No. _____
(Capital Case)

In The
Supreme Court of the United States

TERRY PITCHFORD,

v.

BURL CAIN, Commissioner, Mississippi Department of Corrections; LYNN FITCH, Attorney General for the State of Mississippi.

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

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QUESTIONS PRESENTED (CAPITAL CASE)

District Attorney Doug Evans convicted Terry Pitchford, aged 18 years at the time of the crime, of capital murder and secured a death verdict in the Grenada Circuit Court before Judge Joseph Loper on February 9, 2006, with the entirety of jury selection and opening arguments taking place on February 6.

After direct and collateral reviews in state court, the Northern District of Mississippi granted habeas corpus relief upon concluding that the trial court failed to determine the plausibility of the prosecutor's proffered reasons for peremptorily striking four Black venire members or otherwise consider the full circumstances bearing upon whether Mr. Evans's reasons for striking any and each of these four venire members was pretextual and in violation of the Equal Protection Clause. In so doing, the District Court ruled the state supreme court's reliance on its waiver jurisprudence improperly foreclosed consideration of pretext under *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Fifth Circuit reversed, finding that Judge Loper implicitly made determinations for each of the four strikes, trial counsel waived argument of pretext, and the Supreme Court of Mississippi's waiver jurisprudence comports with *Batson*.

This opinion in *Pitchford v. Cain* confirmed the Fifth Circuit's disavowal of earlier circuit jurisprudence recognizing, inter alia, that since *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), capital petitioners had been unable to "waive[] any *Batson* claim based on a comparison analysis," *Woodward v. Epps*, 580 F.3d 318, 338 (5th Cir. 2009), deepening the Fifth Circuit's split, joined by two other circuits, with the majority of courts of appeals in the application of *Batson*.

This petition presents the following questions:

1. Does clearly established federal law determined by this Court and applied in six other circuits require reversal of a state appellate court's denial of relief from a capital prosecutor's discriminatory exercise of four peremptory strikes against Black venire members wherein the trial court, for each of the four strikes, failed to determine "the plausibility of the reason in light of all evidence with a bearing on it"? *Miller-El II*, 545 U.S at 251–52.
2. Does Mississippi Supreme Court precedent, which deems waived on direct review arguments of pretext not stated in the trial record, defy this Court's clearly established federal law under *Batson*?
3. Does a finding of waiver on a trial record possessing *Batson* objections, defense counsel efforts to argue the objection, and the trial court's express assurance the issues were preserved, constitute an unreasonable determination of facts?

PARTIES TO THE PROCEEDINGS BELOW

Terry Pitchford, Applicant and Petitioner/Appellee below.

Burl Cain, Commissioner, Mississippi Department of Corrections; and Lynn Fitch, Attorney General for the State of Mississippi, Respondents/Appellants.

CORPORATE DISCLOSURE STATEMENT

For purposes of Rule 29.6, no party to the proceedings in the Fifth Circuit is a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

State v. Pitchford, No. 2005-009-CR (Circuit Ct. of Grenada Co. Mississippi) (Feb. 8, 2006, convicted) (Feb. 9, 2006, sentenced to death).

Pitchford v. State, 45 So. 3d 216, 222 (Miss. 2010) (conviction and sentence affirmed on direct appeal).

Pitchford v. State, No. CV2013-116 (Circuit Ct. of Grenada Co. Mississippi) (May 15, 2015) (order denying post-conviction relief following retrospective competency determination) (Nov. 9, 2015) (order denying motion for rehearing).

Pitchford v. State, 240 So. 3d 1061 (Miss. 2017) (affirming denial of post-conviction relief)

Pitchford v. Cain, 706 F. Supp.3d 614 (N.D. Miss. 2023); App.011–030 (granting the writ on partial summary judgment); [1]

Pitchford v. Cain, 126 F.4th 422 (5th Cir. 2025); App.001–010 (reversing grant of writ, remanding to district court).

[1] Proceedings in the District Court on the unadjudicated balance of the petition for writ of habeas corpus are stayed pending disposition of this petition for writ of certiorari. No. 4:18-cv-00002-MPM, Dkt. 255 (Mar. 13, 2025).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Terry Pitchford respectfully petitions for writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals, which reversed the Northern District of Mississippi's grant of the writ of habeas corpus pursuant to 28 U.S.C. § 2254.

INTRODUCTION

The State's theory of the case is that during a botched robbery of a rural bait and grocery store in the morning of Sunday, November 7, 2004, two Black teenagers, Eric Bullins (age 16) and Mr. Pitchford (age 18), killed the shopkeeper, Mr. Rueben Britt (age 67). *Pitchford v. State*, 45 So. 3d 216, 222–23 (Miss. 2010). The State does not allege that Mr. Pitchford personally killed the victim. *Id*. The State's theory is that Bullins fired the lethal .22 caliber shots while Mr. Pitchford fired a .38 caliber revolver kept by the shopkeeper and loaded with non-lethal ratshot pellets, which revolver the State has maintained was the one collected from Mr. Pitchford's car during an un-warranted search a day prior to the vehicle's processing by the state crime lab. *Id*. The State argued that Mr. Pitchford formed the requisite mens rea for capital murder because he believed the revolver was loaded with lethal ammunition. Dkt. 203 at 98 (ROA.175556)[2] (citing Tr. 774). The

[2] Citations to the Appendix submitted with this Petition are to "App." Citations to District Court filings not in the Appendix are to the docket number as "Dkt." with an alternative parenthetical cite to the same document in the Record on Appeal ("ROA") filed in the Fifth Circuit, when available; citations to any Fifth Circuit filings not included in the Appendix are designated "Doc."

For the Court's convenience, the state appellate and federal court records as well as audio of the oral argument before the Fifth Circuit are available at https://www.phillipsBlack.org/pitchford-v-cain-files.

State argued that the .38 caliber revolver was "the chain" tying Mr. Pitchford to the crime scene. Dkt. 203 at 107–08 (ROA. 23-70009.17564–65) (citing Tr. 628).

Local law enforcement bungled the investigation, permitting the cleaning of the crime scene and destruction of vital evidence hours before the state crime lab arrived to process the scene. Dkt. 203 at 193–94 (ROA.17650–51). No law enforcement collected into evidence a .38 revolver repeatedly pictured on the counter in crime scene photos taken by local law enforcement. To this day, it has not resurfaced. The presence of the shopkeeper's revolver at the crime scene is irreconcilable with the State's theory that Mr. Pitchford took it and left it in his car. Dkt. 203 at 188 (ROA.17646) (citing Tr. 498–99, 517).

Mr. Pitchford, just months past his eighteenth birthday,[3] was held shirtless in an air-conditioned room, with his hands cuffed behind his back, and repeatedly interrogated over an extended period of time. Dkt. 203 at 124–25 (ROA.17582–17583). At least once, Mr. Pitchford's invocation of his right to silence was ignored. *Id*. Investigator Robert Jennings described the tag-team interrogation he and Investigator Greg Conley conducted. Tr. 571 ("It was obvious that he had a communication problem with Officer Conley."). Jennings reported that after Conley left the room, Jennings prepared to administer a polygraph test, and Mr. Pitchford began crying. Dkt. 203 at 125 (ROA.17583). Jennings testified that while Conley

[3] The youth of a suspect is relevant in assessing voluntariness. *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011). Whether a confession is voluntary "depends on the circumstances surrounding the confession, such as the defendant's youth, good reputation, lack of familiarity with the criminal justice system, and relationship with or trust in the interrogating officer(s)" *Harden v. State*, 59 So. 3d 594, 605 (Miss. 2011).

was out of the room and the tape recorder was off, he elicited Mr. Pitchford's confession that he and Eric Bullins committed the robbery and murder together. *Id.* But the recorded statements only provided that Mr. Pitchford was pressured by Bullins into participating in the robbery, that Pitchford carried his own gun he knew to be loaded with non-lethal ammunition, and that after Bullins fatally shot Mr. Britt, Pitchford, under duress fired into the floor near Britt's dead body. *Id.*

