact-findings pertaining to the overall composition of the jury and the race of five people the State used peremptory challenges to strikes and all of Mr. Harper's peremptory strikes. ROA.1116.

[4] For ease of reference Mr. Harper will refer to the two claims as "*Batson*-related" claims.

A. The *Batson* Objection and Proffered Race-Neutral Reasons

During individual voir dire, the State exercised a peremptory strike against prospective juror Banks, the fourth African American it had struck, and counsel lodged a *Batson* objection. The trial court requested that the State proffer race-neutral reasons for striking her. The prosecutor gave five reasons: 1) her inability to answer any questions asked by the State directly, appearing to, as Ms. Banks described regarding one question, ponder them for the next 30 minutes; 2) that she would do away with the death penalty in favor of life imprisonment; 3) that she said rehabilitation is the most important thing to consider, that basically everyone is capable of rehabilitation and "can do better in prison for life when given the opportunity with a life sentence than they could with the death penalty"; 4) that she had not answered the question on the questionnaire about whether life is more effective than death but during voir dire said life is more effective than death, indicating as well that a friend's son was murdered and the friend forgave the person who murdered her own son; and, 5) that based on Ms. Bank's background in ministry, she was very capable of forgiving and felt very strongly about rehabilitation. ROA.6451-52. The court denied the *Batson* challenge on the grounds that the State's reasons were race-neutral. ROA.6453.

B. The Pretextual Nature of the Reasons

Three of the proffered race-neutral reasons for striking Banks are belied by the record. In addition, comparative juror analysis demonstrates that Banks' answers on her juror questionnaire and during voir dire do not differ from jurors

accepted by the State. In addition, the State emphasized assumptions it made due to Banks' involvement in ministry without asking Banks any questions about the connection between the two.

1. Ms. Banks answered voir dire questions directly.

The State obtained answers to all the questions it asked of Ms. Banks. To the extent the state was concerned about "indirect" answers, it did nothing whatsoever to ask questions in a way calculated to elicit short answers. Often it would encourage further soliloquy by saying simply, "right," rather than asking another question. Near the end, an interchange occurs that demonstrates the prosecution's ability to get direct answers when it wants them and Ms. Banks's ability to provide them:

> Q. I guess I've had a – I'm not sure exactly. You've told me a lot. I'm not sure exactly if you answered –
> A. Do I believe in the death penalty, yes, I do. Would I give it to someone whose crime justifies death, yes, I would, if that answers the question.
> Q. Right.
> A. And once again, it's not about punishing the person. It is assessing the penalty that goes with the level of crime that was committed, to me.
>
> * * *
>
> Q. And you can't be – what's important, I think you've said, is that you can't be rehabilitated, correct? That's always what's going to be most important?
> A. Rehabilitation, yes. If you cannot be rehabilitated, then.

ROA.6446-47.[5]

[5] These were actually ideal answers for the State given that the crime involved the murder of two children and that it intended to present evidence of a prior similar stabbing death in sentencing.

2. Ms. Banks specifically stated she would *not* do away with the death penalty in favor of life without parole.

In very direct responses, Ms. Banks stated the opposite of what the prosecution claimed she did:

> Q. Do you really think we need to have the death penalty as a possible punishment or would you do away with the death penalty in favor of life without parole?
> A. No, I would not.
> Q. You would keep the death penalty?
> A. I would keep the death penalty.
> Q. What purpose do you think it serves?
> A. I think it serves a purpose of someone that has no remorse or no respect for human life. . . .

ROA.5965.

3. Ms. Banks stressed the importance of rehabilitation but *did not* say that everyone is capable of rehabilitation and did not mean in the way the State suggests that a person could actually do better with a life sentence than a death sentence.

Ms. Banks stated on several occasions that some are incapable of rehabilitation—and should be sentenced to death. ROA.5965, 5966, 6444. At no point did she say *everyone* is capable of rehabilitation.

