No. 24-7351

In the Supreme Court of the United States

TERRY PITCHFORD,
Petitioner,

v.

BURL CAIN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

LYNN FITCH
Attorney General

ALLISON KAY HARTMAN
Counsel of Record
LADONNA C. HOLLAND
Special Assistant
Attorneys General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
Allison.Hartman@ago.ms.gov
(601) 359-3840
Counsel for Respondents

CAPITAL CASE
QUESTIONS PRESENTED

Petitioner and a friend murdered a store owner during an armed robbery. Affirming petitioner's capital-murder conviction and death sentence, the Mississippi Supreme Court ruled that the state trial court properly rejected petitioner's claim that the prosecution committed racial discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986). On federal habeas review under the Antiterrorism and Effective Death Penalty Act, a district court ruled that the state courts violated clearly established federal law when those courts did not consider *Batson* arguments that petitioner failed to present to the trial judge and first raised on appeal. The Fifth Circuit reversed, ruling that the state courts did not violate clearly established federal law by refusing to consider such arguments. The questions presented are:

1. Whether this Court's precedents clearly establish that state courts must consider arguments or facts that a *Batson* challenger did not present to the trial judge and raised only on appeal—a splitless question that the court of appeals decided correctly and resolution of which could not benefit petitioner, whose belated arguments did not establish racial discrimination.

2. Whether the Mississippi Supreme Court erred by "deem[ing] waived on direct review arguments of pretext not stated in the trial record" (Pet. i.)—a splitless and unmeritorious issue that largely restates the first question presented.

3. Whether this Court should review the Mississippi Supreme Court's alleged "finding" that petitioner "waive[d]" his "*Batson* objections," Pet. i, when that court considered (and rightly rejected) petitioner's *Batson* claim on the merits and that issue is factbound, case-specific, and splitless.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

OPINIONS BELOW

The court of appeals' opinion (App.1-10) is reported at 126 F.4th 422. The district court's opinion (App.11-30) is reported at 706 F. Supp. 3d 614. The state supreme court's opinion affirming petitioner's conviction and sentence is reported at 45 So. 3d 216.

JURISDICTION

The court of appeals' judgment was entered on January 17, 2025. That court denied rehearing on January 28, 2025. App.32. On April 23, 2025, Justice Alito extended the time to file a petition for a writ of certiorari to May 28, 2025. The petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was convicted of capital murder and sentenced to death. The Mississippi Supreme Court affirmed, rejecting petitioner's argument that the prosecution committed racial discrimination in jury selection. A federal district court disagreed with that ruling and granted petitioner habeas relief under the Antiterrorism and Effective Death Penalty Act. The Fifth Circuit reversed, holding that the Mississippi Supreme Court's decision comports with federal law. The petition here seeks review of the court of appeals' decision.

1. On November 7, 2004, petitioner and his friend Eric Bullins robbed the Crossroads Grocery store in Grenada County, Mississippi. *Pitchford v. State*, 45 So. 3d 216, 222-23 (Miss. 2010). During the robbery, Bullins shot store owner Reuben Britt three times, killing him. *Ibid.* Petitioner and Bullins stole a cash register and cash. *Id.* at 222. Petitioner confessed to his role in the murder. *Id.* at 223.

Petitioner was tried for capital murder. 45 So. 3d at 223. At the start of voir dire, there were 126 potential jurors—40 black, 84 white, 1 Hispanic, and 1 who did not provide race information. The trial judge excused (without objection) 30 potential jurors for statutory or other reasons unrelated to the case, leaving 96 potential jurors—35 black and 61 white. After voir dire, the trial judge excused 52 potential jurors for cause and 3 for other reasons, again without objection. That left 36 white and 5 black potential jurors. Of the final pool, petitioner used all 12 of his peremptory strikes—all on white potential jurors. The State used 7 of its 12 peremptory strikes, striking 3 white potential jurors and 4 of the 5 remaining black potential jurors. *Ibid.*

Petitioner raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming that the State struck black potential jurors based on race. 45 So. 3d at 224-25. *Batson* sets forth a 3-step framework for evaluating claims of purposeful racial discrimination in jury selection. At step 1, the claimant must make a prima facie showing that "the prosecutor exercised a peremptory challenge on the basis of race." *Rice v. Collins*, 546 U.S. 333, 338 (2006). If the claimant makes this showing, at step 2 "the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question." *Ibid.* At step 3, the court must determine whether the claimant "has carried his burden of proving purposeful discrimination." *Ibid.*

Applying *Batson*, the trial judge rejected petitioner's claim. 45 So. 3d at 224-28. At step 1, petitioner claimed that there "appear[ed] to be a pattern" of the State "disproportionately challenging African-American jurors" and cited *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), which credited a *Batson* claim where the prosecution struck 10 of 11 black potential jurors. App.212-13. The judge was

persuaded that petitioner had shown a prima facie case "given the number of black [potential] jurors that were struck." App.213; *see* 45 So. 3d at 224-26.

The judge proceeded to step 2 and required the prosecution to provide race-neutral reasons for its peremptory strikes of 4 black potential jurors—Patricia Anne Tidwell, Linda Ruth Lee, Christopher Lamont Tillmon, and Carlos Fitzgerald Ward. 45 So. 3d at 226-27. The State explained: The prosecution struck Ms. Tidwell because she was "a known drug user" and she had a relative who had been convicted of battery in the same court as petitioner's trial and a relative with pending charges in a shooting case in the same county. *Id.* at 227; *see* App.151, 215, 224. The prosecution struck Ms. Lee because she had been late returning to court and because, according to the local police captain, she "ha[d] mental problems" and police had been dispatched to her home multiple times. 45 So. 3d at 226; *see* App.214-15. The prosecution struck Mr. Tillmon because his brother had been convicted of manslaughter, and the prosecution did not "want anyone on the jury [who] ha[d] relatives convicted" of "offenses" "similar" to petitioner's murder charge. 45 So. 3d at 227; *see* App.215. And the prosecution struck Mr. Ward because he had no opinion on the death penalty, had many speeding violations, and had many similarities with petitioner (including age, young children, and marital status), which made him an unfavorable juror for the State. 45 So. 3d at 226; *see* App.215-16. Petitioner did not object to any of the State's proffered reasons or offer any arguments in response. The trial judge accepted the reasons as race neutral. 45 So. 3d at 226-28.