Meanwhile, less than two months after Bullins's indictment for capital murder, this Court announced its decision in *Roper v. Simmons*, 543 U.S. 551 (2005), rendering Bullins ineligible for the death penalty. Dkt. 203 at 42 (ROA.17500). During pre-trial detention in this case, Bullins and another inmate murdered by stomping to death another inmate for stealing tobacco. Dkt. 203 at 44 (ROA.17502).[4']

On February 6, 2006, Mr. Pitchford's jury was seated in the Grenada Circuit Court, with District Attorney Evans, exclusively, exercising the prosecution's four strikes presently at issue. Judge Loper sustained each of these strikes over the defense's *Batson* objections, thereby supplying the basis for this certiorari petition.[5] After opening statements later that day, the guilt phase, including deliberations and verdict spanned the next two days. The penalty phase, including deliberations

[4] After Mr. Pitchford's conviction and sentencing in this case, Bullins, on D.A. Evans's express recommendation, pleaded guilty to manslaughter for Mr. Britt's murder, and was sentenced as per Evans's recommendation to a 20-year sentence with 10 years served concurrent with the sentence for the jailhouse murder. Doc. 42 at 14 n.3.

[5] This trial court and prosecutor are reprising their roles from the Court's last *Batson* case, *Flowers v. Mississippi*, 588 U.S. 284 (2019). *Infra* n.19.

and sentencing verdict, transpired on February 9, 2006, with the verdict returned at 4:32 p.m. Tr. 166–816.

After filing an initial habeas corpus petition in the Northern District of Mississippi on September 17, 2018, federal counsel obtained extensive discovery pursuant to Rule 6 of the *Rules Governing Section 2254 Cases in the United States Supreme Court* [hereinafter "Habeas Rules"], upon an ample good cause showing of grave issues concerning the State's duties under *Brady v. Maryland*, 373 U.S. 83 (1963). Dkt. 191 (ROA.11083–11090). Multiple discovery orders produced thousands of pages of new documentary and other evidence, as well as deposition of 11 individuals over 17 days of testimony (across a 20-month span owing to delays caused by the COVID-19 pandemic), including local law enforcement of the Grenada County Sheriff's Department, current and former personnel of the Mississippi Crime Lab, and, ultimately District Attorney Doug Evans and former Assistant District Attorney Clyde Hill. *Id.* This discovery revealed that prosecutors had suppressed significant evidence incontrovertibly impeaching key State witnesses[6] (Dkt. 203 at 35–69 (ROA.17493–17527)) and provided no further information or explanation of the disposition of the gun photographed on the counter after the

[6] For examples, previously undisclosed evidence of prior criminal conduct, including crimes of dishonesty, and previously undisclosed favorable treatment from D.A. Evans's office of Stephanie Grey, the sole witness to the exterior of the crime scene shortly before the homicide implying Mr. Pitchford was present, and James Hathcock, an evergreen snitch witness relaying Mr. Pitchford's alleged jailhouse confession. *Id.*

crime (*see, e.g.*, Dkt. 180-11 at 70–72) (ROA.10792–10794[7]); Dkt. 180-5 at 213 (ROA.9461)[8]).

Discovery also yielded the prosecutors' marked up venire lists clearly denoting race and gender. Dkt. 180-10 at 132–33 (ROA.10654–10655); Dkt. 180-11 at 161–62 (ROA.10883–10884) On the bases of *Batson* and *Foster v. Chatman*, 578 U.S. 488, 514 (2016), another Rule 6 discovery motion followed, which resulted in the extension of the scope of depositions for the prosecutors, District Attorney Doug Evans and retired Assistant District Attorney Clyde Hill, to include not only topics relating to *Brady* but questioning regarding the use of peremptory strikes. Dkt. 95 (ROA.2370–2372). Deposition testimony reflected widely divergent explanations between the two prosecutors as to the impetus and purpose of the comprehensive use of racial and gender notations on their venire lists. Dkt. 180-10 at 132–33, 142–196 (ROA.10654–10655, 10664–10718); Dkt. 180-11 at 161–167 (ROA.10883–10889). Further profound problems concerning the intent behind Mr. Evans's exercise of the prosecution's strikes emerged.[9]

Following this Court's decision in *Shinn v. Ramirez*, 596 U.S. 366 (2022), federal counsel moved for partial summary judgment for the sake of judicial

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[7] D.A. Evans testifying in discovery deposition that the revolver on the counter was not collected into evidence because it had no bearing on the case. *Id*.

[8] Carver Conley testifying it would definitely be considered evidence "especially during that type of crime." *Id*.

[9] For example, D.A. Evans claimed he was also concerned about the similarity between Carlos Ward (*infra* at I.C) and Mr. Pitchford because they lived in the same neighborhood, but Evans conceded had had no idea where Ward lived. Under oath, Evans repeatedly insisted that he determined the basis to strike Mr. Ward solely on the basis of his individual responses in voir dire. But Ward said not one word in the record). Dkt. 180-11 at 226–28, 239 (ROA.10948–10950, 10961); *see* Tr. 156–332 (App.046–222).

economy and based solely on the purely record-based *Batson* claim presented on direct appeal in the state supreme court.[10] Dkt. 207 (ROA.17795).

The District Court granted the motion and issued the writ, ordering Mr. Pitchford released or the initiation of new trial proceedings within 180 days. Dkt. 216 (ROA.18041–18060). The order was stayed pending the State's appeal. Dkt. 227 (ROA.18114–18115).

The Fifth Circuit Court of appeals reversed, finding the state court adjudication was reasonable because the trial court implicitly conducted the third step of *Batson* analysis and relying on Mississippi precedent that when the trial record contains no argument in rebuttal of a proffered race neutral explanation, the trial court must decide the *Batson* challenge based solely on the prosecution's explanations, without considering other evidence before the trial court bearing upon pretext. App.006–008 (citing *Berry v. State*, 802 So. 2d 133, 1037 (Miss. 2001); *Manning v. State*, 735 So.2d 323, 339 (Miss. 1999)). This Mississippi jurisprudence is based on a theory of waiver: when the defendant fails to argue in rebuttal, he has waived the right to a jury that was not selected based on intentional racial discrimination. App.008.

All courts and parties agree that Mr. Pitchford discharged his initial burden of making a *prima facie* case with respect to the four challenged strikes, and that

[10] The habeas corpus proceedings concerning the remaining two dozen unadjudicated claims are stayed pending the outcome of this certiorari petition. *Supra* n.1

the prosecution proffered facially race neutral explanations for those strikes. *Batson*'s third step is the only issue in controversy here.

OPINION BELOW

The January 17, 2025, opinion of the Fifth Circuit Court of Appeals is published. *Pitchford v. Cain*, 126 F.4th 422 (5th Cir. 2025); App.001–010.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (providing for review upon grant of a writ of certiorari of cases in the federal courts of appeals).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

29 U.S.C. § 2254(d) provides:

> (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

This petition for writ of certiorari seeks review of the Fifth Circuit's reversal of the Northern District of Mississippi's grant of Mr. Pitchford's *Motion for Partial Summary Judgment* seeking relief solely on the purely record-based version of his *Batson* claim presented to the Supreme Court of Mississippi on direct review. As none of the two dozen other claims in Mr. Pitchford's § 2254 petition remain to be adjudicated, this statement of the case addresses the aspects relevant to this *Batson* claim.

A. Trial Court Proceedings

During this compressed capital trial, District Attorney Evans used four of his allotted 12 peremptory strikes to remove four of the five Black venirepersons provisionally seated in the jury's empaneling. Tr. 321 (App.211).

