No. 23–5089

IN THE
Supreme Court of the United States

GARLAND BERNELL HARPER,
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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

WILLA COCKSHUTT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
stephen.hoffman@oag.texas.gov

Counsel for Respondent

CAPITAL CASE
QUESTIONS PRESENTED

In a capital case, the State is entitled to a jury that will fairly consider, and be willing to impose, the death penalty. In this capital case, the State exercised a peremptory strike against a black prospective juror who was loquacious and noncommittal, insisted on the importance of rehabilitation and tied her distaste for the death penalty to her religious beliefs, failed to respond to one of the most important items on the questionnaire, and had strong feelings about forgiveness. In light of those facts and all the other evidence before it, the trial court rejected Harper's claims that the State's preemptory strike against the prospective juror was made on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Texas Court of Criminal Appeals (CCA) affirmed on direct appeal and, after Harper modified his substantive *Batson* claim and added additional claims on state habeas review, also denied those claims. A federal district court denied the claims on federal habeas review, and the Fifth Circuit did not grant a certificate of appealability (COA).

Under *Batson*, if a defendant establishes a prima facie case that a State has exercised a peremptory strike based on race, the burden shifts to the State to establish that it struck the prospective juror for a race-neutral reason. If the State provides such a reason, the trial court must then determine whether the defendant has shown purposeful discrimination. Under *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), a court reviewing a trial court's resolution of a *Batson* challenge may not consider race-neutral justifications for a strike that the State did not make in the trial court. Rather, a prosecutor must "state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id*. at 252. In evaluating arguments that Harper made for the first time on state habeas review, reviewing courts considered the prosecutor's affidavit, which alleged no new reasons for the strike, and record evidence showing that allegedly similar jurors were not actually similarly situated to the stricken juror. This case now presents the following questions:

1. Was review of the trial court's denial of Harper's *Batson* claim properly limited to considering the prosecutor's affidavit and record evidence?

2. Did the Fifth Circuit correctly deny a COA?

LIST OF ALL PROCEEDINGS

The State of Texas v. Harper, No. 1272085 (182nd Judicial District Court, Harris County, Texas 2010)

Harper v. State, No. AP-76,452, 2012 WL 4833834 (Tex. Crim. App. Oct. 10, 2012) (not designated for publication)

Ex parte Harper, No. WR-81,576-01, 2016 WL 748215 (Tex. Crim. App. Feb. 24, 2016) (per curiam) (not designated for publication)

Harper v. Davis, No. H-16-762, 2020 WL 3791971 (S.D. Tex. July 7, 2020)

Harper v. Lumpkin, No. 20–70022, 19 F.4th 771 (5th Cir. 2021)

Harper v. Lumpkin, No. 20–70022, 64 F.4th 684 (5th Cir. 2023)

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INTRODUCTION

Harper contends that the Fifth Circuit impermissibly deviated from this Court's jurisprudence when it decided *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) (en banc) and applied that purportedly faulty rationale in the instant case. Pet. at 18. Harper argues that the Fifth Circuit has developed an "incorrect and unique" standard that deviates from this Court's "stand or fall" precedent—*Miller-El II* & *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*)—and from other circuits. Pet. at 14. But nothing in *Chamberlin* or the instant case departs from this Court's precedents, and Harper has shown no important, outcome-dispositive conflict for this Court to resolve.

Harper's substantive *Batson* claim, to the extent it differed from the same claim on direct appeal, was procedurally defaulted. The CCA and federal courts therefore correctly limited their review to the facts before the court on direct appeal. And Harper was precluded from adding new facts to his claim in federal court by *Cullen v. Pinholster*, 563 U.S. 170 (2011). In analyzing Harper's ineffective assistance of appellate counsel claim, the state and lower courts followed *Miller-El II*'s mandate to review the record and test the veracity of the State's proffered reasons for a strike without permitting the State to proffer new reasons for the challenged juror's strike. Harper failed to show that the State's reasons were pretextual or that a comparison to other jurors revealed bias.

Harper's petition thus does not demonstrate any special or important reason for this Court to review the lower court's decision. Accordingly, no writ of certiorari should issue.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the evidence presented during guilt-innocence in its opinion on direct appeal:

> [Harper] and Triska Rose began dating in the spring of 2008. Their relationship progressed quickly, and [Harper] moved in with Rose and her two daughters: Mya, aged seven, and Briana, aged sixteen. The couple's relationship soon deteriorated as [Harper] became convinced that Rose was having an affair. (It was undisputed at trial that Rose was not having an affair.) [Harper] began following her, calling her obsessively, and dropping by her place of employment without warning.
>
> On the evening of October 23, 2008, [Harper] told Rose that he wanted to have sex. Rose responded that she was tired, which [Harper] took as further evidence of her infidelities. Rose told him that she was sick of his accusations and wanted to end things. This led to a fight in which Rose and Briana were somehow cut with a knife. Believing that he would go to jail for domestic violence if the police were called, [Harper] bound and gagged Rose and the girls. He questioned them one at a time in order to "get to the bottom of this." After several hours, Mya "admitted" that Rose had been cheating on him. This sent him into a jealous rage, he later claimed. He stabbed Rose repeatedly and then strangled Briana with his hands, telling her that she should not have sided with her mother. Finally, he strangled Mya with a phone charger. Afterwards he went out "to think." When he returned he thought that Briana and Rose still might be alive, so he slit their throats.