That left step 3. Beyond claiming a pattern of striking black jurors, all petitioner offered to support his *Batson* challenge was to note that only 1 black juror

was seated and to claim, without evidence, that black persons made up 40% of the county's population. 45 So. 3d at 225; *see* App.212-22. As his counsel put it, petitioner sought to "reserve [his] *Batson* objection," to make sure not "to let the paneling of the jury go by without having th[at] objection[ ]," and to put in the record that 1 of the 14 jurors was black "whereas this county is approximately, what, 40 percent?" App.221. The judge confirmed that petitioner had "made th[at]" *Batson* objection, affirmed that the objection was "clear in the record," and heard petitioner's presentation on numbers. *Ibid.* After the judge confirmed that the jury had 1 black member, petitioner's counsel said, "Thank you," and offered no other argument or evidence that the State's race-neutral reasons were pretext for discrimination. App.222. Faced with the State's race-neutral reasons and petitioner's presentation, the trial judge rejected petitioner's *Batson* claim. 45 So. 3d at 227-28.

Petitioner was convicted and sentenced to death. 45 So. 3d at 223.

2. The Mississippi Supreme Court affirmed, upholding the trial judge's rejection of petitioner's *Batson* claim. 45 So. 3d at 224-28.

On step 1, the court was "persuaded that the record supports the trial court's finding of a prima facie showing of discrimination." 45 So. 3d at 225. On step 2, the court upheld the trial judge's ruling that the State's proffered reasons for the 4 challenged strikes were race neutral. *Id.* at 226-27. The court agreed that, because a family member's criminal history supplies a valid reason unrelated to race, the State's reasons for striking Ms. Tidwell and Mr. Tillmon (each of whom had a relative who was convicted of a violent felony) were race neutral. *Id.* at 227. The court also agreed that the State's reasons for striking Ms. Lee (tardiness and a history of mental

issues) and Mr. Ward (including similarities to petitioner on "age and marital status") were race neutral. *Id.* at 226-27. On step 3, the court ruled that the trial judge properly rejected petitioner's claim based on his failure to show purposeful discrimination. *Id.* at 224-28. Petitioner "provided the trial court no rebuttal to the State's race-neutral reasons," the court explained, and when "the defendant fails to rebut, the trial judge must base his ... decision on the reasons given by the State." *Id.* at 227. Although petitioner advanced rebuttal arguments *on appeal* (he offered a comparison of the stricken panel members to seated jurors), the court declined to "entertain those arguments" because petitioner "failed to provide" them at trial. *Id.* at 227-28. The court said: "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." *Id.* at 227. Because the State gave valid race-neutral reasons for its strikes and petitioner failed to meet his "burden to prove" "that the reason[s]" were "pretext for discrimination," his *Batson* claim failed. *Id.* at 224, 228.

In dissent, then-Justice Graves faulted the majority's resolution of *Batson*'s third step. 45 So. 3d at 262-68. He said that the trial judge's decision to "accept[ ] the State's race-neutral reasons" was "clearly erroneous" because those reasons were (in his view) unsupported by the record or also applicable to seated white jurors (and thus pretextual). *Id.* at 266. Justice Graves also believed that petitioner did not "waive[ ]" any pretext arguments. *Ibid.* He thought that petitioner "preserved the issue" of pretext "by making a *Batson* objection," and should have been permitted to "rely[ ] on evidence contained in the record and presented to the trial court during voir dire" to rebut the State's proffered reasons on appeal. *Id.* at 267-68.

Petitioner filed a petition for certiorari, arguing that the state courts failed to consider the "totality of the circumstances" in rejecting his *Batson* claim. Pet. i, No. 10-8439 (Jan. 12, 2011). This Court denied review. 563 U.S. 939 (2011).

3. After petitioner was denied state post-conviction relief (including under *Batson*), he sought federal habeas relief. ROA.100-381.

On December 12, 2023, the district court granted habeas relief to petitioner on his *Batson* claim. App.11-30. The district court credited the Mississippi Supreme Court's rulings at steps 1 and 2 of *Batson*. The district court agreed that "the State's pattern of striking all but one black juror sufficiently demonstrated a prima facie showing" at step 1. App.17 (emphasis omitted). And, at step 2, the district court ruled that "there was no error in the state courts' acceptance of the State's race-neutral reasons" for the challenged juror strikes. App.20; *see* App.15-20. But the district court granted relief because it concluded that "no state court" performed the analysis required at step 3. App.26; *see* App.20-29. On the state trial court: The district court believed that petitioner "was seemingly given no chance" during voir dire "to rebut the State's explanations and prove purposeful discrimination." App.23. Instead, the trial judge "quickly deemed the [State's] reasons as race-neutral" and "moved on" without making explicit findings on pretext. App.27. On the state supreme court: The district court faulted the supreme court for failing "to address" petitioner's "arguments regarding pretext on appeal." *Ibid.* According to the district court, the supreme court "should have performed" a "comparative [juror] analysis"—even if petitioner "had waived the issue" of pretext (which, the district court believed, "he did not"). *Ibid.* The district court added that the supreme court also "should have"

"examined" the history surrounding its prior decision finding a *Batson* violation in *Flowers v. State*, 947 So. 2d 910 (Miss. 2007), which would have been "informative." App.29. The district court did not decide how step 3 should have been resolved. Although the court said that it found Justice Graves' dissent on direct appeal "persuasive," the court "ma[de] no finding as to whether it ultimately agree[d] with Justice Graves' analysis" of the challenged strikes. App.24, 26. Yet the district court concluded that "the state courts' rejection of" petitioner's "*Batson* claim was contrary to or an unreasonable application of clearly established federal law." App.29 (citing 28 U.S.C. § 2254(d)(1) & (2)). The court vacated petitioner's conviction and death sentence and ordered the State to retry or release him "within 180 days." App.29-30.

A week later, the State noticed an appeal and moved on an expedited basis for the district court to stay its judgment. ROA.18062, 18064. Pretrial proceedings routinely exceed a year in capital cases, and the district court—in a ruling issued over 15 years after petitioner's conviction—had ordered petitioner's retrial or release within six months. Yet the district court questioned why the State needed a prompt ruling on the stay motion and failed to rule on that motion by the State's requested date of January 11, 2024. *E.g.*, ROA.18084-18085. So the State filed a stay motion with the Fifth Circuit on January 12, 2024. CA5 Dkt. 17. Within hours of that filing, the district court issued a two-page order staying its judgment pending resolution of the State's appeal. ROA.18114-18115.

4. The court of appeals reversed, ruling that the district court erred in granting habeas relief to petitioner under AEDPA, 28 U.S.C. § 2254(d). App.1-10.