Apart from confirming with Venire Member 43 (Ms. Tidwell) the name of her cousin (Tr. 261 (App.151)), D.A. Evans conducted no voir dire examination of any of these four struck venire members. *Pitchford*, 45 So. 3d at 265–66 (Graves, J., dissenting). Indeed, other than Ms. Tidwell's answer and the trial court's inquiry into Ms. Linda Lee Ruth's reason for arriving some 15 minutes late (App.130), none of the four persons in question were called on to say a word. Tr. 156–332 (App.046–222).

The defense (Ms. Alison Steiner) then objected to these strikes, invoking *Batson v. Kentucky* in noting the State's "pattern of striking almost all of the available African-American jurors." Tr. 321–22 (App.212–213). Upon this objection, the court determined "it would be appropriate [for Evans to proffer race neutral reasons for his strikes] given the number of Black jurors that were struck." Tr. 323 (App.213). The trial court, finding that the defense made a *prima facie* case of the prosecution's discriminatory use of peremptories, satisfied *Batson*'s first step.[11] At this critical juncture, the record then reflects the court's confusion about what *Batson* commands:

> THE COURT: And does counsel want the State to give race neutral [sic] as to all or just as to the individual – there were, I understand four black jurors. And I don't know if the State – if the defense wants the State to put forward race neutral [sic] as to all or just to the minority members.
>
> MS. STEINER: Well, Your Honor –
>
> THE COURT: A lot of times on *Batson* I just have the State gave [sic] race neutral [sic] as to all.
>
> MS. STEINER: I think the jurisprudence speaks for itself.
>
> THE COURT: If your objection is just as to members of the black panel – black jurors, then I will just have the State go forward and give them as to black members of the panel.
>
> MS. STEINER: Your Honor, I think the jurisprudence simply states that the Court must make a determination on the basis of all relevant circumstances to racial discrimination.

[11] The District Court's opinion here usefully block-quotes a Supreme Court recapitulation of *Batson*'s three steps. App.015. Therein, the first step is described thusly: "First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race." *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 338 (2006)).

Tr. 323–24 (App.213–214).

Evans proceeded to make proffers with respect to each of the four Black venire members in question and, immediately after each such proffer, the trial court deemed the given reasons "race neutral." Tr. 326–27 (App.216–217) (especially Tr. 326:05 (App.216:05), Tr. 326:17 (App.216:17), Tr. 326:27 (App.216:27), Tr. 327:12–13 (App.217:12–13)). The trial court thus conducted *Batson*'s second step.[12]

But, as the District Court has put it, "The trial court then full-stop ended its *Batson* analysis." Pitchford, 706 F. Supp.3d at 623 (App.021). The record shows no evidence the trial court conducted the final step which "involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor." *Id.* at 619 (App.015) (quoting *Collins*, 546 U.S. at 338).

The result was a seated jury (including alternates) comprising 13 white and one Black jurors including alternates.[13] Tr.331 (App.221).

Specifically, after Evans's fourth, and final, proffer, the trial court stated: "The Court finds that to be race neutral as well. So now we will go back and have the defense [peremptory strikes] starting at [venire member no.] 37." Tr. 326 (App.216). Thus, "Rather than turning to Pitchford and allowing him the

[12] This Court has explained: "Second, if the [*prima facie*] showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Collins*, 546 U.S. at 338 (citations omitted), quoted in *Pitchford*, 706 F. Supp.3d at 619 (App.015).

[13] This 80% strike rate for Black venire members contrasts with the State's use of three strikes across 35 white venire members, or an 8.5% strike rate for whites. ROA.00129, 17478, 17979; Tr. 321–29 (App.211–219).

opportunity to rebut the reasons articulated by the State, the trial court immediately continued with the juror selection conference." *Pitchford*, 706 F. Supp.3d at 623 (App.021).[14] After the resumption, with juror number 37, and the rapid conclusion of jury selection (Tr. 326:15–330:23 (App.216:15–220:23)), the defense immediately reiterated their *Batson* challenge, whereupon the trial court admonished counsel she had "already made it in the record" and repeated its mere conclusion that Evans's "reasons were race neutral" (Tr. 331:05–332:04 (App.221:05–222:04)).

As the District Court reasoned, the "exchange evinces an attempt by Pitchford's counsel to argue pretext that was thwarted, although likely unintentionally so, by the trial court's abrupt conclusion that there had been no *Batson* violation." *Pitchford*, 706 F. Supp.3d at 619 (App.023). Beyond foreclosing further record development, the trial court's response again failed to make anything even resembling the requisite factual determinations under *Batson*'s third step.

B. Direct Appeal

On direct appeal, counsel for Mr. Pitchford asserted, inter alia, the preserved *Batson* claim. *Pitchford*, 45 So. 3d at 224–28. The state supreme court concluded *Batson* steps one and two were properly conducted: the defense discharged its burden of raising a *prima facie* case of intentional racial discrimination and the

[14] *See also*, Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187, 189–90 (1989) ("This Note argues, first, that the defense must be present to hear the prosecutor articulate his "neutral explanation" and, second, *that the defense should have an opportunity to rebut* the prosecutor's reasons before the trial judge decides whether to allow the prosecutor's peremptories.") (emphasis added).

prosecution offered race neutral explanations for each of the three. *Id*. at 224–27. As to the third step, the court would not consider any argument drawing its attention to the "totality of circumstances" of the evidence in the trial record that the proffers were pretextual. *Id*. at 227 & n.16 ("This Court has held that, '[i]f the defendant fails to rebut, the trial judge must base his [or her] decision on the reasons given by the State.'") (quoting *Berry v. State*, 802 So.2d 1033, 1037 (Miss. 2001)).

The state supreme court additionally cited and quoted its earlier precedent making clear this is a theory of waiver: *Manning,* 735 So.2d at 339 ("It is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver."); *Woodward v. State,* 726 So.2d 524, 533 (Miss.1997) ("In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point").[15] *Id*. at 227 n.16.

To be clear, the court did *not* determine as a matter of fact that the trial court conducted step three; only that on review it would not entertain any argument, regardless of the fact that it shows "even though the State had five available peremptory strikes, it failed to strike whites who shared similar characteristics to some of the blacks who were struck for cause." *Id*. at 227. In other words, under Mississippi law, when there is no rebuttal, there is no need for the trial court to conduct step three, because a finding of pretext is foreclosed. *See id*. at 227 n.16.

[15] See the discussion of the Fifth Circuit opinion in Woodward's habeas corpus litigation, *Woodward v. Epps*, wherein the court recognized the implications of *Miller-El II*. As explained in the present Pitchford opinion, the Court of Appeals overturned its *Woodword* precedent in the en banc rehearing in *Chamberlin v. Fischer*. *Infra* Part I.B.2.

In dissent, Presiding Justice Graves joined by Justice Kitchens, concluded that the record showed that D.A. Evans used peremptory strikes in an intentionally racially discriminatory manner. *Id*. at 261 (Graves., P.J., dissenting). In conducting step three analysis, the dissent rejected the majority's notion that "this Court cannot review the trial court's decision under the totality of the relevant facts" as "contrary to the applicable law." *Id*. at 267. The dissent examines the authorities the majority relies upon, finding that the principle that the court can ignore evidence in the record not argued at trial predates the law's evolution in *Batson*. *Id*. The dissent thereby finds no support for the majority's theory of waiver:

> Pitchford preserved the issue for appeal by making a *Batson* objection. The trial court properly found that he had established a prima facie case and required the State to provide race-neutral reasons. The trial court then made its determination, and Pitchford appeals that determination. Pitchford is not attempting to present an issue that was not first presented to the trial court. The majority cites no authority to establish that Pitchford should be precluded from relying on evidence contained in the record and presented to the trial court during voir dire, as opposed to extraneous evidence. Therefore, Pitchford has not waived this issue.

Id. at 267–68.

C. Post-Conviction Relief Proceedings

This issue was not litigated in post-conviction proceedings.