Ms. Banks did say that a person could do better with a life sentence than a death sentence, for a pretty undeniable reason: "I would have to say life imprisonment, its more effective because, wouldn't you say that because once a person is dead they can't be effective." ROA.6448. But what was meant by "more effective"? More effective at doing what? Ms. Banks clearly interpreted the question to mean more effective at rehabilitation, naturally, because it followed upon the heels of questions about rehabilitation. The State seemed to mean it as life being the more effective punishment. This twisted Ms. Banks's words.

4. The prosecution's stated reasons of not completing the questionnaire, believing a life sentence is more effective than a death sentence, and believing that forgiveness and rehabilitation are important are shared by seated White jurors.

Ms. Banks skipped one question on her questionnaire. Seated White juror Hargrave did not complete the entirety of page 12 of the questionnaire and left blank the signature line that was supposed to indicate that his responses were true and correct. ROA.237, 1387 at 12-13 (questionnaire filed under seal). The State did not question him about the incomplete questionnaire. Alternate White juror Moore did not answer a yes/no question regarding the statement "The State cannot teach the sacredness of human life by destroying it." He was not questioned about this omission or what his answer would be. ROA.238, 1393 at 11 (questionnaire filed under seal).

Seated White juror Smith, more strongly than Banks, agreed with the statement that life in prison is more effective than the death penalty. She agreed on her questionnaire. ROA.238, 1401 at 10 (questionnaire filed under seal). And during voir dire, she explained: "It depends upon what the crime is. I mean, to me, sometimes life imprisonment is worse than the death penalty." ROA.6196.

Seated White juror Price and alternate White juror Moore, like Banks, both said on their questionnaires that rehabilitation is the most important objective of punishment. Both left blank the portion of the questionnaire asking why they believed rehabilitation to be most important. Neither were questioned at all about rehabilitation during voir dire. ROA.239, 1395 at 12 (questionnaire filed under seal), 1393 at 10 (questionnaire filed under seal).

Alternate White juror Pavlovich also stated on her questionnaire that rehabilitation is most important, without explanation. ROA.240, 1397 at 10 (questionnaire filed under seal). When questioned about her answer during voir dire, she stated, like Banks, that not everyone can be rehabilitated. ROA.6677.

White juror Cotten did the same—chose rehabilitation as the most important objective of criminal punishment but did not explain. ROA.240, 1381 at 10 (questionnaire filed under seal). When questioned juror Cotten said, "[w]ell, I mean of the context of the question—I took it to be, you know, which means more. And to me, if someone can be rehabilitated, of course, rehabilitation means more." ROA.5303 The State's next question was, "Do you have any questions of me?" and juror Cotten delved further into his thoughts on rehabilitation: "Punishment—to me, punishment is not the end. Punishment is a means. Unless you attempt to rehabilitate, you know, I don't see where—I don't see where punishment is a means to an end. You know, I guess that's kind of how the context that I read that in and that's why I chose rehabilitation." ROA.5303. Instead of exploring his statements on rehabilitation in more detail, the State verified with him that he could follow the law and evidence to assess a death penalty and then passed juror Cotten to the defense. ROA.5304.

Two State-accepted White prospective jurors also selected rehabilitation as the most important objective of criminal punishment. Prospective juror Summer picked "rehabilitation" and wrote in "This is a hard choise [sic]; however, rehab can be very good if obtainable. Both rehab and punishment should go hand in hand."

ROA.240, 1403 at 10 (questionnaire filed under seal). She was not questioned about rehabilitation during voir dire. Additionally, the State accepted prospective juror Vaughan who selected rehabilitation and wrote in "but I'm not sure that is always possible, seeing as there are so many repeat offenders." ROA.241, 1405 at 10 (questionnaire filed under seal). She was not asked about her feelings concerning rehabilitation during voir dire.

5. The State claimed Banks's background in ministry resulted in her huge capability to forgive and strong belief in rehabilitation without questioning whether its assumption applied to Banks.