First, the court of appeals held that the district court erred in ruling that the Mississippi Supreme Court's decision rejecting petitioner's *Batson* claim "was contrary to, or involved an unreasonable application of, clearly established Federal law." App.6 (quoting 28 U.S.C. § 2254(d)(1)). The court of appeals rejected the view that the state courts erred at all at step 3 of *Batson*—let alone violated clear federal law. The court of appeals reached three main conclusions. One: The state trial judge "did not omit *Batson*'s third step" or violate federal law by not expressly explaining the full basis for his step-3 ruling. App. 6; *see* App.6-7. No "holding" of this Court, the court of appeals said, clearly requires a trial court to "make explicit findings" on "the validity of the State's proffered race-neutral reasons" at step 3. App.6-7. A trial court "may make implicit findings" at step 3—and even the district court seemed to recognize that "this is exactly what occurred here." App.7 (cleaned up). The court of appeals added that the record refuted the district court's view that petitioner "was seemingly given no chance" to show pretext. App.7 n.5. In fact, the trial judge "allowed [petitioner's] counsel to clarify their [*Batson*] objections" and "never cut off any request" "to object to the State's proffered race-neutral reasons." *Ibid.* Two: The state courts properly did not consider arguments supporting petitioner's *Batson* claim that petitioner did not present to the trial judge. Because petitioner "fail[ed]" to "[ ]raise[ ] pretext arguments" at trial, the judge soundly credited the prosecution's facially legitimate race-neutral reasons. App.8; *see* App.7-8. And "no Supreme Court holding supports" the district court's "view" that the state supreme court was required to consider pretext arguments that petitioner raised only on appeal. App.8. So the state courts did not err when they did not consider "facts and circumstances"—

including petitioner's late-breaking "comparative juror analysis"—that petitioner did not "identif[y]" or "argue[ ]" at trial. App.9; *see* App.8-9. "[I]t is not clearly established," the court of appeals explained, "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." App.9. Nor is there any requirement "that a state court conduct a comparative juror analysis" to resolve a *Batson* claim "at all, let alone *sua sponte*." *Ibid.* Three: The district court was wrong to think that *Flowers v. State*, 947 So. 2d 910 (Miss. 2007), is relevant. "[S]tate-court decisions" "are irrelevant under AEDPA," which allows relief based only on federal law clearly established by this Court. App.9. To the extent that the district court meant to allude to *Flowers v. Mississippi*, 588 U.S. 284 (2019), that decision "was issued ... years after the Mississippi Supreme Court rejected [petitioner's] *Batson* claim" and so "could not have informed" clearly established law when the state courts ruled. App.9.

Second, the court of appeals held that the district court "erred" "to the extent" that it ruled that the Mississippi Supreme Court's decision "'was based on an unreasonable determination of the facts.'" App.6, 9 (quoting 28 U.S.C. § 2254(d)(2)). It was "unclear," the court of appeals explained, whether the district court "actually" found that any of the state courts' factual determinations were unreasonable. App.9 n.10. In any event, the court of appeals ruled that, based on the record, "[i]t was not clearly unreasonable" for the state courts to conclude that petitioner's "bare assertions" of pretext based on demographics "failed to overcome the State's race-neutral reasons" and thus failed to establish purposeful discrimination. App.10.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant review on three questions stemming from his claim that the state courts did not fully consider all evidence and arguments on his claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). None of those questions raises a circuit conflict, none satisfies any of the other traditional certiorari criteria, and none of his arguments has merit. The court of appeals soundly rejected an egregiously wrong grant of habeas relief under AEDPA. The petition should be denied.

1. Petitioner first asks this Court to decide whether the state courts violated clearly established federal law by not considering "evidence" and "circumstances" on his *Batson* claim that he failed to argue or present to the trial court. Pet. i; *see* Pet. 6, 15-32. That issue does not further warrant review. The court of appeals correctly ruled that no decision of this Court clearly establishes that a trial court or reviewing court must, in assessing a *Batson* claim, consider arguments or facts that a *Batson* challenger did not present to the trial judge and raised only on appeal.

a. As the court of appeals ruled, the state courts properly refused to consider arguments and facts that petitioner failed to present to the trial judge.

As explained, at step 1 of *Batson* a defendant must "establish a prima facie case of purposeful discrimination" in jury selection. 476 U.S. at 96. To do so, the defendant "must show" "that the[ ] facts and ... relevant circumstances raise an inference that the prosecutor" struck a potential juror "on account of their race." *Ibid.*; *see id.* at 96-97. If the defendant makes this showing, "the burden shifts to the [prosecution]" at step 2 "to come forward with a neutral explanation" for the challenged strike. *Id.* at 97. Then, at step 3, the trial judge must "determine if *the*

defendant has *established* purposeful discrimination." *Id.* at 98 (emphases added). The judge must make this determination "in light of the parties' submissions" at steps 1 and 2. *Davis v. Ayala*, 576 U.S. 257, 270 (2015). The "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from," the party raising the *Batson* challenge. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). This Court in *Batson* "decline[d]" "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" and "ma[d]e no attempt to instruct [trial] courts how best to implement" the 3-step framework. 476 U.S. at 99 & n.24. But the Court made clear that a trial judge's ultimate "findings" on the motives for a challenged strike are entitled to "great deference." *Id.* at 98 n.21.

As the Fifth Circuit held, the state courts here soundly applied *Batson* and properly refused to consider arguments that petitioner failed to present at trial.

To start, the trial judge correctly determined that petitioner failed to meet his burden to prove purposeful discrimination under *Batson*. App.6-10. After finding that petitioner showed a prima facie case at step 1 "given the number of black [potential] jurors that were struck," at step 2 the trial judge required the prosecution to provide race-neutral reasons for its peremptory strikes of 4 black potential jurors. App.213-16; *see* App.4. Petitioner did not object to any of the prosecution's facially race-neutral reasons, offer any evidence or argument suggesting that those reasons were pretextual, or identify any circumstance calling the prosecution's motives into doubt. *See* App.4, 7-10. Indeed, the "only" "ground" that petitioner offered for his claim was to note that the jury had 1 black member while black persons made up 40% of the

county's population. App.8; *see* App.4, 212-22. The trial judge thus ruled at step 3 that petitioner failed to meet his "burden" to "prove[ ] purposeful discrimination." App.6.