D. Federal Habeas Proceedings

Following extensive Rule 6 discovery (*supra*), the District Court granted Mr. Pitchford's motion for partial summary judgment on his purely state record-based *Batson* claim presented to the state supreme court on direct review. Observing that "*Batson* was well-settled law" at the time of Pitchford's 2006 trial, the District Court

explained that the trial court somehow "*seemingly* failed to conduct the third *Batson* inquiry." App.023. Rather than make the fact findings required of a trial court after the first two steps that *Batson* dictates, the judge "full-stop ended" his consideration of the challenges immediately after concluding that each of the prosecutor's proffers were race neutral. App.021.

As the District Court put the "sequence of events,"

> First, Pitchford raised his *Batson* challenge; then, the trial court implicitly found a prima facie showing had been made by requesting race-neutral reasons from the State; the State articulated its reasons for striking Lee, Tillmon, Tidwell and Ward; the trial court deemed all explanations as sufficiently race-neutral; *and that was it*.

App.023 (emphasis added). The District Court noted that in its haste "to proceed to the case itself," the trial court declined "to address the merits of Pitchford's arguments on appeal." *Pitchford*, 706 F. Supp.3d at 626 (App.023, 027).

Thus, finding a *Batson* violation, the District Court granted partial summary judgment, and granted "a writ of habeas corpus *as to this claim*," ordering the conviction and sentence vacated, and the matter remanded to the state court to initiate a new trial within 180 days or release Mr. Pitchford. *Id*. at 628 (App.029–030). The District Court stayed the writ pending the State's appeal. Dkt. 227 (ROA.18114–18115).

On appeal, the Fifth Circuit reversed the order, finding the state supreme court adjudication, was not an unreasonable application of *Batson*, that the state court's reliance on waiver to preclude consideration of comparative juror evidence in the trial record and argued on appeal was reasonable, that the trial court did not

omit the third step of *Batson* analysis, and that the state supreme court "finding" (nowhere apparent in the state court opinion) that the trial court did not omit step three analysis was not unreasonable. Pitchford, 126 F. 4th at 428–431 (App.007–010).

REASONS FOR GRANTING THE PETITION

I. *PITCHFORD* DEEPENS THE FIFTH CIRCUIT'S SPLIT WITH SIX CIRCUITS IN THE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW UNDER *BATSON V. KENTUCKY*.

In reversing the district court's application of this Court's equal protection authorities governing the use of peremptory strikes, the Fifth Circuit Court of Appeals reinstated the trial court, and in turn, the state supreme court's failures to consult all circumstances bearing upon the prosecutor's racial animosity in each of his four peremptory strikes against African-American venire members. The Fifth Circuit thus continues to deepen its divergence, along with the Fourth and Eighth Circuits, from this Court's clearly established federal law under *Batson* and that jurisprudence's routine application among six other circuits—the Second, Third, Sixth, Ninth, Tenth, and Eleventh. *Infra Part A*.

This petition presents the means squarely to address this dysfunction. As reflected in other recent opinions, the Fifth Circuit has routinely undermined this vital jurisprudence and the Court should take this occasion to address this critical element of criminal and civil procedure.[16]

[16] The present clearly established federal law applies not only to race in the selection of criminal trial juries, it also governs the Equal Protection Clause application to intentional discrimination by state actors based on gender in the use of peremptory strikes in civil proceedings. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to concern gender-based peremptory strikes).

A. As the Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits Recognize, Clearly Established Federal Law Dictates Reversal of a State Appellate Court's Denial of *Batson* Relief After Failing to "Consult" "All of the Circumstances that Bear Upon the Issue of Racial Animosity."[17]

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), (*Miller-El I*), a habeas corpus case under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this Court concluded that the Fifth Circuit had erred in denying Miller-El a certificate of appealability under 28 U.S.C. § 2253(c), reversed the Court of Appeals, and remanded the case for further proceedings. In so doing, the Court noted with respect to the review of *Batson* challenges under 28 U.S.C. § 2254, AEDPA's statutory "deference does not imply abandonment or abdication of judicial review." 537 U.S. at 340.

In *Miller-El II*, the Court articulated that, "As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." 545 U.S. at 251–52 (citing *Batson*, 476 U.S. at 96–97; *Miller-El I*, 537 U.S. at 339). *Miller-El II* continued, explaining,

> when illegitimate grounds like race are in 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. The Court of Appeals' and the dissent's substitution of a reason for eliminating Warren [a challenged venire

[17] *Snyder*, 552 U.S. at 478.

> member] does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.
>
> The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.

545 U.S. at 252 (footnote omitted).

A final note from *Miller-El II*, from Justice Thomas in dissent, leaves no doubt as to whether that precedent dictates appellate consideration of the totality of the record proceeding independently from the specific argument and other presentation at trial: "Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments." 545 U.S. at 278 (Thomas, J., dissenting).

Following *Miller-El II*, this Court further addressed the *Batson* inquiry, especially under direct appellate review, "recogniz[ing] that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities," comparing struck African-American venire members with seated white panel members, "were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008).[18] *Snyder* makes plain

[18] Finding a *Batson* violation where the "implausibility" of the prosecutor's stated reason for striking from the venire Mr. Brooks, a Black college student, was "reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'." *Snyder*, 552 U.S. at 483.

the availability on direct appeal of pretext analysis even when the trial record lacks consideration of comparisons among the venire.

Snyder underscores *Miller-El II*'s foregoing enunciation of the trial court's duties, stating that, "in 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." *Id*. at 478. *Snyder* further notes that such circumstances, in the context of multiple viable *Batson* objections, surely include the consequences of a prosecutor's pattern of strikes concerning a suspect classification:

> Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks. In this case, however, the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error."

Id.

The majority of circuits recognize and apply these elements of the *Batson* analysis. The hallmark of review under § 2254(d) is its level of deference to state adjudications through the application of clearly established federal law. However, the foregoing clearly established federal law from the holdings of this Court stems from the given articulated legal rule or principle deciding the case and are pointedly *not* limited to the facts of the given precedential case. *Andrew v. White*, 604 U.S. __, 145 S. Ct. 75, 81 (2025) (citing *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)). *Snyder*, which reviewed the Louisiana Supreme Court's opinion on direct review, did not conduct its analysis of *Batson* through the AEDPA prism. In contrast,

Miller-El II was a habeas corpus case governed by AEDPA and, as such, its enunciation of *Batson*'s requirements of trial counsel, prosecutor, trial court, and state appellate court directly posited the clearly established federal law.

Even prior to *Miller-El II*, *Snyder*, and various other *Batson* opinions of this Court, the Second Circuit recognized the duties of trial counsel to object pursuant to *Batson* and trial and appellate courts to duly consider the totality of circumstances informing the plausibility of the prosecutor's proffered reasons:

> The magistrate judge determined that Galarza"s *Batson* claims were waived by his counsel's failure to pursue the challenges during *voir dire*. We disagree that defense counsel waived Galarza"s *Batson* challenges as to prospective jurors Felix, Valez, Vasquez, Vargas, and Rodriguez. Defense counsel specifically identified each of these members of the *venire* in arguing his *Batson prima facie* case to the court. After the prosecutor proffered race-neutral explanations for each of these five prospective jurors, one of the defense counsel again objected to the striking of these five individuals. Defense counsel thus sufficiently pursued the *Batson* challenges as to these five potential jurors.

Galarza v. Keane, 252 F.3d 630, 636–37 (2d Cir. 2001) (Sotomayor, J.) (footnotes omitted); *Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000) ("Jordan now declares that the district court's conclusory statement that the prosecutor's explanations were race neutral did not satisfy *Batson*'s third step. We agree."); *Barnes v. Anderson*, 202 F.3d 150, 157 (2d Cir. 1999).