The State assumed that forgiveness and rehabilitation were deeply rooted in Banks's ministry. But the State did not specifically question her about this. Instead, it asked pragmatic questions about her background in ministry:

> Q: And you also have a minister diploma . . . What does that allow you to do. . .Does it actually allow you to do services or sermons? . . .Okay. When you, I guess, were getting diplomas, do you—how long does that training last? . . . Okay. And do you—is it there at the church or do you go someplace else like to seminary or— . . . Ss, you actually have, I guess, four semesters?

ROA.5957-58. Furthermore, while Banks did discuss rehabilitation and forgiveness, she was quite clear that "even though I forgive you does not mean that you get to escape the consequences of your bad choice" and that not everyone is capable of rehabilitation. ROA.5970, 5967.

C. The Journey of the *Batson* Error through the Courts

1. Appeal

Appellate counsel argued that 50% of the State's peremptory challenges were to Blacks. He argued that the numbers Ms. Banks indicated "on the scale" were

squarely in the middle, like many White people on the jury. ROA.2550. He asserted that the prosecutor's reasons for striking Ms. Banks were all pretextual.

First, she directly answered all questions put to her by the State. She was simply loquacious in part because the State questioned her differently than other jurors. The questions were not direct, as they were with other jurors. Understandably, her answers were less direct to less direct questions. ROA.2551. The State created the problem and then complained about it. ROA.2552.

Appellate counsel also challenged the State's claim that Ms. Banks would do away with the death penalty as pretextual. Though he did not deny that she made the statement, he cited to instances in voir dire where Ms. Banks *also* indicated her support for the death penalty in the right circumstances.

Regarding rehabilitation, counsel argued on appeal that others who served as jurors had also expressed strong support for rehabilitation. He offered jurors Cotten and Basey as examples. ROA.2552-53.

Regarding the unanswered questionnaire question, counsel argued there was no showing of deceit in Ms. Banks's failure to answer it. Appellate counsel also noted the imprecision of the question whether life in prison is more effective than the death penalty. ROA.2553.

The CCA noted that appellate counsel failed to preserve jury questionnaires which would tell the racial composition of the venire and seated jury. It did not understand "the scale" to which appellate counsel referred. It found that Ms. Banks was long-winded and gave non-committal answers to some questions, and that she

said she did not like to see people die. She also expressed a strong belief in rehabilitation and forgiveness. It concluded that these were race-neutral reasons for the peremptory strike and denied the claim. Appendix F at 6-7.

2. State Habeas

In State habeas proceedings, Mr. Harper attached questionnaires, part of the state-court record that was not included in the record on appeal, as exhibits to his Application for Writ of Habeas Corpus. ROA.1377-1408. He raised *Batson* error and counsel's ineffectiveness in failing to conduct comparative juror analysis. ROA.1280-1302.

In its Answer, the State contested Mr. Harper's characterization of Ms. Banks's voir dire testimony, heavily relying on a 2014 affidavit written by the trial prosecutor *four years* after voir dire. Appendix B; ROA.2168-2171. The State admitted that Ms. Banks never said she would do away with the death penalty. But the trial prosecutor claimed that this was merely an "honest mistake based on the impression I came away with after Banks repeatedly emphasized her belief in forgiveness and rehabilitation in her voir dire." ROA.2117, 2168-2171. Regarding the rest of the proffered reasons, the State attempted to support them by alluding to the prosecutor's overall "impressions" and by bolstering them with the trial prosecutor's affidavit. Based on the affidavit, it denied that the blank question on the questionnaire was a proffered reason. ROA.2119. Likewise it dismissed jurors' rating scales as a determinative factor. ROA.2119 n.25. In its comparative juror analysis, the State repeatedly emphasized voir dire on special issues in which

seated jurors talked about the death penalty. ROA.2120-2122. But the trial prosecutor *never asked* Ms. Banks about special issues. Only the judge made a brief reference to them. ROA.5969-70. In conclusion, the State relied on the affidavit of the trial prosecutor to establish that "she did not strike Banks for racially-based reasons." ROA.2123. Overall, in 10 pages addressing Mr. Harper's factual arguments supporting pretextual proffered reasons, the State quoted the "credible affidavit of prosecutor Bradley" and discussed it five separate times in rebutting them. ROA.2117, 2118-19, 2119 n.25, 2122, 2124.