> After [Harper] cleaned up, he visited some friends. Later that morning, he called Chandra Parson, a friend of the family, to say that Mya was ill and would not be coming over before school as she usually did. When Parson asked about Rose, [Harper] hung up. After learning that Rose was not at work and Briana was not at school, Parson became worried. She went by the apartment, called repeatedly, and filed a missing-person report with the police. Finally, late in the afternoon, Parson and some other friends decided to enter Rose's apartment.
>
> The friends broke in through the back door and found Rose, Briana, and Mya dead in the master bedroom. All three were tied up. An autopsy showed that Rose was stabbed approximately thirty-six times: her throat was slit, she had defensive wounds on her hands and arms, cuts on her chest, stomach, and face. Briana died from strangulation, but she also had cuts on her neck and chest, and three of her fingernails were broken. Mya had been strangled with the cord of a phone charger. The medical examiner said that it would have taken about three minutes for the children to die from asphyxiation.
>
> While the police were processing the crime scene, [Harper] approached and said he wanted to turn himself in. At the police station, [Harper] confessed to the murders.

App. F at 56a–57a.[1]

II. Facts Pertaining to Punishment

The State presented evidence of Harper's prior crimes. From 1989 to 2009, Harper committed various acts of violence, including: Harper put a knife to a woman's neck, demanded money, and threatened to kill her before robbing her; Harper slapped a woman, prevented her from leaving his apartment, and

[1] When citing the Petitioner's Appendices, the Respondent uses the Petitioner's page numbers rather than the internal document pagination.

caused her to fall out of a car window; Harper hit a cab driver in the head after being told he would go to jail if he did not pay the fare; Harper entered into a realty business and threatened the worker there before stealing her purse and using her ATM card to withdraw cash; Harper grabbed a woman's purse and fled in his wife's car; that same day, Harper grabbed another woman's purse and pushed her pregnant sister into a shopping cart before stealing a car and fleeing; Harper grabbed yet another woman's purse and fled, evading pursuit by breaking into an elderly woman's apartment and hiding in her bathroom; and Harper's fingerprint and thumbprint were identified on a piece of paper left by the body of Teasa Jackson, who had been stabbed to death and left for her seven-year-old son to find. ROA.7674–76, 7678–89, 7731–42, 7760–70, 7793–94, 7797–813, 7815–16, 7824–26, 7839–47, 7878–88, 7921–37, 7949, 8039, 8152, 8155–57.[2]

Subsequent DNA analysis of Jackson's vaginal swab matched the male profile obtained from the homicide of Triska Rose and her daughters. ROA.7868–71, 8062–75, 8088, 8201–03. On March 24, 2010, a buccal swab was taken from Harper who was in jail pending trial for the instant triple homicide. ROA.8144–46. DNA analysis showed that Harper could not be excluded from the DNA profile obtained from the vaginal swab; the probability statistics

[2] "ROA" refers to the Record on Appeal. All references are preceded by volume number and followed by page number.

excluded any other person from being a possible contributor. ROA.8204–06. The State also presented evidence of Harper's prison infractions and victim impact testimony. ROA.8217–19, 8237, 8247–51, 8261–74.

The defense presented testimony from Dr. Richard Dudley, who had performed a psychiatric examination of Harper. ROA.8431. In Dr. Dudley's opinion, Harper suffered from schizoaffective disorder—a disorder where the individual simultaneously has the symptoms required for a diagnosis of schizophrenia and the symptoms required for a diagnosis of major mood disorder. ROA.8448–49. Dr. Dudley opined based on a reasonable medical probability that Harper was mentally ill at the time of the offense and during the period from September to October 2008; that Harper was deteriorating; that he was suffering from a disorder characterized by psychotic thinking; that he truly believed that Triska Rose was having an affair that put his life in danger; and that he thought Rose attempted to poison him. ROA.8491–92. Dr. Dudley disagreed with the State's expert's opinion that Harper had an antisocial personality disorder because Harper was clearly remorseful for his actions—something that would not be expected from a person with antisocial personality disorder—and Harper turning himself in was a sign of remorse. ROA.8565–66, 8601.

The defense called Harper's maternal aunt and Bernell Paul Harper, Harper's father, who himself had been in and out of prison. ROA.8822–33, 8885–86. The defense also called: Susan Perryman-Evans, social worker and former employee of TDCJ, who testified to the circumstances of an offender sentenced to life without parole in a maximum-security facility; Curtis Chillis, the resident manager for a Christian transformation facility where men study the Bible after they are released from prison, who related that Harper went to Bible study in prison, always tried to help others, and participated in a program where inmates were allowed to leave the prison on Sunday and preach to the community; Darion Coleman, a neighbor of Harper's family, who testified that Rose and Harper seemed like a happy couple; Don McGinty, a volunteer mentor at the Carol Vance Unit of TDCJ, who testified that Harper was an excellent role model in prison and probably impacted thirty to forty inmates; and Abner Freeman, who had known Harper since the late 1980s or early 1990s, and who testified that he did not see Harper outside of Teasa Jackson's apartment or around the apartment complex or the car on the evening of her death. ROA.8376–79, 8606–19, 8657–58, 8681–93, 8732–33, 8741.

In rebuttal, the State called Dr. Mark Moeller, a psychiatrist who met with Harper for a mental-health evaluation. ROA.8956. Dr. Moeller diagnosed Harper as schizophrenic, paranoid type, in partial remission with mild symptomology. ROA.8958–60. In Dr. Moeller's opinion, there was a component of malingering in Harper's case. ROA.8960–61. Dr. Moeller testified that

Harper's mental illness—specifically paranoid schizophrenia—had nothing to do with the murders. ROA.8969. Harper was not acting from a delusion but from jealousy—a normal human emotion. ROA.8973–74. There was no evidence of Harper having delusional thinking or being psychotic at the time of the murders. ROA.8974. Dr. Moeller did not believe that Harper was remorseful. ROA.8975–76, 9112–14. In Dr. Moeller's opinion, Harper is in a high-risk category for committing future violence, in or out of prison. ROA.8980.