On appeal, the Mississippi Supreme Court soundly rejected petitioner's claim that the prosecution "exercised its peremptory strikes in a racially discriminatory manner." *Pitchford v. State*, 45 So. 3d 216, 224 (Miss. 2010); *see* App.5. The supreme court reviewed the voir dire record and (as *Batson* dictates) applied "great deference to the trial court's findings." 45 So. 3d at 226. The court held that the trial judge did not "abuse[ ] his discretion" in crediting "the State's proffered race-neutral reason[s]" for the challenged strikes, which were both "acceptable" in view of the record and unrebutted by petitioner. *Id.* at 226-27. The court also refused to "entertain" petitioner's new "arguments" that "some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike" because petitioner "never presented" those arguments to the trial court. *Id.* at 227-28.

In the decision below, the court of appeals ruled—correctly—that the state courts' *Batson* rulings comport with federal law and that the district court accordingly erred in granting habeas relief under 28 U.S.C. § 2254(d)(1). As the court of appeals explained: the trial judge properly completed *Batson*'s 3-step inquiry and found "no discrimination" in jury selection (App.6-7, 9-10); the Mississippi Supreme Court "correct[ly]" "refused to consider [petitioner's] pretext arguments" that he "did not present ... to the trial court" (App.7-8); and the state courts "did not err by failing to consider" "facts and circumstances" allegedly "bear[ing] on" the prosecution's motives that were never "raised" or "identified" by petitioner "during *voir dire* or post-trial" (App.8-9). "[N]o Supreme Court holding," the court of appeals recognized, "supports"

the district court's "view" that the state supreme court was required to consider pretext arguments that petitioner raised only on appeal. App.8.

b. Petitioner claims that the Mississippi Supreme Court violated clearly established law when it did not consider or "consult[ ]" arguments and evidence that petitioner did not "present[ ]" "at trial." Pet. 17-18; *see* Pet. 16-19. Petitioner is wrong.

No decision of this Court clearly establishes that a direct-review court must consider *Batson* pretext arguments that a defendant failed to present to the trial judge. App.8. Indeed, petitioner's argument is at odds with this Court's caselaw. This Court's *Batson* precedents: place the "burden" to "prove the existence of purposeful discrimination" in jury selection on "the defendant who alleges [such] discriminat[ion]" (*Batson*, 476 U.S. at 93); recognize that primary responsibility over such claims falls to "trial judge[s]"—who can best evaluate "the demeanor of jurors" and "the credibility of the prosecutor"—and not "[a]ppellate judges" who review "a cold record" (*Ayala*, 576 U.S. at 273-74); and adopt a procedure that "permits prompt rulings on objections to peremptory challenges" by the trial judge "without substantial disruption of the jury selection process" (*Hernandez v. New York*, 500 U.S. 352, 358 (1991) (plurality opinion)). This Court's precedents also embrace "the principle of party presentation," which places the "responsib[ility]" on the "parties" to "advanc[e] the facts and argument entitling them to relief" and to "frame the issues for decision" by judges serving "the role of neutral arbiter." *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020). And this Court's cases do not endorse the gamesmanship that petitioner's proposed rule would invite. Under petitioner's rule, a defendant would have a powerful incentive to raise a threadbare *Batson* objection,

lose on it, and then, if convicted, raise on appeal a raft of "circumstances" buried in the record that supposedly bear on the prosecutor's motives and fault the trial judge for not considering those circumstances. By refusing to present to the trial judge those facts and arguments on the prosecutor's alleged motives—which the State may rebut and the judge may reject (a ruling entitled to "great deference" on appeal, *Batson*, 476 U.S. at 98 n.21)—a defendant could bypass the inconveniences of an adversarial presentation and a deferential standard of review. There is no basis in law or logic for that approach.

Petitioner claims that this Court's decisions in *Miller-El* clearly established that it is irrelevant if a defendant "present[s] no evidence and ma[kes] no arguments" to the trial court supporting his *Batson* claim. Pet. 17; *see* Pet. 17-19. He is wrong. *Miller-El II* reaffirmed that the burden to "*establish*[ ] purposeful discrimination" is on "*the defendant*" and stressed that *the* "*defendant* may *rely* on all relevant circumstances" to show a *Batson* violation. 545 U.S. at 239, 240 (quotation marks omitted; emphases added). *Miller-El II* thus makes clear that the role of "[t]he trial court" is to "determine if the defendant has established purposeful discrimination" (*id.* at 239)—not to make the defendant's showing for him. Indeed, petitioner ignores that, in crediting a *Batson* claim, *Miller-El II* reiterated that the defendant "base[d] his [*Batson*] arguments" on "*evidence*" of discrimination that was "*record[ed]*" *in the* "*transcript of voir dire*." *Id.* at 241 n.2 (emphases added). And *Miller-El I* stressed that the defendant had "*presented extensive evidence* in support of" his claim—both at a "pretrial hearing" under the pre-*Batson* regime and at a "post-trial hearing" after *Batson* was decided. *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) (*Miller-El I*)

(emphasis added); *see id.* at 331-35, 341 (noting "extensive," "substantial" "evidence" that defendant "presented to the state trial court" on his claim). The voir dire record here, by contrast, contains *no* argument or evidence (beyond a weak presentation on numbers) that supports a *Batson* claim.

Petitioner next invokes *Snyder v. Louisiana*, 552 U.S. 472 (2008), which (he claims) "underscores" a court's "dut[y]" to "'consult[ ]'" "'all of the circumstances'" potentially relevant to a *Batson* claim regardless of the defendant's presentation. Pet. 18 (quoting *Snyder*, 552 U.S. at 478). *Snyder* was before this Court "on direct review" and so the Court did not apply AEDPA's "highly deferential standard," which requires "that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam). In any event, *Snyder*'s reference to "all" "circumstances"—which derived from *Miller-El II*—was made in view of the defendant's burden to identify and rely on those circumstances. 552 U.S. at 477, 478 (recognizing challenger's burden to "show[ ]" "purposeful discrimination"); *see Miller-El II*, 545 U.S. at 239-240 ("defendant may rely on 'all relevant circumstances'"). In *Snyder*, defense counsel did not sit idly after raising a *Batson* claim in trial court. Rather, counsel supported that claim by "disput[ing] [the] explanations" offered by the prosecution and by engaging in a colloquy with the trial judge and the stricken juror that revealed that the prosecutor's explanations were "suspicious," "highly speculative," and ultimately "unconvincing." 552 U.S. at 478, 479, 481-83. Petitioner's counsel, by contrast, did not challenge *any* of the prosecution's facially race-neutral reasons and failed to support his *Batson* claim. (That is for good reason. Even with

the benefit of hindsight, petitioner still can muster only feeble assertions of pretext that fall woefully short of showing purposeful discrimination. *See infra* pp. 22-26).

