

CAPITAL CASE

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 Divisions
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its Brief in Opposition (BIO), the State turns this Court's *Batson* jurisprudence on its head. It spins existing carefully crafted procedure aimed at demonstrating racial bias into procedure also applicable to the prosecution's task of simply stating reasons why it struck a Black prospective juror. Because "a *Batson* analysis requires the reviewing court to consider 'all the circumstances that bear upon the issue of racial animosity,'" the State claims a reviewing court must also consider all the circumstances that bear on race-neutrality. *See* BIO 18-19; 32 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El v. Dretke*, 545 US. 231, 239 (2005) (*Miller-El II*)). Therefore, it claims, it is of no moment that the Texas CCA impermissibly bolstered the race-neutrality of the prosecution's reasons for striking Donna Banks by relying on the prosecution's *post hoc* affidavit. BIO 32. But this Court's precedent does not support the argument.

A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If a 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. It is the reasons stated at trial, standing alone, that must be examined for pretext.

The task of demonstrating racial bias is wholly different than the task of not engaging in it. The prosecution's opportunity to demonstrate race neutrality comes when it gives its reasons for the strike. It is upon these reasons that the prosecutor must "stand or fall." *Miller-El II* at 252. Nothing in this approach allows for after-the-fact combing of the record to compare accepted jurors on many *additional*

grounds to the struck juror. Nor does it allow for *post hoc* changing reasons or *post hoc* explaining of unsupported ones. Yet this is precisely what the CCA did and the Fifth Circuit upheld pursuant to its newly-minted procedure. It is *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018), that turned *Batson* and its progeny on its head.

At trial, when asked to give her reasons for striking Black juror Donna Banks, the prosecutor listed five stand-or-fall 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.

In a post-conviction affidavit, the prosecutor felt the need to bolster the record by reasserting that the strike was not racially biased. ROA.2169-70. This effort in itself renders her reasons suspect. *Miller-El II* at 246 (reviewing court’s “readiness to accept the State’s substitute reason ignores . . . its pretextual timing”);

United States v. Taylor, 636 F.3d 901, 906 (7th Cir. 2011) (government’s reliance on additional reasons in support of a strike “raises the spector of pretext”). The prosecutor withdrew and attempted to explain away an erroneous reason (Banks would do away with the death penalty), for the most part softened the hyperbole of some of her asserted reasons that were not borne out by the record (*inability* to directly answer *any* of the questions, *everybody* is capable of rehabilitation, rehabilitation is *the most* important thing to consider), and said that the blank-on-the-questionnaire reason for striking wasn’t what she meant. She went on to unnecessarily assert that she did not strike *any* of the four Black prospective jurors for racially-based reasons. *Id.*

The state court adopted whole hog the trial prosecutor’s post-conviction “credible affidavit” and found that her erroneous assertion that Banks would do away with the death penalty was an honest mistake. ROA.2421. It relied on the “credible affidavit” to find that “the prosecutor did not strike Banks because she left a blank on the questionnaire; she struck Banks because of her repeated, fervent, pervasive belief in rehabilitation.” ROA.2421. It relied on the “credible affidavit” to find that “although there were other prospective jurors who mentioned rehabilitation or thought it was important, they did not reach the intensity of Banks’ belief in rehabilitation and forgiveness.” ROA.2423 It relied on the “credible affidavit” to find that not only was Banks predisposed toward forgiveness and rehabilitation due to her background in ministry, but also that “it was not

overreaching to say that [Banks] seemed to think everyone could be rehabilitated.”¹ ROA.5965. *See also* ROA.5971, 6444 (there is a gap in the testimony in the record), 6446. Finally, the state court found that jurors Smith, Cotton, and Price, and alternate jurors Moore and Pavlovich “did not exhibit the same or similar characteristics as Banks.” 2421-2452.²

Both the federal district court and Fifth Circuit deferred to the Texas CCA’s opinion. Both found that it was not, under 28 USC § 2254, contrary to clearly-established federal law, an unreasonable application of it, or an unreasonable determination of the facts. Both determined that the *Batson*-related claims should be reviewed under AEDPA’s strict standard of deference to the state court. ROA.995, 1003; Slip Op. 15.