III. Facts Pertaining to Harper's *Batson* Claim

During the State's voir dire of Banks, she stated that she previously attended New Life Christian Center Church and obtained a minister diploma after two years of training. ROA.5957. Banks, who initially obtained the diploma for her own spiritual growth, used her minister diploma to lead small Bible study groups. *Id.*

Banks mentioned the murder of a close friend's son who had dated her daughter. ROA.5959. Banks stated that it was "phenomenal" because her friend forgave the murderer, and Banks "watch[ed] her grow and go through faith. . ." ROA.5960. Banks described her friend as "at total peace with God" because she forgave the murderer. *Id.* She said that she learned a lot watching her friend go through this process. *Id.* Banks thought the murderer was sentenced to forty-plus years, and she thought it was an appropriate punishment because both families—the victim's and the murderer's—were distraught. ROA.5961. Banks described the murderer as married with small children whose family was destroyed because they would see him behind bars, and he was not able to contribute or raise his family. *Id*. Banks stated:

> I mean, if you give him life in prison its more - - I think whenever there's an opportunity to rehabilitate someone and when someone has true repentance - - I say, true repentance to me is not, "I'm sorry but there's a chance it would happen again." True repentance to me is, "If I was ever put in this position again, this would not occur again." And it's not that I'm just sorry that I got caught, but I'm really ailing in my heart about my actions.
>
> So - - and I think at the end of the day when this man finally sobers up and gets the opportunity to look back over his actions that day, he'll have to deal with it the rest of his life.

ROA.5962.

When asked if she felt that the offender had repented, Banks replied:

> At that particular time, probably not. But that's the thing about being in strong faith because you have to forgive whether that person is - - if they're dealing with it or not.
>
> Some people, they'll say, yeah, I'm sorry that I did what I did. But you know, you're pulling me into another area because my thoughts are - - is this here: My faith tells me that God looks at the heart. Man looks at the outer appearance. I could be here just as guilty as the next person and you'll look at my outer appearance and determine a certain thing about me, but only the Father knows my true heart. He's the one that knows whether I'm truly sorry about the mistakes that I've made. So, forgiving someone cannot be based upon an outward appearance.
>
> So, he could have told her he was sorry and maybe he didn't, but she had to make the decision to forgive based upon her own faith.

> Because at the end of the day, you know, she's got to stand before the Father herself. That's just my belief.

ROA.5962–63.

When asked if she had thought about the death penalty more since filling out the juror questionnaire, Banks said that she was pretty settled on her thoughts on the death penalty, asserting: "I don't like to see people die." ROA.5963–64. Banks stated that she was not one to say "oh, you killed somebody so that means you die too. I don't feel that strongly about it. I would have to hear more. I would need to know the full circle of what was going on, what happened." ROA.5964. Banks stated that if one of her loved ones was taken from her, she would look at it from a victim's standpoint and "then on the flip side of it." ROA.5964–65. If one of her children did this, she questioned how much she would want her own child to suffer because of his action. ROA.5965.

Banks then said that she would keep the death penalty for someone who had no remorse or respect for human life, such as serial killers without rehabilitation. ROA.5965, 5971. However, she also thought life in prison was an opportunity for offenders to change, become educated, and become a role model to others in prison. ROA.5965–66. Banks answered "absolutely" when asked if she felt strongly about people's potential to be rehabilitated. ROA.5966. She thought most people could be rehabilitated if given the opportunity and if a person chose to be. ROA.5967. When asked if she was saying that a life sentence rather than a death sentence could serve a valuable purpose because a convict could help others once rehabilitated, Banks replied:

> Yeah, that's what I'm definitely saying, if rehabilitation is an option where there will be value added, where this person can one day add value to someone else's life. Because whatever this person did that caused them to be, you know, a candidate for capital murder, if you encounter someone that may be just selling drugs on the street and they're going to be locked up for two or three years or whatever, maybe that's where you started off. You know, I don't know what the case would be. I don't know if those types of prisoners would ever have the opportunity to comingle. I don't know very much about the jail system. I'm just saying if you take that person's life, take that person that's on death row, and they're able to be rehabilitated, and they can be used to minister to or mentor or counsel someone that's in there for something not so major and it turns that person's life around and it keeps that person from going out committing crimes, from that standpoint, yeah, I think that person should live.

ROA.5968–69. Banks then stated that the "flip side," the death penalty, was a hard decision and that the punishment was not to be left to the jurors—it was just a matter of how the jury answers the two questions. ROA.5969. Banks agreed that she felt very strongly about rehabilitation and forgiveness, but that forgiveness did not mean someone should escape the consequences of a bad choice. ROA.5970.

Banks agreed that motive was important, and then she recounted a long example of a father who chose to drink and use his cell phone while driving with his children, who were then killed in an accident. ROA.5971–73. When

Banks was re-directed to discussing the death penalty, she stated she could "say death penalty" depending on "what was done, how it was done, what was the motive," and how well the prosecutor presented the information and whether there was no chance for rehabilitation. ROA.6444.[3] Banks, who exhibited initial confusion that the jury did not return a life or death verdict, also thought that the special issues were answered privately, not as a group with other jurors. ROA.6445. When Banks again acknowledged that rehabilitation was very important to her, the following exchange occurred:

> Q: Right. So, what you're saying is that if there's that case where the person shows no evidence of remorse, regret about what happened, you think there's a chance that they can be rehabilitated, that's something that you're always going to consider?
>
> A: That is something that I will consider. And I think that that should be the case always.
>
> Q: Okay.
>
> A: You should always consider rehabilitation. Life is so very precious. This is not a rehearsal, we don't get to come back and do it again.