Petitioner also suggests that *Snyder* "makes plain" that appellate courts must "analy[ze]" "pretext" "even when the trial record lacks" any "comparisons" between stricken panel members and seated jurors. Pet. 17-18. But as petitioner admits, *Synder* cautioned that "retrospective comparison[s] of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." 552 U.S. at 483; *see* Pet. 17. *Snyder* considered such a comparison only to "reinforce[ ]" its holding that the trial judge had improperly rejected a *Batson* claim and only after observing that the "shared characteristic" between the stricken panel member and seated jurors "was thoroughly explored by the trial court." 552 U.S. at 483. *Synder* thus reinforces the importance of raising pretext arguments to the trial judge.

c. Petitioner also claims that lower courts are divided on a trial court's obligation to "consult all circumstances" in assessing a *Batson* claim. Pet. 15; *see* Pet. 15-25. He says that the Third, Sixth, Ninth, Tenth, Eleventh, and (sometimes) Second Circuits (properly) expect trial judges to consider the "totality" of information that may bear on a *Batson* claim regardless of "the specific argument[s]" and "presentation[s]" made "at trial." App.17; *see* App.16-21. And he says that the Fourth, Fifth, and Eight Circuits (improperly) "fail[ ]" to require trial judges to "consider[ ] all circumstances bearing on racial discrimination" when assessing a *Batson* challenge. Pet. 21 (formatting omitted); *see* Pet. 21-25. Petitioner is wrong. Each case that he cites applies the same 3-step framework and makes clear that the challenger has the

burden to "prove[ ] purposeful racial discrimination" by identifying and relying on relevant facts and circumstances at trial. *Elem*, 514 U.S. at 767.

Start with the cases that (petitioner says) hold that a trial judge must consider the "totality" of information potentially relevant to a *Batson* challenge regardless of the challenger's "presentation." None of those cases holds any such thing.

In one group of those cases, an appellate court faulted a trial judge for impeding the challenger's efforts to introduce evidence or make arguments on pretext. *See Jordan v. Lefevre*, 206 F.3d 196, 199-202 (2d Cir. 2000) (trial judge refused to hear "any argument" from "defense counsel" on challenged strikes, thus "preclud[ing] a full record from being established and prevent[ing] a meaningful determination on ... discriminatory intent"); *Coombs v. Diguglielmo*, 616 F.3d 255, 259, 263 (3d Cir. 2010) (trial judge "refused to allow defense counsel" to "introduce evidence" revealing prosecutor's race-based motivations: the judge "cut off" "multiple attempts" to show pretext and thus "effectively omitted the third step of the *Batson* inquiry by unreasonably limiting the defendant's opportunity to prove ... discriminatory intent"); *Love v. Scribner*, 278 F. App'x 714, 717 (9th Cir. 2008) (trial judge failed to "permit[ ]" the defense "to elicit the facts" necessary to support a showing of pretext). In petitioner's case, by contrast, the trial judge "allowed defense counsel" to present and "clarify" a *Batson* claim, "never cut off any request by" counsel "to object to the State's proffered race-neutral reasons," and "heard" counsel's (bare) "assertions" of pretext. App.7 n.5, 10. Petitioner simply failed to make a showing of purposeful discrimination. More: None of those cases supports petitioner's view that *Batson*, *Miller-El II*, and *Snyder* place the burden on trial judges to identify and

assess facts that a *Batson* challenger fails to present. Each case reinforces that the challenger must present all that to the trial judge. *See Coombs*, 616 F.3d at 261 (defendant must rely on relevant facts "to *prove* the existence of purposeful discrimination"); *Jordan*, 206 F.3d at 201 (trial court erred by giving "*[defense] counsel* no time *to identify the relevant facts and assess the circumstances* necessary to decide whether the race neutral reasons given were credible and nonpretextual"); *Love*, 278 F. App'x at 716-17 ("*defendant*" must "establish[ ] purposeful discrimination" by, for example, "*rais[ing]*" "*alleged similarities*" between stricken panelists and seated jurors) (all emphases added). It is no wonder, then, that courts—including those that, in petitioner's view, properly assess *Batson* claims—recognize that "*Batson*, *Miller-El II*, [and] *Snyder*" do not "alter th[e] fundamental principle" of "party presentation." *Stevens v. Davis*, 25 F.4th 1141, 1169 (9th Cir. 2022).

In another set of cases that petitioner cites, a lower court erred by failing to make any ruling on purposeful discrimination, by applying the wrong standards, or by ignoring overwhelming evidence of racial animus. *See Galarza v. Keane*, 252 F.3d 630, 633 (2d Cir. 2001) (trial judge "failed to rule whether it credited the race-neutral explanations proffered by the prosecutor"); *Barnes v. Anderson*, 202 F.3d 150, 157 (2d Cir. 1999) (trial judge "explicit[ly] refus[ed] to rule on the credibility of either attorney's explanation[s]" for their strikes); *Reynoso v. Hall*, 395 F. App'x 344, 346-47 (9th Cir. 2010) (trial judge wrongly required challenger to establish a "systematic exclusion" of minority jurors to show a *Batson* violation); *Kesser v. Cambra*, 465 F.3d 351, 357, 361, 368 (9th Cir. 2006) (trial judge ignored "clear" and "overwhelming" evidence of "racial animus behind the prosecutor's strikes," and did not allow the

defendant to "present a comparative analysis at trial"). Here, by contrast, the trial judge applied the proper standards and "found no discrimination" when he credited the prosecution's race-neutral reasons as to each challenged strike and then "announced that [he] f[ound] there to be no *Batson* violation" in view of petitioner's "bare assertions" of pretext. App.7, 10 (cleaned up). And again: none of these cases holds that this Court's precedents place the burden on trial judges to identify and assess facts and circumstances that a *Batson* challenger fails to present.