In other circuits, the clarity wrought in *Miller-El II* and *Snyder* informed the positions *Batson*. *Williams v. Beard*, 637 F.3d 195, 219 (3d Cir. 2011); *Coombs v. Diguglielmo*, 616 F.3d 255, 262 (3d Cir. 2010) ("[T]he three-step inquiry for resolving *Batson* claims allows the trial court to respond to a *Batson* challenge in a

meaningful, rather than a *pro forma,* manner. Trial courts fail to engage in the required analysis when they fail to examine all of the evidence to determine whether the State's proffered race-neutral explanations are pretextual.") (quotation omitted); *Hardcastle v. Horn*, 368 F.3d 246, 259 (3d Cir. 2004); *Drain v. Woods*, 595 F. App'x 558, 561(6th Cir. 2014) (reviewing merits despite fact that "[a]t no point did defense counsel join in the court's *Batson* challenge or offer argument against the prosecutor's race-neutral reasons"); *Reynoso v. Hall*, 395 F. App'x 344, 348 (9th Cir. 2010) ("[C]ourts must conduct comparative juror analyses when considering *Batson* objections."); *Love v. Scribner*, 278 F. App'x 714, 717–18 (9th Cir. 2008) (handed down same day as *Snyder v. Louisiana*, holding reviewing court must conduct adequate comparative juror analysis of the record even when not argued at trial, over a dissent on this very point); *Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006); *Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1086 (10th Cir. 2023) (affirming denial of claim on the merits, not on waiver, despite the failure to present the juror comparison arguments at trial); *Johnson v. Rankins*, 104 F.4th 194, 203 (10th Cir. 2024) (remanding for *Batson* reconstruction hearing based on evidence developed in federal court discovery); *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1244, 1258 (11th Cir. 2013) (granting Batson relief under AEDPA standards despite the fact that the defendant made no Batson objection at trial and the trial court did not elicit any race neutral explanation); *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252 (11th Cir. 2009) ("Because the trial court denied McGahee's *Batson* motion based only upon the State's proffer of generalized reasons for its peremptory

challenges, and because the trial court failed to make any ruling following the State's proffer of individualized reasons for its peremptory challenges, the trial court unreasonably applied *Batson* to this case.").

B. The Fifth Circuit, Along with the Fourth and Eighth Circuits, Fails to Apply *Batson* Authorities Requiring Determinations Considering All Circumstances Bearing on Racial Discrimination.

The Fifth Circuit's *Pitchford* opinion deepens that court's divergence from this Court's *Batson* cases, signaling its intransigence in a crucial misapplication of the Equal Protection Clause that it shares with the Second, Fourth, and Eighth Circuits. *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990); *United States v. Whitfield*, 314 F. App'x 554, 556 (4th Cir. 2008); *Davis v. Baltimore Gas & Elec. Co.,* 160 F.3d 1023, 1028 (4th Cir. 1998) (an employment discrimination lawsuit); *Hopson v. Fredericksen*, 961 F.2d 1374, 1377–78 (8th Cir. 1992).

1. In this Case, the Fifth Circuit Relies on Its Own Arrant Precedent Rejecting this Court's Holdings.

The Fifth Circuit invokes the State's characterization "that the district court erred by suggesting the Mississippi courts were obliged to consider the 'totality' of the facts bearing on Pitchford's pretext claims, including the facts in the *Flowers* litigation."[19] *Pitchford*, 126 F.4th at 429-30. Indeed, as set forth throughout the briefing and argument in the Fifth Circuit, this totality of the circumstances inquiry

[19] As the District Court observed, a few years prior to the Supreme Court of Mississippi's consideration of Mr. Pitchford's *Batson* claim on direct appeal, it had reversed Curtis Flowers's third conviction at the hands of D.A. Evans, positing, inter alia, that the circumstances "present[ed] [it] with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Pitchford*, 706 F. Supp.3d at 626 (App.026) (quoting *Flowers v. State*, 947 So.2d 910, 935 (Miss. 2007)).

is not elective and *Pitchford* betrays the circuit court's departure from this law. Doc. 42 (Petitioner-Appellee's Brief) at 43–50.[20] Yet Circuit Judge Duncan's opinion inaccurately submits that "Pitchford directs us to no Supreme Court holding that supports the district court's approach, and our own precedent squarely rejects it." *Pitchford*, 126 F.4th at 430 (App.009).

Pitchford relies on another Mississippi capital habeas corpus case, *Chamberlin v. Fisher*, 885 F.3d 832, 838 (5th Cir. 2018) (en banc), and a Texas one, *Ramey v. Lumpkin*, 7 F.4th 271, 280 (5th Cir. 2021), to justify its disregard of the duty, made clear since *Miller-El II*, to consider the circumstances bearing on the prosecutor's discriminatory intent. *Pitchford*, 126 F.4th at 430 (App.009).

Pitchford embraces *Ramey*'s misdirected position that "it is not clearly established that habeas courts *must*, of their own accord, uncover and resolve all facts and circumstances that may bear on whether a peremptory strike was racially motivated when the strike's challenger has not identified those facts and circumstances." *Id.* at 430 (App.009) (quoting *Ramey*, 7 F.4th at 280) (emphasis in original). *Ramey* turned *Miller-El II* on its head, reasoning that a reviewing habeas court cannot "supply its own justifications for the striking of a particular juror when the prosecutor did not articulate that justification before the trial court." *Ramey*, 7

[20] Further, in a Rule 28(j) letter filed after oral argument (*infra* n. 23), Pitchford noted the repeated invocation of clearly established federal law, e.g., *Miller-El II* at 241 n.1 ; *Snyder*, 552 U.S. at 485–86; Audio at, *e.g.*, 28:33, 43:26. Further, the letter stated, "Appellants' and the state supreme court's reliance on Mississippi forfeiture jurisprudence pre-dating *Miller-El*, was patently contrary to that clearly established Supreme Court authority. Audio at, *e.g.*, 39:55." Doc. 80 (footnote omitted).

F.4th at 280 (citing *Miller-El II*, 545 U.S. at 252; *Chamberlin*, 885 F.3d at 841).[21] That framing misconstrues the *Batson* analysis by pinning it to "justifications" and foreclosing the state court's review of "[t]he whole of the *voir dire* testimony," a review that may determine, as occurred in *Miller-El II*, that a comparison of a challenged *Batson* "strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252.

Quoting *Chamberlin*, *Pitchford* further distorts the requisite inquiry, rejecting a proposition Pitchford never advanced, in espousing that there is not "any *requirement* that a state court conduct a comparative juror analysis at all, let alone *sua sponte*." *Id.* (quoting *Chamberlin*, 885 F.3d at 838) (emphasis in original). The actual propositions at issue are (i) whether the trial court, in considering a *Batson* objection, must consider "all of the circumstances that bear upon the issue of racial animosity," *Snyder*, 552 U.S. at 478—not whether it is invariably required to conduct a comparative juror analysis, and (ii) whether the direct appeal court, too, must consider pretext arguments introduced on appeal, *Miller-El II*, 545 U.S. at 283

[21] *Ramey*'s citations of *Miller-El II* and *Chamberlin* takes considerable liberties with the former. After reinforcing that "the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror," *Miller-El II* explains that consideration of the proffered race-neutral reason "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 251-52 (citing *Batson*, 476 U.S. at 96–97). *Miller-El II* then provides, "But when illegitimate grounds like race are in 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. . . . If the stated reason does not hold up, its pretextual significance does not fade because the trial judge or an appeals court, can imagine a reason that might not have been shown up as false." The problem tackled there emanates from a prosecutor's lack of a legitimate rationale in the trial court and upon direct appellate review, not the straw argument in *Ramey* against a habeas court conjuring a constitutionally deficient basis for the prosecutor's strike.

(cited in *Woodward v. Epps*, 580 F.3d 318, 338 (5th Cir. 2009)), *overruled by Chamberlin*, 885 F.3d at 838, abrogation recognized by *Pitchford).*

2. *Pitchford* Confirms the Fifth Circuit's Disavowal of Its Precedents Respecting *Miller-El II* and *Snyder*.