In addition, the State asserted that many sitting White jurors concluding that they "did not exhibit the same or similar characteristics" as Banks. ROA.2421-22. The State had not raised any of thereasons at trial.

The Texas district court adopted in full the State's Proposed Findings of Fact, Conclusions of Law and denied the substantive *Batson* claim and the ineffective-assistance-of-counsel claim pertaining to it. ROA.2442, 2443. It simply used the State's pleading as its order and signed the last page. ROA.2380-2452. It adopted all the State's findings of fact without reference to defense arguments. In doing so, it relied on the trial prosecutor's "credible affidavit" five times. ROA.2421 (three separate times), 2423 (two separate times). Noting that the *Batson* claim could not be addressed under state law because it was previously raised, the Court went on to address it in the alternative. ROA.2442. It adopted in full the State's proposed findings of law without reference to the defense arguments. ROA.2442-43.

The CCA adopted most of the district court's order. ROA.1115. Relevant to the *Batson* facts, it rejected district court fact-findings pertaining to the overall composition of the jury, the race of five people the State used peremptory challenges to strike, and the race of all people Mr. Harper used peremptory challenges to strike. ROA.1116. It noted that the substantive *Batson* claim was procedurally barred. *Id.*

3. Federal § 2254 Proceedings

Mr. Harper filed in federal district court an Application for Writ of Habeas Corpus virtually identical to the state habeas application. *Compare* ROA.1119-1369 *with* ROA.41-350. In its Motion for Summary Judgement and Answer, the State again argued that the substantive *Batson* claim was defaulted and the ineffective-assistance-of-counsel claim should be denied on the ground that the *Batson* claim was meritless; Mr. Harper was not prejudiced by counsel's failure to raise the facts and arguments in support of it on direct appeal. ROA.2108-2130. In doing so it again relied on the *post-hoc* affidavit of the trial prosecutor and a plethora of additional reasons supporting the trial prosecutor's race-neutral reasons. ROA.2117-2123.

The district court disposed of the *Batson*-related claims in three pages. ROA.1001-1003. Critical to its denial of the claims was the trial prosecutor's *post-hoc* affidavit and the State's argument that White sitting jurors "did not exhibit the same or similar characteristics as those that caused the State to dismiss Banks." ROA. 1002. The court described this as "additional information" provided by the

State in state habeas proceedings. *Id*. Applying AEDPA deference, it found that "the state courts were not unreasonable because Banks' questioning could reasonably give prosecutors the impression that she would not be a good juror." ROA.1003. It denied a Certificate of Appealability (COA). ROA.1007-08.

The Fifth Circuit reviewed the *Batson*-related claims with AEDPA deference and the COA standard of review. Slip Op. 3-4.[6] It concluded that that the substantive claim of *Batson* error should be reviewed based only on arguments made on appeal to the CCA. Regarding ineffective assistance of counsel for the limited arguments raised on appeal, it concluded that the underlying *Batson* claim was without merit. On both claims, it denied a COA.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit has adopted an incorrect and unique standard for determining whether a prosecutor's race-neutral reasons are pretextual and therefore indicative of purposeful discrimination.

In 2019, the Fifth Circuit Court of Appeals parted with this Court's and other circuit courts' *Batson* jurisprudence to establish its own standard of reviewing race-neutral reasons for pretext. *Chamberlin v. Fisher*, 885 F.3d 832, 842 (5th Cir. 2018) (*en banc*). As the dissent said, the novel approach "[made] meaningless *Miller-El II*'s

[6] Mr. Harper petitioned for e*n banc* rehearing because the panel did not apply the correct COA standard of review. It held Mr. Harper to a higher burden of proving the claims were meritorious. *En banc* rehearing was denied but the panel issued a substituted opinion in which the use of the wrong standard was simply replaced with the language of the correct one. Slip Op. 1. The Court initially used the wrong standard when determining whether a COA should be granted on *Batson*-related claims.

bar on considering new reasons for strikes." *Id.* at 854 (Costa, J., Stewart, C.J., Davis, J., Dennis, J., and Prado, J., dissenting).