In the last group of cases that petitioner cites, an appellate court had to consider new facts or arguments on pretext for reasons absent here. The reasons include that: the trial judge failed to elicit race-neutral reasons for challenged strikes, *see Johnson v. Rankins*, 104 F.4th 194, 196, 196-97 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 1081 (2025) (trial judge wrongly found no prima facie case at step 1 and "never prompted the state to give race-neutral justifications"); *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252, 1258-59 (11th Cir. 2009) (trial judge "ignored" prosecution's "offer" to "proffer specific reasons for the peremptory strikes"); a lower court wrongly found that a party had failed to raise any *Batson* challenge, *see Williams v. Beard*, 637 F.3d 195, 212-20 (3d Cir. 2011) (court "unreasonabl[y] determin[ed]" that defendant "did not raise a *Batson* objection during voir dire" when he "objected" multiple times to prosecution's strikes); or the challenger could not develop a *Batson* claim at trial under then-existing law, *see Hardcastle v. Horn*, 368 F.3d 246, 252 (3d Cir. 2004) (*Batson* "post-date[d]" the defendant's trial, so "the prosecution did not rebut [any] objection" to its peremptory strikes and "the trial court did not rule on the issue"); *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1244

(11th Cir. 2013) (no "objection by the defense" or "proffer of reasons by the prosecutor" because, under then-existing law, "white defendant[s]" "lacked standing to challenge the state's exercise of peremptory strikes to remove black jurors"). None of those circumstances are present here. Petitioner objected to certain strikes under *Batson*, the trial judge instructed the prosecution to provide race-neutral reasons for the strikes (and allowed defense counsel to object to those reasons), and the judge credited the prosecution's reasons in view of petitioner's bare assertions of pretext. And these cases (like the others petitioner cites) again stress that defendants can "*introduce*[ ]" "evidence" to "*prove* that the explanations offered by [the prosecution] are not persuasive and are instead pretextual." *Williams*, 637 F.3d at 215-16; *see Hardcastle*, 368 F.3d at 259 (trial courts should "evaluate" the "evidence *introduced by each side*"); *Adkins*, 710 F.3d at 1252, 1254 n.11 (faulting lower courts for not "considering the relevant circumstances *raised by [the defendant]*" at step 3 and for "interject[ing] non-record facts into [the] *Batson* analysis"); *McGahee*, 560 F.3d at 1261, 1263 (courts should "weigh *the defendant's evidence*" and "crucial facts" "*raised*" *by the defendant* "against the prosecutor's" "neutral explanation") (all emphases added).

Now take the cases from the Fourth, Fifth, and Eighth Circuits that petitioner says "fail[ed]" to properly "apply *Batson*." Pet. 21 (formatting omitted); *see* Pet. 21-25. These cases all applied the same 3-step framework discussed above to reach the result the facts demanded. *See United States v. Whitfield*, 314 F. App'x 554, 556 (4th Cir. 2008) (recognizing that "defendant[s] may rely on all relevant circumstances to raise an inference of purposeful discrimination," but rejecting a *Batson* claim where the defendant "did not challenge the Government's race-neutral explanation[s]," "identify

a similarly situated venire member of a different race who was not peremptorily challenged," or "otherwise establish that race was the real reason for the strike[s]") (emphasis omitted); *Davis v. Baltimore Gas & Electric Co.*, 160 F.3d 1023, 1026-27 (4th Cir. 1998) (recognizing that parties "may show purposeful discrimination by demonstrating that the opposing party's explanation is mere pretext for racial discrimination," but the challenger "made no attempt to rebut the proffered explanation[s]" and failed to meet his "burden" to "prove the existence of purposeful discrimination"); App.6-7 (Fifth Circuit applied "the familiar *Batson* framework" to petitioner's case); *Hopson v. Fredericksen*, 961 F.2d 1374, 1377-78 (8th Cir. 1992) (parties may "show" that the "facts and any other relevant circumstances" "establish[ ] purposeful discrimination," but the challenger "made [no] attempt to rebut the reasons" offered and failed to carry his "burden" to prove discrimination).

Last, petitioner faults the Fifth Circuit for "rejecti[ng]" "its own precedent" in denying his claim. Pet. 24; *see* Pet. 24-25 & n.23. Petitioner claims that earlier circuit cases relieved *Batson* challengers of any need to raise evidence or arguments (including comparative juror analyses) "at trial." Pet. 24. But a lower court's decisions are not "clearly established Federal law" "as determined by the Supreme Court" and so cannot provide a basis for habeas relief. 28 U.S.C. § 2254(d)(1). And an intra-circuit conflict would not warrant this Court's review. Anyway, petitioner's view of Fifth Circuit precedent is wrong: before the decision below, the en banc court of appeals made clear that "state court[s] need not" consider *Batson* pretext arguments that "a litigant fails to raise ... at trial." App.9 n.9 (citing *Chamberlin v. Fisher*, 885 F.3d 832, 838-39 (5th Cir. 2018) (en banc)).

d. Petitioner attempts to buoy his case for review by claiming that "abundant evidence" shows "disparate treatment" in jury selection here. Pet. 25; *see* Pet. 25-32. He is wrong. Even considering the arguments first raised on appeal, petitioner falls far short of establishing purposeful discrimination on any strike.

First, the record shows that the prosecution struck potential juror Patricia Anne Tidwell because she was "a known drug user" and she had a relative who had been convicted of battery in the same court as petitioner's trial and a relative with pending charges in a shooting case in the same county. App.215; *see* App.4, 151, 224; *Pitchford v. State*, 45 So. 3d 216, 227 (Miss. 2010). Petitioner does not dispute that those reasons are facially race-neutral or that a "family member's carceral status" is a legitimate "race-neutral rationale." *Rhoades v. Davis*, 914 F.3d 357, 383 (5th Cir. 2019). Instead, he contends that, during voir dire, the prosecutor "seemed to [mistakenly] consolidate" two of Ms. Tidwell's relatives, which (petitioner claims) "call[s] into question the actual impetus for" the "strike." Pet. 26-27. But there is no dispute that Ms. Tidwell had (at least) one relative who was convicted of a serious crime: her juror questionnaire states that her "brother" was convicted of "sexual battery." App.224; *see* App.151, 215. The prosecutor may have misspoken by referring to Ms. Tidwell's brother instead of her cousin (or vice versa). But that does not undermine the (unrebutted) race-neutral rationale for the strike. *Cf. Rice v. Collins*, 546 U.S. 333, 340 (2006) ("accidental reference[s]" and "innocent transposition[s]" do not "undermine[ ] the prosecutor's credibility"). Petitioner also argues that the prosecution "failed to make any record substantiating that [Ms.] Tidwell" was a "drug user" and says that the prosecution's assertion "should [have] precipitate[d] a third

step hearing." Pet. 26. But it is petitioner's burden to prove that the State's stated reasons are pretextual. He did not object to the State's assertions, request a hearing, or introduce evidence calling the State's rationale into question. *See* App.215. He thus gave the trial judge no reason to doubt the credibility of the prosecutor's stated reasons for striking Ms. Tidwell. Petitioner's late speculation about the "dubious" nature of the strike (Pet. 26) does not make up for his failure to *show* discrimination.