And both allowed the prosecutor’s changing characterization of her reasons to determine the merits of the *Batson*-related claims. The Fifth Circuit denied a COA on the *Batson*-related claims because it found that the “prosecutor’s affidavit falls squarely within the type of evidence that *Chamberlin* said later reviewing courts may consider: a prosecutor’s ‘opportunity to respond’ to ‘newly discovered comparisons to other prospective jurors.’” Slip Op.16 (citing *Chamberlin v. Fisher*,

¹ The *post-hoc* statement was equally untrue. Banks testified that she would not do away with the death penalty. She would keep it. “I think that it serves a purpose of someone that has no remorse or no respect for human life. . . . I mean you take people that are serial killers. They have no respect for human life. They don’t regret what they’ve done. They’d do it again if they were given the opportunity to. So what is the purpose of – there’s no rehabilitation.” ROA.5965.

² Banks was an ideal juror for this case even though she believed in rehabilitation because she also believed that death was appropriate for someone who did not care about human life. As the State points out, its case for death was premised on Mr. Harper’s prior convictions and crimes. BIO, 3-4. Included was a prior murder similar to the one in this case. The State presented the evidence of Harper’s involvement at sentencing in a mini-trial that spanned two days. ROA7867-8211 According to her testimony, Ms. Banks would place Harper in the category of those who could not be rehabilitated.

885 F.3d 832 (5th Cir. 2018)). The Fifth Circuit does not cite Supreme Court case law for the proposition. It cites its own law, as it must. Slip Op. 16. The language is nowhere to be found in this Court’s jurisprudence.

The State argues that “[t]he Fifth Circuit’s decisions in *Chamberlin* and Harper’s case are consistent with [*Snyder* and *Miller-El II*] and do not side-step or abrogate this Court’s stand or fall precedent.” BIO 18. It likewise contends that “Harper’s purported conflict between the Fifth Circuit’s treatment of Batson claims and that of other circuits is illusory.” BIO 20. But the Seventh Circuit, for one, does not apply the Fifth Circuit’s faulty standard. It completely rejected a district court’s finding of no discrimination when the only reason given by the prosecutor for striking a prospective black juror was her response to a non-shooter question and the court went far afield of that single question.

[T]he court should have limited its inquiry and analysis to exploring that very question. But the remand hearing went much further. The government compared Watson to jurors Nowak, Evans, and Wills against the backdrop of seven new reasons unrelated to the jurors’ willingness to impose the death penalty on a non-shooter. And the district court factored several of these new reasons into its analysis.

United States v. Taylor, 636 F.3d at 905-06. In fact, the court found that “reliance on additional reasons raises the specter of pretext.” *Id.* at 906. Because the court could not separate new impermissible reasons from old impermissible reasons, it vacated the convictions and sent the case back for a new trial. *Id.* Other circuits likewise do not apply the Fifth Circuit’s faulty standard. *Currie v. Adams*, 149 Fed. Appx. 615, 616 (9th Cir. 2005) (prosecutor not entitled to “open up the record” to argue considerations not articulated at trial); *Adkins v. Warden*, 710 F.3d 1241,

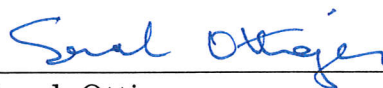
1254 (11th Cir. 2013) (court should not have considered prosecutor's after-the-fact affidavit); *Drain v. Woods*, 595 Fed. Appx. 558, 580 (6th Cir. 2014) (court could not supply its own thinking that mistaken reason resulted from oversight).

Finally, the State's assertion that the Fifth Circuit's critical misinterpretation and misapplication of the *Batson* analysis is not worthy of this Court's attention is baseless. This case involves a grossly distorted rule of law and is precisely the type of case worthy of this Court's consideration under Supreme Court Rule 10.

CONCLUSION

For all the foregoing reasons, and those asserted in the petition, certiorari should be granted.

Respectfully submitted,



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