Batson set out the three-step process for establishing purposeful discrimination in a prosecutor's peremptory challenge. *See Batson v. Kentucky*, 476 U.S. 79 (1985). First, a defendant must make out a *prima facie* case of intentional discrimination. *Id.* at 93-94. Next, the State must provide race-neutral reasons for its peremptory challenge. And third, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 98; *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Miller-El v. Miller-El v. Dretke*, 545 US. 231, 239-40 (2005) (*Miller-El II*); *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) (*Miller-El I*). One racially discriminatory strike is too many and purposeful discrimination may be shown solely based on the trial record. *Flowers*, 139 S. Ct. at 2241.

In Mr. Harper's case the court ordered the State to provide race-neutral reasons. Those reasons were critical to the determination of purposeful discrimination in the strike. *Miller-El I*, at 338-39 ("the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike"). Furthermore, they determine the review of the prosecutor's discrimination from that point forward:

> [W]hen illegitimate grounds like race are at issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason

> does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El II, at 252; *accord Flowers*, 139 S. Ct. at 2259 (Thomas, J., Gorsuch, J. dissenting).

However, in the Fifth Circuit, a two-thirds majority of an *en banc* court announced a new rule. When a prosecutor states her reasons, the court can "consider the entire context in which a white juror was accepted." *Chamberlin v. Fisher*, 885 F.3d 832, 842 (5th Cir. 2018) (*en banc*). As the dissent explained, the Fifth Circuit now "uses the answers to questions not identified at trial as the basis for overturning [a] district court's finding that clear and convincing evidence of discrimination exists." *Chamberlin*, 885 F.3d at 846 (Costa, J. dissenting).

This is precisely what the Texas Court of Criminal Appeals did in Mr. Harper's case, and it went further. The CCA's findings of fact impermissibly bolstered the prosecution's stated reasons both by pointing to places in the record that provided additional reasons to support them and by relying heavily on an after-the-fact affidavit from the trial prosecutor attempting to explain her reasons and put them in a better light. ROA.2418-23.[7]

The state court rejected Mr. Harper's comparative juror analysis by pointing to additional differences between Banks and seated White jurors. It did so for jurors

[7] The very need for the trial prosecutor to explain and refute reasons given at trial in itself demonstrates purposeful discrimination. *See Miller-El II* at 265; *Snyder*, at 485 ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent").

Smith, Cotton, Price, and alternate jurors Moore and Pavlovich, concluding that they "did not exhibit the same or similar characteristics" as Banks. ROA.2421-22.

The habeas court also found, based on the trial prosecutor's affidavit, that the unsubstantiated reason—Banks would do away with death—was an honest mistake that she made due to her *real* reason—Banks's repeatedly-articulated belief in forgiveness and rehabilitation. ROA.2421. It found, based on the affidavit, that the trial prosecutor did not mean she struck Banks due to the question left blank on her questionnaire. She struck Banks due to Banks's belief in rehabilitation. *Id*. It found, based on the trial prosecutor's affidavit, that the State struck Banks for "several reasons" (apparently not stated at trial) including her strong belief in forgiveness and rehabilitation. ROA.2423. And it found, based on the trial prosecutor's affidavit, that the trial prosecutor did not espouse group bias by citing Banks's background in ministry as a reason. What she *meant* was that the background in ministry made her strongly in favor of forgiveness and rehabilitation. *Id*. The habeas district court then relied on the prosecutor's affidavit written four years later to find four reasons to be nondiscriminatory. The court credited the prosecutor's after-the-fact pivot to rehabilitation and forgiveness as *the* reason for the strike. It was but *one* reason given at the time of trial and the others did not pan out.