Second, the prosecution struck Linda Ruth Lee because, according to the local police captain, she "ha[d] mental problems" and police had been "call[ed] to her house" "numerous" times. App.214-15; *see* App.4; 45 So. 3d at 226-27. The prosecution also said that Ms. Lee was "15 minutes late" returning to court during voir dire, suggesting a lack of responsibility or respect for the court. App.214; *see* App.130. Petitioner (again) does not dispute that those reasons are facially race-neutral or that they provide a legitimate basis for a strike. Instead, he claims that Ms. Lee's "history of mental problems" "remained entirely unsubstantiated" and "untested." Pet. 27; *see* Pet. 27-28. But if that history was "untested" it was because petitioner did not question it or object to Ms. Lee's exclusion on that basis. Petitioner says that the police captain "could have been made to answer questions" about Ms. Lee. Pet. 27. But petitioner sought no such questioning and gave the trial judge no reason to think it might be necessary. Petitioner identifies no authority—let alone any clear holding of this Court—permitting a *Batson* challenger to sit silent and then later challenge the trial court's ruling based on speculation about what hypothetical evidence might have shown on pretext. Petitioner also claims that "[s]everal other jurors" returned late to court but the State "made no attempt" to strike any juror for lateness "other

than [Ms.] Lee," which suggests "disparate treatment." Pet. 28. But Ms. Lee was the last juror to return to court, the court waited several minutes before proceeding without her, and the judge said that she would be "dealt with accordingly." App.129. Ms. Lee eventually returned to court "about 15 minutes later than everybody." App.130; *see* App.129 (trial judge's statement that "if everybody else could be back on time [Ms. Lee] could have as well"). Petitioner notes that the trial judge had "rejected" Ms. Lee's "lateness" as a basis to strike her for cause. Pet. 28. But *Batson* itself "emphasize[d] that the prosecutor's explanation" for a peremptory strike "need not rise to the level justifying exercise of a challenge for cause." 476 U.S. at 97.

Third, the prosecution struck Christopher Lamont Tillmon because his brother was "convicted of manslaughter" and, "considering that this is a murder case," the prosecution did not "want anyone on the jury [who] ha[d] relatives convicted of similar offenses." App.215; *see* App.4, 232; 45 So. 3d at 227. Petitioner (again) does not dispute that those reasons are facially race-neutral and legitimate. He instead claims that the State accepted two "similarly situated" white jurors: one whose "son" and "stepson" were convicted of "burglary and forgery, respectively," and another with an "uncle [who] was a convicted felon." Pet. 29-30. The second juror's uncle was convicted of "forgery." App.284 (juror questionnaire). Petitioner's claim that these jurors were "similarly situated" to Mr. Tillmon defies credulity: A prospective juror related to someone convicted of forgery or burglary is not "similarly situated" to a prospective juror related to someone convicted of manslaughter—especially in a murder trial. Petitioner observes that the prosecutor did not "question" Mr. Tillmon or the other jurors that petitioner identifies "about the convictions of [their] family members." Pet.

30. But as petitioner admits, those "convictions" were "identified" in the jurors' "questionnaire[s]." *Ibid.* So the prosecutor did not need to ask more questions to learn about those crimes. Petitioner adds that Mr. Tillmon "was 27 years old and 'strongly favor[ed]' the death penalty," which (petitioner claims) made him "similarly situated" to two other white male jurors accepted onto the panel. *Id.* at 29. But petitioner does not claim that either juror had (as Mr. Tillmon did) a relative convicted of homicide. So those jurors were not comparable to Mr. Tillmon.

Last, the prosecution struck Carlos Ward for "several reasons" that made him an unfavorable juror for the State: he "had no opinion on the death penalty"; he had "numerous speeding violations"; and he had many similarities with petitioner—he was "approximately" petitioner's age, had "children about the same age" as petitioner's children, and, like petitioner, had "never been married." App.215-16; *see* App.4; 45 So. 3d at 226. Petitioner argues that the State's reasoning was "facially discriminatory." Pet. 30; *see* Pet. 30-32. That is not so. As the prosecution explained, Mr. Ward was "closely related" to petitioner (App.216) based on characteristics—age, children, marital status—that have nothing to do with race. *Cf. Collins*, 546 U.S. at 341-42 (state courts reasonably credited prosecution's rationale for striking a potential juror based on, *e.g.*, age, marital status, and lack of community ties). Petitioner also claims that "the pretextual quality of" the State's reasons "is plain" in view of the "numerous white venire members who possessed at least one of the characteristics" used to strike Mr. Ward. Pet. 31; *see* Pet. 31-32. But the State struck Mr. Ward because he had *all* those characteristics *and* lacked an opinion on the death penalty *and* had speeding violations. App.215-16. Petitioner's argument reveals that

none of the allegedly similar jurors possessed more than two of the several features the prosecution cited. Pet. 31-32 nn.32-33. While petitioner need not identify "an exactly identical white juror" to show pretext, he does have to establish that the cited differences are not "significant" and that the prosecution's "proffered rationale" for the strike "cannot reasonably be accepted" as legitimate "trial strategy." *Miller-El II*, 545 U.S. at 247 & n.6. He has failed to make that showing. Petitioner adds that "there is no ... record" of Mr. Ward's "driving violations." Pet. 32. But again, petitioner failed to object to the State's justification or attempt to rebut it. Last, petitioner claims that the "pretextual quality" of the prosecution's reasons for striking Mr. Ward is "obvious in the wider frame of reference of [the prosecutor's] handling of the venire." Pet. 32. Such bald assertions of pretext—based on "debatable inferences" about the prosecutor's alleged motives—do not come close to satisfying petitioner's "ultimate burden of persuasion regarding racial motivation." *Collins*, 546 U.S. at 338, 342.

2. Petitioner next asks this Court to decide whether the state supreme court "def[ied]" *Batson* by "deem[ing] waived on direct review arguments of pretext not stated in the trial record." Pet. i; *see* Pet. 33-36. This issue again concerns the supreme court's refusal to consider arguments that petitioner did not present at trial, and so it largely restates petitioner's first question. It too does not warrant review.

First, petitioner focuses on Mississippi cases and does not identify any relevant split of authority on the waiver issue amongst the courts of appeals. *See* Pet. 33-36.

Second, this case is not a worthy vehicle for addressing that issue because this Court's intervention would not affect this case's outcome. An answer in petitioner's

favor would not help him because he cannot show purposeful discrimination even with the new arguments he made on appeal. *See* App.7-8; *supra* pp. 22-26.