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[3] Due to a copying error, Volume 7 of the trial reporter's record, which includes Banks's voir dire testimony, actually starts within what is listed as Volume 6. ROA.5801. Banks's testimony starts at ROA.5955 and ends at ROA.5974. Her testimony picks up again under what is listed as Volume 9, or at ROA.6444, and finally ends at ROA.6450. The defense's *Batson* challenge, the State's response, and the trial court's ruling are at ROA.6451–54.

ROA.6446. Banks then stated that she would give the death penalty to someone whose crime justifies death. *Id*. Banks acknowledged that whether the person can be rehabilitated is most important. ROA.6447.

When Banks was told that she did not indicate on her questionnaire whether she agreed or disagreed with the statement: "Life imprisonment is more effective than the death penalty[,]" Banks said that she "would have to say 'yes,' because there are more people that are serving life in prison than there are on death row." ROA.6447–48. Banks stated that her initial response would be life in prison is more effective than the death penalty, unless she had thirty more minutes to ponder on the question. ROA.6448. Banks then said:

> I would have to say life imprisonment, it's more effective because, wouldn't you say that because once a person is dead, they can't be effective. So, I would say life in prison with the rehabilitation would be more effective than someone that's on death row that's just waiting to die. I guess. I guess.

Id.

During defense counsel's voir dire, counsel pointed out that the special issues or questions did not say anything about proof of rehabilitation. ROA.6449. Counsel also asked Banks is she was able "to listen to the facts and reach a determination based on the questions that are proposed to them, their understanding of the facts, and their understanding of the law and not be close-minded." ROA.6449–50. Banks answered "yes." ROA.6450. Defense counsel did not ask any other questions.

At the conclusion of voir dire, the State exercised a peremptory strike against Banks. *Id*. Then, defense counsel noted that Banks was African-American and asked for a race-neutral explanation from the State. ROA.6451. The prosecutor responded:

> First of all, I believe that the record will clearly show [(1)] Ms. Banks'[s], in my opinion, inability to answer any of the questions that I asked her directly. Which is a concern of mine. I think she called it pondering for the next 30 minutes and that's, basically, I think the way that Ms. Banks appears to evaluate things.
>
> The other thing is that she stated that [(2)] she would do away with the death penalty in favor of life without parole. She believes that [(3)] rehabilitation is the most important thing to consider; and she believes, frankly, that everybody is capable of rehabilitation and that a person can actually do better in prison for life when given the opportunity with a life sentence than they could with the death penalty. She stated that - - [(4)] she didn't answer the question on the questionnaire about whether or not she would - - whether she thought life in prison was more effective than the death penalty. When asked just now, she stated that she believed life in prison was more effective than the death penalty.
>
> She also indicated that her friend or her son's friend was murdered and that the friend forgave that person who murdered her own son. [(5)] I believe it is clear based on Ms. Banks'[s] background in ministry, the things that she said today, forgiveness is something she's very capable of doing and rehabilitation is something she feels very strongly about. And those are the reasons that I don't think that she would be a good juror for the State in this case.

ROA.6451–52 (numbers added).

Defense counsel argued that the State had exercised eight peremptory strikes, that four of those were against African-Americans: Kelvin Clark, Deidra Broadnax, Martha Pugh, and Donna Banks, and that their ratings on the juror questionnaires were the same as some of the accepted jurors. ROA.6453. The trial court ruled that the State's reason for striking Banks was race neutral and denied the *Batson* challenge. ROA.6453–54.

IV. Conviction and Postconviction Proceedings

In 2010, a jury found Harper guilty of capital murder for the death of his girlfriend and her two daughters, aged seven and sixteen. App. C at 25a. Based on the jury's answers to the special issues, the trial court sentenced Harper to death. *Id.*; Tex. Code Crim. Proc. art. 37.071, § 2(g). The CCA affirmed Harper's conviction and death sentence on October 10, 2012. App. F. Harper did not seek a writ of certiorari in this Court from his direct appeal.

On October 22, 2012, Harper filed a postconviction application for a writ of habeas corpus asserting twenty-four grounds for relief. App. D at 42a. The trial court did not hold an evidentiary hearing and entered findings of fact and conclusions of law and recommended that relief be denied. *Id*. Other than a "few minor adjustments," the CCA adopted the trial court's findings and conclusions and denied relief on February 24, 2016. *Id*. at 43a.

Harper filed a federal habeas petition, raising thirty-one claims, which was denied. App C. The district court did not certify any issue for appeal. *Id*. at 40a. The Fifth Circuit denied COA and, upon Harper's filing for panel rehearing and rehearing en banc, the Fifth Circuit withdrew its prior opinion and substituted a new one. App. A. Harper now seeks certiorari review of the Fifth Circuit's decision.

V. Procedural History of Harper's *Batson* and *Batson*-related Claims.

Harper first brought his substantive *Batson* claim regarding prospective juror Banks on direct appeal. App. F at 60a–61a. But Harper "failed to preserve the jury questionnaires" upon which he relied, and the CCA held that the State's reasons for the peremptory challenge were "race-neutral" and affirmed the trial court's decision. *Id*. at 61a. On state habeas, Harper raised a modified[4] version of that substantive *Batson* claim, as well as claims that his appellate counsel was ineffective for failing to conduct a comparative juror analysis and that his trial counsel was ineffective for failing to preserve potential *Batson* claims. ROA.1280–304. The CCA found that claim eleven, i.e., Harper's substantive *Batson* claim, was procedurally barred and denied relief as to all three claims. App. D at 42a–43a; *see* ROA.1280.