In this jettisoning of Supreme Court law, *Pitchford* enunciates the Fifth Circuit's rejection of its own precedent in *Woodward v. Epps*, which stated that "[c]apital cases employ different standards than noncapital cases at times, and our more recent decision in *Reed v. Quarterman*, 555 F.3d 364, 371 (5th Cir. 2009), suggests that [*Batson*] waiver does not apply in capital cases."[22] 580 F.3d 318, 338 (5th Cir. 2009). *Woodward* construed *Miller-El II* and *Snyder* to hold that a capital petitioner is unable to have "waived any *Batson* claim based on a comparison analysis." 580 F.3d at 338 (observing that the petitioner "nonetheless must carry his burden of proving purposeful discrimination."). Appellee Pitchford filed a Rule 28(j) letter pointing to six Fifth Circuit authorities referenced in oral argument, including *Reed* and *Woodward*,[23] as authorities opinion explains "supposedly standing for the proposition that a litigant does not forfeit a comparative juror analysis by failing to raise it at trial." 126 F.4th at 430 n.9. But the opinion singled out *Reed* and *Woodward* two authorities as unavailing in that, "To the extent any of

[22] *Wright v. Harris County*, 536 F.3d 436 (5th Cir. 2008) (civil wrongful death lawsuit) and *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (non-capital drug case).

[23] The letter provides, "Appellee hereby specifies supplemental authorities of this Court referenced during oral argument that establish that comparative juror analysis is not forfeited when unraised at trial. Audio at, e.g., 39:55–40:30. These authorities include: *Reed v. Quarterman*, 555 F.3d 364, 372–73 (5th Cir. 2009); *Woodward v. Epps*, 580 F.3d 318 338 (5th Cir. 2009); *Smith v. Cain*, 708 F.3d 628, 628 (5th Cir. 2013); *Stevens v. Epps*, 618 F.3d 489, 497 (5th Cir. 2010); *Hayes v. Thaler*, 361 F.App'x 563, 571 (5th Cir. 2010); *Wade v. Cain*, 372 F.App'x 549, 553 (5th Cir. 2010); *see also* Doc. 42 at 47–48." Doc. 80 (footnote omitted).

those cases support that notion, however, they predate our en banc decision in *Chamberlin*,[24] which held that a state court need not conduct a comparative juror analysis where, as here, a litigant fails to raise the argument at trial."[25] *Id.* (citing *Chamberlin*, 885 F.3d at 838-39; *McDaniels v. Kirkland*, 813 F.3d 770, 783 (9th Cir. 2015) (Ikuta, J., concurring)).

C. The Totality of the Circumstances Based on the Trial Record Shows D.A. Evans's Explanations are Pretextual.

The circumstances before the trial court included abundant evidence of disparate treatment[26] and disparate questioning,[27]—evidence that Mr. Pitchford's appeal underscored and the state court and Fifth Circuit wrongly disregarded.[28]

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[24] *Chamberlin* reheard en banc *Chamberlin v. Fisher*, 855 F.3d 657 (5th Cir. 2017), which had affirmed the Southern District of Mississippi's grant of relief predicated upon the application of *Woodward*, *supra*. The district court explained that the circuit jurisprudence, "relying heavily on the Supreme Court's opinion in *Miller-El II*, has held that, in a death penalty case, a comparative analysis of jurors is appropriate even where defense counsel did not rebut the prosecutor's stated reasons for striking Black jurors." *Chamberlin v. Fisher*, 2015 WL 1485901, *17 (S.D. Miss. Mar. 31, 2015) (citing *Woodward*, 580 F.3d at 338). The district court further explained, "The Fifth Circuit's review of the law 'suggests that waiver does not apply in capital cases.'" *Id.* (quoting *Woodward*, citing *Reed*, 555 F.3d at 364).

[25] The circuit's commitment to this blinkered treatment of discriminatory intent and improperly cabined view of the clearly established federal law is also demonstrated in *Pitchford*'s digression on the *Flowers* litigation. *Pitchford*, 126 F.4th at 430 (App.009) ("We agree with the State that the Mississippi courts did not err by refusing to consider such facts, which were not argued by Pitchford during *voir dire* or post-trial.").

[26] *Hayes*, 361 F. App'x at 567 (recognizing that *Batson* requires comparative analysis for disparate treatment, but the fact that the comparative evidence may show discriminatory intent even when the individuals compared are not "identical in all respects") (citing *Miller El II* at 47 n.6).

[27] "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246 (quotation omitted).

[28] The District Court's opinion makes extensive references to the trial court record, including, in relevant part, the juror questionnaires.

Patricia Anne Tidwell, Venire Member 18

Ms. Patricia Tidwell generally favored the death penalty. App.226 (R. 787-90).[29] A 37-year-old African-American woman, D.A. Evans used his fourth strike against her:

> MR. EVANS: S-4 is juror number 43, a black female, Patricia Anne Tidwell. Her brother, David Tidwell, was convicted in this court of sexual battery. And her brother is now charged in a shooting case that is a pending case here in Grenada. And also, according to police officers, she is a known drug user.
>
> THE COURT: During voir dire, in fact, I made a notation on my notes about her being kin to this individual. I find that to be race neutral.

Tr. 325 (App.215).

The State failed to make any record substantiating that Tidwell was "a known drug user." *Id*. A large segment of the Grenada County Sheriff's Department was under subpoena at that time and present during voir dire to assist the prosecution in exercising strikes. R. 215. Thus, these officers were available to make an actual record of this drug use, which was belied by the lack of any indication of arrests, let alone convictions, of Tidwell for such behavior. *Id*. Even a specific assertion concerning such purported grounds should precipitate a third step hearing, but the court failed to proceed in that manner despite the dubious reason for the strike.

Further, D.A. Evans seemed to consolidate into one person issues relating to two men (David Tidwell and an unnamed brother), calling into question the actual

[29] Because the juror questionnaires, though in the trial record, were never deposited in the District Court (*supra* note 28), the ones cited herein are included in the Appendix to this Petition. App.223–283.

impetus for his use of a strike and underscoring the four strikes made in succession against African-Americans.

Linda Ruth Lee, Venire Member 30

D.A. Evans struck Linda Ruth Lee, a 27-year-old African-American woman and the first Black venire member presented to the State, doing so without posing a single question to her during voir dire. Tr. 156–332 (App.046–222). In her questionnaire, Lee answered that she "generally" though not "strongly" favored the death penalty. App.230 (R. 638). Among the white venirepersons the prosecution found acceptable, half gave that same response. But in striking Lee, Evans could offer only these reasons:

> MR. EVANS: Yes, sir. S-2 is black female, juror number 30. She is the one that was 15 minutes late. She also, according to police officer, police captain, Carver Conley, has mental problems. They have had numerous calls to her house and said she obviously has mental problems. Juror Number S-3—
>
> THE COURT: That would be race neutral as to – as to that juror.

Tr. 324–25 (App.214–215). As with Mr. Ward (*infra*), the trial court conducted no further inquiry and accepted wholesale that purported rationale.

The District Attorney's conjecture that Lee had a history of mental problems purportedly came from Carver Conley, one of the officers who investigated the Britt murder. This basis remained entirely unsubstantiated, untested, and would have been, were it not for the legal nature of the proceedings, libelous. This was so, even though Investigator Conley happened to be under subpoena and thus could have been made to answer questions concerning Evans's attribution to him about Lee. R.

215. In this instance, the prosecution's choice not to attempt to make a record of the factual premise for striking Lee taken from the factual claim attributed to Investigator Conley betrays that this rationale was a mere pretext—a thinly disguised one, at that.

Neither Lee's juror questionnaire responses nor answers to voir dire suggested any mental health issues. Yet the D.A. Evans did not opt to question, nor did the court instruct the prosecutor to voir dire, the panel collectively or Lee, or any other venire member, individually with regard to mental illness or health issues. Tr. 156–332 (App.046–222).