Third, petitioner's arguments are (again) meritless. As the court of appeals ruled, the state courts complied with this Court's precedents. No decision of this Court holds that an appellate court on direct review must consider *Batson* pretext arguments that a party failed to present to the trial court. Indeed, this Court has held to the contrary. "Ordinarily," this Court has recognized, "an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). And more specific to the context here, this Court has recognized that "state court[s] may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal." *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (cited at App.7). As the court of appeals said, the Mississippi Supreme Court's decision comports with these precedents. After concluding that the record failed to support petitioner's claim that the prosecution "exercised its peremptory strikes in a racially discriminatory manner," the state supreme court refused to "entertain" petitioner's new "arguments" that "some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike." 45 So. 3d at 224, 227-28; *see* App.5. The Fifth Circuit reiterated that all petitioner did to support his *Batson* claim at trial was to compare the jury's makeup to the county's demographics. App.8. "That was not remotely sufficient to raise an objection to the State's race-neutral reasons" "on the basis of pretext or comparative juror analysis." *Ibid.* Because "no Supreme Court holding" suggests that courts must consider *Batson* arguments that are not raised at trial, the

Mississippi Supreme Court soundly refused to credit petitioner's newly raised pretext arguments on appeal. App.7-8.

Petitioner claims that the Mississippi Supreme Court violated the "principle" that a "reviewing court *may* certainly consider juror comparative evidence in the trial record, even though it was not argued before the trial court." Pet. 33 (emphasis added). By recognizing that courts only "*may*"—not *must*—consider new *Batson* arguments on appeal (*ibid.*), petitioner admits that the Mississippi Supreme Court did not violate any clear holding of this Court *requiring* such consideration. That precludes AEDPA relief. Citing *Miller-El II*, petitioner says that "the argument that reviewing courts are limited to evidence argued at trial" supporting a *Batson* claim "has not prevailed." *Ibid.* Again, *Miller-El* stressed that the "evidence" on which the defendant in that case "base[d] his [*Batson*] arguments" was "record[ed]" in the "transcript of *voir dire*" (*Miller-El II*, 545 U.S. at 241 n.2) and that the defendant had "presented extensive evidence in support of" his *Batson* claim before the trial court (*Miller-El I*, 537 U.S. at 328-29). Petitioner here presented no evidence or argument beyond bare numbers at trial, and the "transcript of voir dire" fails to establish a *Batson* violation under any standard—and certainly under AEDPA.

Petitioner also argues (again) that step 3 of *Batson* requires a court to "consider[ ]" "the totality of the relevant facts" to assess the "discriminatory intent and credibility of the prosecutor." Pet. 33. He cites circuit cases stating that courts must "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" for a challenged strike. Pet. 33-34 (quoting *Hardcastle v.*

Horn, 368 F.3d 246, 259 (3d Cir. 2004), and citing *United States v. McMillon*, 14 F.3d 948, 953 n.4 (4th Cir. 1994)). But petitioner did not identify any "relevant facts" beyond bare demographics or otherwise call into question the prosecutor's "intent" or "credibility" before the trial court. *Supra* pp. 11-12. Nor did he "introduce[ ]" any "evidence" that the State's strikes were motivated by race. So he has not "met his burden of persuasion" (Pet. 34) on purposeful discrimination. Petitioner insists that he "presented" "rebuttal evidence" on the State's strikes in the trial court. Pet. 35. No: the record is clear that petitioner did not even try to rebut *any* of the State's proffered reasons for its strikes. *See* App.10 ("All the [trial] judge had available to weigh against the State's race-neutral reasons was [petitioner's] conclusory argument that 40% of the county was black" and citation to "*Miller-El II*"); *see also* App.4-5, 7-8; App.212-16, 221-22. And the Fifth Circuit rejected the view—which petitioner does not press here—that the trial judge "cut off" or "[dis]allowed" defense counsel from presenting evidence or arguments on petitioner's *Batson* claim. App.7 n.5.

Last, petitioner faults the Mississippi Supreme Court's view of state law on waiver in *Batson* cases, which provides that "[i]f the defendant fails to rebut" the State's race-neutral reasons for a peremptory strike, "the trial judge must base his [or her] decision on the reasons given by the State." Pet. 34 (quoting 45 So. 3d at 227); *see* Pet. 34-36. Of course, disagreement with a state court's view of state law is no basis for federal habeas relief or for this Court's review. And anyway, the Mississippi Supreme Court's approach simply reflects the proper allocation of the burden of persuasion in *Batson* cases. *See supra* pp. 10-13. Petitioner argues that Mississippi precedent "is contrary to clearly established federal law" because it means that

"evidence in the record must be ignored." Pet. 35. That is wrong. As in this case, the state supreme court may decline to consider arguments raised only on appeal because they are *not* "in the record." Petitioner also says that, under that court's approach, "it is impossible for ... evidence in the record to show" that the State's "facially race neutral" "reasons" "are pretextual." Pet. 35. Nonsense. As in other States, a defendant in Mississippi can show pretext by (for example) "*offer[ing]*" a comparative analysis, "*present[ing]* statistical evidence of racial disparities in the prosecutor's strikes," "*show[ing]* that the prosecutor misrepresented the record when defending the strikes," or "*produc[ing]*" "historical evidence of racial discrimination" to the trial judge. *Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1083-85 & n.3 (10th Cir. 2023) (emphases added) (cited at Pet. 20). Petitioner did none of that, so the state courts correctly rejected his *Batson* claim.

3. Finally, petitioner asks this Court to decide whether the Mississippi Supreme Court's "finding" that petitioner "waive[d]" his "*Batson* objections" was "an unreasonable determination of facts." Pet. i; *see* Pet. 36-38. That issue does not warrant review. The issue is factbound, turning entirely on case-specific arguments about the record in this case. *See* Pet. 36-38. The issue is also splitless, and petitioner does not claim otherwise: he cites no circuit cases in urging review on this issue. *See ibid.* And this case does not even present the "waiver" issue that petitioner asks this Court to decide. Like the trial court, the Mississippi Supreme Court considered (and rejected) petitioner's *Batson* claim *on the merits*—refusing only to "entertain" certain "arguments" that petitioner failed to raise at trial. 45 So. 3d at 228. The state courts did not rule that petitioner "waived or abandoned his *Batson* objection." *Contra* Pet.

38. And as explained, the Mississippi Supreme Court was right not to entertain petitioner's untimely factual arguments—and the court of appeals was right to rule that that approach complies with federal law. *Supra* pp. 10-16; App.7-8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LYNN FITCH
Attorney General

ALLISON KAY HARTMAN
Counsel of Record
LADONNA C. HOLLAND
Special Assistant
Attorneys General
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, Mississippi 39205-0220
(601) 359-3840
Allison.Hartman@ago.ms.gov
Counsel for Respondent

August 2025