On federal habeas, Harper renewed his substantive *Batson* claim and the two *Batson*-adjacent claims from his state writ application, as well as the claim that the "State's discrimination extended to all African-American

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[4] Harper argued that "the Fifth Circuit Court of Appeals requires [a comparative juror analysis] . . . when investigating the merits of a *Batson* challenge" under *United States v. Brown*, 553 F.3d 768, 796 (5th Cir. 2008), and included a comparative juror analysis. ROA.1283, 1290–97, 1300–02.

jurors." App. C at 28a, 34a. The district court held that Harper had not shown that the state court "was unreasonable in finding that [Harper] did not demonstrate purposeful discrimination" and denied these claims. *Id.* at 35a. Harper then sought COA for his substantive *Batson* claim and his ineffective assistance of appellate counsel claim. App. A at 8a, 15a. The Fifth Circuit determined that Harper "procedurally defaulted the 'juror questionnaire' aspects of his 'pattern of strikes' argument" but had "exhausted the more limited 'pattern of strikes' argument that he presented on direct appeal." *Id.* at 10a. The Fifth Circuit found that Harper had "exhausted his objections to the State's first and second proffered reasons" for the peremptory strike but that Harper could only rely on the comparison to jurors Cotton and Basey regarding the "third proffered reason," that Harper was limited to the "'deception' argument" regarding the "fourth proffered reason," and that Harper's argument regarding the State's "fifth proffered reason" was "entirely procedurally defaulted." *Id.* at 10a–11a. The court denied COA as to both claims. *Id.* at 10a, 17a.

REASONS FOR DENYING THE WRIT

The questions that Harper presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id.*

I. An Appellate Court Reviewing a *Batson* Claim Should Consider All the Evidence in the Record Bearing upon the Issue.

This Court is familiar with the steps employed when a *Batson* challenge is made: (1) the defendant must make a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race; (2) the prosecutor then must articulate a race neutral reason for the strike(s); and, (3) the court must determine whether the defendant has carried her burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96–98. This Court has placed the burden on the party "who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'" *Id.* at 93 (citation omitted). To determine if the defendant has carried this burden, a court must undertake "'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* (citation omitted).

Once the *Batson* analysis reaches the third step, this Court has directed that the reviewing court must consider "all of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). This final step "largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21. And, "[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El I*, 537 U.S. at 339. In *Miller-El II*, the Court explained, "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." 545 U.S. at 240–41. The "stand or fall" doctrine is this Court's command that "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." *Id*. at 252.

But *Miller-El II* does not prohibit a reviewing court from considering other evidence in the record to reach the ultimate determination of whether discrimination occurred. To the contrary, the *Miller-El II* and *Snyder* opinions considered the entire record—not just portions related to the prosecutor's stated reasons—to determine if there had been purposeful discrimination.

The Fifth Circuit's decisions in *Chamberlin* and Harper's case are consistent with these opinions and did not side-step or abrogate this Court's stand or fall precedent, as Harper contends. Indeed, the Fifth Circuit recognized in *Chamberlin* that the State's "timely expressed neutral reasons, after all, are what must be tested for veracity by the trial court and later reviewing courts" and that *Miller-El II* "criticized both the prosecutor and later reviewing courts for accepting either entirely different substituted reasons or post hoc reasons for strikes." 885 F.3d at 841. But where, as in *Chamberlin*, a reviewing court is presented with "newly discovered comparisons to other prospective jurors," the Fifth Circuit concluded that it was "manifestly unfair" that the State should be "stuck with the answer it had given to an entirely different question during jury selection" and that the "prosecutor would forfeit the opportunity to respond to such contentions." *Id*. at 841–42. In doing so, the Fifth Circuit drew upon this Court's later acknowledgment that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483. "The Court thus drew a distinction between: (1) inventing a new reason for a strike after the fact (not allowed); and (2) reviewing the record to test the veracity of the prosecution's reasons already given in their proper time (required)." *Chamberlin*, 885 F. 3d at 842.

The Fifth Circuit also corrected the district court's determination in *Chamberlin* that *Miller-El II* requires a comparative juror analysis. *Id*. at 838–39. This Court has not held that a comparative juror analysis is required in the *Batson* framework. *See McDaniels v. Kirkland*, 813 F.3d 770, 782–85 (9th Cir. 2015) (Ikuta, J., concurring) ("The Supreme Court did not discuss, let alone squarely establish, a new procedural rule that state courts must conduct comparative juror analysis when evaluating a *Batson* claim."); *United States v. Atkins*, 843 F.3d 625, 634 (6th Cir. 2016) ("To begin with, the government is correct that the district court's failure to conduct its own comparative juror analysis is not sufficient to require reversal."). This Court denied certiorari review in *Chamberlin* and should deny review of the instant case. *Chamberlin v. Hall*, 139 S. Ct. 2773 (2019).

II. There Is No Split of Authority Regarding the Application of *Batson* that Warrants This Court's Review.

Harper's purported conflict between the Fifth Circuit's treatment of *Batson* claims and that of other Circuits is illusory. *Love v. Cate*, 449 F. App'x 570, 572–73 (9th Cir. 2011), is non-precedential and distinguishable, and the other decisions that Harper cites simply apply the rule recognized in *Miller-El II* and *Chamberlin* to reject attempts to substitute new race-neutral reasons for the ones given by the trial prosecutor. In *United States v. Taylor*, for instance, involving a direct appeal from a federal conviction and not review under the deferential standards of the AEDPA[5], the prosecutor struck two black jurors on the basis that they could not impose the death penalty on a non-shooter. 636 F. 3d 901, 903 (7th Cir. 2011). But the prosecutor had accepted a white juror with the same view. *Id*. The *Taylor* court had previously remanded the matter, saying:

> "It is apparent that an evidentiary hearing is needed for the court to properly develop the record and address this *Batson* challenge. That will allow the court to question the prosecutor as to why the government eliminated Watson based on the non-shooter question but chose not to challenge similarly-situated white jurors."