The federal district court found the state court determination of no purposeful discrimination not unreasonable. It upheld the state court's ruling on the

substantive *Batson* and ineffective-assistance-of-counsel claims. It denied a Certificate of Appealability on the claims. ROA.1007-08.

The Fifth Circuit Court of Appeals found that the substantive *Batson* claim raised in state habeas was procedurally defaulted. As a result, it reviewed that claim based only on arguments made on appeal, Slip Op. 9, and through the COA standard of review: "whether jurists of reason 'could disagree with the district court's resolution of [the] constitutional claims' or 'could conclude the issues presented are adequate to deserve encouragement to proceed further.'" Slip Op. at 3 (quoting *Buck v. Davis,* 580 U.S. 100, 115 (2017) (quoting *Miller-El I*, at 327)). It reviewed the ineffective-assistance-of-counsel claim based on the entire record in the state habeas court. Slip Op. 15.

In doing so, it made the same mistake as the state habeas court and based its mistake on the *en banc* Fifth Circuit decision in *Chamberlin*. It considered the *post-hoc* affidavit of the trial prosecutor as well as reasons outside the proffered reasons at trial, finding that "*Miller-El II* 'does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence . . . .'" Slip Op. 16 (quoting *Chamberlin* at 674). But the Fifth Circuit's reach beyond the stated reasons at trial in Mr. Harper's case as well as in *Chamberlin* fly in the face of this Court's stand or fall precedent and other circuits' application of it. *See*, *e.g.*, *United States v. Taylor*, 636 F. 3d 901, 905-06 (7th Cir. 2011) (clear error for court looked to other justifications supporting race-neutral reasons); *Love v. Cate*, 449 App'x 570, 572-73 (9th Cir. 2011) (appellate counsel

improperly pointed out non-racial characteristics distinguishing seated jurors from prospective Black juror when trial prosecutor never stated he relied on the reasons); *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1269-70 (11th Cir. 2009) (CCA's reasoning does not support race-neutral reasons when State didn't provide that reason at trial).

II. Mr. Harper's direct appeal preserved the substantive *Batson* claim for review in light of all record-based evidence of it and he should be granted a COA on it in addition to the ineffective-assistance-of-counsel claim.

Mr. Harper should have been granted a COA on both the *Batson* substantive claim and the ineffective-assistance-of-counsel claim and the two claims should have been reviewed in the alternative. The Fifth Circuit should not have confined itself only to facts raised in support of the *Batson* claim on appeal. "[I]n considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (citing *Miller-El II*, 545 U.S. at 239). Once the claim was raised, the Fifth Circuit's *Batson* review should have proceeded based on all record-bound facts.[8] It could not pick and choose, as it did, the appeal arguments and not the habeas arguments—all based on the state-court record. Slip Op. 9-12 (concluding that "[h]aving sorted through which arguments in support of Harper's *Batson* claim were at least debatably exhausted, we next consider whether

[8] Any concern in the case that the state court did not have the opportunity to review the arguments is eviscerated by its consideration of the *Batson* claim in the alternative. ROA.2442.

reasonable jurists could debate the district court's denial of the non-defaulted *Batson* arguments").

The Fifth Circuit was of course bound by AEDPA's very strict standard of review. But the state-court denial of the *Batson*-related claims was based on an unreasonable application of clearly-established law *and* an unreasonable determination of the facts in light of the state-court record. *See* § 2254(d)(1) and (2). The state court considered race-neutral reasons not raised by counsel in step two of the *Batson* analysis, contrary to *Miller-El II*, and those reasons figured into its factual basis for denying the *Batson*-related claims. ROA.2418-2423.

Review of the *Batson*-related claims *de novo* would dictate granting the COA. Jurists of reason *did* debate the method through which the state habeas court reached its conclusion—relying on reasons not stated by the prosecutor as well as the prosecutor's *post-hoc* explanations of the reasons for the strike. *See Chamberlin* (*en banc* decision with five dissents)

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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