The record does reflect that Lee was late in returning from lunch. It also reflects disparate treatment on lateness. Several other jurors apparently failed to return from lunch on time, thus delaying resumption of the proceedings. App.128–129. However, D.A. Evans made no attempt to remove any venire member for that reason other than Lee. App.197–208. The initial thrust of the State's defense of its facially pretextual basis for striking Lee hinged on her innocuous and explained lateness in returning to the courthouse. Initially, while seeking to strike her for cause, Evans did not even mention Lee's purported, and never substantiated, mental problems. App.208. After the court rejected her lateness as an acceptable cause for striking Lee, Evans secured additional time for preparation of his peremptory challenge. Tr. 319 (App.209). About a half-hour later, Evans then injected the specter of Lee's mental instability into the record in his effort to justify this plainly race-based strike. *Id.*

Christopher L. Tillmon, Venire Member 31

Mr. Tillmon's questionnaire reflected he was 27 years old and "strongly favor[ed]" the death penalty. App.231–234. The State accepted two similarly situated white males from the venire.[30] The questionnaire also reflected Tillmon had worked in law enforcement, *id.*, another highly coveted characteristic in the prosecution's typical selection of a capital jury. Nonetheless, without posing a single question to Tillmon during voir dire, D.A. Evans used a peremptory strike against him:

> MR. EVANS: S-3 is a Black male, number 31, Christopher Lamont Tillmon. He has a brother that has been convicted of manslaughter. And considering that this is a murder case, I don't want anyone on the jury that has relatives convicted of similar offenses.
>
> THE COURT: What was his brother's name?
>
> MR. EVANS: I don't even remember his brother. He said that he had a brother convicted of manslaughter.

Tr. 325 (App.215).

The prosecution's disparate treatment of two similarly situated white venire members reflects the illegitimate reasons for striking Tillmon. Mr. Jeffrey Counts, Venire Member 74, a 37-year -old white male, was seated as Juror 12 despite disclosure in his questionnaire that his uncle was a convicted felon. Tr. 328 (App.218); R. 479–90, 1104. Also, the prosecutor accepted Mr. Henry Bernreuter, Venire Member 65, despite disclosure that his son and his stepson had been

[30] Brantley Clark, Venire Member 19, App.279–282 (R. 417–20); Michael Sherman, Venire Member 17, App.239–242 (R. 761–64).

convicted of serious felonies (burglary and forgery, respectively). Tr. 325 (App.215); R. 399–400. The State failed to question Messrs. Tillmon, Counts, and Bernreuter about the convictions of certain family members that each had identified in his questionnaire. In striking Tillmon, and not striking the others, D.A. Evans conducted no voir dire on the topic of this purported reason. The lack of questioning betrayed Evans's lack of familiarity with the venire member's brother, much less any particulars concerning the underlying issue pretextually relied on in striking Tillmon.

Carlos F. Ward, Venire Member 48

The State sought to justify its use of a peremptory on Carlos F. Ward (No. 48), with a facially discriminatory reason. Tr. 322 (App.212). The record here provides:

> MR. EVANS: Juror number 5 is juror number 48 on the list, a Black male, Carlos Ward. We have several reasons. One, he had no opinion on the death penalty. He has a two year old child. He has never been married. He has numerous speeding violations that we are aware of. The reason that I do not want him as a juror is he is too closely related to the defendant. He is approximately the age of the defendant. They both have children about the same age. They both have never been married. In my opinion he will not be able to not be thinking about these issues, especially on the second phase. And I don't think he would be a good juror because of that.
>
> THE COURT: The Court finds that to be race neutral as well. So now we will go back and have the defense starting at 37.

Tr. 325–26 (App.215–216).

D.A. Evans's reasoning behind striking Ward was facially demographic—the espoused rationale was that Ward was "too closely related to" Pitchford. This

relation, of course, was not familial, as there is no suggestion of there being any such relationship between the two men. Further, the pretextual quality of the stated reasons is plain when assessed with reference to numerous white venire members who possessed at least one of the characteristics the prosecutor invoked in justifying his strike of Ward. Direct comparisons with 11 white venire members whom Evans accepted illuminates this pretext.[31]

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[31] *Whites with young children*:

Sherman, Michael (tendered by State, Tr. 321 (App.211), daughter 2½ years old, son 3 months; R. 763 (App.241);
Wilbourn, Lisa (Alternate 2, R. 1104), son 23 months old, R. 837 (App.245);
Parker, Lisa (tendered by State, Tr. 321 (App.211), 6-year-old child, R. 701 (App.249);
Tramel, Nathalie Drake (Alternate 1, R. 1104), 4-year-old daughter, 5-year-old son, R. 808 (App.253);
Ward, Laura Candida (Juror 5, R. 1104), 6-year-old daughter, R. 817 (App.257);
Marter, Stephen Abel, Jr. (tendered by State, Tr. 321 (App.211), 4-year-old daughter, 5-year-old son, R. 808 (App.261);
Curry, Michael (tendered by State, Tr. 328 (App.218)), 5-year-old son, R. 497

Unmarried whites:

Eskridge, Chad (Juror 2, R. 1104), never married, R. 527 (App.269);
Durham, Kenton (tendered by State, Tr. 322 (App.212), divorced, R. 525 (App.272);
Counts, Jeffrey S. (Juror 12, R. 1104), divorced, R. 481 (App.285);
Brewer, Mary W. (Juror 6, R. 1104), widowed, R. 421 (App. 277).

Whites of similar age:

Clark, Brantley (tendered by State, Tr. 321 (App.211)), age 22, R. 417 (App.279);
Eskridge, Chad (Juror 2, R. 1104), age 25, R. 527 (App.267);
Sherman, Michael (tendered by State, Tr. 321 (App.211)), age 27, R. 761 (App.239);
Wilbourn, Lisa (Alternate 2, R. 1104), age 28, R. 835 (App.243);
Parker, Lisa (tendered by State, Tr. 321 (App.211)), age 29, R. 699 (App.247).

Whites sharing more than one of the D.A.'s posited traits:

Eskridge, Chad (Juror 2, R. 1104), age, unmarried, R. 527–29 (App.267–269);
Ward, Laura C. (Juror 5, R. 1104), young children, no opinion on D.P., R. 817–18 (App.257–258);
Tramel, Nathalie D. (Alt. 1, R. 1104), young children, no opinion on D.P., R. 805–06 (App.253–254), Tr. 255 (App.145);
Parker, Lisa (tendered by State, Tr. 321 (App.211)), age, young children, R. 699–701 (App.247–249);
Wilbourn, Lisa (Alt. 2, R. 1104), age, young children, R. 835–37 (App.243–245);

D.A. Evans's use of Ward's speeding traffic violations and expression of no opinion on the death penalty were spurious. The juror questionnaire inquired about criminal charges and convictions but specifically excluded, with the State's assent, traffic violations. *Pitchford*, 706 F. Supp.3d at 626 (App.026). If the State researched Ward's driving record, the record suggests it was not interested in the entire panel in that regard. Further, there is no indication at all of any record establishing the existence of such driving violations. Concerning the absence of opinion on capital punishment, Evans used this attitude to justify striking Ward despite failing to employ the criterion in striking whites with a commensurable view on the question. The prosecutor accepted two white venire members despite indistinguishable questionnaire answers from those Ward gave.[32] As with the others, neither Evans nor the trial court posed a single question to Ward. Evans faced no impediment in probing any of these reasons with Ward under oath. Their pretextual quality is particularly obvious in the wider frame of reference of Evans's handling of the venire. *See Snyder*, 552 U.S. at 478 ("[T]his court may consider the strike of one juror for any relevance it might have regarding the strike of another juror.").

Sherman, Michael (tendered by State, Tr. 321 (App.211)), age, young children, R. 761–63 (App.239–241).