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[5] The Antiterrorism and Effective Death Penalty Act of 1996.

Id. at 904 (quoting *United States v. Taylor*, 277 F. App'x 610, 612–13 (7th Cir. 2008)). Exactly as in *Chamberlin*, the prosecutor clarified a retrospective comparison between jurors. And the court expressly limited the prosecutor to its "non-shooter question" justification, inviting clarification only over the retention of white jurors who answered the same. Nevertheless, on remand, the prosecutor gave seven new reasons for removing one of the black jurors, including her reluctance to impose the death penalty. *Id*. at 904. The district court "accepted the prosecutor's expanded explanation" and used the new reasons in deciding that the prosecutor's use of a peremptory strike "was not racially motivated." *Id*.

The Seventh Circuit held that the new justifications for the strike were not permissible considerations and found itself unable to "parse the district court's decision, separating the permissible from the impermissible reasons supporting the court's credibility finding." *Id*. at 906. Accordingly, it vacated the judgments and remanded for a new trial. *Id*. Nothing about this contradicts the Fifth Circuit's jurisprudence, which forbids the contemplation of new reasons for a strike.

In *McGahee v. Ala. Dep't of Corr*., 560 F.3d 1252, 1256 (11th Cir. 2009), the prosecution struck all black panelists from the jury. When challenged, the State cited only general reasons and good faith for the exercise of the strikes and the trial court denied the claim. *Id*. at 1259. Only after the defendant was convicted and sentenced did the State proffer specific reasons for its use of strikes. *Id.* at 1259–60. The trial court never made any ruling as to whether the reasons stated were race-neutral. *Id.* at 1260. On appeal, the Eleventh Circuit faulted the trial court's application of *Batson* and the state appellate court's refusal to consider all the evidence available on the issue of discrimination. *Id.* at 1260–62. For example, it failed to consider that the prosecution cited low intelligence as a reason to strike some of the panelists. *Id.* at 1267. And it failed to consider the prosecution's explanation that it did not want to leave the last remaining black panelist alone, which strongly indicated racial motivations. *Id.* at 1267–68. The court expressly held, "[b]ecause the [appellate] court omitted from step three of its analysis crucial facts which McGahee raised in his brief to that court, we find that the [Alabama] Court of Criminal Appeals did not review 'all relevant circumstances' as required by *Batson*." *Id.* at 1263. This is precisely the approach applied by the Fifth Circuit in *Chamberlin* and the instant case—a reviewing court should consider all the evidence as commanded by *Batson*. Many more cases recognize that *Batson*'s framework requires assessing the plausibility of the contemporaneous justifications the prosecution gave for its peremptory strikes and condemn consideration of post hoc or substituted reasons for the strikes. *Porter v. Coyne-Fague*, 35 F.4th 68, 78–79 (1st Cir.

2022); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004); *People v. Ojeda*, 503 P.3d 856, 865 (Colo. 2022); *State v. Clegg*, 867 S.E.2d 885, 908–09 (N.C. 2022).

In *Love*, an unpublished case, the prosecution struck the only black venire member, who was a social worker. In response to the *Batson* challenge, the prosecutor justified the strike by saying he thought teachers and social workers did not make good jurors. 449 F. App'x at 572. But this rationale was belied by the prosecution's acceptance of three non-black jurors who had those professions. *Id.* The trial court erroneously concluded that Love had not made a "prima facie case of race discrimination because only one peremptory strike was at issue" and thus, there was no "pattern," which the trial court believed was required. *Id.* at 573. Further, Love had asked the trial court "to explore whether or not the prosecutor dismissed all venire-members who were teachers or social workers," but the court refused. *Id.* at 573–74. The Ninth Circuit remanded "for an evidentiary hearing" because the record "did not provide an adequate basis for showing that the prosecutor had any reason other than race for striking the venire-member." *Id.* at 571.

The Ninth Circuit found that the prosecutor's lack of credibility as well as his refusal to even question the stricken juror was substantial evidence of discrimination. *Id.* at 572–74. And the trial court's refusal to explore whether all teachers and social workers were dismissed by the prosecution rendered its factual determination erroneous and unreasonable under the AEDPA. *Id.* at

573. While the prosecutor's stated reason for striking the juror—her profession—remained the same at the evidentiary hearing, the respondent "pointed out to the district court that these jurors had non-racial characteristics that distinguished them from the black venire-member." *Id*. The Ninth Circuit held that the district court properly rejected respondent's reasoning because it was "not the prosecutor's rationale." *Id*. at 573.

Although seemingly in conflict, because *Love* is unpublished, it has no precedential value. *See Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022) (an unpublished opinion from a panel of the Ninth Circuit does not constitute binding authority for a Ninth Circuit panel in a subsequent case); Ninth Circuit Rule 36-3(a) (only published opinions of the Ninth Circuit are binding precedent except when relevant under law of the case, claim preclusion, or issue preclusion). Recently, the California Supreme Court agreed with the Fifth Circuit that *Miller-El II* does not bar a reviewing court, when evaluating a comparative-juror argument made for the first time on appeal, from considering the full record to determine whether a defendant's comparative-juror arguments rest on similarly situated prospective jurors. *People v. Miles*, 464 P.3d 611, 636–37 (Cal. 2020). The instant case and *Chamberlin* are also distinguishable from *Love*. Unlike in *Chamberlin* and the instant case, the *Love* trial court's legal error rendered its factual findings unreasonable under the AEDPA, and, therefore, the trial court's favorable determination of the prosecutor's credibility and authenticity was no longer entitled to deference. *Chamberlin* is further distinguishable from *Love* because the comparison to other jurors was not raised at trial. To the extent that *Love* does represent an aberrance in *Batson* jurisprudence, the issue is not yet ripe and should percolate further before this Court considers exercising its review.