[32] *Whites lacking opinion on death penalty*:

Ward, Laura C. (Juror 5, R. 1104), R. 818 (App.258);
Tramel, Nathalie D. (Alt. 1, R. 1104), R. 806 (App.254); Tr. 255 (App.145).

II. THE STATE COURT DISPOSITION IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW IN ELIDING *BATSON*'S SECOND AND THIRD STEPS.

As this Court has recently clarified, for purposes of 28 U.S.C. § 2254(d)(1), "clearly established federal law" is any holding of this Court, and a holding includes any underlying legal principle the decision was premised on, whether or not that principle was explicitly discussed and regardless of the fact that the case involved different facts and a different application of that underlying principle. *Andrew.*, 145 S. Ct. at81–82.

As shown above, this Court has not only conducted *Batson* step three analysis including comparative juror analysis when that evidence was not argued at trial, the argument that reviewing courts are limited to evidence argued at trial has not prevailed. *See Miller-El II,* 545 U.S. at 275 (Thomas, J., dissenting). The underlying legal principle is, therefore, that the reviewing court may certainly consider juror comparative evidence in the trial record, even though it was not argued before the trial court.

Further, this Court has clearly established that step three determination of discriminatory intent and credibility of the prosecutor must be done in consideration of "the totality of the relevant facts." *Batson*, 476 U.S. at 93–94. This includes evidence presented in the record regardless of when it was presented. *E.g.*, *Hardcastle v. Horn*, 368 F.3d 246, 259 (3d Cir. 2004) ("Step three requires a court conducting a Baton inquiry to address and evaluate all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determine whether the

defendant has met his burden of persuasion.") (quotation omitted); *United States v. McMillon*, 14 F.3d 948, 953 n.4 (4th Cir. 1994) ("[T]he court then addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion.").

In Mr. Pitchford's direct appeal, his counsel argued the comparative juror analysis as presented above (section I.A), but the Mississippi Supreme Court refused to consider it based on Mississippi precedent. *Pitchford*, 45 So. 3d at 227 ("This Court has held that, '[i]f the defendant fails to rebut, the trial judge must base his [or her] decision on the reasons given by the State.'") (quoting *Berry v. State*, 802 So.2d 1033, 1037 (Miss. 2001)). The majority opinion also cites and quotes *Manning,* 735 So.2d at 339 ("It is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver."), and *Woodward,* 726 So.2d at 533 ("In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point"). *Id.* at 227 n.16. The majority reasoned that if the trial court were not obliged to conduct the juror comparators based on the trial record because they were not argued at trial. *Id.* at 227 ("We will not now fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented.").

But, as argued on direct appeal, the rebuttal evidence was already "presented"—it was in the trial court record. *Supra* Section I.A. The majority correctly recited that the court is obliged in *Batson*'s third step "to determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike, i.e., that the reason given was a pretext for discrimination." *Pitchford*, 45 So. 3d at 224 (citing *Flowers v. State*, 947 So.2d at 917).

Under the Mississippi precedent, evidence in the record must be ignored, and all that may be considered are "the reasons given by the State." *Pitchford*, 45 So. 3d. at 227. In other words, as long as the State's reasons are facially race neutral, it is impossible for any evidence in the record to show they are pretextual. This approach is contrary to clearly established federal law. *Purkett v. Elem*, 514 U.S. 765, 768 ("The Court of Appeals erred by combining *Batson* 's second and third steps into one . . . .").

As the dissent in Mr. Pitchford's direct appeal points out, the *Manning* line of cases was always poorly rooted. *Pitchford*, 45 So.3d at 267 (Graves, P.J., dissenting) ("*Manning* cites *Mack v. State,* 650 So.2d 1289, 1297 (Miss.1994), which cites *Whitsey v. State,* 796 S.W.2d 707 (Tex.Crim.App.1989), for this proposition. However, *Whitsey,* which is not binding authority on this Court, makes no such finding [that failure to argue against the prosecutor's reasons constitutes waiver].") Further, the *Woodward* line of cases foreclosing *Batson* in the absence of rebuttal ultimately "rel[ies] on the inapplicable, pre-*Batson* cases of *Jones v. State*, 306 So.2d

57, 58 (Miss. 1975), and *Pennington v. State,* 437 So.2d 37, 39 (Miss.1983). Both *Jones* and *Pennington* involved issues regarding a trial court's refusal to permit the appellant to make an offer of proof to preserve testimony.") *Id.*[33]

That the Mississippi Supreme Court majority clings to this misbegotten waiver jurisprudence is emblematic of the state's long history of white supremacy and disenfranchisement of its Black citizens by exclusion from jury service well after *Strauder v. West Virginia*, 100 U.S. 303 (1880). *See Flowers*, 588 U.S. at 293 ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); *Gibson v. State*, 17 So. 892, 892 (Miss. 1895) (documenting no Black grand jurors served in any case for years in a county that is three-fourths Black); *Smith v. Mississippi*, 16 S. Ct. 900, 901 (1896) (documenting no Black grand or petit jurors in over six years in an overwhelmingly Black county).

III. THE STATE COURT DISPOSITION IS BASED ON AN UNREASONABLE FACTUAL DETERMINATION THAT MR. PITCHFORD WAIVED THE PROSECUTOR'S RACIAL DISCRIMINATION IN JURY SELECTION.

The transcript of the hasty jury selection is irreconcilable with the theory that Mr. Pitchford waived or abandoned his *Batson* objection.

Immediately upon Doug Evans's exercise of strikes, counsel lodged the objection:

> MS. STEINER: We would object on the grounds of *Batson* versus Kentucky that it appears there is a pattern of striking almost all of the available African-American jurors. They have tendered one African-

[33] Another case *Woodward* relies on merely holds that "the defendant 'is allowed to rebut the reasons' offered by the State." *Id.* (quoting *Bush v. State*, 585 So.2d 1262, 1268 (Miss. 1991)).

> American juror out of the five that have thus far -- four that have thus far arisen on the venire. As we had noted previously, due to the process of cause challenges, particularly death qualification challenges, this is already a disproportionally white jury for the population of this county. And we make a *Batson* challenge. It appears to be a pattern of disproportionately challenging African-American jurors.
>
> And I would invite the Court's attention to the United States Supreme Court case. The most recent *Miller-El versus Dretke* case in which the United States Supreme Court on habeas actually reversed a conviction where the prosecutors had used most, though not all, of their strikes. They had left either one or two black jurors on the venire, but the United States Supreme Court nonetheless reversed.

Tr. 322–23 (App.212–213). The trial court, truncated the process after finding the State's explanations facially race neutral, and considered the matter closed. Tr. 326 (App.216) (finding the final explanation to be race neutral and hastily moving on to the defense strikes).

Defense counsel attempted to re-open the objection, and the court assured her that the objection was preserved:

> MS. STEINER: At some point the defense is going to want to reserve both its Batson objection and a straight for Tenth Amendment racial discrimination.
>
> THE COURT: You have already made it in the record so I am of the opinion it is in the record.

Tr. 111 (App.221). Defense counsel tried again, with the same result:

> MS. STEINER: I don't want to let the paneling of the jury go by without having those objections.
>
> THE COURT: I think you already made those, and they are clear in the record.

Id. And finally, before the jury was sworn in, defense counsel attempted to place into the record the racial makeup of the county, and the fact that only one Black venireperson was seated. Tr. 111–12 (App.221–222).

Additionally, the issue was raised on direct appeal, including detailed argument of the juror comparison analysis already in the trial court record. *Pitchford*, 45 So. 3d at 227 ("Pitchford points out that some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike. Although Pitchford devoted a considerable portion of his brief and oral argument before this Court to his pretext argument, he did not present these arguments to the trial court during the voir dire process or during post-trial motions.").

The notion that Mr. Pitchford waived or abandoned his *Batson* objection is patently irreconcilable with this record.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari and either call for briefing and oral argument or summarily reverse the opinion below and remand for further proceedings.

Respectfully submitted,

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