Moreover, if this Court were to find for Harper's suggested approach—that of the *Chamberlin* dissent or, arguably, *Love*—it would create an incentive for a criminal defendant to withhold comparative juror arguments at trial. A defendant would know that he could secure a reversal merely by raising the argument for the first time on appeal because appellate courts would be powerless to consider record evidence showing that the argument is unfounded. No sound reason commends Harper's suggested rule. This Court should reject it.

Harper's claimed lower-court conflict is therefore illusory. He simply has not shown that the lower courts have adopted different outcome-dispositive, precedential rules or any other compelling reason for this Court to exercise its discretionary jurisdiction over this case. The petition should thus be denied.

III. The Fifth Circuit Properly Denied a COA.

Even if Harper could show an important or compelling reason for this Court to exercise review over this case, Harper's case does not present an appropriate vehicle. It was neither the Fifth Circuit's supposed distortion of the stand or fall doctrine nor the courts' alleged refusal to heed the command that "all of the circumstances that bear upon the issue of racial animosity must be consulted" that confined the Fifth Circuit to reviewing only the facts raised in support of the substantive *Batson* claim on direct appeal. Rather, the court's review was limited by the fact that the claim on state habeas—or portions of it—were procedurally defaulted. The lower courts considered all the circumstances when analyzing Harper's ineffective assistance of appellate counsel claim, and the Fifth Circuit properly denied COA. In any event, only by purposefully disregarding record evidence could a reviewing court find discrimination here, and Harper's claims fail even under de novo review.

A. Aspects of Harper's substantive *Batson* claim not raised on direct appeal are procedurally defaulted.

Harper contends that "[t]he Fifth Circuit should not have confined itself only to facts raised in support of the *Batson* claim on appeal." Pet. at 19. But it is well settled that federal review of a claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Foster v. Chatman*, 578 U.S. 488, 497 (2016); *Harris v. Reed*, 489 U.S. 255, 265 (1989). Harper raised a *Batson* claim pertaining to Banks on direct appeal, but the claim did not include the extensive briefing and analysis that Harper provided on state habeas review. *Compare* ROA.2546–53 (direct appeal claim) *with* ROA.1280–97 (state habeas claim). As a result, the CCA held that the claim was procedurally barred. App. D at 42a. The CCA bars all record-based claims not raised on direct appeal as procedurally defaulted. *Ex parte Rojas*, 981 S.W.2d 690, 691 (Tex. Crim. App. 1998); *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998). The Fifth Circuit has recognized this rule as an adequate state ground that bars federal habeas relief. *Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005). The Fifth Circuit therefore correctly determined that aspects of the substantive *Batson* argument raised on state habeas but not direct appeal were procedurally defaulted. *See* App. A at 10a–11a. And Harper forfeited any misapplication argument by failing to brief the issue in his COA application. App. A at 10a; *see Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Additionally, because the *Batson* claim was adjudicated on the merits by the CCA on direct appeal, any new evidence on which Harper relied in support of the instant *Batson* claim would be barred under *Pinholster*, 563 U.S. at 181–82.

B. The Fifth Circuit correctly denied COA, and Harper's claims fail even under de novo review.

Harper contends that the Fifth Circuit should have granted COA on both his substantive *Batson* claim and his ineffective assistance of appellate counsel claim. Pet. at 19. With respect to his substantive *Batson* claim, he argues that the Fifth Circuit should have "proceeded based on all record-bound facts." *Id.* But, as discussed in Section A above, the procedural bar was properly applied and served to limit the scope of Harper's substantive *Batson* claim to the arguments and evidence adduced on direct appeal. App. A at 10a–12a. Because Harper could not make a substantial showing of the denial of a constitutional right with respect to these arguments, the Fifth Circuit properly denied COA.

A trial court's denial of a *Batson* claim "is entitled to 'great deference' and 'must be sustained unless clearly erroneous.'" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (quoting *Snyder*, 552 U.S. at 477). That, however, "is the standard on direct review," whereas AEDPA imposes an even higher standard of review which "'demands that state-court decisions be given the benefit of the doubt.'" *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). "Therefore, the federal court's role is to 'determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary.'" *Hoffman v. Cain*, 752 F.3d 430, 448–49 (5th Cir. 2014) (quoting *Murphy v. Dretke*, 416 F.3d 427, 432 (5th Cir. 2005)).

And a federal court can only issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, "a state court has reviewed a petitioner's claim on the merits," the federal court's "review is constrained by the deferential standards of review" of AEDPA. *Nelson v. Davis*, 952 F.3d 651, 658 (5th Cir. 2020). The federal court "may not issue a COA unless reasonable jurists could debate that the state court's decision was either 'contrary to, or involved an unreasonable application of, clearly established Federal law,' or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Id.* (internal citations omitted) (quoting 28 U.S.C. § 2254(d)(1)–(2)). "For claims that are not adjudicated on the merits in the state court, however, [a federal court does] not apply the deferential scheme laid out in § 2254(d) and instead apply a de novo standard of review." *Id.* (citation omitted).

Harper contends that his direct appeal preserved the substantive *Batson* claim for review "in light of all record-based evidence of it" and that COA should have been granted. Pet. at 19. But Harper's substantive *Batson* claim fails even under de novo review. The prosecution struck Banks for race-neutral reasons. Even if Harper's pattern of strikes argument had been preserved, it would not succeed. The Fifth Circuit noted in its opinion that it has denied *Batson* claims based on similar statistics. App. A at 13a; *see Sheppard v. Davis*, 967 F.3d 458, 472 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2677 (2021).

Harper's argument that the prosecutor's reasons were pretextual also fails on de novo review. The prosecutor's first reason, as the CCA found, was race-neutral. App. E at 60a–61a. Banks did indeed give extremely long-winded answers that were noncommittal and often gave the impression that she would have a difficult time sentencing anyone to death. Banks provided many answers in narrative form that meandered and left the impression that she was equivocating. App. A at 13a; *see Miller-El II*, 545 U.S. at 248 (noting that peremptorily striking a venireperson for inconsistent answers can be a race-neutral reason).

Second, the prosecutor's statement that Banks believed "that everybody is capable of rehabilitation and that a person can actually do better in prison for life when given the opportunity with a life sentence than they could with the death penalty" is a fair assessment of Banks's voir dire answers. *See Haynes v. Quarterman*, 526 F.3d 189, 200 (5th Cir. 2008) (where prospective juror stated "to sentence someone to death is a last resort" and that the sentence of death would be applied if there is "not a possibility of redemption, of improvement on that person," these are valid and acceptable race-neutral explanations); *see Davis v. Ayala*, 135 S. Ct. 2187, 2200 (2015) ("[The venireperson's] voir dire responses amply support the prosecution's concern that he might not have been willing to impose the death penalty."); *Hoffman*, 752 F.3d at 449 (accepting hesitancy to impose a death sentence as race-neutral).

Third, although the prosecutor mistakenly said that Banks would do away with the death penalty, it is understandable that the prosecutor came away with this impression. Bradley's mistaken recall when viewed against the tenor of Banks's voir dire was not improper and did not reveal discriminatory intent. Bradley's assertion is only one of several race-neutral reasons that the prosecution gave for striking Banks, which included Banks's inability to answer questions directly, her views on rehabilitation, her belief that life in prison was more effective than death, and her ministry background and emphasis on forgiveness. ROA.6451–52. The trial court deemed the prosecution's race-neutral reasons for striking Banks to be credible, and Harper has failed to surmount the deference accorded to the trial court's decision. The state habeas court also examined the claim in the alternative and determined that Harper failed "to show that the prosecutor's reasons for striking Banks were racially-based." App. E at 51a (no. 20).

Further, a "*Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." *Sheppard*, 967 F.3d at 472 (citing *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009); *Stevens v. Epps*, 618 F.3d 489, 500 (5th Cir. 2010)). Here, the Fifth Circuit held that Harper failed to rebut "at all" the State's fifth proffered reason (i.e., Banks's strong belief in the importance of forgiveness) and that it was procedurally defaulted. App. A at 11a, 14a–15a.

As for Harper's claim that his appellate counsel was ineffective for failing to conduct a comparative juror analysis, that claim also fails under de novo review. The state court conducted a comparative juror analysis on habeas review comparing Banks to five other jurors and found that those jurors "did not exhibit the same or similar characteristics as Banks." App. E at 48a–49a (nos. 197–201). Harper has not shown that the CCA would have adjudicated the claim differently on direct appeal or, indeed, that the claim has any merit. *See* Pet.; App. C at 35a. This Court's precedent does not require a comparative juror analysis. *See Chamberlin*, 885 F.3d at 838–39. Because the comparative juror analysis lacked merit and because it is not required, appellate counsel could not have been ineffective for failing to present one. *Moore v. Vannoy*, 968 F.3d 482, 489 (5th Cir. 2020) (holding that appellate counsel "need not raise every nonfrivolous ground of appeal, but should instead present solid, meritorious arguments based on directly controlling precedent") (internal quotations and citation omitted).

Harper offers nothing to demonstrate that the prosecutor's reasons were pretext for discrimination. Harper contends that the state courts rejected his comparative juror analysis by "pointing to additional differences between Banks and seated White jurors." Pet. at 16. But the state court's findings were based on the jurors' voir dire. *See* App. E at 48a–49a (nos. 197–201). Harper further complains that "the CCA's findings of fact impermissibly bolstered the prosecution's stated reasons." *Id*. But, as Harper acknowledges, a *Batson* analysis requires the reviewing court to consider "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478 (citing *Miller-El II*, 545 U.S. at 239); Pet. at 16, 19.

Harper also contends that the state habeas court and lower courts erroneously considered "the post-hoc affidavit of the trial prosecutor as well as reasons outside the proffered reasons at trial." Pet. at 18. Harper argues that by relying on this "post hoc" reasoning, the habeas court violated *Miller-El II*'s "stand or fall" rule. *Id.* at 18. But, as explained in Sections I and II, above, *Batson* and *Miller-El II* do not compel the prosecutor to explain at trial why she did not strike prospective white jurors. Rather, they allow prosecutors to later clarify these reasons in light of retrospective comparative juror analyses. And Harper's complaint that the state and federal courts relied on "post hoc" justifications in rejecting his claim is incorrect because the state courts pointed to evidence from the trial record supporting its decision that Banks was struck for race-neutral reasons. App. D at 46a–52a; App. F at 60a–61a. Further, the prosecutor's affidavit presents no impermissible "new reasons" for her strike of Banks. *Compare* App. B *with* ROA.6451–52.

Harper simply assumes pretext by claiming that some of the prosecutor's reasons were untrue, Pet. at 5–6, but these claims are contradicted by the record. Without more, Harper's claim is conclusory and was properly rejected by the district court.

CONCLUSION

As demonstrated above, the Fifth Circuit correctly denied COA in this case. Harper's petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

WILLA COCKSHUTT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
Fax: (512) 320–8132
stephen.hoffman@oag.texas.gov

Attorneys for Respondent